

**U.S. Department of Labor**

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**Issue Date: 14 February 2019**

CASE NO.: 2018-LCA-00008

*In the Matter of:*

**YU HAO FAN,**  
*Prosecuting Party,*

vs.

**SILICON VALLEY UNIVERSITY,**  
*Respondent.*

APPEARANCES:

YI TAI SHAO, Esq.  
For the Prosecuting Party

OLGA SAVAGE, Esq.  
For the Respondent

Before: Christopher Larsen  
Administrative Law Judge

**DECISION AND ORDER**

This is a claim arising under the Immigration and Nationality Act (“the Act”), 8 U.S.C. section 1182, subsection (n)(2). The Prosecuting Party, Yu Hao Fan (also known as Kevin Fan, TR 64:1-11) contends he is entitled to relief against the Respondent, his former employer, for the breach of its obligations to him under a Labor Condition Application.

I held a hearing in this matter in San Francisco, California, on January 15 and 18, 2019. Attorney Yi Tai Shao appeared for the Prosecuting Party, while Attorney Olga Savage appeared for the Respondent. I heard testimony from witnesses Kevin Chang, Wen Lee, Yu Hao Fan, Jialin Zhao, and Luna Liu, and received in evidence the Prosecuting Party's exhibits 1, 6 (pages 61 and 63 only), 8 (pages 95-111 only), 9, 11 (pages 141-154 only), 12 (pages 161-164 only), 13, 14, 15, 16, 17, 19, 20, 21, 25 (page 318 only), 27, 28, 29, 30, 32 (pages 354 and 355 only), 34, and 35. I also received in evidence Respondent's Exhibits 70, 73, 76, and 77, together with Exhibits ALJ-1 and ALJ-2.<sup>1</sup>

### Statement of the Case

Although the parties declined to stipulate, on the record before me I find these facts undisputed.

The Prosecuting Party, Mr. Fan, went to work for Respondent on April 1, 2015, as a Database/Facility Administrator with an annual salary of \$50,400 (PX 19). He had been hired by Dr. Jerry Shiao, then Respondent's President (TR 109:8-24). On or about March 22, 2016, Respondent petitioned for issuance of an H-1B visa for Mr. Fan, a petition which included a Labor Condition Application (PX 20). The Labor Condition Application specified Mr. Fan would work as a Database Administrator from June 7, 2016, to June 7, 2019 (PX 20, p. FAN\_0252) at an hourly rate of \$30.69 (PX 20, p. FAN\_0254). The Department of Labor approved the petition (PX 16, p. FAN\_0201).

On December 22, 2016, Respondent's Board of Directors adopted a resolution removing Dr. Shiao as its President, and appointed Kevin Cheng as "Interim President" (PX 34; TR 29:3-5). A few days thereafter, Dr. Shiao returned to Respondent's campus and was asked to leave, and a scuffle ensued.<sup>2</sup>

Around December 30, Dr. Shiao spoke with Mr. Fan to say he had been prevented from returning to the campus, and that the people who stopped him would also prevent Mr. Fan from returning to campus (TR 152:12-25). Mr. Fan also received a text message dated December 30, 2016 (ALJ-1) from Jialin Zhao, also known as "Jocelyn" (TR 258:23-259:14), from which he inferred Respondent was

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<sup>1</sup> In this decision, I abbreviate "Prosecuting Party's Exhibit" as "PX," "Respondent's Exhibit" as "RX," and the official transcript of the hearing as "TR."

<sup>2</sup> Mr. Fan contends, and Respondent denies, that on this occasion Dr. Shiao was physically blocked and battered to prevent him from returning to work; that Respondent is legally responsible for the blocking and battering, which comprise criminal conduct; and that entire episode comprises a wrongful termination of Dr. Shiao. Dr. Shiao and Respondent are currently litigating these questions, among others, in the Superior Court of the State of California, as more fully discussed below.

about to terminate his employment (TR 153:1-25).<sup>3</sup> Additionally, Kevin Cheng telephoned and sent messages to Mr. Fan asking him to return certain items.<sup>4</sup> On January 3, 2017, Mr. Cheng and Mr. Fan met face-to-face, in a meeting also attended by Mr. Fan's uncle, Michael Wang (TR 45:17-46:19; PX 27). At that meeting, according to Mr. Cheng, Mr. Fan returned a set of keys, but did not return all of the keys or codes Mr. Cheng was expecting him to return (TR 47:5-50:1). About a week later, Mr. Cheng met Mr. Fan at a coffee shop, at which time Mr. Fan returned the remaining code or codes, and also made a demand for overtime pay (TR 123:14-124:6; 166:9-17). Mr. Fan never returned to the campus after January 3, 2017, and never performed any services as an employee of Respondent after December 23, 2016.

