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No. 68877-4

WASHINGTON COURT OF APPEALS  
DIVISION ONE

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KANNAN KRISHNAN,  
Appellant

v.

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

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Appeal from Washington Superior Court  
for King County  
No. 11-2-17845-5 SEA

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APPELLANT'S OPENING BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON



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## ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of May 9, 2012, dismissing Appellant Kannan Krishnan's Petition for Judicial Review of the February 2011 Decision of the Hearing Panel on Remand that upheld Respondent Matthew O'Donnell's decision not to reappoint Appellant to an endowed chair position in the College of Engineering at the University of Washington.
2. In conducting an evidentiary hearing on remand that resulted in a decision upholding Respondent Matthew O'Donnell's decision not to reappoint Appellant Kannan Krishnan to an endowed chair position in the College of Engineering at the University of Washington the Hearing Panel failed to comply with the September 28, 2009 decision of the Court of Appeals that remanded the case to the Hearing Panel.
3. The Hearing Panel Decision on Remand upholding Respondent Matthew O'Donnell's decision not to reappoint Appellant Kannan Krishnan to an endowed chair in the College of Engineering at the University of Washington is arbitrary and capricious.

## ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. What scope attached to the January 28, 2009 decision of the Court of Appeals remanding for fact finding as to whether Respondent Matthew O'Donnell considered a flawed report from a review committee as part of his decision not to reappoint Appellant Kannan Krishnan to an endowed chair position and, if he did consider the flawed report, whether his decision can stand? (Assignment of Error Numbers 1, 2, and 3).

## STATEMENT OF THE CASE

An internationally recognized scholar, Kannan Krishnan has been a member of the faculty in the Department of Materials Science and Engineering (MSE) in the College of Engineering (COE) at the University of Washington (University) since the fall of 2001. During his tenure at the University he has received numerous honors and awards including, for example, a prestigious Guggenheim Award in 2005.

**The University Appointed Prof. Krishnan to the Campbell Chair in 2006. During the Five Year Term of His Appointment, He Received Several Forms of Recognition for His Achievements in Research and Scholarship.**

In 1991, Robert J. Campbell, a retired faculty member in the COE at the University, entered into an agreement with the University to endow a chaired professorship in Ceramic Engineering (Campbell Chair).<sup>1</sup> Under the terms of the agreement, holders of the Campbell Chair would have to “have demonstrated, through interests, activities, and employment, expertise in ceramic engineering.” AR 747. The selection process required the establishment of a selection committee and a search in accordance with standard procedures at the University. Ultimately, the

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<sup>1</sup> In 1995, the Campbell Endowed Professorship was upgraded to an endowed chair. AR 189, l. 2-9. Thus, this brief refers to the Campbell Chair.

Dean of the COE would make a recommendation to the University's President. The University's Regents would have to give final approval to the appointment. AR 747.

In March 2001, Prof. Rajendra Bordia (Prof. Bordia), Chairman of MSE at the University, acting pursuant to an authorization from the Dean of the COE, offered Prof. Krishnan the Campbell Chair. The position included, among other things, appointment at the faculty rank of professor in MSE and a term of up to five years, with the possibility of renewal. AR 755-758.

The specific "University policies and procedures" for determining whether to reappoint to an Endowed Chair or Professorship in the COE are set forth in two documents: Endowed Chair and Professorship Guidelines (Guidelines) and Endowed Chair and Professorship Expectations (Expectations). AR 750-752. Prior to April 2005, there were no written policies and procedures for conducting such reviews. According to Prof. Bordia, at some point he informed Prof. Krishnan that the required review for reappointment would involve a committee and subsequent review by the Dean of the COE, both of which would "include all aspects of a faculty member's performance." AR 503, l. 13-25.

In 2004, 2005, and 2006, Prof. Krishnan underwent reviews of his performance within MSE. AR 892-893, 898. Each of those reviews was

positive. In a memorandum dated June 13, 2007, Prof. Bordia, who had served as Chair of MSE until 2005, summarized the views of Prof. Krishnan's performance as of the review in 2004: "In a very short time, Prof. Krishnan met or exceeded our high expectations for this prestigious position [Campbell Chair]. As a result, in 2004, I recommended and the Dean approved a significant salary adjustment for him (an Endowment Supplement)." AR 892.

Also in 2004, Prof. Krishnan held a John Simon Guggenheim Memorial Foundation Award (Guggenheim), which according to the COE is "given for exceptional capacity in productive scholarship or creative ability in the arts and sciences." AR 895. Prof. Krishnan was one of only three persons in engineering to hold a Guggenheim that year 2004. AR 762.

Subsequent to the 2004 review, Prof. Krishnan achieved several forms of recognition within the community of scholars. For example, in 2005 he was elected as a Fellow of the American Association for the Advancement of Science. In congratulating Prof. Krishnan on his election, the University's President, Mark Emmert, and its Provost, Phyllis Wise, wrote, in part:

Congratulations on your election as a Fellow of the American Association for the Advancement of Science. This is a tremendous honor, one that speaks to an

exceptional level of accomplishment and commitment to advancing scientific knowledge. It is also wonderful recognition of the high degree of respect accorded to you by your peers in the academic community.

AR 899.

Subsequently, after an international search, the University of Western Australia selected Prof. Krishnan as the 2006 Professor-at-Large for its Institute for Advanced Studies. Prof. Krishnan was the sixth person to hold that position. The program for which he was selected “is designed to enable individuals who have achieved distinction through broad intellectual interests to be invited to visit the university and roam *widely* across disciplines and the intellectual life of the campus community.” AR 770. In 2008, he held a Rockefeller Fellowship, Bellagio Residence. In 2009, he became a Fellow of the American Physical Society -- a status that only .5 percent of the members of that body enjoy. AR 695.

**Relying Heavily on Review Letters that It Solicited and Received, in 2006, a Review Committee Evaluated Prof. Krishnan for Reappointment to the Campbell Chair.**

In April of 2006, the COE’s Dean, Mani Soma (Dean Soma) appointed a three-person Review Committee, chaired by Prof. Samson Jenekhe (Prof. Jenekhe), to conduct the required reappointment review of Prof. Krishnan as Campbell Chair. As part of the process of conducting

the review, the Review Committee compiled a “dossier.” Among other things, the dossier contained review letters from scholars from within and outside the University. The review letters resulted from the Review Committee’s having solicited written input regarding Prof. Krishnan’s record. In all, the Review Committee received eight letters commenting on Prof. Krishnan’s performance. Three of the letters came from scholars within the University (Internal Reviewers). The other five of those letters were from scholars outside the University (External Reviewers). AR 547, l. 6-13; AR 323, l. 2-13. All three Internal Reviewers explicitly recommended Prof. Krishnan’s reappointment to the Campbell Chair. AR 906, 908, and 910.

