Member Beck, Dissenting in Part

I agree with Chairman Pope and Member DuBester that the Judge did not err in concluding that the Respondent violated the Statute when it deviated from a past practice that permitted employees to earn overtime up to 7:00 p.m. without providing the Union notice and an opportunity to bargain. As the Judge found, the practice was not covered by statute or the CBA and therefore was not subject to unilateral change by the Respondent without notice to the Union and an opportunity to bargain.

I do not agree, however, with the conclusion of my colleagues that this matter must be remanded to determine whether the past practice of permitting employees to earn credit hours until 7:00 p.m. is or is not contrary to the CBA. The Majority concludes that the Judge failed to consider Article 10, Appendix A, §14(F) of the collective bargaining agreement, which contemplates that employees "***may*** earn up to two and one-half (2 ½) credit hours per workday" (emphasis added). As I understand the Majority's perspective, this provision, if properly considered, might salvage the asserted entitlement to 2 1/2 credit hours per workday under the past practice by reconciling the past practice with the contract. For §14(F) to do so, this provision must be interpreted as a contractual entitlement to 2 1/2 credit hours per workday. However, under this contract language, whether credit hours will be earned by a particular employee on a particular day is uncertain; an employee "may"— or, by definition, may not — have an opportunity to earn credit hours. In contrast, the specific limit on credit hours earned is certain. Accordingly, the better reading of §14(F) is not that it grants an entitlement to 2 1/2 credit hours, but rather that it sets an outside limit on credit hours that may be earned.

Consequently, I cannot conclude that it is necessary for the Judge further to assess the language in §14(F). The Judge specifically found that the past practice is contrary to both 5 USC §6121(4) and the CBA and the Respondent therefore was under no obligation to bargain over its termination. ALJ Decision, at 12. Since I would find the appropriate standard of review in such cases to be whether the Judge's findings are supported by substantial evidence, I cannot conclude that the Judge's findings are unreasonable or not supported by the record. *See United States Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirkland Air Force Base, N.M.*, 64 FLRA No. 24 (2009) (Member Beck concurring); *United States Dep't of the Air Force, Randolph AFB and AFGE Local 1840*, 63 FLRA 256, 262-63 (2009) (separate opinion of Member Beck). *

I would therefore sustain the Judge's findings with regard to credit hours and conclude that a remand is unnecessary.

*. In footnote 13, *supra*, the Majority states, as if it is an unremarkable proposition, that the proper standard for the Authority to apply in reviewing a judge's factual findings is "preponderance of the record evidence." This new standard, announced by a new two-Member majority only very recently, is a departure from the Authority's numerous pronouncements in recent years that it applies a "substantial evidence in the record" standard of review. *See, e.g., United States Dep't of Justice, Fed. Bureau of Prisons, Federal Corr. Inst., Elkton, Ohio*, 61 FLRA 515, 517 (2006) (citing *United States Dep't of Transp.*, 48 FLRA 1211, 1215 (1993)) ("When reviewing a judge's factual findings, the Authority reviews the record to determine whether those factual findings are supported by substantial evidence in the record as a whole."); *United States Dep't of Homeland Sec., Border and Transp. Directorate, Bureau of Customs and Border Prot.,* 59 FLRA 910, 913 (2004) (same); *Dep't of Justice*, 61 FLRA 460, 465 (2006) ("we find that substantial evidence in the record supports the Judge's findings"); *FAA*, 59 FLRA 491, 493 (2003) ("there is substantial evidence in the record supporting the Judge's finding").