Statement of Facts and Basis of Charges

This unfair labor practice charge is about how the United States Internal Revenue Service ("IRS"), in concert with and at the behest of the exclusive representative of the bargaining unit of relevant IRS employees, National Treasury Employees Union ("NTEU"),[1] along with NTEU's affiliated local chapter organization, NTEU Chapter 99 ("Chapter 99"), refuses to process Office of Personnel Management ("OPM") standard forms that would allow employees to disassociate from NTEU and its affiliates and stop automatic dues deductions from their paychecks for the benefit of NTEU and its affiliates until Pay Period 15 each year. In practice this means that an employee such as Ashley Kjarbo ("Kjarbo"), who wants to resign from and stop financially supporting NTEU and its affiliates is not permitted to do so until at least Pay Period 18 of a given year (and potentially the following year if she wanted to submit a request after Pay Period 15 that year). Perhaps worse, IRS refuses to process ***any*** SF-1188 if it is not initialed by an NTEU official—giving NTEU an effective veto over a member's resignation. In addition, IRS officials have become enmeshed with and beholden to union officials to the point that they have assisted with at least one union matter. This conduct violated the Federal Service Labor-Management Relations Statute ("FSLMRS") and the Administrative Procedure Act ("APA").

This charge is also about how IRS, in concert with NTEU and Chapter 99 under color of law, violated Kjarbo's rights under the First Amendment to the United States Constitution.

A. FACTUAL & LEGAL BACKGROUND

1. The Charging Party is Kjarbo. Kjarbo is a Correspondence Examining Technician and Bankruptcy Coordinator employed by IRS at the Brookhaven Service Center. She has been so employed since 2004.

2. The Charged Agency is IRS.

3. On information and belief, Kjarbo was a dues-paying member of NTEU until Pay Period 18 of 2022 (the official pay date was September 22, 2022). As of Pay Period 18 of 2022, it appears Kjarbo is no longer a member of and is not paying dues to NTEU. Kjarbo did not at any time hold any elected or appointed position within NTEU.

4. Kjarbo is a member of the collective bargaining unit of the IRS employees for which NTEU is the exclusive representative. *2022 National Agreement: Internal Revenue Service and National Treasury Employees Union*, Exhibit 1, hereto, art. 1, sec.1.A (hereinafter "CBA").[2] Chapter 99 is an agent of its parent NTEU. *See NFFE and Thompson*, 24 FLRA 320, 322–23 (1986). The CBA makes this clear by, for example, discussing how "National NTEU" has the right to represent the bargaining unit, and it is separate from "local chapters." Ex. 1 at 207 ("NTEU

[1] Kjarbo has simultaneously filed parallel charges against NTEU and Chapter 99 with FLRA.

[2] The CBA was executed on August 26, 2021, and it was implemented on October 1, 2021. Ex. 1 at 185. It does not appear to have an expiration date. *See generally id.*

National Office will advise local chapters . . . ."). NTEU "represents employees in 34 departments and agencies, including tens of thousands of IRS workers." *Id.*

5. OPM's Standard Form ("SF") 1187 is the method by which a federal employee can elect to become a member of the union that represents the collective bargaining unit of which he or she is part. The form also authorizes dues to be deducted from the signatory's paychecks going forward for the benefit of the relevant union. The form must be submitted to the employee's relevant agency payroll office, which processes it and begins deducting union dues thereafter. By completing this form, Kjarbo became a member of NTEU, and IRS began deducting dues of up to $19.88 from her biweekly paychecks for NTEU's benefit.

6. Concomitantly, OPM's SF-1188 is the method by which federal employees can resign from union membership and stop union dues being deducted from their paychecks. A federal employee must submit his or her signed SF-1188 to his or her relevant agency payroll office for processing. Only once the agency payroll office has processed the SF-1188 can union dues stop being deducted and will resignation from a union be recognized and effective. Attached hereto as Exhibit 2 is a blank SF-1188.

7. Kjarbo decided to resign her NTEU membership and deauthorize dues deductions for its benefit in or about March 2022 and accordingly completed an SF-1188. *See* Exhibit 3, hereto, at 5–6. Two major factors brought Kjarbo to her decision: (1) she felt that "the union did not defend [her] interests and did not represent [her] values"; and (2) she was experiencing serious financial hardship to the point that she needed to use the money that IRS was taking for NTEU to feed her family. *See id.* at 3–5 ("Please, we need help. I have two kids and can barely afford to put food on the table.").