In their letters (External Letters) three of the five External Reviewers explicitly recommended Prof. Krishnan’s reappointment:

In conclusion, Kannan Krishnan is a highly productive scientist who spans solid-state physics and materials science with great depth of understanding in both. His careful and thorough research has earned Kannan the highest regard of the international community. . . . I believe Kannan Krishnan is deserving of his position as Campbell Chair, and I would have no doubt that he would be judged as worthy for an equivalent position at my institution.

AR 914.

Kannan is internationally well known for his long and productive career in magnetism. Everywhere I go around the world, people ask me if I know Kannan!. His work is

widely regarded as being excellent, pioneering and paradigm breaking.

...

In summary, it is my opinion that Kannan has done very well as a chaired professor at UW. His scholarship is world class . . . . I support his reappointment wholeheartedly.

AR 918.

It is a pleasure and an honor to write this letter of support and nomination of Dr. Kannan Krishnan for the continuation of the Campbell Chair. I don't think that you will find a more deserving candidate. . . . In my mind this continuation is a no-brainer.

AR 919.

In their letters the remaining two External Reviewers did not explicitly address the question whether they would recommend reappointment. They did, however, weigh in on Prof. Krishnan's record of scholarship. For example, one of those letters begins,

It gives me great pleasure to evaluate the performance of Professor Kannan Krishnan's performance as the holder of the [Campbell Chair].  
I have known Prof. Krishnan's research [redacted].

AR 912. In a one page letter, that reviewer offered only brief evaluative statements about specific portions of the body of Prof. Krishnan's research and scholarship, but concluded that he "has demonstrated great performance in . . . research . . . ." AR 912.

In his/her letter the second remaining External Reviewer, known as reviewer "C," offered:

[Prof. Krishnan] is a leading expert on preparation of magnetic materials and other materials of scientific and technological interest. . . . Without a doubt Dr. Krishnan has been effective at developing new materials and processes of broad science and technology interest, especially in the areas of magnetism, nanomagnetism, and spintronics. He has had lasting impact . . .

. . .

In my judgment the achievements since arriving at the University of Washington continue to show Prof. Krishnan's creativity and his interest for being in the midst of current and rapidly moving fields. . . .

I would expect Prof. Krishnan to take increasing leadership in his field and to have increasing visibility for his research during the next 5 to 10 years.

AR 915-916.

In its report (Report) to Dean Soma, dated July 14, 2006, the Review Committee addressed Prof. Krishnan's record under three headings: Educational Activities, Service, and Research and Scholarship. As to the first of those, the Review Committee concluded that "Prof. Krishnan has proven to be a very good educator." As to the second, the Review Committee concluded that "his service [is] commensurate with expectations for a holder of an endowed professorship." AR 771-772.

Regardless, in the Recommendation section of the Report, the Review Committee offered an equivocal recommendation regarding reappointment of Prof. Krishnan to the Campbell Chair. According to the Report, that recommendation derived from the contents of the External Letters regarding Prof. Krishnan's record of research and scholarship:

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.

AR 772.

**Without Having Read any of the Review Letters, Dean O'Donnell Conducted His Own Assessment of Prof. Krishnan's Research and Scholarship and Subsequently Decided Not to Reappoint Prof. Krishnan to the Campbell Chair.**

After Dean Soma received the Report, he spoke with Matthew O'Donnell (Dean O'Donnell) to learn whether Dean O'Donnell wished to have Dean Soma "handle" the reappointment decision regarding Prof. Krishnan. Dean O'Donnell, who was to begin his tenure at the COE in August of 2006, replied that he would "prefer to handle" the matter after he arrived. AR 248, l. 7-16.

Subsequently, Dean O'Donnell read the Report. Afterwards, on August 20, 2006, he met with Prof. Jenekhe, who had chaired the Review Committee and authored the Report. According to Dean O'Donnell, in that meeting,

I asked about some concerns I had regarding Professor Krishnan's scholarship, based on the [review]committee report. Professor Jenekhe confirmed that several external

reviewers did not consider Professor Krishnan's research scholarship and accomplishments among those of world leaders in the fields of materials science.

AR, l. 9-15. Dean O'Donnell also

reviewed the [Campbell Chair] endowment agreement, because I had not seen it prior to arriving in Seattle. And all of the materials which are provided to the [Review] [C]ommittee I received at that time too.

AR 200, l. 16-19.

According to Dean O'Donnell, by mid-September 2006, he had re-read the Report several times, reviewed documents related to the review process, reviewed the process that the Review Committee had followed in preparing its Report, reviewed Prof. Krishnan's reply to that Report, and met with Prof. Krishnan regarding the contents of the Report. AR 201-203, 205-208. Dean O'Donnell had not, however, read the External Letters. Nor did he have any personal knowledge of the contents of those documents. AR 239, l. 25; 240, l. 1-25; 241, l. 1. Still, the Report's statement regarding the External Letters concerned him:

The [Review] [C]ommittee's last sentence [in the Report] summarized what I knew at that date in mid September, and so I'd like to refer you again to Attachment 6, to the recommendation, which is the last paragraph of that report. Which states, "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 collaboration are adequate for this appointment. A

continuation of this appointment may thus be justified.”

This did not reflect strong support for reappointment.

Based on the [R]eport, my conversation with Professor Jenekhe, and a careful review of Professor Krishnan’s response to the [R]eport, I could not reappoint Professor Krishnan to the Campbell Chair at that time with the information I had available.

AR 208, l. 7-25.

Because he “could not reappoint . . . with the information [he] had available,” Dean O’Donnell conducted his own assessment of Prof.

Krishnan’s research and scholarship. That review involved the solicitation of additional input regarding Prof. Krishnan’s research and scholarship from scholars outside the University. Ultimately, Dean O’Donnell had telephone conversations with four scholars who had not supplied written input to the Review Committee. Based on those conversations, Dean O’Donnell concluded that at least three of the four had raised concerns about Prof. Krishnan’s record of research and scholarship. AR 211, l. 21-25; AR 212, l. 1-16.

In a meeting on December 6, 2006, Dean O’Donnell informed Prof. Krishnan that he had decided against reappointment. In a letter dated December 14, 2006, Dean O’Donnell summarized the contents of the December 6 meeting. In particular he reiterated the basis for his decision not to reappoint:

As we discussed, I have decided not to renew your appointment to this endowment based on the reappointment committee [R]eport and my own analysis of your scholarly impact.

AR 698. His own analysis largely depended on his telephone conversations with the four additional External Reviewers. AR 251, l. 21-23.

