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NO. 68877-4

King County Superior Court No. 11-2-17845-5 SEA

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

KANNAN KRISHNAN,

Appellant,

v.

MATTHEW O'DONNELL, in his official capacity as the Dean of
the University of Washington's College of Engineering,

Respondent.

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON

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INTRODUCTION

This is Professor Krishnan's second appeal of the decision made in 2006 by Matthew O'Donnell, Dean of the College of Engineering, not to reappoint Professor Krishnan to an endowed chair he held in addition to the tenured faculty position he holds. Through two Faculty Adjudication proceedings, reviews by two University Presidents, two Superior Court Judicial Reviews, and now a second appeal to this Court, Professor Krishnan has been and remains unable to bear his burden of proving that Dean O'Donnell's decision, and the agency action upholding that decision, were invalid.

The scope of review is narrow. Although Dean O'Donnell's decision was to be based in part on recommendations of a reappointment review committee, the decision is reviewable only to the extent necessary to determine whether it was affected by factors other than the relevant and permissible considerations, i.e., factors other than stated in applicable Guidelines and Expectations. Professor Krishnan obviously, and understandably, disagrees with the decision and feels that he deserved to be reappointed to the endowed chair. But that is not the standard. Nor is it determinative that the first decision written by the University's Hearing Panel was imprecise and necessitated a remand for fact-finding. After conducting a fact-finding hearing consistent with this Court's instructions, the Hearing Panel on Remand issued a second decision resolving the issues it was tasked with resolving and addressing inconsistencies that seemed to exist in the first decision. Substantial evidence supported the

conclusions that Dean O'Donnell based his decision on the Review Committee's decision and that his decision was not affected by irrelevant or impermissible factors.

The University of Washington asks this Court to affirm the Superior Court's dismissal of Professor Krishnan's second Petition for Judicial Review. The University conducted its second fact-finding hearing in accordance with this Court's remand instructions and determined, again, that Professor Krishnan had not borne his burden of proof.

COUNTERSTATEMENT OF ISSUES

1. When it issued its Order of September 28, 2009 remanding for fact-finding, did this Court limit the University's Hearing Panel so that it was to "find" facts using only the record developed in the original Faculty Adjudication proceeding, or did the University's Hearing Panel on Remand act within its discretion and in accordance with this Court's Order by providing both parties opportunity to offer evidence in the hearing on remand?

2. Has Professor Krishnan sustained his burden of proving that the University's action was invalid?

COUNTERSTATEMENT OF THE CASE

Professor Krishnan joined the University of Washington faculty in 2001 as a tenured Professor in the College of Engineering; in addition, he was appointed to the Campbell Endowed Chair.¹ The College of

¹ AR 755-58 (also 888-91). Professor Krishnan was not tenured before. AR 523-25. It is undisputed that he continues in his tenured faculty position.

Engineering administrators endowed chair positions in accordance with written Guidelines² and Expectations.³ The Campbell Chair, like other endowed chairs, was for a term of up to five years and could be renewed.⁴ A recommendation for reappointment must be “well established” and based on specific accomplishments relative to the College’s guidelines. The decision is the Dean’s to make.⁵ The holder of an endowed chair is not entitled to expect automatic reappointment.⁶

Acting Dean Mani Soma started the process of reviewing the Campbell Chair appointment in 2006.⁷ Consistent with the Guidelines and Expectations, Acting Dean Soma assembled a Review Committee of three professors: Professors Sampson Jenekhe, Charles Campbell and Guozhong Cao.⁸ Professor Jenekhe chaired the committee,⁹ and both he and Professor Campbell were in departments other than Professor Krishnan’s.

² AR 883-84 (also AR 750-71).

³ AR 885 (also AR 752).

⁴ AR 884. The 2001 appointment letter notified Professor Krishnan that the term of the chair appointment was for up to five years with potential for renewal. AR 3-4, 888-89. See also the testimony of former Chair Bordia at AR 496-98.

⁵ AR 884.

⁶ AR 189.

⁷ AR 204:14-23. The first nine pages of the transcript of the first day of hearing in the first adjudication (November 13, 2007), are out of order in the Administrative Record. Some of Acting Dean Soma’s testimony is on these pages. The transcript corresponds to the following pages of the Administrative Record: Transcript p5 is at AR 204; Transcript p6 is at AR 215; Transcript p7 is at AR 226; Transcript p8 is at AR 237; Transcript p9 is at AR 248. Transcript p10 is at AR 161. The remainder of that portion of the transcript appears in order (with the pages noted in the preceding sentence inserted between pages that are otherwise in order).

⁸ AR 215, 226:7-13; 237:4-18; 886; see also AR 904-904, the Review Committee Report (Exhibit 17 to the hearings).

⁹ AR 237:6-8; 886.

The third committee member, Professor Cao, was in Professor Krishnan's department.¹⁰

The Review Committee had no reason to treat Professor Krishnan unfairly.¹¹ At the time, Professor Krishnan expressed no dissatisfaction with the committee.¹²

As Professor Jenekhe testified in the first hearing, the Review Committee members began by assuming that they would recommend reappointment. But they were surprised. First they were surprised by the number of external references who declined to write letters about a professor in a position as prominent as the Campbell Chair.¹³ That was unusual.¹⁴ And then they were surprised at the information received.¹⁵ Although the testimony in the first hearing was somewhat convoluted (neither party was represented by counsel), the evidence was that external reviewers, other than those with whom Professor Krishnan collaborated, did not consider his work outstanding.¹⁶ In addition, one external contact provided, orally, some decidedly negative information (that Professor Krishnan "hyped" his work), although the Committee took that into only

¹⁰ AR 161-63; 885.

¹¹ AR 427:10-428:15.

¹² AR 200:9-202:11; 248:17-20. In the first hearing Professor Krishnan at one point implied that the Review Committee members were insufficiently expert but the evidence (and standards) do not support such an argument. AR 590:11-593:18.

¹³ AR 316:4-22. The Review Committee contacted 18 professionals, external and internal to the University and including some identified by Professor Krishnan. AR 315:13-316:22 330:16-25; 575-84.

¹⁴ AR 327:1-5.

¹⁵ AR 325:3-6.

¹⁶ AR 580:3-23.

minor consideration.¹⁷ There was some concern that Professor Krishnan contacted reviewers during the process.¹⁸

In Professor Jenekhe’s view the Report accurately summarized the Review Committee’s interpretation of the information received.¹⁹ The letters were not uniformly positive—for example, being identified as in the “top 50%” is just not a strong recommendation.²⁰ Professor Jenekhe testified that the Review Committee reviewed the information carefully, evaluated the information and metrics provided,²¹ and addressed pertinent issues.²² Although Professor Krishnan has argued that the Review Committee somehow “misrepresented” the information,²³ there was evidence to the contrary. Moreover, the fact that interpretations may be different does not mean that misrepresentation or fabrication has occurred.

The Review Committee reached consensus—they did not affirmatively recommend reappointment.²⁴ Yes, Professor Krishnan received positive evaluations, and raises.²⁵ Professor Krishnan is

¹⁷ AR 328:1-330:11; 549; 610:17-614:7.

¹⁸ AR 151:16-152:6.

¹⁹ AR 151:9-153:25; 554:1-565:12; 566:14-24; 567:19-589:8.

²⁰ AR 563:5-567:12.

²¹ AR 551:15-20; 600:3-601:18; 601:19-602:8; 602:9-20; 602:21-605:8.

²² AR 544:21-545:15; 549:2-550:22; 552; 553:3-554:8; See also: AR 877-81, 883-84; 885.

²³ See AR 834:17-840:7.

²⁴ AR 596:16-19. The Review Committee’s Report, dated July 14, 1006, is Ex. 17 and at AR 771-72.

²⁵ The testimony of Alex Jens, Chair Professor Krishnan’s department, is telling. Professor Jens gave Professor Krishnan good evaluations. AR 401:23—402:9; 428:22—429:25. However, Professor Krishnan’s work was not so special so as to warrant the raise Professor Krishnan sought. AR 403:26-407:19; 798. In addition, although Professor Krishnan prodded him to do so, Professor Jens declined to write a testimonial in support of Professor Krishnan in his effort to overturn Dean O’Donnell’s decision. AR 410:14-414:1.

considered “solid.”²⁶ However, according to the Committee’s assessment his work was not of the exceptional caliber that justified recommending him for another term.²⁷ The Review Committee concluded its Report by stating:

Although Krishnan’s research and scholarship are very strong by some measures it is not clear based on external letters that it is of the outstanding level expected for appointment to an Endowed Chair. His educational activities, service, and extra-departmental collaborations are adequate for this appointment. A continuation of this appointment may thus be justified.²⁸

The Review Committee completed its Report about the time the new Dean, Matthew O’Donnell, arrived. The decision whether to reappoint Professor Krishnan to the Campbell Chair was Dean O’Donnell’s.²⁹

Dean O’Donnell views an endowed chair as the highest honor the University can bestow on a professor.³⁰ Only seven percent of faculty are chairs and even fewer have been renewed as endowed chairs.³¹ The performance level expected for someone to be renewed in an endowed chair is “very high.”³²

In August 2006, after reviewing the Review Committee Report, Dean O’Donnell met and discussed the Report with Professor Jenekhe.³³ Next, Dean O’Donnell provided the report to Professor Krishnan and met

²⁶ AR 418:5-16.

²⁷ AR 597:8-599:14.

²⁸ AR 905.

²⁹ AR 199:16-24.

³⁰ AR 179-80.

³¹ AR 189:16-23.

³² AR 189:23-25.