### Prosecuting Party's Theory of the Case

As nearly as I can determine, Mr. Fan argues 1) that the removal of Dr. Jerry Shiao was a wrongful termination, either because of, or as evidenced by (or perhaps both), an altercation at the campus on or about December 29, 2016; 2) that because the removal of Dr. Shiao was a wrongful termination, Kevin Cheng is not the legitimate Interim President of Respondent; 3) that because Mr. Cheng is not the legitimate Interim President of Respondent, he has no authority to act on Respondent's behalf; 4) that because Mr. Cheng has no authority to act on Respondent's behalf, he had no authority to terminate Mr. Fan's employment; 5) that because Mr. Cheng had no authority to terminate Mr. Fan's employment, Mr. Fan is still employed by Respondent; and 6) because Mr. Fan is still employed by Respondent, he is still entitled to be paid under the Labor Condition Application, even though he has done no work since December 23, 2016 (*see* TR 201:20-203:14).

Mr. Fan has advanced these arguments repeatedly and passionately, but he cites no controlling legal authority for them. What is more, Dr. Shiao and Respondent appear to be litigating many of these questions currently in a more appropriate forum, the Superior Court of the State of California. Under 29 C.F.R. section 18.84, I take official notice of two cases currently pending there: *Silicon Valley University v. Shiao*, Santa Clara County Superior Court No. 17cv606346, filed February 14, 2017; and *Shiao v. Silicon Valley University*, Santa Clara County Superior Court No. 17cv306511, filed February 17, 2017. These matters were pending when this claim was filed with the Department of Labor; they involve important state interests in the regulation of a domestic corporation and allegedly-criminal conduct, and they appear to me to provide an adequate opportunity to raise any federal claims that may be associated with the contentions I have outlined above.

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<sup>3</sup> Mr. Fan appears to have inferred Respondent directed Ms. Zhao to deliver this message to him (TR 153:18-25), a contention she denies (TR 260:13-262:17).

<sup>4</sup> In one such telephone conversation, Mr. Cheng says he terminated Mr. Fan's employment (TR 44:2-25; *see also* 120:14-122:14), but Mr. Fan denies this (TR 154:5-10). Mr. Fan acknowledges Mr. Cheng asked for the return of some items (TR 159:13-160:2; 161:22-162:9).

Mr. Fan, so far as I know, is not a party to either of these state-court actions. But neither he nor Respondent may use this proceeding to gain advantage for one side or another in the pending state-court actions. I conclude the questions of governance of Respondent, and Mr. Cheng's authority to act on behalf of Respondent, are not properly before me, and even if they were, the most appropriate course would be for me to abstain in deference to the Superior Court. Mr. Cheng has at least apparent authority to act for Respondent under PX 34 (*see also* TR 119:2-6), and, as discussed more fully below, the parties' conduct in this case shows they recognized that authority. I make no further finding or conclusion with respect to the issues described above.

I further find and conclude:

**1. Mr. Fan litigated wage claims before the California Labor Commissioner**

The record shows Mr. Fan made, and, on October 12, 2018, won, a claim against Respondent before the Labor Commissioner of the State of California for unpaid wages owed during the period from June 7, 2016, through December 23, 2016 (RX 76).

The doctrine of collateral estoppel applies in administrative adjudication. *Hasan v. Sargent & Lundy*, ARB No. 05-099, ALJ No. 2002-ERA-032, slip op. at 6-7 (ARB Aug. 31, 2007), (quoting *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 5, 77 n. 1 (1984)). Collateral estoppel applies "when: 1) the same issue has been actually litigated and submitted for adjudication; 2) the issue was necessary to the outcome of the first case; and 3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination." *Administrator, Wage and Hour Division, v. ZL Restaurant Corp.*, ARB No. 16-070, ALJ No. 2016-FLS-004, 2018 WL 2927674 (ARB Jan. 31, 2018), slip op. at 5; *Chao v. A-One Med. Svcs., Inc.*, ARB No. 02-067, ALJ No. 01-FLS-27, 2004 WL 2205227 (ARB Sep.23, 2004), slip op. at 6.