**Following Dean O'Donnell's Decision not to Reappoint, Prof.**

**Krishnan Pursued Administrative Remedies.**

Subsequently, Prof. Krishnan sought to have the University's Vice Provost, Cheryl Cameron, recommend that Dean O'Donnell reconsider his decision. Vice Provost Cameron declined to do so. Similarly, after conducting a de novo review on behalf of Provost Phyllis Wise, Vice Provost Cameron denied Prof. Krishnan's request that she reverse Dean O'Donnell's decision. AR 705.

Following the issuance of Vice Provost Cameron's decision on behalf of Provost Wise, pursuant to Sections 28-32.B.1 and 28-32.B.3 of the University's Faculty Code, Prof. Krishnan filed a petition for adjudication in which he named Dean O'Donnell as the respondent. Among other things, he alleged that the Review Committee did not conduct its' reappointment review in accordance with established procedures and that using the Review Committee's Report, Dean

O'Donnell conducted an ad hoc, arbitrary review of Prof. Krishnan's research and scholarship. AR 705.

Section 28.32.B.1 of the Faculty Code addresses:

Cases in which it is alleged that an authorized University official, through action or inaction, has violated University regulations thereby affecting the terms, conditions, or course of employment of the petitioning faculty member. Examples of such cases include, but are not limited to, allegations that University regulations were violated in the denial of tenure or promotion or in the process of program elimination.

Section 28.32.B.3 encompasses:

Cases in which the petitioning faculty member alleges an injustice resulting from decisions, actions, or inactions of any persons acting on behalf of the University in an administrative capacity and affecting the terms, conditions, or course of employment of the faculty member by the University. In cases involving denial of tenure or promotion, program elimination or discriminatory salary reduction, decisions 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. Such relevant and permissible considerations are set forth in sections of the *Faculty Code* chapters addressing appointment, promotion and tenure of faculty members, including but not limited to Chapter 24, Sections 24-32, 24-33, 24-34, 24-35 and Chapter 25, Section 25-32 as amended

For purposes of this section "injustice" includes, but is not limited to:

- a. Any action taken that was based at least in part on a legally permissible reason or any other reason that was unfair in light of the decision being made; and
- b. Any action that was not supported by an articulated reason that can be shown to be fair and relevant to the circumstances.

**In an Adjudication Over a Period of Three Days a Hearing Panel**

**Received Extensive Evidence Regarding the Evaluation of Prof.**

**Krishnan's Candidacy for Reappointment to the Campbell Chair.**

On October 23 and 24, 2007 and November 13, 2007, an adjudication panel (Hearing Panel), comprising five members of the University's faculty, and a hearing officer (Hearing Officer Busto), conducted a comprehensive adjudication on Prof. Krishnan's petition. During the course of the hearing, Prof. Krishnan called five witnesses: himself, Dean O'Donnell, Prof. Bordia, Prof. Jenekhe, and Prof. Alex Jen (Prof. Jen), the then-chair of MSE. Dean O'Donnell called two witnesses: himself, and former Dean Soma. Apart from the testimony of Prof. Krishnan and Dean O'Donnell, the bulk of the hearing involved testimony by Prof. Jenekhe. In fact, that testimony, on direct, cross, re-direct, and re-cross examination, and in response to questions from all five members of the Hearing Panel and Hearing Officer Busto, takes up approximately 120 pages of transcript during the proceedings on October 23 and October 24, 2007. AR 540-613; AR 314- 362; AR 312, 438, 439.

Over the two dates of his testimony all five members of the Hearing Panel posed questions to Prof. Jenekhe regarding the Review Committee's evaluation of Prof. Krishnan. AR 314-327; AR 600-613. For example, Prof. Sjavik, with Hearing Officer Busto's assistance, probed Prof. Jenekhe for any indication as to whether members of the Review Committee were biased against Prof. Krishnan when they conducted their evaluation of him:

Dr. Sjavik: I – I'm trying to get a sense of whether there was sentiments among members of the MSE department and other colleagues in the College of Engineering that it had been a mistake to originally make the appointment to the Campbell chair.

Mr. Busto: Okay. Let me break that down. Did you come into – I want to make sure that he can speak from first-hand knowledge. Professor, did you –

Dr. Jenekhe: I had.

Mr. Busto: -- come into the process with any impression that it had been a mistake that Professor Krishnan had been awarded the Campbell Chair?

Dr. Jenekhe: No. I had no personal knowledge of that.

Mr. Busto: Do you have any first-hand knowledge whether any of the other [Review] [C]ommittee members believed that it was a mistake that Professor Krishnan had been awarded the Campbell Chair?

Dr. Jenekhe: No. Not that they – not that they discussed. If they knew that, not that they discussed in committee meetings.

AR 321, l. 20-25; AR 322, l. 1-15.

Prof. Krishnan questioned Prof. Jenekhe about the Report, in particular, the equivocal recommendation:

Q. Thank you. Is it fair to conclude that the only matter of concern to the [Review] [C]ommittee was based on the external letters? . . .

A. Well, the external letters addressed research and scholarship. That's what we emphasize.

AR 542, l. 11-17.

The Witness: The concern had to do with the research and scholarship. And obviously, for that, we ask for experts to help us in understanding that. Together with [Prof. Krishnan's] publications, citations, and record, we looked at that very carefully. So those were of great concern to us.

AR 543, l. 24; AR 544, l. 1-5. Prof. Krishnan then went on to question Prof. Jenekhe about the eight review letters that the Review Committee received:

Q. Okay. So would it be fair to assume that [the Review] [C]ommittee read all of [the review] letters?

A. Yes, very carefully.

AR 551, l. 15-17.

Q. (By Dr. Krishnan) Generally, people, when they write a letter, they make the case then they make the conclusion, yes?

A. Mm-hmm.

Q. They are very knowledgeable about – that's why you solicited their opinion.

A. Mm-hmm.

AR 557, l. 10-16. After having him review, serially, six of the review letters, Prof. Krishnan engaged in the following exchange with Prof. Jenekhe:

Q. (By Dr. Krishnan) So basically, out of the six people that you had – that you read --, at least on the conclusion – at least that conclusion is unequivocally supporting reappointment. . . .

A. Well, I suppose you could say that.

Q. Fair enough. So you agree that these six people, according to their statements, supported the appointment.

A. Yes.

AR 562, l. 4-13.

Prof. Krishnan then questioned Prof. Jenekhe about the remaining two review letters in which the writers did not explicitly address whether they would recommend reappointment. As to the first of those two, after Hearing Officer Busto insinuated himself into the questioning, Prof.

Jenekhe conceded that the letter was nearly uniformly positive:

Q . . . So you write in your [R]eport that one – “An external reference described Krishnan’s overall accomplishment to date as in the top 50 percent as a full professor in a major research university.” . . . .

. . .

Q. Would you read just the underlined sentence which is the previous sentence to that [in the review letter]?

A. Okay. In summary, Professor Krishnan has demonstrated good performance in teaching, research, and community service.” . . . .