³³ AR 200:9-15.

with him twice, both before and after Professor Krishnan responded to the Committee's Report in writing.³⁴ Dean O'Donnell confirmed that the Review Committee was duly constituted.³⁵ Dean O'Donnell also confirmed that the Review Committee addressed appropriate criteria.³⁶

In mid-September 2006, after analyzing the Review Committee's work, Dean O'Donnell concluded that the Review Committee had met its charge and provided a fair report.³⁷ However, he also decided to do his own review—his “own due diligence”—before making his final decision.³⁸

After discussing his plan with Professor Krishnan, Dean O'Donnell gathered information from other experts in Professor Krishnan's field.³⁹ Professor Krishnan provided names of those to speak with and Dean O'Donnell obtained additional names from professors at another institution and from within the University.⁴⁰ Ultimately, out of about ten or twelve names, Dean O'Donnell decided on three potential reviewers he had found and three identified by Professor Krishnan.⁴¹ Dean O'Donnell tried to contact all six; he was ultimately able to speak with four—two from his list and two from Professor Krishnan's.⁴²

³⁴ AR 200:16-201:8.

³⁵ AR 201:9-25.

³⁶ AR 202:12-203:25; 205:1-208:8; 877-81; 885.

³⁷ AR 208:6-20.

³⁸ AR 208:25-209:2.

³⁹ AR 209:3-7.

⁴⁰ AR 209:7-211:5.

⁴¹ AR 211:6-24.

⁴² AR 211:24-212:3.

Dean O'Donnell asked each reviewer about the quality of Professor Krishnan's work and his standing. Three out of the four reviewers raised serious concerns.⁴³ Dean O'Donnell re-read the Review Committee Report. Dean O'Donnell also reviewed Professor Krishnan's written response and the input provided by the reviewers with whom he had spoken and, based on the report and additional information, decided not to reappoint Professor Krishnan to the Campbell Chair.⁴⁴ Dean O'Donnell met with Professor Krishnan and notified him of his decision.⁴⁵

Professor Krishnan first appealed to the Vice Provost for Academic Personnel.⁴⁶ The Vice Provost found no basis to reverse.⁴⁷

Professor Krishnan then initiated the administrative Faculty Adjudication process. The hearing took place over several days in 2007.⁴⁸ Six witnesses testified, including Professor Krishnan and Dean O'Donnell. Out of the three Review Committee members, only Professor Jenekhe was called to testify.⁴⁹ Neither side had counsel in the hearing.⁵⁰

The Hearing Panel issued its Decision on January 7, 2008.⁵¹ There has been no dispute that the Hearing Panel accurately stated the issues

⁴³ AR 212:4-16; see also AR 212:19-224:10 for further detail about the questions Dean O'Donnell asked and the expert reviewers' responses.

⁴⁴ AR 222:6-11.

⁴⁵ AR 222:11-224:10; 797 (Ex. 22).

⁴⁶ AR 224:11-225:1; AR 943-45 (Ex. 26).

⁴⁷ AR 943-45.

⁴⁸ The Prehearing Conference took place on September 28 (AR 617). The Hearing itself was on October 23 (AR 437); October 24 (AR 310); and November 13 (AR 160). Closing arguments took place that same day (AR 289-309).

⁴⁹ AR 401.

⁵⁰ AR 437-39.

⁵¹ AR 1304-23.

presented: “Whether the decision not to renew Krishnan’s endowed chair was affected by factors other than the relevant and permissible considerations and, if so, what is the remedy?”⁵²

The Hearing Panel described the Review Committee’s Report as “seriously flawed.” The Hearing Panel determined that the Review Committee seemed to ignore relevant input leading up to its equivocal recommendation and failed to inquire further to clarify some inconsistent information.⁵³ The Hearing Panel did not conclude, however, that the Review Committee had in fact considered irrelevant or impermissible factors. The Hearing Panel stated that the apparent inconsistencies between the letters and the Review Committee Report “suggested” consideration of impermissible factors.⁵⁴ In any event, however, because Dean O’Donnell’s process was an independent and fair review of Professor Krishnan’s scholarship and research and because Dean O’Donnell was the decisionmaker, the Hearing Panel determined that Professor Krishnan had not carried his burden of proof.⁵⁵

⁵² AR 1316. That scope of review derives from the Faculty code, Section 28-34: “[d]ecisions relating to merit or qualify of the faculty member can be reviewed only to the extent necessary to determine whether the decision being questioned was affected by factors other than the relevant and permissible considerations in making the particular decision being challenged.” As noted, the relevant and permissible considerations are in the Endowed Chair and Professorship Guidelines and Expectations, AR 883-84, 885.

⁵³ AR 1318-20.

⁵⁴ AR 1306, 1320.

⁵⁵ AR 1320-21.

After appealing, unsuccessfully, to the University President,⁵⁶ Professor Krishnan filed a Petition for Judicial Review with the Superior Court. The Superior Court dismissed Professor Krishnan's Petition.⁵⁷

Professor Krishnan then appealed to this Court, which remanded.⁵⁸

The first paragraph of the Opinion summarizes the ruling:

Because we cannot determine from the record whether the hearing panel found that the review committee report was merely flawed or was actually affected by irrelevant or impermissible considerations, we remand this matter to the hearing panel to conduct a fact-finding hearing.⁵⁹

The reasons underlying this Court's decision are stated in three key paragraphs:

Our review of the hearing panel's decision is hindered by inconsistent fact-finding with respect to crucial issues. [fn 16] For example, the hearing panel found that "[b]ased on the Review Committee's report *and* his own analysis of Krishnan's scholarly impact, O'Donnell decided not to renew Krishnan's appointment as Campbell Chair. [fn 17] But the hearing panel also concluded that O'Donnell's decision was not affected by the flawed review committee report because it found that the results of O'Donnell's independent review formed the basis of his reappointment decision. Both findings cannot be true at the same time: either O'Donnell relied on both or he only based his decision on his own independent review. Here the evidence in the record would have been sufficient to support either conclusion had the hearing panel made one, but we cannot conduct meaningful judicial review without knowing which conclusion to review. [fn 18]⁶⁰

Because University policies and procedures required O'Donnell to base his decision, in part, on the review committee's recommendation, a finding that O'Donnell did not base his decision on the review committee report supports a conclusion that

⁵⁶ AR 1268.

⁵⁷ AR 1230-38.

⁵⁸ Krishnan v. O'Donnell, 152 Wn. App. 1031, _ P.3d _ (2010); AR 2-15. For convenience, a copy of this Court's Opinion is attached as an Appendix to this Brief.

⁵⁹ AR 2.

⁶⁰ AR 9-10.

O'Donnell did not follow University policies and procedures when he decided not to reappoint Krishnan. If O'Donnell in fact based his decision on both his review and the review committee report...then his decision would have been partly affected by irrelevant or impermissible factors to the extent the review committee report was itself affected by irrelevant or impermissible considerations.⁶¹

As the University correctly argues, the hearing panel found that the report's serious flaws *suggested* that the report *may have been* affected by impermissible or irrelevant factors. Unfortunately, the hearing panel also reaches an inconsistent conclusion, which is that O'Donnell's decision "would have also been affected by irrelevant or impermissible factors" if he had accepted the review committee's recommendation "without more." Here, O'Donnell was required to base his decision, in part, on the hearing panel's recommendation. Thus, if that recommendation was affected by impermissible factors, so would O'Donnell's decision, even though he also did "more" by conducting an independent review. He cannot, under the procedural rules, ignore the review committee's report altogether. The hearing panel also concluded that the review committee ignored relevant input, which would support a finding that it failed to base its recommendation on relevant factors as required. The evidence in the record does not rule out either conclusion, [fn 19] but the review committee report cannot both merely suggest impermissible considerations and be based on impermissible considerations at the same time. Accordingly, we remand this issue to the hearing panel for a finding on whether the review committee actually considered impermissible or irrelevant factors. [fn 20]⁶²

Footnote 20 of the Opinion references the portion of Washington's Administrative Procedures Act ("APA") applicable to the remand, RCW 34.05.562(2):

The court may remand a matter to the agency, before final disposition of a petition for review, with direction that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if: (a) [t]he agency was required by this chapter or any other provision of law to base its action exclusively

⁶¹ AR 10.

⁶² AR 10-11.

on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record.⁶³

To summarize this Court's ruling, the Hearing Panel, in its first decision, characterized the Committee Report as seriously flawed and noted that the apparent inconsistency between the positive-sounding letters and equivocal recommendation "suggested" that impermissible factors might have been considered. However, the Hearing Panel also used inconsistent language later in its Decision and never decided the issue. Because Dean O'Donnell's unquestionably fair review would have cured any substantive defect in the Committee Report, had there been a defect, the Hearing Panel did not decide whether there was a such a defect in the Committee Report and therefore never decided the ultimate question before it, i.e., whether the nonrenewal decision was affected by irrelevant or impermissible considerations.

The problem with the Hearing Panel's Decision was that the reappointment decision was to be based on "guidelines outlined in the specific endowment agreement, on the recommendations of the review committee and the decision of the Dean."⁶⁴ Although it was undisputed that Dean O'Donnell reviewed and reread the Review Committee's Report and halfhearted recommendation, the Hearing Panel did not explicitly find that Dean O'Donnell had based his decision on the Review Committee's recommendation. If the Review Committee Report was flawed because it was based on "irrelevant or impermissible considerations" (and no fact-

⁶³ AR 11.

⁶⁴ AR 877-8; 883-84, 885.

finder has so held), then Dean O'Donnell's decision could also have been infected by "irrelevant or impermissible considerations."