8. On March 3, 2022 (Pay Period 5), Kjarbo asked Chris Burns, the President of Chapter 99, how she could submit her completed SF-1188 to resign her NTEU membership and stop paying union dues. *See id.* at 5. The same day, Ms. Burns told Kjarbo that SF1188s are not processed until Pay Period 15 and informed her of the NTEU and IRS-imposed requirements that Ms. Burns must first "examine," "approve[],"and "sign[]" them before IRS will process them. *See id.*

    a. The CBA says that SF-1188s "for employees who have had dues allotments in effect for more than one (1) year" must be submitted to IRS Payroll "during USDA pay period fifteen (15) each year." Ex. 1 art. 10, sec. 5.A(3). Those submitted forms "will become effective during USDA pay period eighteen (18)." *Id.*

    b. Additionally, SF-1188s must be "initialed by the Chapter President or his or her designee." *Id.* art. 10, sec. 5.A(3)–(4). IRS will return any SF-1188 submitted without the appropriate initials to the employee and direct him or her "to the proper Union official for initialing." *Id.* By IRS and NTEU

agreeing to impose these extra requirements for SF-1188s, they improperly transformed the process of submitting an SF-1188 from being an IRS matter to being an NTEU matter. *See* ¶ 22(c)–(d), *infra*. As of now, submitting an SF-1188 is an NTEU matter.

c. Pay Period 15 in 2022 was July 17–30. Exhibit 4, hereto. Pay Period 18 in 2022 was August 28–September 10. *Id.*

9. Kjarbo subsequently pleaded with Ms. Burns three separate times to grant her an exception and allow her SF-1188 to be processed straight away. *See* Ex. 3, at 3–5. Each time, Ms. Burns told her that there was nothing she could do because the CBA prevents her, "the only person who may process [SF-1188s]," from processing them outside of Pay Period 15. *Id.* at 3. After Kjarbo's third request, Ms. Burns told Kjarbo to stop asking about the resignation process. *See id.*

10. After Ms. Burns repeatedly denied Kjarbo's requests to resign her NTEU membership, Kjarbo followed-up with her and cited 5 C.F.R. § 2429.19—FLRA's government-wide regulation providing that a federal employee's "previously authorized [dues deduction] assignment" that has been in effect for one year may be revoked "at ***any time*** that the employee chooses" ("FLRA's Regulation")—and again attempted to resign her NTEU membership pursuant to it. *See id.* at 2 ("Per 5 CFR 2429.19, I respectfully request to revoke the previously authorized dues assignment . . . ."); 5 C.F.R. § 2429.19 (emphasis added). Ms. Burns did not respond. *Id.*

11. On April 5, 2022, Kjarbo attempted one last time to resign her NTEU membership and stop paying it dues pursuant to FLRA's Regulation. *See id.* at 1–2. The following day, Ms. Burns again rejected Kjarbo's resignation attempt and asserted that FLRA's Regulation applies only "to those who joined [NTEU] after August 10, 2020." *Id.* at 1. Significantly, Ms. Burns threatened to report Kjarbo to her IRS supervisor and to Treasury's Inspector General for Tax Administration ("TIGTA") if she continued to ask her questions about the union resignation process. *Id.* ("If there is any further contact on this issue before pay period 15, it will be reported to both your Operations Manager and TIGTA.").

12. Kjarbo honored Ms. Burns's request to stop contacting her about resigning from NTEU and deauthorizing dues deductions. Instead, she searched for help elsewhere and submitted a help ticket to IRS, again requesting cancellation of her dues deductions. *See* Exhibit 5, hereto, at 2 ("Request cancellation of union dues, financial hardship, union no longer aligns with my personal and family values.").

13. Kjarbo received a reply from Florence Hutchinson of IRS HR on June 14, 2022, informing her that she must submit to IRS during Pay Period 15 an SF-1188 that has been initialed by an NTEU official. *Id.* Kjarbo followed up with Ms. Hutchinson on the same day via email asking for her help obtaining Ms. Burns's signature on her SF-1188. *Id.* Kjarbo also explained that Ms. Burns asked Kjarbo

to stop contacting her and that Kjarbo wanted to submit her SF-1188 to IRS at that time to ensure IRS processed it by Pay Period 18. *Id.* at 1. After Kjarbo sent that email to Ms. Hutchinson, she did not receive any further correspondence from Ms. Hutchinson or any NTEU official.

