Member Beck, Concurring in part:

I agree with Chairman Pope and Member DuBester that the Judge did not err in her factual findings and that the Respondent violated § 7116(a)(1) and (5) by failing to provide the Union an opportunity to bargain over the impact and implementation of the office relocation, reorganization and realignment and § 7116(a)(1) and (8) by failing to provide the Union with notice of a meeting.

I do not, however, agree with the Majority's application of the "preponderance of the evidence" standard to review the factual determinations made by the Judge. I disagree for the same reasons I articulated in my separate opinion in *United States Dep't of the Air Force, Randolph AFB, San Antonio, Tex. and AFGE, Local 1840*, 63 FLRA 256, 262-63 (2009) (*Randolph AFB)*.

As I stated in *Randolph AFB*, the "substantial evidence" standard "is the appropriate standard to use when the Authority acts as an appellate tribunal rather than the initial trier-of-fact." *Randolph AFB,* 63 FLRA at 263. My colleagues in the Majority do not agree that we sit as an appellate tribunal when reviewing the decisions of our Administrative Law Judges. With all due respect to my colleagues, I believe that this view defies common sense. When a 3-member adjudicative body decides a legal dispute by reviewing the written record of a proceeding below in which live testimony and other evidence is introduced before a single judge, I believe most reasonable observers familiar with Anglo-American jurisprudence would say that adjudicative body is acting as an appellate tribunal. [1]

The Majority reasons that the Members of the Authority do not sit as an appellate tribunal because the Authority has not chosen to delegate decisional authority to its ALJs. If that assertion were accurate, one would be left to wonder what *have* we been doing with our ALJs, and what is the legal justification for their presence on the agency's payroll? Our Statute contemplates that we may utilize ALJs in only one way: "The Authority may delegate to any administrative law judge … its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice." 5 U.S.C. § 7105(e)(2). [2] The Majority's suggestion that we have not delegated to our ALJs authority to issue "final orders" because they issue only "recommended decisions" is refuted by the fact that, by operation of law, ALJ decisions become final and binding decisions of the Authority if they are not appealed or for some other reason are not reviewed by the Members of the Authority. 5 U.S.C. § 7105(f).

It is plain that ALJs have been delegated decisional authority, and that the Authority Members sit as an appellate tribunal over those ALJs.

The Majority characterizes its "preponderance of the evidence" standard of review as "well established" in Authority precedent. To support this proposition, the Majority cites three decisions issued during the period 2001 through 2008. But the standard can hardly be viewed as well established given the many cases in which the Authority has articulated a different standard, "substantial evidence in the record." *Pension Benefit Guar. Corp.,* 62 FLRA 219, 222 (2007) ("the judge's finding in this regard is supported by substantial evidence in the record"); *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst.,* 61 FLRA 515, 517 (2006) ("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 Justice, Executive Office for Immigration Review, N.Y., N.Y.,* 61 FLRA 460, 465 (2006) ("we find that substantial evidence in the record supports the judge's findings...we find that the record as a whole supports the conclusion that the judge did not err in finding that the Respondent violated its statutory duty to bargain in good faith"); *United States Army Corps of Eng'rs, Waterways Experiment Station, ERDC, Vicksburg, Miss.,* 61 FLRA 258, 261 (2005) ("[w]e find that substantial evidence in the record, including the wording of the insulated coveralls agreement, supports the judge's determination"); *United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary (Admin. Maximum), Florence, Colo.,* 60 FLRA 752, 757 (2005) ("[w]e find that the judge's findings and conclusions are supported by substantial evidence in the record"); *Soc. Sec. Admin., Office of Hearings and Appeals, Montgomery, Ala.,* 60 FLRA 549,553 (2005) ("[w]hen 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.*

1. The Merriam-Webster Dictionary defines "appellate" as "having the power to review the judgment of another tribunal[.]" *See* Merrriam-Webster online at www.merriam-webster.com; *Webster's Seventh New Collegiate Dictionary* 42 (1971). At the Member level, the Authority has the power to review the judgment of its ALJs.