After disposing of Professor Krishnan's further arguments, this Court concluded its Opinion by stating "[w]e remand this matter to the hearing panel for fact-finding on whether O'Donnell followed the requirement that he consider the flawed review committee report and, if so, whether his decision can stand."⁶⁵

When the parties received this Court's Opinion Professor Krishnan first argued that no further proceedings were necessary. He claimed that this Court had ruled on the ultimate issues and that meant he had won and should be reappointed to the Campbell Chair without any further action by the Hearing Panel. Professor Krishnan also argued that the Hearing Panel was somehow without authority and its prior Decision had to be reversed.⁶⁶ The University President considered and rejected Professor Krishnan's arguments and denied his motion for a decision to be granted in his favor without further fact-finding.⁶⁷ In the interim the Superior Court issued its remand to the Hearing Panel.⁶⁸

At the Pre-Hearing Conference for the Hearing Upon Remand,⁶⁹ Professor Krishnan again sought to limit the fact-finding hearing to prevent further evidence from being taken.⁷⁰ After considering his

⁶⁵ AR 15.

⁶⁶ AR 29-33, 39-42.

⁶⁷ AR 34-35, 76.

⁶⁸ AR 37-38.

⁶⁹ AR 107-111, 113-152 (transcript of pre-hearing proceedings).

⁷⁰ AR 680-724.

arguments the Hearing Officer, attorney Mark Busto, denied Professor Krishnan's Amended Motion to Limit Evidence to the Record and issued a Prehearing Order.⁷¹ Hearing Officer Busto noted that the Panel preferred to take testimony from the Review Committee members to determine what facts the Review Committee had considered in making its recommendation, rather than draw inferences from the incomplete record.⁷²

In preparing for the Hearing Upon Remand, both parties identified as potential witnesses the two Review Committee members who had not testified at the first hearing, Professor Cao and Professor Campbell.⁷³ The parties were also able to identify and call additional witnesses.⁷⁴

The Hearing Upon Remand took place on December 3, 2010.⁷⁵ Unlike the first hearing, the parties were represented by counsel.⁷⁶ The Hearing Panel Upon Remand was composed of faculty members who had been on the earlier Hearing Panel.⁷⁷

Professor Krishnan chose not to provide evidence. Rather, he objected "to this proceeding on the ground that the evidence necessary to answer the questions that the appellate court's addressed to this panel is in the record that has already been assembled and that we don't have to call

⁷¹ AR 739-40, 741-42.

⁷² AR 740.

⁷³ AR 741.

⁷⁴ Id.

⁷⁵ AR 813-867.

⁷⁶ AR 814.

⁷⁷ AR 1044; 1323.

anyone.”⁷⁸ With that, Professor Krishnan rested.⁷⁹ The hearing proceeded as the University called witnesses.

Professors Cao⁸⁰ and Campbell both testified. Their testimony was generally consistent with Professor Jenekhe’s in the first proceeding although each gave more detail in response to clearer questions.⁸¹ The record indicates that their testimony clarified, rather than “un-did,” prior evidence as Professor Krishnan now contends. Professor Campbell confirmed that, when they started, the Review Committee expected that their recommendation would be affirmative.⁸² He was not concerned that the Review Committee might be disposed against Professor Krishnan. Rather, Professor Campbell was troubled that, if anything, Professor Cao would be too much under Professor Krishnan’s influence.⁸³ In the remand hearing there was further evidence presented that the expectations of a faculty member holding an endowed chair are higher than general faculty reviews and promotion or tenure decisions.⁸⁴

⁷⁸ AR 816-17.

⁷⁹ AR 817.

⁸⁰ There is no transcript of Professor Cao’s testimony; that portion of the hearing was apparently not recorded. The substance of Professor Cao’s testimony is not in any event disputed--Professor Krishnan has not alleged that his testimony was other than as set forth in the Decision of the Hearing Panel on Remand. In that decision the Hearing Panel specifically identified the evidence presented in support of the facts cited and there are repeated references to Professor Cao’s and Professor Campbell’s testimony, much of which was overlapping and consistent. See AR 1019-30. In addition, notes prepared by one of the members of the Hearing Panel (Hazlet), and the hearing officer (Busto), during the hearing are within the record. AR 946-59.

⁸¹ AR 1019-1026.

⁸² AR 820:1-24; 823:8-824:5; 1019-20.

⁸³ AR 820:25-821:8; 821:5-16; 822:5-823:7. See also AR 1020.

⁸⁴ AR 824:6-825:2; 827:3-24; 1020.

When the questions turned to what information the Review Committee received about Professor Krishnan, the evidence at the second hearing was also consistent with what was presented earlier. The members of the Review Committee who testified at the hearing on remand also saw it as a bad sign that some potential references declined to give feedback about Professor Krishnan.⁸⁵

Counsel for the parties elicited greater detail in the fact-finding on remand about the Review Committee's interpretation of the letters it had received about Professor Krishnan. This included letters that seemed positive but which the committee members viewed as negative, such as Exhibits 18A, 18C and 18E, all of which were admitted in the first hearing.⁸⁶ Letter 18A, for example, was worded carefully and did not recommend reappointment; it contained other faint praise as well. Professor Campbell called the last line (that Professor Krishnan was in the "top 50%") a "real winger."⁸⁷ Regarding the letters in general, the Review Committee noted that the authors who provided more positive input were also those whose own work had less impact in the field.⁸⁸ Such information provided background as to why the Review Committee came to its equivocal recommendation despite some seemingly uniformly positive input. Another factor also considered (and which was described

⁸⁵ AR 825:3-20; 1021.

⁸⁶ Those exhibits are AR 779, 782-83 and 786-87, respectively. See also 825:3-832:24, and the Decision of the Hearing Panel Upon Remand at AR 1021-26.

⁸⁷ AR 826:5-24. He did not specifically define "winger," but it was obviously not a positive description.

⁸⁸ AR 829:16-831:15.

briefly in the initial hearing) was the relatively low number of citations to papers written by Professor Krishnan, as noted in Exhibit 18E. Compared with exceptional contributors, the Review Committee's quantitative assessment was that Professor Krishnan's citation record was in fact low, even though one reviewer apparently characterized it otherwise.⁸⁹ In addition, although one reference identified Professor Krishnan as a "leading authority," someone else in a position to know about that fact said he did not know Professor Krishnan's record well enough even to write a letter. That supported the Review Committee's concerns that, while Professor Krishnan was a good professor and colleague, after a thorough and fair review the Review Committee could not strongly recommend reappointment.⁹⁰

Dean O'Donnell also testified at the second hearing, primarily on the issue of whether he considered the Review Committee Report (i.e., whether he based his decision on it to some extent).⁹¹ The evidence is that Dean O'Donnell read the Review Committee report first, before he took other action, and re-read it repeatedly during the process while he was

⁸⁹ AR 831:18-833:1; see also 845:24-849:8 (on cross examination, Professor Campbell indicated that the Review Committee had its own view of what was a high or low number of citations per paper, and concluded that ten citations in the past five years was "low"). In the first hearing the Chair of the Review Committee had also provided detail supporting the Review Committee's assessment that the number of citations to Professor Krishnan's work was low. One important fact was that Professor Krishnan was not the corresponding author to some of the papers. AR 600-02. Also, some of the papers receiving a higher number of citations had been submitted before Professor Krishnan came to the University. See AR 569, 600-02.

⁹⁰ AR 825:8- 832:24.

⁹¹ AR 855- 862.

making his decision.⁹² Although Dean O'Donnell used his own "due diligence" as his major consideration, the Report clearly played a part in his process and decision. If nothing else, the equivocal nature of the Review Committee's recommendation caused Dean O'Donnell to realize that more needed to be done.⁹³ And there has never been an allegation that Dean O'Donnell's inquiry was unfair or inaccurate.⁹⁴

After the parties submitted closing statements⁹⁵ the Hearing Panel Upon Remand issued its Decision on February 7, 2011. As before, the Hearing Panel concluded that Professor Krishnan had not met his burden of proving that Dean O'Donnell's decision was affected by factors other than the relevant and permissible considerations. The Hearing Panel ruled that Dean O'Donnell's decision should stand.⁹⁶

Professor Krishnan again appealed to the University President; Interim President Wise denied his appeal.⁹⁷ Professor Krishnan petitioned for Judicial Review and the Superior Court dismissed Professor Krishnan's petition.⁹⁸ Professor Krishnan appealed again to this Court.⁹⁹

⁹² AR 859:1-860:8.

⁹³ AR 860:22-862:1.

⁹⁴ As Dean O'Donnell testified in the initial hearing, the input from three out of the four references did not support reappointment. AR 212:1-16; 216-22.

⁹⁵ AR 983-993, 972-82.

⁹⁶ AR 1030.

⁹⁷ AR 1048-73, 1083-88, 1089.

⁹⁸ CP 26-34.

⁹⁹ CP 25.

ARGUMENT

A. Standards of Review

Reviewing courts uphold agency findings of fact that are supported by substantial evidence, i.e., “could a fair-minded person have ruled as the Hearing Panel did after considering all of the evidence.”¹⁰⁰ Inferences are to be drawn in the light most favorable to the prevailing party, i.e., the University.¹⁰¹ A court reviewing an agency’s adjudicative proceeding may grant relief only if it determines that agency engaged in unlawful procedure, acted arbitrarily or capriciously or for the other bases stated in the statute.¹⁰²

College of Engineering guidelines set the standard the Review Committee is to use for its recommendation to the Dean. For a Review Committee to recommend that an endowed chair be reappointed, the bases for renewal must be “well-established.”¹⁰³ The University’s Faculty Code sets the extent to which a decision relating to a professor’s merit or quality may be reviewed. Such a decision “can be reviewed only to the extent necessary to determine whether the decision being questioned was affected by factors other than the relevant and permissible considerations.”¹⁰⁴

¹⁰⁰ Callecod v. Washington State Patrol, 84 Wn. App. 663, 673, 929 P.2d 510 (1997).

¹⁰¹ Johnson v. Dept. of Health, 133 Wn. App. 403, 411, 136 P.3d 760 (2006).

¹⁰² RCW 34.05.570(3); Batchelder v. City of Seattle, 77 Wn. App. 154, 158, 890 P.2d 25 (1995).

¹⁰³ AR 884.