14. On information and belief, Ms. Burns carried through with her threat to report Kjarbo as described. *See* Exhibit 6, hereto (referencing discussions between Kjarbo's IRS supervisor and Ms. Burns). Indeed, IRS Program Manager Michael Birsner emailed Kjarbo on June 24, 2022, with what he described as a "verbal warning." *See* Ex. 6. The "verbal warning" accused Kjarbo of "discourteous and unprofessional" behavior and threatened further disciplinary action if Kjarbo continued attempting to resign from and stop paying NTEU. *Id.*

15. IRS deducted $298.20 in union dues from Kjarbo's pay from the time she originally submitted an SF-1188 until Pay Period 18 of 2022. *See* Exhibit 7, hereto.

16. The FSLMRS grants most federal employees the right to collectively bargain. 5 U.S.C. § 7102(2). It also requires IRS to afford exclusive representative status to a labor organization selected by the majority of voting employees in an appropriate unit. 5 U.S.C. § 7111(a). NTEU is now such an exclusive representative. Ex. 1.

17. The FSLMRS also codifies federal employees' right to refrain from labor union activity. 5 U.S.C. § 7102 ("Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.").

    a. IRS's violation of an employee's right to refrain is an unfair labor practice. 5 U.S.C. § 7116(a)(1), (8).

18. The FSLMRS says that an assignment from an employee "which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative . . . may not be revoked for a period of 1 year." 5 U.S.C. § 7115(a). The FSLMRS contains no provision restricting when a dues deduction assignment may be revoked after the one-year period is up. *Off. Pers. Mgmt.*, 71 FLRA 571, 572 (2020) ("Except for the limiting conditions in § 7115(b), which § 7115(a) explicitly acknowledges, nothing in the text of § 7115(a) expressly addresses the revocation of dues assignments after the first year.").

19. Moreover, FLRA's Regulation provides that a federal employee's "previously authorized [dues deduction] assignment" that has been in effect for one year may be revoked "at ***any time*** that the employee chooses." 5 C.F.R. § 2429.19 (emphasis added). Upon receipt, the employing agency "must process the revocation request as soon as administratively feasible." *Id.* The regulation does not contain any date limitation, so it applies to all federal employees no matter when they joined a union.

Despite the lack of date limitation, the CBA purports to apply one to FLRA's Regulation by extending its benefits only to those employees who submitted SF-1187s after August 10, 2020. *See* Ex. 1 art. 10, sec. 5.A(3)(a) ("Revocation notices for employees who have had dues allotments in effect for more than one (1) year and whose SF-1187 was submitted after August 10, 2020, will become effective as soon as administratively feasible."). IRS's and NTEU's CBA and practice therefore violate FLRA's Regulation.

20. The FSLMRS prohibits agencies from "otherwise assist[ing] any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status[.]" 5 U.S.C. § 7116(a)(3).

    a. IRS's assistance of a union beyond furnishing requested customary and routine services and facilities is an unfair labor practice. *Id.*

B. BASIS OF THE CHARGES

21. Violation of Kjarbo's Right to Refrain from Union Activity

    a. The FSLMRS guarantees Kjarbo's right to refrain from being a member of NTEU and participating in other related activity. *See* ¶ 17, *supra*.

    b. Kjarbo attempted to exercise her right to refrain from NTEU membership and subsidization of its political activity with which she disagrees by resigning her union membership and revoking her dues deduction authorization on March 3, 2022. *See* ¶ 8, *supra*.

    c. But IRS, in concert with and at the behest of NTEU and Chapter 99, failed to allow Kjarbo to refrain from NTEU membership and other related activities when it refused to process an SF-1188 for her until Pay Period 15, 2022, which would not be effective until Pay Period 18, 2022. *See* ¶¶ 8–15, *supra*.

    d. IRS's actions in concert with the unions had the effect of forcing Kjarbo to be associated with NTEU and its affiliates as a member who was required to have dues taken from her paychecks from March 3, 2022, until September 22, 2022—almost six months.

    e. IRS's actions accordingly forced Kjarbo to associate with NTEU and its affiliates against her will and in violation of her conscience for fifteen paychecks—and forced her to subsidize NTEU's and its affiliates' political speech with which she disagrees in the amount of approximately $298.20 in violation of her will and conscience. *See* ¶¶ 7–15, *supra*.

    f. IRS's violation of Kjarbo's right to refrain from union membership and other related activity was an unfair labor practice. 5 U.S.C. § 7102; 5 U.S.C. § 7116(a)(1), (8).

g. IRS's refusal to allow Kjarbo to revoke her union membership and dues authorization on the date she chose and without any date limitation violated FLRA's Regulation governing such revocations (and therefore also Kjarbo's First Amendment rights as discussed in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018)). *See* 5 C.F.R. § 2429.19; *see also* ¶ 19, *supra* (analyzing FLRA's Regulation).

h. Because the CBA contains language that purports to restrict when and how employees may resign from NTEU and stop financially supporting it, *see* ¶¶ 8.a, 19, *supra*, the CBA itself violates Kjarbo's right to refrain from union membership and related activity.

i. IRS's purported restriction of when employees may resign from and stop supporting NTEU and its affiliates violates the APA because it is an agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706(2)(A). And because IRS's actions violated Kjarbo's right to refrain from union membership and other related activity in violation of FSLMRS, they also violate the APA because they are in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. § 706(2)(C). For the same reasons, they are *ultra vires*.

