# FEDERAL WORKERS ALLIANCE

COLLECTIVELY REPRESENTING OVER 300,000 FEDERAL WORKERS

July 23, 2021

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Ave.
Washington, D.C. 20500

**Re: Request to Nominate Immediately a Qualified Person to Replace Federal Labor Relations Authority (FLRA) Member James T. Abbott, and to Appoint Qualified Individuals to the Federal Service Impasses Panel (FSIP)**

Dear President Biden:

We, the undersigned, write as members of the Federal Workers Alliance (FWA), an alliance of more than 30 national unions that collectively represent more than 300,000 federal workers across the country, to request that the Biden-Harris Administration take urgent action to restore order and functionality to the Federal Labor Relations Board (FLRA). It is our request that the Biden Harris Administration send immediately to the Senate a nomination for FLRA Member to accompany the nomination of Ernest W. DuBester as FLRA Chairman.

In passing the Civil Service Reform Act, Congress made the specific finding that "labor organizations and collective bargaining in the civil service are in the public interest." In that vein, the Federal Labor Relations Authority is tasked with "carrying out the purpose of [Federal Service Labor Management Relations Statute.]" While Kiko and Abbott remain on the FLRA, the Authority continues to act in a manner that undermines the law promoting collective bargaining. Their judgment on FLRA cases continues to produce decisions that are inherently biased against labor and the collective bargaining process. Their decisions are clearly aimed at diminishing the Federal Service Labor-Management Relations Statute meant to protect the proper balance of workplace labor rights.

The failure of Abbot and Kiko to adhere to sound legal reasoning has become even more apparent as cases have been reviewed by the U.S. Court of Appeals for the D.C. Circuit. A good example is the case National Treasury Employees Union v. FLRA, where the Court found that the FLRA's finding that NTEU's proposal was not negotiable did not constitute "reasoned decision-making." This was a unanimous decision that included a panel existing of two republican appointed judges, including a Trump nominee. Telework discussions and negotiations will be vitally important as the government seeks to reopen safely in the midst of the Delta variant of COVID-19. The current makeup of the FLRA will be a detriment to that process.

Furthermore, U.S. Representative Gerald E. Connolly, Chairman of the Subcommittee on Government Operations, directed a stern letter of reprimand to then-Chairman Kiko, criticizing three "radical policy decisions" that "discarded decades of labor-management relations precedent and violated their own rules to achieve the goal of limiting collective bargaining" for nearly 1.2 million federal employees. *See* Attachment, November 30, 2020 Letter.

If the goal is to protect collective bargaining rights to federal employees, and to promote the collective bargaining process, the lack of respect that Kiko and Abbot have shown for precedent and the rule of law makes them wholly unqualified to serve on the FLRA. The manufactured legal reasoning cited in decisions by Kiko and Abbott have resulted in thousands of employees being stripped of legitimate workplace rights and union protections. These decisions have severely restricted employees' free exercise of rights guaranteed by the Federal Service Labor-Management Relations Statute — even on the most fundamental of things — such as bargaining over working conditions.

The current majority provided by Kiko and Abbott have vacated decades of workable precedent. It will take years, if not decades, to rebuild these frameworks, and some of the damage may be permanent. In 2021 alone, poor decisions and concurrences have done considerable harm, such as radically expanding the applicability of 7116(d) bar on grievances. Any delay in changing the current makeup of the FLRA indulges the risk of further damage.

On a separate but related note, we appreciate the Biden-Harris Administration's decision to remove all members of the Federal Service Impasse Panel (FSIP) upon taking office in January. We believe it is time to appoint new members. Given that the appointments to FSIP do not require Senate confirmation, it is our hope that the Administration can move quickly to staff those positions with qualified, experienced personnel to begin again its important work to resolve impasses during collective bargaining. A growing FSIP backlog halts progress on critical workplace issues and leaves both employees and agencies in limbo as they await adjudication, potentially for years on end. This delay will likely negatively impact the ability of unions to eradicate the harmful effects of the executive orders issued by the Trump Administration.

In the interest of the welcomed and admirable commitment of the Biden-Harris Administration to bring respect and dignity into the workplace, we urge you to nominate new members to the FLRA and FSIP as quickly as possible. Doing so will provide relief from a disturbing precedent installed by the previous administration to diminish the systematic protections that administer fairness and effectiveness within the federal workforce.