Additionally, in the Ninth Circuit, issue preclusion bars the relitigation of issues actually adjudicated in previous litigation between the same parties. *Litjohn v. United States*, 321 F.3d 915, 023 (9th Cir. 2003) A party invoking issue preclusion must show: 1) the issue at stake is identical to an issue raised in the prior litigation; 2) the issue was actually litigated in the prior litigation; and 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Id.*

In this case, the record shows the parties litigated these issues before the Labor Commissioner of the State of California:

1. Whether Mr. Fan was entitled to be paid \$30.69 per hour<sup>5</sup> for regular time worked from June 7, 2016, to December 23, 2016 (RX 76, 6:13-15<sup>6</sup>). The Labor Commissioner concluded he was, and awarded him \$7,639.98 in unpaid back wages. (RX 76, 12:22-13:2).

2. Whether Mr. Fan was entitled to overtime pay for the period June 7, 2016, to December 23, 2016 (RX 76, 6:19-21). The Labor Commissioner concluded he was, and awarded him \$7,135.42 in unpaid overtime for that period (RX 76, 13:13-14:4).

Although there is some minor dispute between counsel as to how promptly Respondent paid these awards (TR 12:22-13:12), there is no doubt Respondent has paid the Labor Commissioner's entire award, including the two specific awards detailed above (TR 222:3-225:7; RX 77). Having litigated these issues to decision, Mr. Fan may not re-litigate them again here.

But in one important respect, the Labor Commissioner's action complicates the matter before me. In this case, before the Labor Commissioner issued its decision, the Administrator investigated Mr. Fan's complaint to the Department of Labor, and concluded Respondent was obligated to pay him \$6,376.38 in back wages (RX 70, p. 3).<sup>7</sup> What is more, the record shows Respondent has already paid it to Mr. Fan (TR 224:19-225:12). Thus, it would appear Respondent has paid both a back wage calculated by the Administrator, and a back wage calculated by the State of California Labor Commissioner. To make matters worse, nothing in RCX 70 shows the Labor Commissioner was aware of the Administrator's action, or of Respondent's payment of the amount the Administrator determined.

Unlike the Administrator, the Labor Commissioner issued its decision after an August 29, 2018, hearing on the merits, at which both parties appeared and were represented by counsel (RX 76, p. 7, lines 4-7). For that reason, the Labor Commissioner's decision is entitled to preclusive effect. Because I have the authority to modify the Administrator's decision, 20 C.F.R. section 655.840, subsection (a), I act to eliminate what would otherwise be a double recovery.

Apart from those claims the Labor Commissioner decided, in this proceeding Mr. Fan asks me (TR 9:6-21) to award wages for the period beginning December 23, 2016, until the expiration of the Labor Condition Application on June 7, 2019. He cites 20 C.F.R. section 655.731, subsection (c)(7) as authority for such an award. He also asks me to award wages under the Labor Condition Application retroactively

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<sup>5</sup> That is, the hourly rate specified in the Labor Condition Application (PX 20, p. FAN\_0254).

<sup>6</sup> In citing to RX 76, I use the Exhibit numbers found in the lower right corner, rather than the internal page numbers of the various documents comprising it.

<sup>7</sup> The Administrator assessed no civil money penalties, concluding Respondent owed back wages to only one H-1B worker (RX 70, p. 3).

from April 5, 2015, until June 7, 2016, citing 20 C.F.R. section 655.731, subsection (c)(6). He also seeks reimbursement of H-1B attorney fees and costs, and the cost of return transportation to his country of origin.

**2. There was a *bona fide* termination of Mr. Fan's employment after he last worked on December 23, 2016<sup>8</sup>**

As a general rule, an employer must pay an employee on the terms set forth in a Labor Condition Application unless there has been a "bona fide termination" of the employee under 20 C.F.R. section 655.731, subsection (c)(7)(ii), which provides:

. . . Payment need not be made if there has been a bona fide termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

"[A]n employer need not establish a valid basis or good cause for an employee's termination to effect a '*bona fide* termination' under the INA's H-1B provisions." *Amtel Group of Florida, Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006 (ARB Sep. 29, 2006), slip op. at 10. Rather, a "*bona fide*" termination occurs when the employer 1) notifies the employee of the termination, 2) notifies federal immigration authorities of the termination, and 3) under appropriate circumstances, pays for the employee's transportation home. *Id.*, slip op. at 11-12.

Notice to Employee

When asked the question directly, Mr. Fan testified Respondent never gave him notice of termination (TR 154:5-10), while Mr. Cheng testified he terminated Mr. Fan's employment by telephone ((TR 44:2-25; *see also* 120:14-122:14).