¹⁰⁴ Faculty Code, Section 28-32.B.3; see also AR 1317 (Hearing Panel Decision); AR 9 (this Court’s Opinion of September 28, 2009).

In this appeal Professor Krishnan does not appear to dispute directly the findings of fact issued by the Hearing Panel Upon Remand. Rather, Professor Krishnan challenges the Hearing Panel's decision, made in the exercise of its discretion in determining how to comply with this Court's remand instructions, to allow the parties to offer additional evidence in the fact-finding hearing on remand. The burden of demonstrating the invalidity of agency action is and remains on the party asserting invalidity, i.e., Professor Krishnan.¹⁰⁵ Professor Krishnan is unable to bear this burden.

B. The Hearing Panel, Acting Within Its Discretion, Complied With This Court's Instructions on Remand

When a reviewing court remands after appeal, it is the duty of the lower court (and, by extension, an administrative body) to comply with the mandate.¹⁰⁶ The primary question in this appeal is whether the post-remand process in which the Hearing Panel Upon Remand engaged, i.e., holding a fact-finding hearing in which further testimony was admitted, was consistent with this Court's instructions. It was.

The language used by this Court is a logical starting place from which to assess whether this Court prohibited the Hearing Panel from accepting further evidence on remand. Had it intended to direct the Hearing Panel to simply review the existing record and prepare new findings then, presumably, this Court could have indicated something like

¹⁰⁵ RCW 34.05.570(1)(a).

¹⁰⁶ See Smith v. Superior Court for Cowlitz County, 71 Wash. 354, 357, 128 P. 648 (1912); Rothschild & Co. v. Marshall, 51 F.2d 897 (9th Cir. 1931); see also Sweeny v. Sweeny, 52 Wn.2d 337, 339, 324 P.2d 1096 (1958).

“we remand for the Hearing Panel to determine the following outstanding questions, based on the existing record.” But that is not the language used. The matter was remanded for a fact-finding hearing and the natural interpretation of this phrase is that of a proceeding at which evidence is taken. Certainly Professor Krishnan fails to cite any authority to indicate that a fact-finding hearing has to be a hearing limited to finding facts based on pre-existing evidence. The reasonable and logical conclusion to draw is that this Court allowed the Hearing Panel to obtain evidence it deemed necessary to find the facts on the issues it was instructed to decide on remand.

The articulated reason for why this Court remanded—because the record was inadequate—further indicates that the fact-finding on remand was not limited to the existing record. As this Court noted in its Opinion,¹⁰⁷ what occurred was within the situation addressed in RCW 34.05.562(2)(a), i.e., where the agency failed to prepare or preserve an adequate record. In this case the record developed by the agency did not identify whether the review committee’s “flawed” report was faulty because it was based on impermissible or irrelevant considerations or for some other reason, for example, that it simply failed to explain why the Review Committee did not accept, at face value, the seemingly uniformly-positive letters. The record was inadequate. Had the record been sufficient so that all the Hearing Panel needed to do on remand was review

¹⁰⁷ AR 11, at footnote 20.

the record and revise its decision, the situation might have been different.¹⁰⁸ But it was appropriate for the Hearing Panel to take additional evidence because of the inadequate record.

Given the absence of explicit limitations imposed by this Court, the Hearing Panel had discretion to determine for itself whether to allow the parties to offer additional evidence. As a general rule the fact-finding body, such as a trial court or the University's Hearing Panel, retains the discretion, even on remand, to determine whether or not it is necessary to admit additional evidence in order to resolve a factual question.¹⁰⁹

Sweeny v. Sweeny¹¹⁰ is on point. Sweeny involved a child custody dispute that had been through multiple appeals, the last of which resulted in a remand with instructions to the trial court that it "take further proceedings, make a determination of certain factual issues and enter judgment accordingly."¹¹¹ The trial court reopened the case for the purpose of taking additional testimony, in addition to evidence from the

¹⁰⁸ Professor Krishnan cites National Audubon Soc'y v. Hoffman, 132 F.3d 7, 18-19 (2d Cir. 1997) and other cases, apparently arguing that the Hearing Panel engaged in an inappropriate *de novo* review or that it otherwise exceeded the scope of its mandate. Appellant's Opening Brief at 43. Even the cases Professor Krishnan cites, however, recognize that supplementation of an agency record may be necessary when needed to evaluate the agency action under challenge. That is consistent with this Court's statement that the record was inadequate, i.e., that it could not determine a key issue in the case based on the existing record.

¹⁰⁹ Criminal matters are different. When a criminal matter is remanded to the trial court for entry of written findings and conclusions the trial court is not free to make determinations based on new evidence. That is because of the prohibition against double jeopardy. State v. Head, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). This case is civil, consisting of Professor Krishnan's challenge to the University's decision, for which Professor Krishnan bears the burden of proof. It is not even a disciplinary matter and raises no double jeopardy concerns.

¹¹⁰ 52 Wn.2d 337, 324 P.2d 1096 (1958).

¹¹¹ 52 Wn.2d at 338.

earlier trial. After considering the evidence of both proceedings the trial court entered findings, a conclusion of law and judgment. Like Professor Krishnan, the losing parent argued that the trial court violated its mandate by reopening the case and hearing new evidence. In rejecting the appeal the Washington Supreme Court noted that the mandate contained no directive that the new findings had to be entered upon the evidence contained in the appeal record only, or that the “further proceedings” were to be limited to the trial court’s consideration of the prior record.¹¹²

This matter presents many of the same considerations as Sweeny, and should be similarly decided. This Court remanded the matter to the hearing panel “to conduct a fact-finding hearing” and enter findings on the factual matters to be decided. This Court did not specifically limit the Hearing Panel to only evidence admitted in the first hearing. Moreover, there is no reason why the Hearing Panel should not have retained its discretion to determine for itself whether the admission of further testimony would be helpful to render the fact-finding it was charged with conducting. The decision to admit further evidence was not done automatically or in a vacuum. Rather, the Hearing Officer and panel considered Professor Krishnan’s arguments that he should be deemed to have prevailed and/or that the evidence should be limited,¹¹³ and made a conscious determination to admit further evidence. And, as noted,

¹¹² 52 Wn.2d at 339-40.

¹¹³ AR 29-32, 39-42; 34-35, 76; 680-724; 739-40, 741-42.

Professor Krishnan had the same opportunity to present evidence that Dean O'Donnell did.¹¹⁴

Yet another basis for concluding that the fact-finding was not limited to the existing record is that there was no reason for this Court to impose such a limitation. To preclude the members of the Review Committee from explaining to the Hearing Panel why they, the Review Committee, came to their weak recommendation despite letters that seemed superficially to be positive, would have prevented the Hearing Panel from having access to relevant and appropriate information and, ultimately, from the truth. There was no reason to limit the Hearing Panel from having such access. Professor Krishnan was at no point thwarted from putting on whatever case he felt was the strongest.¹¹⁵ It was appropriate that he was not allowed to prevent the University from defending against Professor Krishnan's arguments. Moreover, and just as important, Professor Krishnan cannot convincingly explain how the Hearing Panel even could have carried out its mandate without further information from the Review Committee. This Court noted that the record was inadequate. This Court cited an appropriate basis for remand and its instructions to the Hearing Panel, to conduct a fact-finding hearing, were

¹¹⁴ AR 741 (pre-hearing order).

¹¹⁵ Professor Krishnan implies he was "curtailed" from making his case in the first hearing (Appellant's Opening Brief at 40). The record does not bear out that view. Neither party had counsel in that hearing and they were certainly not experts at eliciting clear testimony from the witnesses. There is no evidence that the Hearing Officer's attempts to keep the proceeding moving forward, and deal with parties' attempts to argue with the witnesses, prevented either side from offering appropriate evidence. See, for example, AR 542:11-544:10; 888-89.

consistent with the APA. The Hearing Panel’s proceedings—including its fact-finding hearing in which both parties had opportunity to submit evidence—were consistent with the remand instructions.

C. Professor Krishnan’s Arguments Are Unpersuasive

Professor Krishnan asserts, essentially, two basic arguments in his efforts to argue why the Hearing Panel acted improperly by allowing the parties to offer evidence in the hearing upon remand. Professor Krishnan first contends that this Court’s instructions were “clear” in requiring that the fact-finding on remand be limited to evidence submitted in the first hearing. Second, Professor Krishnan also contends that, under the “law of the case” or other doctrine, the Hearing Panel’s acceptance of additional evidence meant that factual matters that had been conclusively established in his favor were improperly “undone” on remand. Apparently related to this second argument is Professor Krishnan’s request that the Court apply the burden-shifting McDonnell-Douglas summary judgment standard for employment cases to this matter in a way that would enable him to prevail, despite his burden of proof, based on inferences potentially available based on the fact-issues for which this matter was remanded. Professor Krishnan’s arguments are without merit.

1. This Court’s Remand Instructions Did Not Limit the Hearing Panel From Exercising Its Discretion

Turning first to this Court’s remand instructions and what they required, Professor Krishnan may be accurate in observing that not all “hearings” and not even all “fact-finding hearings” involve proceedings in

which oral testimony is taken. But that does not mean that a “fact-finding hearing” has to be one in which the evidence is limited to a pre-existing record, and Professor Krishnan offers no authority to support such an argument. That is, simply because the term “fact-finding hearing” may include hearings based on an existing record does not mean that this Court limited this proceeding to a hearing on the existing record. This Court just did not articulate the limitation that Professor Krishnan desires. It certainly did not “clearly” so state. As discussed above, the Hearing Panel acted in conformity with this Court’s remand instructions when it determined, within its discretion, that the parties could offer additional evidence on remand.