We thank you, in advance, for your attention to this very urgent matter. Should you require any further information, please contact the Federal Workers Alliance Co-Chairs, Randy Erwin at
and Sarah Suszczyk at

Sincerely,

American Federation of State, County, and Municipal Employees (AFSCME)
American Federation of Teachers, AFL-CIO (AFT)
Antilles Consolidated Education Association (ACEA)
Federal Education Association/National Education Association (FEA/NEA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAMAW)
International Brotherhood of Electrical Workers (IBEW)
International Brotherhood of Teamsters (IBT)
International Federation of Professional and Technical Engineers (IFPTE)

International Organization of Masters, Mates and Pilots (MM&P)
Marine Engineers' Beneficial Association (MEBA)
Metal Trades Department, AFL-CIO (MTD)
National Association of Government Employees, SEIU (NAGE)
National Federation of Federal Employees (NFFE)
National Weather Service Employees Organization (NWSEO)
Overseas Federation of Teachers, AFT, AFL-CIO
Professional Aviation Safety Specialists (PASS)
Patent Office Professional Association (POPA)
Seafarers International Union/NMU (SIU)
Service Employees International Union (SEIU)
Sheet Metal, Air, Rail and Transportation Workers (SMART)
SPORT Air Traffic Controllers Organization (SATCO)
United Power Trades Organization (UPTO)

CAROLYN B. MALONEY
CHAIRWOMAN

ONE HUNDRED SIXTEENTH CONGRESS

JAMES COMER
RANKING MINORITY MEMBER

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November 30, 2020

The Honorable Colleen Duffy Kiko
Chairman
Federal Labor Relations Authority
1400 K Street, N.W.
Washington, D.C. 20424

Dear Chairman Kiko:

I write to strongly object to three radical policy decisions released by the Federal Labor Relations Authority (FLRA) on September 30, 2020.[1] The Republican two-member majority discarded decades of labor-management relations precedent and violated their own rules to achieve the goal of limiting collective bargaining for the almost 1.2 million federal employees represented by federal employee unions.[2]

**Bargaining Over Management-Directed Policy Changes**

The first decision came at the request of the U.S. Department of Agriculture (USDA) and the U.S. Department of Education for a general statement of policy or guidance on the duty to bargain over management-initiated policy changes.[3] The two-member Republican majority abandoned the FLRA's longstanding precedent that the duty to bargain is triggered for any non "de minimis" change. The FLRA will now require bargaining only if the agency proposal is a "clear and meaningful" substantial change.[4]

This decision flies in the face of prior FLRA precedent, including decisions affirmed by federal appellate courts, and congressional intent of labor-management relations law regarding federal employees' rights to collective bargaining.[5] What is even more concerning is that the

[1] *71 FLRA No. 190: United States Department of Education and United States Department of Agriculture (Sept. 30, 2020)* (online at www.flra.gov/decisions/v71/71-190.html#_ftn2); *71 FLRA No. 191: United States Office of Personnel Management* (Sept. 30, 2020) (online at www.flra.gov/decisions/v71/71-191.html); and *71 FLRA No. 192: United States Department of Agriculture, Office of the General Counsel* (Sept. 30, 2020) (online at www.flra.gov/decisions/v71/71-192.html).

[2] U.S. Department of Labor, Bureau of Labor Statistics, News Release (Jan. 22, 2020) (online at www.bls.gov/news.release/pdf/union2.pdf).

[3] 71 FLRA No. 190.

[4] *Id.*

[5] *24 FLRA No. 42: HHS, SSA and AFGE Local* 1760 (Dec. 9, 1986) (online at

FLRA afforded itself no opportunity to hear from labor organizations before issuing this one-sided decision.[6] Agencies can now reject a union's request to bargain over a new policy based on the agency's interpretation that their policy change will not have a "clear and meaningful" impact on employee working conditions.[7] This decision creates an unduly high standard for triggering the duty to bargain and conflicts with congressional intent.

**Engaging in Mid-Term Bargaining**

The second extremist FLRA decision came at the request of the Office of Personnel Management to clarify that zipper clauses, which limit negotiations during the term of a union contract, are mandatory subjects of bargaining.[8] The FLRA Republican majority granted that request and then went much further, finding that federal labor law "neither requires nor prohibits midterm bargaining," leaving "midterm bargaining obligations to the parties to resolve as part of term negotiations."[9]

The decision contradicts previous precedent, which held for decades that "midterm bargaining over matters not contained in or covered by the term agreement" was within the duty to bargain and consistent with the Federal Service Labor-Management Relations Statute.[10] The previous precedent set in 2000 asserted that midterm bargaining was in the public interest because it contributes to stable labor management relations and effective government.[11] It also suggested that midterm bargaining contributes to a more efficient government by providing a vehicle for focused negotiations in the initial term agreement.[12]

The FLRA's current Republican majority discarded a decades-old precedent with no clear demonstration that reversing it was necessary or consistent with congressional intent.[13] The effect of the new policy denies both unions and management the obligation to initiate midterm bargaining unless they have negotiated for and secured that right in their contracts.[14] This is a radical change that makes the government less effective and efficient, not more. It is in the public interest for management and unions to negotiate responses to evolving situations that may arise at any time, as the current pandemic clearly demonstrates. If nothing else, the

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www.flra.gov/decisions/v24/24-042.html); *19 FLRA No. 101: HHS, SSA Region V, Chicago, IL and AFGE Local 3239* (Aug. 19, 1985) (online at www.flra.gov/decisions/v19/19-101.html); 397 F.3d 957 (D.C. Cir. 2005); 446 F.3d 162 (D.C. Cir. 2006).