I find Mr. Fan's denial unpersuasive. Exhibit ALJ-1<sup>9</sup> shows Mr. Fan received a text message from Jialin (Jocelyn) Zhao on December 29 warning him "they are going to seek for an attorney, to terminate your H1b status . . . I think you know

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<sup>8</sup> Mr. Fan apparently last worked on or before December 23, 2016, the date the Labor Commissioner concluded his employment had ended, and he was on vacation thereafter (TR 185:14-24).

<sup>9</sup> ALJ-1 is something of a mess. Its pages are not numbered, and most of it is not written in English. As originally submitted, the pages in Mandarin are interspersed with pages of English translation prepared by Mr. Fan's own counsel. Originally described as PX 2 (TR 45:1-14, 84:6-10), I marked the exhibit as ALJ-1 after counsel's translation was reviewed, and in some respects modified with handwritten notations, by certified court interpreter Wan Lee (TR 142:6-144:2).

that Seiko<sup>10</sup> is not a heartless person, she is actually very nice and treat you not too bad [*sic*], but we all know that you work for Jerry, so she can't let you stay to work." The next day, Ms. Zhao sent another message urging Mr. Fan to negotiate with Respondent to "get some more money, and also give you some more time for your H1b status." Mr. Fan testified he assumed Ms. Zhao was conveying these messages on behalf of Respondent (TR 153:18-25; 161:8-21). He also testified

Q: What was your understanding when Kevin Cheng asked you to return the keys of the classrooms and the storage rooms for a code, what was your understanding – what was that for?

A: Because I was handling the keys as well as the security code.

Q: Did he ask you to – was that your understanding that – well, what was your understanding when he asked you to return those keys – was that, you know, as far as related to your employment?

A: Okay. If it's demanded like that, without any reason, to return all the things I have, shows something like ask me to leave.

(TR 161:22-162:9).

Thus, Mr. Fan had been told, by someone he believed to be speaking on behalf of Respondent, that Seiko Cheng did not want Mr. Fan to continue working for Respondent because of his association with Dr. Shiao, and that Respondent intended to terminate his H1-B status. He also inferred Kevin Cheng was demanding the return of keys and codes because Respondent intended to terminate his employment. Mr. Fan's conduct speaks even more loudly on this point. After meeting with Mr. Cheng and returning some of the items demanded, he met a second time to return the rest, and at the same time demanded overtime pay allegedly unpaid. And he never returned to work.

I suspect no witness in this case has given me a comprehensive account of the reasons why Mr. Fan was terminated, or how that decision was communicated to him. Nevertheless, I find Mr. Cheng's testimony that he told Mr. Fan, on the telephone, that he was being terminated more credible than Mr. Fan's denial that Mr. Cheng ever said anything to him about it. Correctly or incorrectly, Mr. Fan believed Ms. Zhao had also delivered the same message on behalf of Respondent. He also understood Mr. Cheng's demand for keys and codes as a threat of termination. He

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<sup>10</sup> "Seiko" is Seiko Cheng, Respondent's CFO, and also the sister of Kevin Cheng (TR 16:23-17:1), a member of Respondent's Board (TR 30:5-9), and the ex-wife of Dr. Jerry Shiao (TR 147:12-148:2).

turned in the keys and codes, and never returned to Respondent's campus. He knew Respondent had terminated him.

### Notice to Immigration Authorities

The parties appear not to dispute this issue. Under 29 C.F.R. section 18.84, I take official notice of this statement set forth in the Complainant's Pre-Hearing Statement, filed August 22, 2018, at p. 1: "Presumably, at an unknown time, the University illegally notified the Immigration and Naturalization Services to terminate H-1B as FAN's F-1 status was denied for out of H-1B status."

### Return Transportation

The third feature of a *bona fide* termination in most cases is the employer's payment – or, at least, tender – of the cost of return transportation to the terminated employee's country of origin. But in some cases the ARB has concluded there was a *bona fide* termination, even without the payment of transportation costs, in cases where the employer showed proper notification to immigration authorities and also showed some voluntary actions on the part of the terminated employee. See *Puri v. University of Ala. Huntsville*, ARB No. 13-022, ALJ Nos. 2008-LCA-38, -43, 2012-LCA-10 (ARB Sep. 17, 2014) (holding employer owed no back wages beyond the date of notice, even though it did not tender or provide the cost of return transportation, because employee had an independent reason for not returning home). In *Vinayagam v. Cronous Solutions, Inc.*, ARB No. 15-045, ALJ No. 2013-LCA-029, 2017 WL 1032321 (ARB Feb. 14, 2017), slip op. at pp. 7-8, the terminated employee "voluntarily chose to remain in the United States, admittedly without a valid visa or other legal permission or authority to be in the United States," and the ARB concluded the employer, having notified the employee and USCIS of the termination, was no longer obligated to pay wages, although it neither "offered nor provided payment" for the employee's return travel. *Id.*, at 8-9).