2. Professor Krishnan’s Arguments That the Evidence On Remand Interfered with Facts That Had Been Conclusively Established In His Favor, Have No Merit

Professor Krishnan also argues that the admission of evidence on remand was inappropriate because the Hearing Panel “re-visited” and “undid” factual findings that, he argues, this Court had already decided conclusively in his favor.¹¹⁶ Underlying Professor Krishnan’s argument is the characterization of the reference letters and the apparent inconsistency between the seemingly uniformly “positive” letters and the Review Committee’s interpretation of the information in the letters, which was plainly more nuanced (and less “positive”) than the letters seemed initially to the Hearing Panel. Professor Krishnan’s logic is apparently this: in his

¹¹⁶ Appellant’s Opening Brief at 37-38.

prior appeal, Professor Krishnan argued, in part, that the Hearing Panel's decision, upholding nonrenewal, was unsupported by substantial evidence, apparently because the decision did not go into sufficient detail to explain the seeming inconsistency between the letters and the Review Committee's equivocal recommendation. In responding to Professor Krishnan's argument this Court pointed out that the Hearing Panel's decision was supported by sufficient evidence to withstand judicial review. What Krishnan seems to argue now is that this Court's response to his earlier argument means that the Hearing Panel's statement "[t]he generally negative opinion of the Review Committee of Krishnan's research and scholarship is not supported by the letters supplied by external reviewers" established, as a matter of law, that the reference letters were in fact "uniformly positive." Thus, according to Professor Krishnan, any evidence explaining that the letters were not actually as positive as they might have seemed at first¹¹⁷ must be excluded as contrary to the law of the case or some other doctrine.¹¹⁸ There are multiple reasons in law and fact why Professor Krishnan's arguments are baseless.

First, the language to which Professor Krishnan cites is this Court's response to an argument he made that there was insufficient evidence. That this Court rejected Professor Krishnan's contention does not necessarily mean that it is established, as a matter the law, that the

¹¹⁷ The Hearing Panel, on remand, noted that its initial interpretation of the letters was "naïve." Decision of the Hearing Panel Upon Remand at 12; CP 21.

¹¹⁸ Appellant's Opening Brief at 44-45.

information received about Professor Krishnan was in fact so uniformly positive that the Review Committee's equivocal recommendation lacked evidentiary support. A critical issue in this case is the fact that, in its first decision, the Hearing Panel failed to determine whether or not the Review Committee's recommendation was based on irrelevant or impermissible factors. Although the seemingly-positive letters suggested that this might have occurred (and this suggestion is what enabled Krishnan to obtain a remand), a key point of the remand is that the Hearing Panel had not determined this factual issue. Given the lack of certainty on this key fact issue it was plainly not settled as the "law of the case" or otherwise.

Moreover, the law of the case is not inflexible, and not applied in ways that create anomalous or unjust results.¹¹⁹ As noted above, when a matter is remanded for the taking of further evidence the matter of what evidence shall be received is left to the fact-finder's discretion.¹²⁰

Professor Krishnan's argument is also invalid because it is inconsistent with an admission he made to this Court. In his Opening Brief Krishnan states his agreement that the inconsistent findings made judicial review impossible.¹²¹ That is why remand, to further elucidate the pertinent facts by accepting more evidence if necessary, was appropriate.

Another reason to reject Professor Krishnan's argument is that it is illogical. Were Professor Krishnan correct that this fact question (that the

¹¹⁹ See Greene v. Rothschild, 68 Wn.2d 1, 3-5, 402 P.2d 356 (1965); Eserhut v. Heister, 62 Wn. App. 10, 14-15, 812 P.2d 902 (1991).

¹²⁰ Brown v. Brown, 192 Wash. 333, 337-38, 73 P.2d 795 (1937).

¹²¹ Appellant's Opening Brief at 42.

reference letters were in fact positive and the Review Committee's recommendation was therefore infected by irrelevant and impermissible considerations), had been decided as the law of the case then there would have been no reason for the Court of Appeals to even remand the matter for hearing. This Court is composed of strong jurists who understand the consequences of their directives – had they intended to declare Professor Krishnan as victor in the ultimate question then they would have done so. But they did not.

Professor Krishnan also argues that this Court, by identifying the Review Committee's Report as "flawed," established that the Report was flawed by being affected by irrelevant or impermissible considerations. Professor Krishnan's argument is based on footnote 19 in this Court's earlier Opinion.¹²² Professor Krishnan's argument is, apparently, that the footnote's reference to a potential inference means that this Court held there to be sufficient evidence in the record to eliminate any factual dispute about whether the Review Committee's Report resulted from the consideration of impermissible or irrelevant factors. Thus, according to Professor Krishnan, it was improper for the Hearing Panel Upon Remand to allow evidence explaining how the Review Committee reached its recommendation and why it was equivocal despite the seemingly-positive letters. In order to make this argument Professor Krishnan has to ignore the fact that he bears the burden of proof. It is he who has to prove that

¹²² Appellant's Opening Brief at 46-47; AR 11 (and, as noted, the Opinion is attached as an appendix to this brief).

Dean O'Donnell's decision, and ultimately the University's action, was affected by irrelevant or impermissible considerations. But for this Court's determination that a reasonable fact-finder "could" be able to infer such a fact, there would have been no way Professor Krishnan might later bear his burden of proof. That is, had this Court not determined that a reasonable fact-finder "could" infer that the discrepancy between the facially positive letters and equivocal recommendation was based on impermissible or irrelevant factors, this Court would have rejected Professor Krishnan's appeal and affirmed the Superior Court then and there. That there was a possibility a fact-finder "could infer" the existence of irrelevant or impermissible considerations meant that fact-finding hearing was needed to clear up the facts, so Professor Krishnan received another hearing. It does not mean the facts had been proven in Professor Krishnan's favor.

There are other reasons why Professor Krishnan's related argument, that "flawed" necessarily means "affected by irrelevant or impermissible considerations," is defective. One such reason is the language of this Court's Opinion. On the first page the Court explains the basis for remand as being "because we cannot determine from the record whether the hearing panel found the review committee report was merely flawed or was actually affected by irrelevant or impermissible considerations, we remand." That statement directly contradicts Professor Krishnan's theory.

Professor Krishnan might argue that only the last sentence of this Court’s Opinion should be considered: “[w]e remand this matter to the hearing panel for fact-finding on whether O’Donnell followed the requirement that he consider the flawed review committee report and, if so, whether his decision can stand.” But the Opinion contains both sentences—there is no reason to ignore the first and follow only the second. The effect of a reversal is appropriately determined from and entire opinion, not just certain portions.¹²³ Moreover, even the sentence on which Professor Krishnan would rely – the last sentence of the Opinion – does not limit remand to only the issue of whether Dean O’Donnell considered the flawed Review Committee Report. The sentence ends with the phrase “and, if so, whether his decision can stand.” Had there been a determination that the Report was affected by irrelevant or impermissible considerations so that the Court of Appeals intended the sole issue on Remand to be whether Dean O’Donnell considered the Report, the Court would have had no reason to include the last part of the sentence.

Professor Krishnan bore the burden of proof on the remand as well as in this proceeding. The question was not whether Professor Krishnan agreed with the decision, but whether it was based on factors other than relevant and permissible considerations. After a thorough and fair fact-finding the Hearing Panel Upon Remand concluded that the Report was

¹²³ *Kolatch v. I. Rome & Sons*, 137 Wash. 268, 270-71, 242 P. 38 (1920) (scope and effect of appellate court’s order is appropriately determined from the order as a whole and in context).

not affected by irrelevant or impermissible considerations. It also concluded that Dean O'Donnell, appropriately, considered the Report even though he based his decision in primary part on his further inquiry conducted after further involving Professor Krishnan in the process.

3. The Burden-Shifting Analysis Utilized in Employment Discrimination Cases Is Not Applicable

Professor Krishnan submits another, new, theory: that employment discrimination analysis should be applied in a way that not only enabled him to obtain a remand, but also so that he should be held to have prevailed.¹²⁴ As with his argument addressed above, the starting point for this argument asserted by Professor Krishnan appears to be footnote 19 in this Court's Opinion. As also noted above, this Court's recognition that a fact-finder "could" infer that the discrepancy between the positive letters and the Review Committee's equivocal recommendation resulted from the consideration of impermissible or irrelevant factors is what required remand. Professor Krishnan argues that this Court should now apply the burden-shifting analysis used in employment discrimination cases so that he should be deemed to have proven that the Review Committee's Report was in fact based on impermissible or irrelevant factors.

Professor Krishnan's newest theory should also be rejected. First of all this is not an employment discrimination case and, properly, has not been analyzed using the burden-shifting protocols of McDonnell-Douglas

¹²⁴ Appellant's Opening Brief at 47-48.

Corp. v. Green.¹²⁵ Rather, the correct standard of review to determine whether the Hearing Panel's finding that impermissible factors did not affect the Report is whether substantial evidence in the record supports the Panel's finding. Professor Krishnan offers no authority to suggest that this Court should replace the well-settled law establishing substantial evidence as the test with a burden-shifting analysis borrowed from employment discrimination cases. Professor Krishnan's suggestion should be rejected.

Even if this was a discrimination case, and it is not, the burden-shifting analysis is relevant only to a prima facie case. It is not intended to be used by the ultimate fact-finder and does not relieve a plaintiff from the burden of proving the fact of discrimination.¹²⁶ As noted above, this Court remanded based in part on the potential that the Review Committee's Report was flawed because of irrelevant or impermissible considerations. But that did not relieve Professor Krishnan from having the burden of proof. To accept Professor Krishnan's argument would have that effect.

D. Professor Krishnan Fails to Establish Any Basis to Overturn the Decision of the Hearing Panel on Remand

It was and remains Professor Krishnan's burden to demonstrate the invalidity of the University's action, and he is unable to do so. His various procedural arguments are without merit, as discussed above. In addition, Professor Krishnan has not and now cannot show that Dean O'Donnell's reappointment decision was unsupported by substantial evidence.

¹²⁵ 411 U.S. 792 (1973).