2. § 7105(d) permits the Authority to delegate to other "officers and employees" the authority to perform other duties "as may be necessary"; however, the Statute's subsequent, much more specific pronouncement about the limited role for ALJs indicates that they are not among such officers and employees.

Directorate, Bureau of Customs and Border Prot., 59 FLRA 910, 913 (2004) ("when reviewing a [j]udge'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 Transp., Fed. Aviation Admin.,* 59 FLRA 491, 493 (2003) ("we find that the [j]udge is not required to comment on every piece of evidence presented to her, particularly where, as here, there is substantial evidence in the record supporting the Judge's finding that OMB disapproved the agreement"); *United States Dep't of Def., Def. Contract Mgmt. Agency, Orlando, Fla.,* 59 FLRA 223, 227 (2003) ("[g]iven the judge's credibility determinations, however, those factual findings are supported by substantial evidence in the record as a whole"); *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). The preponderance of the cases militates in favor of the "substantial evidence" standard.

The Majority cites *Lion Unif., Inc. Janesville Apparel Div. v. NLRB*, 905 F.2d 120, 124 (6th Cir. 1990) for the "principle that 'the standard of deference is heightened as the appeal process progresses.'" This asserted principle is subject to serious question because, if followed, it would mandate that the United States Supreme Court apply some standard of review more deferential than "substantial evidence" whenever it reviews a circuit court decision that applied the "substantial evidence" standard. That is not what the Supreme Court does. *See, e.g., Fort Stewart Sch. v. FLRA*, 495 US 641 (1991) (applying a "substantial evidence" standard of review in affirming an Eleventh Circuit decision that applied a "substantial evidence" standard when reviewing a decision of the Authority). Further, even if the Majority's asserted principle of increasing deference were valid, it argues for, not against, applying the "substantial evidence" standard when the Authority reviews an ALJ decision. Our ALJs apply a "preponderance of the evidence" standard when making their factual findings. 5 C.F.R. §2423.32. Under the Majority's increasing-deference principle, the Authority should then apply some more deferential standard — i.e., "substantial evidence" — when reviewing those factual findings. [3]

Finally, the Majority argues that the Authority should apply the same standard of review that the National Labor Relations Board applies when reviewing its ALJs' factual findings, because the Authority is modeled on, and in many ways analogous to, the NLRB. I agree with the general propositions that the NLRB was the model for our agency and that the two agencies are, in many ways, analogous — these points are indisputable. However, I can hardly conclude that general similarities require us to emulate the NLRB in every respect. Our statutory scheme and mandate is different from that of the NLRB in important ways. For example, under § 7114 (a)(2)(B) of our Statute, the "exclusive representative" — that is, the union — enjoys the right to be present at an investigative interview, but under the National Labor Relations Act, the analogous right lies with the bargaining unit employee. *NLRB v. Weingarten, Inc.,* 420 U.S. 251 (1975). *Cf. NTEU v. FLRA*, 826 F.2d 114, 122 (D.C. Cir. 1987) (applying "a statutory policy that is unique to the public sector[,]" the D.C. Circuit held that, unlike the National Labor Relations Act, the federal sector Statute does not impose a *per se* rule against direct solicitation by management of information concerning conditions of employment from employees represented by a duly recognized labor union); *Library of Congress v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983) (court urged caution in applying private sector labor law precedent to public sector labor cases). And, in any event, general similarities certainly do not require us to apply the NLRB's chosen standard of review for ALJ factual findings when we have historically enunciated a different standard (as noted above).

I agree with the ultimate resolution of this matter because the outcome is the same regardless of which standard of review is applied. Accordingly, I concur.

3. The Majority's reference to *Steadman v. Securities and Exchange Commission* is similarly misplaced. *Steadman* did not address the question of what standard of review should be used by SEC commissioners when reviewing fact-finding by an ALJ. *Steadman* resolved the question of what burden of proof ("preponderance" or "clear and convincing") is to be applied by the SEC at whatever level it chooses to conduct initial fact-finding.