Q. If you examine this letter carefully . . . other than this one sentence, the rest of the letter is uniformly positive.

. . .

Mr. Busto: Other than that one sentence that is in the top 50 percent, is it true that the remaining letter is uniformly positive?

The Witness: Well, I don’t know if I would say uniformly positive. But I suppose you could say that, yes.

AR 563, l. 9-12, 23-25; AR 564, l. 1-2, 5-7, 13-18. In fact, Prof. Jenekhe mis-read the sentence that Prof. Krishnan asked him to read: The letter stated that “Professor Krishnan has demonstrated great performance in teaching, research, and community service.”

The contents of the second remaining letter, known as letter C, found expression in the Report in a sentence that drew the attention of Prof. Krishnan and Hearing Officer Busto:

An external reference noted that a check of Krishnan’s publications through ISI Web of Science showed 2 papers (from 1990 and 2001) that are highly cited >540 citations (for which he is not the corresponding author) and >120 citations, whereas most papers have few citations.

AR 772.

The second paragraph of the letter actually referred to three papers. According to the reviewer, one of those papers, published in 2001, had received approximately 547 citations within the immediately preceding five years. A second, published in 1992, according to the reviewer, had received 52 citations within the immediately preceding five years. The third, published in 1997, according to the reviewer, had received 72 citations within the immediately preceding five years. The reviewer’s concluding sentence of the paragraph states:

In addition, Dr. Krishnan has had several other papers published which received extensive citations (10 citations) in the past five years.

AR 915.

On October 23, 2007, Prof. Krishnan questioned Prof. Jenekhe about the Report's statement regarding the contents of letter C and the letter itself:

Q: Sure. Could you tell us where in this letter that you cited that you cited [in the Report] came from? . . .

. . .

A: Okay. So the sentence [in the Report] is not a quotation. So we're not exactly quoting that sentence –

Q. Could you read that again, please?

Mr. Busto: Excuse me. I'd like him to finish his testimony –

. . .

A: So the – yeah, yeah. So we're not exactly quoting here. We just provided a summary. And I think the summary from here – because I'll just say –

Mr. Busto: It's C you're referring to.

The Witness: So – yes, it is letter C. The second paragraph, here.

. . .

Mr. Busto: Wait, wait, wait. Please don't argue. Can you tell us where the – that – the information is supported that the statement comes from?

The Witness: Well, yeah. In fact, this – the original version of the letter while we were preparing [the Report] was sent to us, had exactly this. But the final version, I guess, is slightly different. But that's – it is this that we were summarizing.

Mr. Busto: Okay. So your testimony is – just so that we're clear –

The Witness: Yeah.

Mr. Busto: The part quoted in the [R]eport was the original version of [letter] C, which was ultimately changed somewhat –

The Witness: Slightly, yes.

AR 574, l. 8-10, 16-20, 23-25; AR 575, l. 1-3, 11-25.

On October 24, 2007, Prof. Jenekhe testified that, in fact, the two versions of letter C were exactly the same:

A. . . . In fact, I went back and I promised yesterday I will check. I did check exactly word-for-word the letter [C] that was sent in electronic form and the hard copy that I received are exactly the same.

AR 345, l. 18-21.

Q. So the letter [C] was not different?  
A. Right. It was exactly the same.

AR 346, l. 3-4.

On October 23, 2007, in a lengthy exchange, Prof. Krishnan questioned Prof. Jenekhe on another sentence in the Report:

Other than Krishnan's collaborators, the [E]xternal [Reviewers] do not consider his research and scholarship to be outstanding or to have made a major impact in his field to date.

AR 772; AR 578-590.

The five external letters, designated A, B, C, D, and E, contain the following statements regarding Prof. Krishnan's research record:

Letter A: His work has received the recognition of the [scientific] community. . . . He has demonstrated a great performance in . . . research . . .

AR 905.

Letter B: He is *the* leading authority on structure-property relations in complex and artificially structured thin films.

AR 913.

Letter C: He has had lasting impact.

AR 915.

Letter D: His work is widely regarded as being excellent, pioneering and paradigm breaking.

AR 917.

Letter E: Over the past five years [Prof. Krishnan] has built up impressively over a resume that was already quite impressive! Just over this period, he has been awarded the extremely prestigious Guggenheim fellowship, Fellowship into the A.A.A.S. and into the Institute of Physics (both of which are highly coveted). . . . Not many faculty can boast of such recognition in such a short period! . . . All these peer recognitions are happening mainly because of the highest quality of research that he continues to pursue and execute.

AR 919.

On October 24, 2007, Prof. Krishnan again sought to question Prof. Jenekhe on the External Letters. During the questioning Hearing Officer Busto interrupted Prof. Krishnan:

Dr. Krishnan: Do I go through all the [external] letters, or how do I do this now? Can I go through all the letters? The external A, B, C, D, and E? . . .

...

Mr. Busto: I'll just say that cumulative testimony – cumulative means that we've been there before.

...

Mr. Busto: And I'll just say that I don't – I think that it has limited value at this point.

...

Mr. Busto: Because the [external] letters will speak for themselves. And we can compare them to the [R]eport . . .

AR 352, l. 2-18.

Although the Report's recommendation identified contents of the External Letters as having led to the recommendation, Prof. Jenekhe's testimony suggested that other information the Review Committee received played a role in fashioning the recommendation. For example, on October 23, 2007, the following exchange between Hearing Officer Busto and Prof. Jenekhe occurred:

Mr. Busto: Can I ask a question that needs to be asked? What comment did you get from this one individual who did not submit a [review] letter, but provided you with some input?

[Prof. Jenekhe]: Well, the -- okay. So should I summarize that comment?

Mr. Busto: Please.

[Prof. Jenekhe]: Okay. I think it doesn't -- so the basic comment was -- and had to do with -- this person said that Professor Krishnan is a very nice person. However, the research and scholarship is hyped.

AR 610, l. 17-25; AR 611, l. 1-2.

Prof. Jenekhe's testimony set forth above stands in marked contrast to External Review Letter B:

[Prof. Krishnan] is not one to overly "hype" his work, hence his reputation is one that reflects particularly well on the University of Washington.

AR 914.

Further, when Prof. Jenekhe returned to testify on October 24, 2007, Prof. Krishnan questioned him about the unidentified potential reviewer's statement regarding Prof. Krishnan's "hying" his work:

Q. So [letter B] says – it says, "His careful and total research has given Kannan the highest regard of the international community."

And it follows, "He's not one to overly hype his work. Hence his reputation is one that reflects particularly well on the University of Washington."

So you have a written statement from somebody which clearly says exactly the opposite [from what the potential reviewer said]. So if I, you know – so wouldn't it be logical to expect that you emphasized something that is written in the record than something that was on a phone call?