[6] 71 FLRA No. 190.

[7] *Id.*

[8] 71 FLRA No. 191.

[9] *Id.*

[10] *56 FLRA 6: U.S. Department of the Interior, Washington, D.C. and U.S. Geological Survey, Reston, Virginia and National Federation of Federal Employees, Local 1309* (Feb. 28, 2000) (online at www.flra.gov/decisions/v56/56-006.html).

[11] *Id.*; 71 FLRA No. 191.

[12] *Id.*

[13] *Id.*

[14] 71 FLRA No. 191.

volatility of 2020 should have reinforced the necessity for midterm bargaining in the face of rapidly changing, life-altering conditions that directly affect labor-management relations. Yet, the FLRA's new policy to limit negotiation opportunities directly conflicts with Congress' position that collective bargaining is in the public interest.[15]

**Expiring Collective-Bargaining Agreements**

The third decision came at the request of USDA's Office of General Counsel about the longstanding practice of continuance provisions in collective bargaining agreements. These provisions ensure that a contract remains in force even after expiration when negotiations are underway. The Republican members of the FLRA ruled that before an expiring union contract can remain in force while parties negotiate a new contract, it must be subject to agency head review.[16]

Like the other decisions, this one was made in a vacuum, without the benefit of a real-world contract issue. As defined by statute, the agency head is required to approve a collective bargaining agreement "within 30 days from the date the agreement is executed."[17] Previously, the FLRA established that an agreement's execution date was "the date on which no further action is necessary to finalize a complete agreement."[18] The FLRA's new decision, however, disregards this reasoned, long-held understanding and instead redefines what constitutes execution. Now, exercising an *existing* agreement's continuance provision is tantamount to execution of a *new* agreement. This decision contradicts common sense and prior precedent, which held that execution of a continuance is not a *new* agreement, and that an *existing* agreement should "remain in full force and effect" until a new agreement is negotiated and approved.[19]

The FLRA's confusing and contradictory decision "unnecessarily introduces conflict and uncertainty into the collective barraging negotiations" and has opened the door to additional questions and conflicts when agencies and unions try to apply this new rule to actual continuance provisions. [20] This regrettable outcome is contrary to the purpose of the Federal Service Labor-Management Relations Statute, which states that "the provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government."[21]

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[15] 5 U.S.C § 7101(a)(2).

[16] 71 FLRA No. 192.

[17] 5 U.S.C § 7114(c)(2).

[18] *68 FLRA No. 34: U.S. DOD, Ill. Nat'l Guard, Springfield, Ill.*, (Jan. 15, 2015) (online at www.flra.gov/decisions/v68/68-34.html); *44 FLRA 70: Fort Bragg Association of Teachers and Army, Fort Bragg Schools, Fort Bragg, NC* (Apr. 16, 1992) (online at www.flra.gov/decisions/v44/44-070.html).

[19] 71 FLRA No. 192; *40 FLRA 57: Army, HQ III Corps and Fort Hood, Fort Hood, TX and AFGE Local 1920* (May 3, 1991) (online at www.flra.gov/decisions/v40/40-057.html).

[20] 71 FLRA No. 192, dissenting member's argument.

[21] 5 U.S.C. § 7101(b).

**The Authority Violated Its Own Rules in Issuing These Radical Decisions**

In publishing this trio of decisions, the two-member Republican majority violated the FLRA's own rules. Advisory opinions are legal opinions that do not arise out of an actual dispute between two real parties. Under its own regulations, the FLRA "will not issue advisory opinions."[22] None of these cases arose out of a dispute; all arose from requests by agency management for guidance.

The FLRA's rule derives from its longstanding practice to follow the customs and practices of the federal judiciary. Federal courts may not issue advisory opinions. The Constitution's justiciability definition, set forth in Article III, Section 2, Clause 1, limits the exercise of judicial authority to matters that involve an actual "case or controversy."[23]

The three decisions referenced above are radical in both substance and form. They are radical in substance because they overturn longstanding precedent, undermine both present and future collective bargaining agreements and upset the balance of rights and responsibilities that have long characterized federal labor-management relations. They are radical in form because the Republican majority went to the extreme lengths of violating the FLRA's own prohibition and the Constitution's prohibition on the judiciary against issuing advisory opinions.

For those reasons, these recent decisions issued by a two-to-one Republican majority at the close of the Trump administration should be reconsidered in the future and overturned to reinstate precedents and customary practices that have governed these issues for decades.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. If you have any questions, please contact Subcommittee staff at (202) 225-5051.

Sincerely,

Gerald E. Connolly
Chairman
Subcommittee on Government Operations

cc: The Honorable Jody B. Hice, Ranking Member
Subcommittee on Government Operations

[22] 5 CFR § 2429.10.

[23] U.S. Constitution Art. III Sec. 2 Clause 1 (online at https://constitution.congress.gov/browse/article-3/section-2/)