At the time of the hearing, Mr. Fan was living in the United States (TR 233:10-11). After his termination, Mr. Fan remained in the United States. Between the time of his termination and the time of the hearing, he returned to his home in Taiwan twice, once "to visit my family and to change my visa<sup>11</sup>," and once "[t]o have some activities in Taiwan with the church members" (TR 233:10-234:22). His ability to come and go twice in two years suggests he remained in the United States of his own volition. Accordingly, I conclude Respondent's failure to offer him return transportation to his country of origin does not alter the *bona fide* character of his termination by Respondent.

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<sup>11</sup> The record does not show Mr. Fan's current immigration status, but if he is in the United States legally at this time, his status militates against requiring his former employer to pay return travel expenses. See *Puri v. University of Ala. Huntsville*, ARB No. 13-022, ALJ Nos. 2008-LCA-038, -043, 2012-LCA-010 (ARB Sept. 17, 2014); *Batyrbekov v. Barclay's Capital*, ARB No. 13-013, ALJ No. 2011-LCA-025 (ARB Dec. 20, 2011).

Because of the *bona fide* termination of Respondent's employment on December 23, 2016, Respondent is not obligated to pay wages to him thereafter, whether regular or overtime. *See* 20 C.F.R. section 655.731(c)(7)(ii).

**3. Mr. Fan was not entitled to pay under the LCA before the LCA was approved**

Mr. Fan argues he should have been paid at the LCA rate, even before the LCA was approved, from the time he started working for Respondent on April 1, 2015, until June of 2016. During that period, he was apparently working under an F-1 Optional Practical Training student visa (TR 226:9-19; RX 76, 7:15-18).

The only authority Mr. Fan cites for the proposition that Respondent was obligated to pay him under the LCA before it became effective is 20 C.F.R. section 655.36, subsection (c)(6), which provides

Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant "enters into employment" with the employer.

The flaw in Mr. Fan's reasoning is that he was not an "H-1B nonimmigrant" until his H-1B visa issued. *See Voitisek-Lom v. Clean Air Technologies Int'l.*, ARB No. 07-097, ALJ No. 2006-LCA-00009 (ARB Jul. 30, 2009) (affirming the ALJ's conclusion that Voitisek-Lom did not enter into employment until he resigned his graduate student researcher position to begin working for employer under the H-1B program). Mr. Fan's immigration status from April 1, 2015, through June of 2016 was something else entirely (TR 225:22-226:3),

**4. Mr. Fan is not entitled to return transportation expenses**

Because Respondent was not obligated to pay Mr. Fan's return transportation expenses at the time of his *bona fide* termination, it is not obligated to pay them now.

**4. Mr. Fan is entitled to unreimbursed attorney fees**

Attorney fees and other costs in connection with filing an H-1B petition are a business expense of the employer, and should not be deducted from an employee's pay. *See* 20 C.F.R. section 655.731, subsection (c)(9).

Mr. Fan testified he paid Attorney Lawrence Fong "three thousand two hundred eighty-something" in fees in connection with his H-1B application (TR 170:21-171:24). He further testified Respondent had repaid him for half that amount (TR

242:23-243:9).<sup>12</sup> Mr. Cheng acknowledged Respondent's obligation fully to reimburse Mr. Fan for these costs (TR 135:20-136:4; *see also* 73:1-12). There is no evidence in the record to show Respondent ever reimbursed Mr. Fan for the remaining \$1,641.00.

### **ORDER**

1. Under 20 C.F.R. section 655.840, subsection (a), I modify the Administrator's decision to eliminate the award of back wages totaling \$6,376.38. I do this because the Prosecuting Party has since won a second award of those wages in proceedings before the State of California Labor Commissioner.

2. Respondent must pay the Prosecuting Party \$1,641.00 in unreimbursed expenses associated with his H-1B petition.

3. Except as set forth above, the Prosecuting Party's claim is denied.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge

### **NOTICE OF APPEAL RIGHTS**

Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (e-File) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file

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<sup>12</sup> Counsel appear to agree the amount of that repayment, as shown on the first page of at PX 14, was \$1,641.00 (TR 242:23-243:9; 194:24-195:13).

new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.