¹²⁶ Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 490-91, 859 P.2d 26 (1994).

Professor Krishnan was given the same opportunity as the University to offer any further evidence at the Hearing Upon Remand. Although Professor Krishnan's counsel cross-examined the witnesses during the University's case, he chose to not offer a case-in-chief. Professor Krishnan's attorney simply objected, saying "we don't have to call anyone."¹²⁷ As noted above, Professor Krishnan bore the burden of proof. And he failed to take action, such as making any offer of proof, to show a reviewing court that he might have some evidence to support his case. A party whose evidence at trial is not admitted must ensure that there is a record for a reviewing court. In the absence of proof that the would-be evidence would have been probative there is no reason to overturn a trial court's evidentiary ruling.¹²⁸

Similarly, Professor Krishnan offered no reason to conclude that the Review Committee's Report, including the equivocal recommendation, was based on other than relevant and permissible considerations.¹²⁹ That Professor Krishnan disagreed with how the Review Committee interpreted the information did not create "misrepresentations;" nor does it mean the Review Committee's conclusions were improper. The Review Committee was to make the recommendation and it determined there was not a well-established basis

¹²⁷ AR 816-17.

¹²⁸ See ER 103(a)(2); see also Estate of Fahnlander, 81 Wn. App. 206, 212, 913 P.2d 426 (1996), by analogy. Even though the trial court abused its discretion by not allowing the plaintiff to call a certain witness, the party claiming error had not made an offer of proof and there was no other record showing that the evidence not admitted would have been material. Thus there was no basis to reverse.

¹²⁹ AR 1028-29.

for reappointment.¹³⁰ There was substantial evidence to support the finding that the Review Committee's recommendation was based on relevant and permissible considerations. The Decision of the Hearing Panel Upon Remand should stand.

CONCLUSION

The University's Hearing Panel followed this Court's instructions on remand and appropriately exercised its discretion with respect to the evidence it accepted. That evidence explained the seeming inconsistencies and questions that had necessitated a remand. After having another opportunity to put on evidence, in the Hearing Upon Remand, Professor Krishnan failed to meet his burden of proving that Dean O'Donnell's decision not to reappoint him to the Campbell Chair was based on irrelevant or impermissible considerations. Respondent asks this Court to affirm the Superior Court's Order Dismissing Professor Krishnan's Petition for Judicial Review. Respondent further asks this Court to deny Professor Krishnan's request for attorney's fees as he has not prevailed.

RESPECTFULLY SUBMITTED this 25th day of September, 2012.

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¹³⁰ AR 884.

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KANNAN M. KRISHNAN,

Appellant,

v.

MATTHEW O'DONNELL,

Respondent.

No. 62804-6-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: September 28, 2009

AGID, J.—Dean Matthew O'Donnell did not reappoint Dr. Kannan Krishnan to an endowed chair at the University of Washington. Krishnan appealed that decision to a hearing panel, which apparently found that O'Donnell relied on a flawed review committee report when making his decision. But it concluded that his decision was not affected by impermissible or irrelevant considerations because his own review of Krishnan's qualifications provided an independent basis for his decision. Krishnan contends that the hearing panel's decision is not supported by sufficient evidence and is arbitrary and capricious. Because we cannot determine from the record whether the hearing panel found that the review committee report was merely flawed or was actually affected by irrelevant or impermissible considerations, we remand this matter to the hearing panel to conduct a fact-finding hearing.

FACTS

In 2001, Krishnan accepted an appointment as a tenured and full professor of materials science and engineering at the University of Washington's College of Engineering and the Campbell Chair, which is an endowed chair. The Chair's purpose is to enhance the University's ability to attract and retain distinguished faculty within the department of materials science and engineering.

The offer letter from Professor Rejendra Bordia, who was then chairman of the department of materials science and engineering, stated that the "Campbell Endowed Chair shall be for a period of up to five years, and shall be subject to review in accordance with University policy and procedures. It can be renewed. If the renewal is denied, you will have a minimum time period of one year . . . to vacate the Chair."¹

During appointment negotiations, Bordia conveyed to Krishnan that the University's reappointment policies and procedures involved review by a committee that would be set up by the dean and that would include review of all aspects of a faculty member's performance.

In 2005, the University codified the relevant reappointment policies and procedures in two documents. The Endowed Chair and Professorship Guidelines state that the purpose of endowed chairs is to "recruit and retain faculty with outstanding scholarly record[s]." The University expects endowed chair holders to have an "established record of outstanding intellectual achievement in research and education, as measured by scholarly activity, an international professional reputation, and a demonstrated ability for leadership." The guidelines state that reappointment review

¹ The Robert J. Campbell Endowed Professorship in Ceramic Engineering also states that "[e]ach appointment shall be for an indefinite period or a limited term, to be determined by the Dean, and shall be subject to review in accordance with University policy and procedures."

is based on the accomplishments of the [endowed chair] holder relative to the guidelines listed in this document and any particular guidelines relevant to that specific endowed position. Renewal of the appointment will be based on the guidelines outlined in the specific endowment agreement, on the recommendations of the review committee, and the decision of the Dean. A recommendation for renewal must be well established, based on specific accomplishments relative to the guidelines, with final approval being made by the Dean.

The Endowed Chair and Professorship Expectations document provides criteria for the review committee to use in evaluating the holder's performance.² The review committee may also consider "any other criteria deemed applicable." The expectations document also provides that "the review committees will consist of three members: two from other departments or units (one of whom will chair the committee), one from the holder's department."

In April 2006, the acting engineering dean, Mani Soma, appointed a three-person committee to review Krishnan's reappointment. Soma provided the review committee with the Endowed Chair and Professorship Guidelines, the Endowed Chair and Professorship Expectations, and the Robert J. Campbell Endowed Professorship in Ceramic Engineering Agreement. Krishnan provided the review committee with a narrative of his accomplishments as the Campbell Chair holder and a copy of his curriculum vitae. Consistent with the endowed chair expectations, which encourage the

² The criteria are:

1. Enhance both academic and research programs in the holder's department.
2. Establish and/or expand collaborative partnerships within the College of Engineering and in other units at the UW.
3. Establish and/or expand collaborative partnerships with industry and/or international partners.
4. Develop and/or refine teaching methods.
5. Develop innovative curriculum for both undergraduates and graduates.
6. Recruit and mentor students, both undergraduate and graduates.
7. Build and/or enhance the reputation of the holder's department, the College of Engineering, and the UW.

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review committee to consult with individuals at the University and other institutions to provide input on the chair holder's work, the review committee contacted twelve potential evaluators from outside the University and six from within. Six external and four internal reviewers evaluated Krishnan.

The review committee provided a unanimous and equivocal recommendation, concluding that "[a]lthough Krishnan's research and scholarship are very strong by some measures[,] it is not clear based on external letters that it is of the outstanding level expected for appointment to an Endowed Chair. His educational activities, service, and extra-departmental collaborations are adequate for this appointment. A continuation of this appointment may be justified." The outgoing engineering dean deferred the reappointment decision to Matthew O'Donnell, the incoming engineering dean. The review committee's report concerned O'Donnell because it did not support reappointment.

O'Donnell met with Krishnan to discuss the report and to inform him that he planned to conduct his own review before making a final reappointment decision. Krishnan provided O'Donnell with the names of 10 experts who could provide input regarding his scholarship. O'Donnell also contacted people inside and outside the university and received four lists of names. O'Donnell scheduled phone interviews with three of the reviewers who were common to all lists and three reviewers from Krishnan's list. O'Donnell interviewed two reviewers from his list and two from Krishnan's list.

O'Donnell asked each reviewer if they had read Krishnan's curriculum vitae and whether they were acquainted with his work. Then he asked each reviewer about Krishnan's standing in his field and whether he would have an endowed chair at the

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reviewer's institution. Three out of four external reviewers raised some concerns about Krishnan's contributions. O'Donnell decided not to renew Krishnan's appointment as Campbell Chair "[b]ased on the Review Committee's report and his own analysis of Krishnan's scholarly impact."³

Krishnan requested that Cheryl Cameron, Vice Provost for Academic Personnel, recommend that O'Donnell reconsider his decision. She declined, but she conducted a de novo review on behalf of the provost and found no basis to reverse O'Donnell's decision. Krishnan petitioned for review of O'Donnell's decision by a faculty hearing panel, alleging that the review committee failed to conduct its review in accordance with University procedures and that O'Donnell's review was ad hoc and arbitrary.

The hearing panel determined that the faculty handbook provided the applicable legal standard and required Krishnan to prove by a preponderance of the evidence that the decision to deny him reappointment was based on factors other than relevant and permissible considerations.⁴ The hearing panel found that the review committee's evaluation of external reviewers was flawed because the letters provided by external reviewers did not support the review committee's "generally negative opinion" of Krishnan's research and scholarship. The panel found that this flaw "suggests that its recommendation was affected by irrelevant or impermissible factors." According to the panel, the review committee's treatment of Krishnan's evaluations "indicates that it did

³ O'Donnell testified that he reread the review committee report before making his decision.

⁴ The complete faculty handbook is not in the record, but the hearing panel quotes from section 28-32.B.3, which states that "[d]ecisions relating to merit or quality of the faculty member can be reviewed only to the extent necessary to determine whether the decision being questioned was affected by factors other than the relevant and permissible considerations in making the particular decision being challenged."

not refer to a significant amount of *uniformly positive* input from both internal and external reviewers in its findings.⁵

In contrast to its more hedged findings, the hearing panel found that O'Donnell's decision "would have also been affected by irrelevant or impermissible factors" if he had accepted the review committee's recommendation "without more." And the hearing panel concluded that "the Review Committee ignored much relevant input in reaching its equivocal recommendation and failed to inquire further to clarify some inconsistent information." Because the hearing panel found that O'Donnell conducted an independent, impartial, and fair review of Krishnan's scholarship, which formed the basis for his non-renewal decision, it concluded that Krishnan did not prove that O'Donnell's decision was based on factors other than relevant and permissible considerations. But the hearing panel also concluded that "[b]ased on the Review Committee's report and his own analysis of Krishnan's scholarly impact, O'Donnell decided not to renew Krishnan's appointment as Campbell Chair."