22. Violation of Kjarbo's Rights by Improperly Assisting a Labor Organization

a. The FSLRMS protects individual rights by ensuring the independence of labor unions from agencies. *See* ¶ 20, *supra*; *SSA & NTEU*, 52 FLRA 1159, 1176 (1997) ("[T]he purpose of . . . section 7116(a)(3) is to prevent 'company unions' and to preserve the bargaining unit representative's independence . . . .").

b. That independence is destroyed when an agency sponsors, controls, or otherwise assists a union unless the agency is furnishing "upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status[.]" 5 U.S.C. § 7116(a)(3); *SSA*, 52 FLRA at 1173 ("[T]he purpose of section 7116(a)(3) is contained in the first clause of the section—agencies may not sponsor, control, or assist labor organizations. This fundamental objective guides our interpretation of this section."); *id.* at 1176 ("Accordingly, we will be examining whether, in the totality of circumstances, the employer interfered with employee freedom of choice by failing to maintain a proper arms-length relationship with the labor organization involved.").

c. IRS provided improper assistance to NTEU when it became involved, at Chapter 99's request, in (what the CBA has made into) a union issue: the initial steps of Kjarbo's attempt to exercise her right to refrain from union activity by resigning from NTEU and deauthorizing dues deductions from

her paychecks for its benefit. *See* ¶¶ 8.b, 7–14, *supra*.[3] IRS's improper union assistance had significant consequences for Kjarbo: IRS officials put in writing on a government email system a so-called "verbal warning" about her "[r]equest to withdraw from the union," accused her of "discourteous and unprofessional" behavior, and threatened her with disciplinary action "if it continues." *See* ¶ 14, *supra*; Ex. 6. This improper assistance also interfered with Kjarbo's exercise of her rights under the FSLRMS to refrain from union activity. *See* ¶¶ 20–21, *supra*.

d. Additionally, IRS's improper assistance of NTEU has blurred the lines between NTEU and IRS—a harmful effect that § 7116(a)(3) intends to prevent. *See* ¶ 20.a, *supra*. For example, knowing that IRS is willing to involve itself in union issues, NTEU effectively armed itself with IRS's authority as Kjarbo's employer: "If there is any further contact on this issue before pay period 15, it will be reported to both your Operations Manager and TIGTA." *See* Ex. 3, at 1; *see also* ¶ 8.b.

e. IRS's conduct was an unfair labor practice. 5 U.S.C. 7116(a)(1), (a)(3), (a)(8).

23. Violation of the United States Constitution

a. IRS's refusal, in concert with NTEU and Chapter 99, to allow Kjarbo to immediately resign from and stop paying dues to NTEU and its affiliates was a violation of Kjarbo's rights under the First Amendment to the United States Constitution.

b. IRS required Kjarbo, at the behest of NTEU and Chapter 99, to maintain unwilling allegiance to and financial support of NTEU and its affiliates; this impinged on Kjarbo's rights to free association, self-organization, assembly, and petition, and freedoms of thought, speech, and conscience, as guaranteed to her by the First Amendment.

c. The United States Supreme Court held in *Janus* that the First Amendment requires that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486. Further, "by agreeing to pay [union dues], [employees] are waiving their First Amendment rights, and such a waiver cannot be presumed . . . [and] must be freely given." *Id.*

d. Once Kjarbo revoked her consent to being a member of and subsidizing NTEU and its affiliates, IRS had a duty to honor Kjarbo's decision

[3] Moreover, but for the CBA's improper involvement of NTEU in the processing of SF-1188s, Kjarbo would not have any "verbal warning," pejorative commentary, and threat of further discipline in her file. *See* ¶¶ 8–15, *supra*. This further demonstrates that NTEU must be removed from anything to do with SF-1188s—and the real-world consequences for federal employees that will persist until that happens.

immediately. "The theme of *Janus* is that an employee has the right to support, or to stop supporting, the union by paying, or to stop paying, dues." *Off. Pers. Mgmt.*, 71 FLRA at 574 (Abbott, M., concurring); *see also* 5 C.F.R. § 2429.19.