...

A. And I was, in fact, aware that that yes, somebody had written an opposing view. So I did not --

...

[Prof. Jenekhe]: So yeah, I mean, I did not try to bring it out or say that, in fact, you hyped your work. I just reported that one [potential] letter writer said that. And, in fact, I just said that when he called back, he did not want to write. And then I was asked [by Hearing Officer Busto], and I have to say that. So I did not emphasize it in any way.

AR 328, l. 20-25; AR 329, l. 1-5, 24-25; AR 330, l. 5-11.

On October 23, 2007, questioning of Prof. Jenekhe by two members of the Hearing Panel, Dr. Baden and Dr. Killien, resulted in testimony that Review Committee's sole source of input from reviewers, and even potential reviewers, was the contents of the review letters:

Dr. Baden: But didn't you say that there was another undocumented opinion [that the Review Committee received]?

The Witness: Yes. . . .

CRAB 542.

Dr. Baden: So are there any minutes that would reflect those comments that the [Hearing Panel] can decide whether those were relevant to the –

The Witness: You mean this group or our group when we met? I conveyed that information to the -- in the [Review] [C]ommittee meeting that we had. And we thought as a whole together, all the comments, even those [potential reviewers] who said that they were not going to write because they did not know [Prof. Krishnan] or know his work, that those were nevertheless useful input and we were not going to weigh those in any major way.

Dr. Killien: . . . So I'm confused what data you considered in the evaluation [of Prof. Krishnan]. . . .

. . .

Dr. Killien: Did you consider things that were not in our packet?

The Witness: Not in any major way.

Dr. Killien: In what minor way did you consider them?

The Witness: . . . [W]e took it to that extent, without weighing it in any way to the evaluation.

Dr. Killien: And were there any other comments that were considered?

The Witness: That's by and large the comments we received and used.

AR 603, l. 16-18; AR, l. 1-25; AR, l. 1-8.

On October 24, 2007, Hearing Officer Busto followed up on the line of questioning above:

Mr. Busto: With respect to [external] reviewers who said, "I don't know his work," –

Dr. Jenekhe: Yes.

Mr. Busto: -- did that give the [Review] [C]ommittee any impression that factored into their assessment [of Prof. Krishnan's research and scholarship]?"

Dr. Jenekhe: To whose? You mean our [the Review Committee's] assessment?

Mr. Busto: Yeah. That is, the [Review] [C]ommittee members assessment.

Dr. Jenekhe: Not in any way. . . .

AR 326, l. 17-25; AR 327, l.1.

In sum, Prof. Jenekhe's testimony, set forth above, was that any comments the Review Committee received, other than those in the review letters, had nothing to do with the Review Committee's assessment of Prof. Krishnan's research and scholarship. Nor, according to Prof. Jenekhe, did the fact that some potential reviewers chose not to submit review letters or stated that they were not familiar with Prof. Krishnan or his research factor at all into the Review Committee's assessment of Prof. Krishnan's research and scholarship.

On January 8, 2007, the Hearing Panel issued its decision (Panel Decision). Of particular significance, among other things, the Panel Decision concluded:

The Review Committee Evaluation of Krishnan's External Reviewers Was Flawed

O'Donnell Conducted an Independent, Impartial Review of Krishnan's Scholarship, Which Was the Basis of His Decision Not to Renew Krishnan's Appointment

AR 1318; AR 1320. As to the first conclusion, the Hearing Panel went on to state that the Review Committee's review process was seriously flawed.

AR 1320. The basis for that conclusion derived two other conclusions/findings:

The generally negative opinion of the Review Committee of [Prof.] Krishnan's research and scholarship is not supported by external reviewers . . .

AR 1319.

[T]he Review Committee ignored much relevant input in reaching its equivocal recommendation and failed to inquire further to clarify some inconsistent information [from the reviewers].

AR 1320.

Ultimately, the Hearing Panel's conclusion that the Review Committee's evaluation of Prof. Krishnan's research and scholarship was seriously flawed was of no consequence for its decision on Prof. Krishnan's Petition. Instead, the Hearing Panel attached determinative significance to its conclusion that Dean O'Donnell had conducted an independent, impartial review of Prof. Krishnan's research and scholarship. Then, using that conclusion the Hearing Panel applied a "cat's paw" rationale for ruling against Prof. Krishnan:

the Review Committee's process was seriously flawed and was saved only by the independent review of O'Donnell.

AR 1320. Thus, Prof. Krishnan did not prevail on his Petition because Dean O'Donnell's independent review of Prof. Krishnan's research and scholarship "repaired the damage done to the process by the Review Committee." AR 1321.

**Following the Hearing Panel's Decision Denying His Petition for Adjudication, Prof. Krishnan Sought Relief, Which Led to the Court of Appeals to Remand His Case to the Hearing Panel.**

On April 22, 2008, Prof. Krishnan filed a Petition for Judicial Review in King County Superior Court. AR 1256-1257. After a hearing on December 5, 2008, the court entered an order dismissing the petition and accepting proposed findings of fact and conclusions of law submitted by Dean O'Donnell. AR 1239-1247. An appeal to this court followed.

On September 28, 2009, a panel of the Court issued its decision on Prof. Krishnan's appeal. Among other things, pursuant to substantial evidence review, the Court determined as follows:

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.

AR 708.

Further, the Court repeatedly referred to the Hearing Panel's conclusion that the Report was flawed, or seriously flawed. AR 702, 703, 705, 706, 707, and 709. The Court's decision is devoid of any indication that sufficient evidence did not support the conclusion. The final sentence, by itself, indicates that the Court accepted it:

We remand this matter to the hearing panel for fact-finding in whether [Dean] O'Donnell followed the requirement that he consider the *flawed review committee report* and, if so, whether his decision can stand. (Emphasis supplied).

AR 709.

The Court explained that the Hearing Panel made inconsistent findings, the result of which frustrated the ability of the Court to conduct judicial review. As to the first of those inconsistent findings the Court explained:

Our review of the hearing panel's decision is hindered by inconsistent fact-finding with respect to crucial issues.<sup>16</sup> 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.”<sup>17</sup> 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.<sup>18</sup>

AR 706.

Significantly, the Court did not state that the evidentiary record was incomplete as to the issue whether Dean O'Donnell based his decision on the flawed Report. Instead, as the last sentence in the Court's decision, quoted above, makes clear, the evidence in the record was sufficient to support either of the two inconsistent findings that the Court identified.

The Court explained the import of the second inconsistent finding as follows:

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,<sup>19</sup> 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.<sup>20</sup>

AR 707.