Mark Emmert, the University of Washington's president, affirmed the hearing panel's decision. Krishnan petitioned for review of the agency action to the superior court, which dismissed his petition. Krishnan appeals.

⁵ The record supports the finding that there was a significant amount of uniformly positive input from internal and external reviewers. And the review committee report did not refer to all positive input.

DISCUSSION

The judicial review provisions of the state Administrative Procedure Act⁶ govern our review of the hearing panel's order.⁷ In reviewing administrative action, we sit in the same position as the superior court, applying the standards of the APA directly to the record before the agency.⁸ This court will grant relief if the hearing panel's order is not supported by substantial evidence based on the record before the panel.⁹ Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter.¹⁰ We view the evidence and its reasonable inferences in the light most favorable to the prevailing party—here, the University of Washington—in the highest forum that exercised fact-finding authority—here, the hearing panel.¹¹ We will also grant relief from the hearing panel's order if it is arbitrary or capricious.¹² Under the APA, Krishnan bears the burden of proving the invalidity of the hearing panel's order on appeal.¹³

⁶ Ch. 34.05 RCW.

⁷ Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002).

⁸ Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

⁹ RCW 34.05.570(3) ("The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . (a) [t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court."). The superior court's findings of fact are not relevant. Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 100 n.11, 11 P.3d 726 (2000) ("Unless the superior court takes new evidence under RCW 34.05.562, its findings are not relevant in appellate review of an agency action.").

¹⁰ R & G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413, review denied, 152 Wn.2d 1034 (2004).

¹¹ Johnson v. Dep't of Health, 133 Wn. App. 403, 411, 136 P.3d 760 (2006).

¹² RCW 34.05.510(3)(i).

¹³ RCW 34.05.570(1)(a) ("The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.").

I. Substantial Evidence Review

Krishnan contends that substantial evidence does not support the hearing panel's conclusion that O'Donnell's independent analysis cured the review committee's flawed report. Krishnan's reappointment was subject to review in accordance with University policy and procedures. University policy allows for review of decisions relating to faculty member merit or quality that are affected by factors other than the relevant and permissible considerations. The hearing panel found that the endowed chair guidelines and expectations contained the relevant and permissible reappointment considerations.¹⁴ The guidelines state that "[r]enewal of the appointment *will be based on the guidelines outlined in the specific endowment agreement, on the recommendations of the review committee, and the decision of the Dean.*"¹⁵

Our review of the hearing panel's decision is hindered by inconsistent fact-finding with respect to crucial issues.¹⁶ For example, the hearing panel found that "[b]ased on the Review Committee's report *and his own analysis of Krishnan's scholarly impact, O'Donnell decided not to renew Krishnan's appointment as Campbell Chair.*"¹⁷ But the hearing panel also concluded that O'Donnell's decision was not affected by the flawed review committee report because it found that the results of O'Donnell's independent review formed the basis of his reappointment decision. Both findings cannot be true at the same time: either O'Donnell relied on both or he only based his decision on his own

¹⁴ Krishnan points out that the University also has policies that govern promotion and tenure evaluations. But those policies do not apply here because this case involves an endowed chair reappointment decision, not a promotion or tenure review.

¹⁵ (Emphasis added.)

¹⁶ See Boeing Co. v. Gelman, 102 Wn. App. 862, 870, 10 P.3d 475 (2000) (holding that the hearing Board was required to decide what evidence is persuasive and why: "[f]ormal findings of fact serve an important function for meaningful judicial review of agency action"), review denied, 142 Wn.2d 1021 (2001).

¹⁷ (Emphasis added.)

independent review. Here, the evidence in the record would have been sufficient to support either conclusion had the hearing panel made one, but we cannot conduct meaningful judicial review without knowing which conclusion to review.¹⁸

Because University policies and procedure require O'Donnell to base his decision, in part, on the review committee's recommendation, a finding that O'Donnell did not base his decision on the review committee report supports a conclusion that O'Donnell did not follow University policies and procedures when he decided not to reappoint Krishnan. If O'Donnell in fact based his decision on both his review and the review committee report, which is the conclusion most strongly supported by the evidence, then his decision would have been partly affected by irrelevant or impermissible factors to the extent the review committee report was itself affected by irrelevant or impermissible considerations.

As the University correctly argues, the hearing panel found that the report's serious flaws *suggested* that the report *may have been* affected by impermissible or irrelevant factors. Unfortunately, the hearing panel also reaches an inconsistent conclusion, which is that O'Donnell's decision "would have also been affected by irrelevant or impermissible factors" if he had accepted the review committee's recommendation "without more." Here, O'Donnell was required to base his decision, in part, on the hearing panel's recommendation. Thus, if that recommendation was affected by impermissible factors, so would O'Donnell's decision, even though he also

¹⁸ The most likely conclusion is that O'Donnell relied on both the review committee recommendation and his own review when deciding not to reappoint Krishnan. But as the University points out, the hearing panel's finding that O'Donnell made his nonrenewal decision on the basis of his own review is entitled to substantial deference, and it is plausible, although unlikely, that a reasonable person could have concluded that the hearing panel discounted O'Donnell's testimony after assessing witness credibility.

did "more" by conducting an independent review. He cannot, under the procedural rules, ignore the review committee's report altogether. The hearing panel also concluded that the review committee ignored relevant input, which would support a finding that it failed to base its recommendation on relevant factors as required. The evidence in the record does not rule out either conclusion,¹⁹ but the review committee report cannot both merely suggest impermissible considerations and be based on impermissible considerations at the same time. Accordingly, we remand this issue to the hearing panel for a finding on whether the review committee actually considered impermissible or irrelevant factors.²⁰

Krishnan also argues that other parts of the hearing panel's decision are not supported by substantial evidence. First, he contends that the hearing panel should have gone into greater detail about the positive reviews the review committee received. But the hearing panel concluded that the review committee's report "did *not* refer to a significant amount of *uniformly positive* input from both internal and external reviewers in its findings" and that "[t]he generally negative opinion of the Review Committee of Krishnan's research and scholarship is not supported by the letters supplied by external reviewers." Those findings are both favorable to Krishnan and sufficiently supported by evidence of positive reviews in the record, which is what this court reviews under the

¹⁹ As the University argues, no direct evidence in the record shows that the review committee based its recommendation on impermissible considerations, but a reasonable fact finder could also infer that the discrepancy between the positive letters and the merely equivocal conclusion resulted from consideration of impermissible or irrelevant factors.

²⁰ See RCW 34.05.562(2) ("The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if: (a) [t]he agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record.").

substantial evidence standard. The APA does not require the hearing panel to provide an exhaustive recitation of every piece of evidence in the record.

Second, Krishnan argues that the hearing panel's decision is not supported by substantial evidence because it failed to note all discrepancies between the review committee's characterization of Krishnan's reviews and what the reviewers actually wrote. But as mentioned above, the hearing panel found that the review committee's report was flawed because "it did *not* refer to a significant amount of *uniformly positive* input from both internal and external reviewers in its findings." Evidence of discrepancies between the review committee's characterization of Krishnan's reviews and reviewer's evaluations supports this finding, which is also favorable to Krishnan.

Third, Krishnan argues that the hearing panel should have concluded that he received notice that his performance was consistent with expectations instead of finding that he had no notice that his performance was not consistent with expectations for the Campbell Chair holder. Even if a rational fact finder could have worded the panel's finding differently consistent with the evidence in the record, we review whether the evidence in the record supports the facts found. Here, the evidence supports the hearing panel's finding that Krishnan did not receive notice that his performance was not consistent with expectations,²¹ which is where our review ends. Additionally, the guidelines exist to communicate performance expectations to endowed chair holders. They do not require the University to notify the chair holder as soon as performance does not actually meet those expectations.

²¹ There is no evidence in the record that Krishnan received a negative performance evaluation during the time he held the Campbell Chair. And Krishnan testified that he expected reappointment to be "smooth sailing."

II. Arbitrary and Capricious Review

Krishnan argues that the hearing panel's decision was arbitrary and capricious because it relied on hearsay testimony from O'Donnell about his conversations with the reviewers he called. Hearsay evidence is admissible in adjudicative proceedings under the APA "if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."²² Here, Krishnan did not formally object to O'Donnell's testimony, but he raised the issue of the reliability of O'Donnell's notes and memory during his cross-examination of O'Donnell. Accordingly, Krishnan, who was proceeding pro se, sufficiently objected to O'Donnell's testimony to preserve appellate review. But he fails to establish that a reasonably prudent person would not have relied on O'Donnell's testimony about what the reviewers, who could not have been cross-examined by Krishnan without revealing their identities, told O'Donnell in confidence about Krishnan's scholarly reputation.

Additionally, the hearing panel did not need to rely on O'Donnell's testimony about the out-of-court statements for the truth of the matter asserted because O'Donnell did not have to prove to the hearing panel what the reviewers told him. Instead, he only had to satisfy the hearing panel that his decision relied on relevant criteria, such as the quality of Krishnan's scholarship and his standing among world leaders in his field. O'Donnell testified that he asked reviewers to evaluate the quality of Krishnan's scholarship and his standing among world leaders in his field, which are relevant factors, and Krishnan was able to cross-examine O'Donnell about what he asked the reviewers to evaluate.

²² RCW 34.05.452(1).