e. As Member Abbott explained in detail: "The Court's decision in *Janus* leads me to one conclusion – once a Federal employee indicates that the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be 'freely given' and the earlier election can no longer serve as a waiver of the employee's First Amendment rights. Thus, restricting an employee's option to stop dues withholding – for whatever reason – to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights." *Id.* at 575.

f. And as the Authority held: "[I]t would assure employees the fullest freedom in the exercise of their rights under the Statute if, after the expiration of the initial one-year period during which an assignment may not be revoked under § 7115(a), an employee had the right to initiate the revocation of a previously authorized dues assignment ***at any time that the employee chooses***." *Id.* at 573 (emphasis added). IRS in concert with the unions failed to allow Kjarbo this right.

g. Because the CBA contains language that purports to restrict when employees may resign from NTEU and its affiliates and stop financially supporting them, *see* ¶ 8.a, *supra*, the CBA itself violated Kjarbo's First Amendment rights.

h. The CBA is also agency action that violates the APA because it is contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

i. CBP, NTEU, and Chapter 99, in concert under color of law, have violated Kjarbo's First Amendment rights by: (1) agreeing to and abiding by a CBA that purports to disallow Kjarbo to immediately resign from and stop financially supporting NTEU and its affiliates; (2) agreeing to a CBA that transforms employees' union resignation by purporting to disallow IRS from processing an SF-1188 unless or until a "[c]hapter president [or] his or her designee" initials it; and (3) permitting IRS to be improperly involved in the process of Kjarbo resigning from NTEU and deauthorizing dues deductions from her paychecks. *See* ¶¶ 7–15, *supra*.

j. NTEU knew about Kjarbo's desire to resign her union membership and stop paying union dues for almost ***six months*** before NTEU, Chapter 99, and IRS honored her wishes. Union membership and dues deduction authorizations have constitutional significance. Union officials should not be permitted to have anything to do with SF-1188s, and agency officials should not be permitted to discipline employees for exercising their right to resign from a union. Otherwise, those very union officials can exercise a veto over someone's constitutional rights and force them into unwilling

associations for years, all while acting with the influence of the employee's employer behind them.

* * *

k. Kjarbo reserves her right to seek adjudication of her APA and constitutional claims in federal court if this Charge is not accepted by the FLRA. *Brookens v. Gamble*, No. 20-CV-1740 (CRC), 2020 WL 6134266, at *10 (D.D.C. Oct. 19, 2020) ("Brookens is therefore required to exhaust his administrative remedies at the FLRA before bringing his constitutional claims to district court.").

C. REQUEST FOR RELIEF

Kjarbo requests that this Board:

i. Determine that IRS has engaged in unfair labor practices;

ii. Order IRS to cease and desist from these unfair labor practices;

iii. Order IRS to return to Kjarbo $298.20—the union dues it deducted from her wages for the benefit of NTEU from March 3, 2022 (when she first attempted to resign from the union and stop dues from being deducted), to September 22, 2022 (when she was paid for Pay Period 18 of 2022);

iv. Order IRS to remove the written June 24, 2022, "verbal warning" from Kjarbo's personnel file and any other place in which it is stored, and to put in writing that it was unlawful and is rescinded in total;

v. Order IRS to renegotiate the CBA with NTEU to remove art. 10, sec. 5.A(3)–(4), regarding how employees may only submit SF-1188 to IRS's Payroll Office during Pay Period 15 each year; to modify art. 10, sec. 5.A(3)(a) to require the expeditious processing of dues deduction revocations for all employees who submit SF-1188s—not only for employees who submitted SF-1187s after August 10, 2020; and to remove any language restricting the processing of SF-1188s unless or until a union official initials them, including but not limited to striking art. 10, sec. 3.A(3)–(4);

vi. Order IRS to renegotiate the CBA with NTEU to remove art. 10, sec. 3.A(5), which provides for NTEU to serve as the intermediary between employees and IRS during the process of resigning NTEU membership and deauthorizing dues deductions by requiring NTEU to forward employees' SF-1188s (which it has accepted and initialed) to IRS before they can be processed; and

vii. Enter any other relief that justice requires.

Respectfully submitted,

ASHLEY KJARBO
By Counsel

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David R. Dorey
Washington, DC Attorney I.D. No. 1015586
Email: drdorey@fairnesscenter.org
Tessa E. Shurr
Pennsylvania Attorney I.D. No. 330733
Email: teshurr@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Suite 600B
Harrisburg, Pennsylvania 17101
Telephone: 844.293.1001
Facsimile: 717.307.3424

Counsel for Ashley Kjarbo