In simple terms, then, the serious flaws in the Report could not merely suggest that the report was affected by impermissible or irrelevant factors and at the same time demonstrate that Dean O'Donnell's decision, if it were based, even in part, on the Report, was affected by such factors. As to evidence in the record regarding the whether the Report was affected by impermissible or irrelevant factors the Court noted, first, the conclusion that the Review Committee "ignored relevant input [contained in the review letters] . . ." was sufficient to "support a finding that [the Review Committee] failed to base its recommendation on relevant factors as required." Second, in footnote 19 the Court explained:

19 As the University argues, no direct evidence in the record shows that the re-view 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.

AR 707.

Neither in footnote 19, nor any other footnote, nor anywhere else in its decision did the Court even suggest that the circumstantial evidence to which it referred in that footnote, or in the quoted remarks to which the footnote attached, was insufficient to support a conclusion that the flawed Report was affected by impermissible or irrelevant factors. Thus, the

evidentiary record was not incomplete. Instead, the record was incomplete only in that the Hearing Panel's decision contained inconsistent findings.

On April 16, 2010, the trial court entered an order remanding the case to the Hearing Panel to conduct fact finding in accordance with the Court of Appeals' decision of September 28, 2009. AR 1221-1222.

**After a Series of Intermediate Proceedings, the Hearing Panel Conducted an Evidentiary Hearing On Remand and, Based Solely on New Evidence, Ruled Against Prof. Krishnan.**

On November 8, 2010, Hearing Officer Busto conducted a pre-hearing conference. AR 113-152. On November 12, 2010, Prof. Krishnan submitted an amended motion to limit the evidence in the hearing to that which was before the Hearing Panel when it decided his petition for adjudication. AR 681-695. In the course of the pre-hearing conference Prof. Krishnan asserted that if the Hearing Officer/Hearing Panel were to deny the motion, he would object to the conducting of a hearing at which Dean O'Donnell would have the opportunity to introduce new evidence. AR 132, l. 16-21. Hearing Officer Busto did not rule on the motion at the pre-hearing conference. Instead, he set December 3, 2010 as the date for an evidentiary hearing, pending a decision on Prof. Krishnan's motion to limit the evidence to the record. AR 741-742.

In support of that motion Prof. Krishnan argued as follows:

The scope of fact-finding on remand from the Court of Appeals appears succinctly in the last sentence of the decision of that court:

We remand this matter to the hearing panel for fact-finding in whether [Dean] O'Donnell followed the requirement that he consider the *flawed review committee report* and, if so, whether his decision can stand. (Emphasis supplied).

*Krishnan v. O'Donnell*, 2009 Wash. App. LEXIS 2501, September 28, 2009, at \*21. Thus, there are two questions that the Hearing Panel must answer: First did Dean O'Donnell consider the flawed review committee report? Second, if the answer to that question is "yes," was the flawed review committee report itself affected by irrelevant or impermissible factors? There is no room in that charge, however, for the Hearing Panel to engage in fact-finding to determine whether the review committee report was flawed. By the quoted language above the Court of Appeals found the review committee report to be flawed. Consequently, for purposes of further deliberations before the Hearing Panel the review committee report is no longer "allegedly" flawed. As we explain below, the evidence necessary to answer the two questions above is in the record.

AR 681.

In a decision dated November 22, 2010, Hearing Officer Busto denied the motion. AR 739-740. In a memorandum dated November 24, 2010, he identified the issues for the evidentiary hearing as follows:

Whether the [R]eview [C]ommittee's [R]eport and recommendation to [Dean O'Donnell] was affected by factors other than relevant and permissible considerations;

Whether and to what extent did [Dean O'Donnell] consider the [R]eview [C]ommittee's [R]eport; and,

Whether [Dean O'Donnell's] decision not to renew [Prof. Krishnan's] endowed chair can stand.

AR741.

In the same decision Hearing Officer Busto expanded the scope of the issues the Court of Appeals set forth in the final sentence of its decision, quoted above:

[The Hearing Panel] prefers to take testimony from the [Review] [C]ommittee members to determine the factors they considered, rather than draw inferences from the current incomplete record.

...

Factual issues remain regarding the extent to which Dean O'Donnell considered the [R]eview [C]ommittee's report and how it informed his decision not to reappoint Petitioner. With this information the hearing panel can decide, as the Court of Appeals stated, "whether his decision can stand."

AR 740.

On December 3, 2010, the evidentiary hearing went forward. Prior to any testimony in that proceeding, Prof. Krishnan, as he had indicated his intent to do so in the pre-hearing conference, objected to the proceeding:

Mr. Gautschi: Though for the record, we object to this proceeding on the ground that the evidence that's 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 anyone.

AR 817.

Despite the objection, the evidentiary hearing proceeded. Over the course of the hearing Dean O'Donnell called three witnesses: Prof. Cao and

Prof. Campbell, both of whom were members of the Review Committee, and Dean O'Donnell himself. Again, the Court of Appeals' decision was clear that new testimony from Dean O'Donnell was not necessary to resolve the first inconsistency the Court of Appeals identified: Either Dean O'Donnell did or he did not consider the Report in his decision not to reappoint Prof. Krishnan. Regardless, Dean O'Donnell's new testimony on direct examination eliminated any doubt as to whether the Report's recommendation played any part in his decision not to reappoint:

Q. Can you please explain to us whether you considered the [Report] in your overall review of Dean O'Donnell – excuse me, Dr. Krishnan's endowed chair with you?

A. Yes.

AR 856, l. 4-8.

As to the second issue, the Hearing Officer allowed Professors Cao and Campbell to revisit the contents of the Report about which Prof. Jenekhe had testified at length more than three years earlier. Relying on that new testimony, the Hearing Panel again ruled against Prof. Krishnan on the following basis:

It is now clear from the testimony of Cao and Campbell that the hearing panel's initial reading and interpretation of the letters was naïve. According to Cao, based on his reading of hundreds of letters during his committee work, it was no surprise to him that all of Krishnan's letters were positive on their face. Both he and Campbell testified that it was very

unusual to receive a negative letter. So, the review committee looked elsewhere and found other indicators of lack of support for Krishnan:

- Refusals by reviewers to write a letter, which was a “bad sign” that the reviewers did not have a positive opinion of Krishnan;
- Lack of knowledge of Krishnan’s work by an expert that should be acquainted with his research, which undermined statements from other reviewers that his work had “high” or “lasting” impact;
- Use of tepid adjectives, *e.g.*, “strong” or even “very strong,” by some external reviewers, instead of more complimentary descriptions, *e.g.*, “exceptional,” which indicated a relatively low opinion of Krishnan’s research and scholarship;
- Failure to expressly recommend Krishnan’s reappointment, which Cao described as “very negative.”