Krishnan also asserts that O'Donnell's decision not to reappoint him was arbitrary and capricious under McDonald v. Hogness because the University did not employ adequate procedural safeguards to control arbitrary reappointment decisions.²³ In McDonald, an unsuccessful medical school applicant claimed the school's admission process and treatment of his application violated due process because the State delegated the authority to set admissions requirements to the Board of Regents without providing standards prescribing how to exercise that authority.²⁴ Unlike McDonald, which is a case about the proper delegation of legislative authority, this is an APA case. Accordingly, we are not reviewing the University's reappointment process or O'Donnell's substantive decision.

Instead, under the APA, we use the arbitrary and capricious standard to review the hearing panel's determination that impermissible or irrelevant factors did not affect O'Donnell's decision not to reappoint Krishnan. As O'Donnell correctly argues, the decision to reappoint an endowed chair is assigned to his discretion, although that does not give him the authority to make arbitrary decisions. Instead, he must base his decision on the review committee report and Krishnan's qualifications and achievements in relation to the criteria in the endowed chair guidelines and expectations. O'Donnell does not have the discretion to consider impermissible or irrelevant factors when making reappointment decisions. As long as O'Donnell followed University policies and procedures and considered permissible and relevant criteria, he acted within his discretion by determining that Krishnan was an outstanding scientist

²³ 92 Wn.2d 431, 598 P.2d 707 (1979), cert. denied, 445 U.S. 962 (1980).

²⁴ Id. at 444.

62804-6-1/14

and professor, but not sufficiently outstanding to warrant the renewal of an endowed chair.

We remand this matter to the hearing panel for fact-finding on whether O'Donnell followed the requirement that he consider the flawed review committee report and, if so, whether his decision can stand.

Ajid, J.

WE CONCUR:

Dwyer, A.C.J.

Schindler, C.J.

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

KANNAN KRISHNAN

Appellant,

v.

MATTHEW O'DONNELL, in his
official capacity as the Dean of the
University of Washington's College
of Engineering,

Respondent.

DECLARATION OF
HELEN ARNTSON
REGARDING
CALCULATION OF
TIME TO FILE BRIEF
OF RESPONDENT

Helen Arntson certifies and declares:

1. I am an Assistant Attorney General in the University of Washington Division of the Washington State Attorney General's Office; I am over the age of 18 years, not a party to the above-captioned action and competent to testify. I make the following declaration based upon my personal knowledge and capacity as an Assistant Attorney General.
2. As an Assistant Attorney General I represent the Respondent in this matter.
3. The Appellant's Opening Brief was served on my office by US Mail post-marked August 23, 2012. I was aware that Appellant's brief would be served via mail because counsel for Appellant Kannan

2012 SEP 26 PM 4:54
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

Krishnan, Frederick H. Gautschi, III, had called me to let me know this was how he was going to be serving my office. Also in my brief conversation with Mr. Gautschi we discussed that my client, Respondent, would have an extended due date because Appellant's brief was being served via mail.

4. Pursuant to RAP 18.6 (a) and (b), which extends by 3 days when the 30-day time period begins to run if a preceding brief has been served by mail, the due date for filing the Brief of Respondent is September 26, 2012.
5. The Court of Appeals Docket showed the date to file the Brief of Respondent to be September 24, 2012. Therefore, on September 10, 2012 I sent a letter via US Mail to the Court of Appeals seeking clarification of the date that Respondent's brief would be due. I copied Frederick H. Gautschi, III, counsel for Appellant Kannan Krishnan, on this letter by both email and US Mail.
6. On September 20, 2012 I learned that this Court had not received my letter of September 10, 2012. Upon my request, on September 20, 2012 Paralegal Michelle Doiron sent to the Court a cover letter, a copy of the September 10, 2012 letter and its attachments, and a Declaration of Service to the Court via fax and US Mail. She also sent copies of the above-mentioned documents to Mr. Gautschi via email and US

Mail on the same day. Consistent with my prior conversation with Mr. Gautschi, we have received no objection from Appellant to our calculation of the due date of Respondents' brief (September 26, 2012).

7. Attached to this Declaration are true and correct copies of the September 20, 2012 letter and attachments.

I declare under the penalty of perjury of the laws of Washington and the United States that the foregoing is true and correct.

DATED this 25th day of September, 2012, in Seattle, WA.



HELEN ARNTSON
WSBA #19932
Assistant Attorney General
4333 Brooklyn Ave NE 18th Fl.
Seattle, WA 98105
206-543-4150



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

University of Washington Division • Box 359475
Seattle WA 98195-9475 • Phone (206) 543-4150 • Fax (206) 543-0779

September 20, 2012

Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176
Fax No. 206-389-2613

RE: Kannan Krishnan v. Matthew O'Donnell
COA Case# 68877-4

Dear Clerk:

Attached to this letter is a letter dated September 10, 2012 confirming the date that the Respondent's Brief is due to be filed. Also attached is Proof of Service.

The attached letter was mailed to the Court of Appeals, Division I and to opposing counsel on September 10, 2012, but we have since learned that it was not received by the Court. We ask you to consider the September 10 letter so that the Respondent's Brief may be filed with the Court appropriately.

Thank you for your assistance.

Sincerely,

MICHELLE E. DOIRON
Paralegal

:med

Enclosure/Attachment: September 10, 2012 letter and attachment; Declaration of Service

CC: Frederick H. Gautschi, III, attorney for Petitioner Kannan Krishnan



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

University of Washington Division • Box 359475

Seattle WA 98195-9475 • Phone (206) 543-4150 • Fax (206) 543-0779

September 10, 2012

Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

**RE: Kannan Krishnan v. Matthew O'Donnell
COA Case# 68877-4**

Dear Clerk:

I am contacting you to confirm the due date for filing the Respondent's Brief in this matter. The Court of Appeals Docket indicates the due date as Monday, September 24, 2012. However, my office calculates the due date as Wednesday, September 26, 2012. Service was effected by mail, thus extending by three days the day the 30-day period began to run. See RAP 18.6(a) and (b).

Thank you for your assistance in clarifying the due date.

Sincerely,

HELEN ARNTSON
Assistant Attorney General

HXA:med

Enclosure/Attachment: Certificate of Service

Cc: Frederick H. Gautschi, III, attorney for Petitioner Kannan Krishnan

No. 68877-4

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KANNAN KRISHNAN,

Appellant,

v.

CERTIFICATE OF SERVICE

MATTHEW O'DONNELL, in his official capacity
as the Dean of the University of Washington's College
of Engineering,

Respondent.

I, Frederick H. Gautschi, III, counsel for Appellant Kannan Krishnan in the above-captioned appeal, certify that on August 23, 2012, I placed in the U.S. mail a copy of Appellant's Opening Brief and a copy of this Certificate of Service to be mailed via the U.S. Postal Service to Helen Arntson, the attorney for the Respondent in the above-captioned appeal, whose mailing address is below:

Helen Arntson
Attorney General of Washington, University of Washington Division
4333 Brooklyn Ave. NE, 18th Floor
Box 359475
Seattle, WA 98195-9475

In addition, on the same date, I emailed a copy of Appellant's Opening Brief and a copy of this Certificate of Service to Helen Arntson at harnatson@u.washington.edu.

Dated this 23rd day of August 2012.



Frederick H. Gautschi, III, WSBA No. 20489
Attorney for Kannan Krishnan

NO. 68877-4

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

KANNAN KRISHNAN

Appellant,

v.

MATTHEW O'DONNELL, in his
official capacity as the Dean of the
University of Washington's College
of Engineering,

Respondent.

DECLARATION OF SERVICE

I, Michelle Doiron, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am a Paralegal for the University of Washington Division of the Washington State Attorney General's Office; I am over eighteen (18) years of age; I caused to be delivered, by the method and on the date described below, the following documents: **September 10, 2012 Letter and Attachment; and Declaration of Service.**

Sent by US Mail on September 10, 2012 to the following parties:

Court of Appeals, Division I
One Union Square
600 University Street
Seattle, Washington 98101

Sent by US Mail and Email on September 10, 2012 to the following parties:

Frederick H. Gautschi, III
Gautschi Law Firm, LLC
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
rgautschi@gautschilaw.com

Additionally, I caused to be delivered, by the method and on the date described below, the following documents: **September 20, 2012 Cover Letter; September 10, 2012 Letter and Attachment; and Declaration of Service.**

Sent by US Mail and Facsimile on September 20, 2012 to the following parties:

Court of Appeals, Division I
One Union Square
600 University Street
Seattle, Washington 98101
Fax No. 206-389-2613

Sent by US Mail and Email on September 20, 2012 to the following parties:

Frederick H. Gautschi, III
Gautschi Law Firm, LLC
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
rgautschi@gautschilaw.com

DATED this 20th day of September, 2012, in Seattle, WA.


Michelle Doiron

DECLARATION OF SERVICE

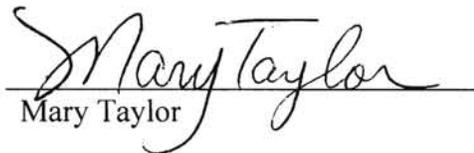
I, Mary Taylor, declare under penalty of perjury in accordance with the laws of the State of Washington, that I am a Legal Assistant for the Washington State Attorney General's Office, University of Washington Division, and that I filed with the Washington State Court of Appeals, Division I, the original plus one copy of (1) Cover Letter, (2) Brief of Respondent including Appendix, (3) Declaration of Helen Arntson Regarding Calculation of Time for Filing Brief of Respondent, including Attachments, and (4) Declaration of Service, as follows:

Via Seattle Legal Messengers on September 26, 2012:
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, Washington 98101-1176

I further declare that I served Appellant with a copy of the above-referenced documents, as follows:

Via Seattle Legal Messengers on September 26, 2012:
Frederick H. Gautschi III
Gautschi Law Firm, LLC
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121-1820
Attorney for Appellant

DATED this 26th day of September, 2012 at Seattle, Washington.


Mary Taylor

2012 SEP 26 PM 1:54
COURT OF APPEALS
STATE OF WASHINGTON