When the evidence is viewed with these factors as a framework, the “inconsistency” perceived by the hearing panel after the first hearing ceases to exist . . . The testimony of Cao and Campbell made clear the basis of the review committee’s “equivocal” recommendation: . . . The hearing panel finds that the recommendation was a fair statement of the input the review committee received and concludes that it was not affected by irrelevant or impermissible factors.

AR1014-1015.

Prof. Krishnan appealed the decision to the University’s Interim President Phyllis Wise, who, in a decision dated April 18, 2011, denied the appeal and designated her decision a final order of the University. AR 1098. On May 18, 2011, Prof. Krishnan filed a petition for judicial review of that decision in King County Superior Court. CP 1-25. On May 9, 2012, the

trial court entered findings and conclusions and an order dismissing the petition. CP 26-34.

## ARGUMENT

### **Standards of Review**

The appellate court sits in the same position as superior court when reviewing an agency's decision, applying the applicable standards of review in RCW 34.05.570 directly to the record. [Citation omitted].

*Hunter v. University of Washington*, 101 Wn. App. 283, 288, 2 P.3d 1022 (2000). Further,

The appellate court] review[s] the agency's record without consideration of the superior court's findings of fact and conclusions of law. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

*Donahue v. Central Washington University*, 140 Wn. App. 17, 23, 163 P.3d 801 (2007).

This appeal focuses on a single question: Did the Hearing Panel exceed the scope of the remand that the Court of Appeals ordered in its September 28, 2009 decision? If the answer is "yes," RCW 34.05.570(3)(c) and (i) provide relief in that circumstance:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(i)The order is arbitrary or capricious.

Arbitrary and capricious action is ““willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.”” [Citations omitted].

*Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145

(2011).

**The Hearing Panel Conducted an Evidentiary Hearing on Remand Without a Legitimate Basis for Doing So and, in the Process, Exceeded the Scope of the September 28, 2009 Decision of the Court of Appeals and Willfully Disregarded Extensive Evidence in the Record.**

Again, in the September 28, 2009 decision the Court directed the Hearing Panel to do two things: First, eliminate the inconsistency in the findings identified in the September 28, 2009 decision. Second, if Dean O’Donnell considered the Review Committee’s flawed Report, determine whether his decision not to reappoint Prof. Krishnan could stand. Equally important is that the Court did not order the Hearing Panel to re-visit issues that were settled in the appeal: Specifically, it did not direct the Hearing Panel to re-visit the findings and conclusions for which evidence in the original record provided sufficient support:

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.

AR 708.

Despite this clear statement, as the portion of the Hearing Panel's Decision on Remand set forth above indicates, the Hearing Panel undid the settled findings. Over the repeated objections of Prof. Krishnan's counsel the Hearing Panel, more than four years after the Review Committee issued its Report, entertained testimony of Prof. Campbell and Prof. Cao regarding comments that the Review Committee received from persons who did not write review letters. Where the Court determined that substantial evidence supported the conclusion that the Review Committee did not refer to a significant amount of uniformly positive input from the reviewers, the Hearing Panel decided that the positive input was actually negative: For example, the word "strong" used by a reviewer to describe Prof. Krishnan's research and scholarship became a "tepid" comment. The fact that some persons chose not to write review letters somehow translated into those persons' having a negative view of Prof. Krishnan's research and scholarship, which by implication transformed the review letters into something other than uniformly positive. The "fact" that an

“expert” in Prof. Krishnan’s field was allegedly unfamiliar with his work undermined the eight uniformly positive review letters that the Review Committee had solicited and received from Internal and External Reviewers. Finally, the fact that two of the eight review letters did not explicitly recommend reappointment was “very negative” regarding Prof. Krishnan’s research and scholarship. Of course, the writer of one of those letters concluded that Prof. Krishnan “has a great record in . . . research.” The other writer had written that Prof. Krishnan’s research has had a “lasting impact.”

In order to arrive at the articulated bases for deciding that the Report’s “recommendation was a fair statement of the input the [R]eview [C]ommittee received” the Hearing Panel had to pretend that the first hearing never occurred. As described above, when questioned by members of the Hearing Panel and Hearing Officer Busto, Prof. Jenekhe testified under oath that any input the Review Committee members received from persons, other than in the form of the review letters, played no part in the Review Committee’s evaluation of Prof. Krishnan. That some persons chose not to write, for whatever reason(s) was merely something the Review Committee members wondered about without attaching any significance to the fact, according to Prof. Jenekhe.

Also as to the contents of the review letters, in the first hearing, Hearing Officer Busto curtailed Prof. Krishnan's attempts to question Prof. Jenekhe regarding those contents with the statement, "The letters will speak for themselves." By allowing Prof. Campbell and Prof. Cao to testify, in effect, that the ordinary English meaning of, for example, "strong," is actually "weak," for whatever reason, Hearing Officer Busto abandoned his earlier edict that the letters would speak for themselves. Similarly, the Court did not direct the Hearing Panel to reconsider whether the Review Committee's Report was flawed. A reading of the September 28, 2009 decision makes clear that the Court had decided the matter: The Report was flawed.

As to the fact that two of the eight review letters did not explicitly recommend reappointment, the first hearing involved testimony from Prof. Jenekhe on that point. That is, the Hearing Panel addressed his testimony regarding the "50 percent" comment that appeared in one of the letters in which the reviewer did not explicitly recommend reappointment. Prof. Krishnan had Prof. Jenekhe read, for emphasis, the sentence in the same letter that referred to Prof. Krishnan's research record as "great." In an apparent reference to the obvious inconsistency between the "50 percent" comment and the "great" assessment in its first decision, the Hearing Panel noted that the Review Committee "failed to inquire further to clarify

some inconsistent information.” Nothing in any of the testimony in the second hearing altered that fact. On that point Prof. Campbell’s testimony on cross-examination is telling:

Q: Yes. And you’ve testified that the “50 percent” reference caused you concern?

A: Yeah. A lot of concern.

...

Q: Was there a discussion among the committee members as to whether that might have been a typographical error?

A: I don’t think so.

AR 851, l. 16-19, 22-24.

Q: Thank you. Did you speak with the writer of this letter to ascertain whether it was a typo?

A: No. . . .

...

Q: So your answer to my question is, no, you didn’t –

AR 852, l. 2-4, 25.

A: Yeah.

Q: -- talk to this person.

A: No. I might have even discouraged it if – if the issue came up, I probably discouraged it.

Q: Yes. Not only about the 50 percent, but also about anything else in the letter.

A: Yeah.

AR 853, l. 1-7.

As to the Hearing Panel’s wish to take testimony from members of the Review Committee in order to “determine the factors they considered” in evaluating Prof. Krishnan, as set forth above, Prof. Jenekhe’s testimony was comprehensive. Again, that testimony, particularly in response to

Hearing Officer Busto's questions, was clear that no one on the Review Committee had any bias toward Prof. Krishnan.

In its September 28, 2009 decision the Court explained that the Hearing Panel's Decision's two sets of inconsistent findings made judicial review impossible. In footnote 16 the Court elaborated:

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).

Similarly, in cases involving the federal administrative agencies the U.S. Supreme Court has made clear that an agency must explain the "rationale and factual basis" for a decision that it makes. *Bowen v. American Hospital Assoc.*, 476 U.S. 610, 627, 106 S. Ct. 2101, 90 L. Ed.2d 584 (1986). Or, in the words of the D.C. Circuit,

[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.

*Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 921 (D.C. Cir. 1982).

The failure to explain adequately "frustrates" judicial review. If an agency fails to explain adequately the basis for its decision such as to frustrate judicial review, that circumstance does not qualify as a deficiency in the agency's fact finding procedures. If it were such a deficiency, there

would a need for a *de novo* hearing. See *Camp v. Pitts*, 411 U.S. 138, 141-142, 93 S. Ct. 1241, 36 L. Ed.2d 106 (1973). Under limited exceptions to the “record rule” an agency may, however, supplement the original agency record on remand:

Generally, a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985); *Camp v. Pitts*, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973) (“The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”). Supplementation of that record upon remand to the agency may be necessary when the record does not support the agency action, when the agency has not considered all relevant factors, or when the reviewing court simply cannot evaluate the challenged action on the basis of the record before it. *Florida Power*, 470 U.S. at 744.

*National Audubon Soc’y v. Hoffman*, 132 F.3d 7, 18-19 (2d Cir. 1997).

Thus, for example, a reviewing court were to determine that an agency’s decision was arbitrary and capricious, there would be a need vacate the decision and remand for a *de novo* proceeding. Here, the Court did not remand because it determined that the record before the Hearing Panel did not support the Hearing Panel’s decision. Nor did the Court determine that remand was necessary because the agency had not considered all relevant factors. Again, the Court remanded to the Hearing Panel for two limited purposes: To explain the basis for its decision, i.e.,

to find whether Dean O'Donnell considered the flawed Report when he made his decision not to reappoint Prof. Krishnan. Because, the Court explained, had Dean O'Donnell failed to consider the flawed Report, by doing so he would have violated University rules/regulations. The result of doing so would necessitate an ultimate ruling in favor of Prof. Krishnan.

As to the second purpose, were the Hearing Panel to find that Dean O'Donnell did consider the flawed Report, the Hearing Panel would have to determine whether the Report was merely flawed or affected by impermissible or irrelevant factors. Because in its decision of January 8, 2007 the Hearing Panel decided that Dean O'Donnell had, by conducting an independent review of Prof. Krishnan's research and scholarship, cured the flaws in the Report, Dean O'Donnell's decision necessarily stood. Thus if on remand the Hearing Panel were to decide that Dean O'Donnell had considered the flawed Report, the next task would be to determine whether the flawed Report was merely flawed or affected by impermissible or irrelevant factors.

Federal case law is clear that pursuant to "law of the case doctrine" an appellate court may not, generally, re-consider matters that were decided in a previous appeal. In *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9<sup>th</sup> Cir. 1993), the Ninth Circuit explained the doctrine:

Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case. For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition. (Citations omitted).

Washington courts subscribe to a similar articulation of the doctrine. In *Greene v. Rothschild*, 68 Wn.2d 1, 2, 414 P.2d 1013 (1996), citing to language in *Adamson v. Traylor*, 66 Wn.2d 338, 402 P.2d 499 (1965), the Washington Supreme Court explained:

It is also the rule that questions determined on appeal, or which might have been determined had they been presented,<sup>1</sup> will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause. *Clark v. Fowler*, 61 Wn.2d 211, 377 P.2d 998. . . .

Application of the doctrine here means that the matters this Court decided in its September 28, 2009 decision may not be considered again in this appeal. There is support in Washington case law for the application of the doctrine to those same matters in the context of the December 3, 2010 hearing on remand. See *Energy NW v. Hartje*, 148 Wn. App. 454, 465-466, 199 P.3d 1043 (2009).

The evidence before the Hearing Panel on remand changed in two ways. First, the Hearing Panel allowed Prof. Campbell and Prof. Cao to testify regarding matters that the Hearing Panel had already decided in the first hearing and the determinations on which the Court had affirmed the

Hearing Panel. Second, the Hearing Panel disregarded altogether evidence in the form of Prof. Jenekhe's testimony. Again, these developments occurred only because the Hearing Panel expanded, over the repeated objections of Prof. Krishnan, the scope of the Court's mandate. Consequently, application of law of the case doctrine is appropriate to preclude the Hearing Panel's revisiting the findings/conclusions that the Review Committee ignored significant uniformly positive input, that the Review Committee's generally negative opinion of Prof. Krishnan's research and scholarship was not supported by the external letters, and that the Report was flawed.

Consistent with law of the case doctrine, as explained above, Prof. Krishnan repeatedly argued before the Hearing Panel on remand that issues crucial to the case had been decided by the Court of Appeals. For example, in his motion to limit evidence to that in the record, he urged that there was no justification for revisiting whether the Review Committee's Report was flawed. Further, he argued that the existence of the flawed Report, particularly in the manner that the Report was found to be flawed, necessarily meant that Dean O'Donnell's decision not to reappoint was affected by impermissible or irrelevant factors, irrespective of the absence of direct evidence on the matter. The basis for the argument was that a review committee's recommendation that rests on a representation of the

contents of review letters which is at odds with the actual contents of those letters must be, by definition, a recommendation that is the product of impermissible or irrelevant factors. AR 681, 692-694. Even Prof. Campbell, on cross-examination, admitted as much:

Q: Okay. And the conduct of those reviews is governed by University rules and regulations, correct?

A: Yes.

Q: And at the end of any of those reviews there's a recommendation generated, whether it's a grant of a merit increase, for example, reappoint whatever reappointment, correct?

A: Correct.

Q: And those recommendations are to be based upon the candidate's record of teaching, scholarship, and service, correct?

A: Yes.

Q: Isn't it true that the same university rules and regulations do not permit a recommendation to be based upon a misrepresentation of the candidate's record? Isn't that correct?

A: Yeah.

AR 835, l. 1-17.

In its September 28, 2010, the Court indicated that direct evidence was not necessary to establish that the decision not to reappoint was affected by impermissible or irrelevant factors:

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.

AR 707.

The language above is analogous to that which courts routinely use in the context of employment discrimination cases. As the trial court in *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397, 399 (D. Or. 1970), *aff'd*, 492 F.2d 292 (9<sup>th</sup> Cir. 1974), explained, “direct evidence of discrimination . . . is virtually impossible to produce.” The familiar burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973), recognizes that reality and allows a plaintiff to prove discrimination with circumstantial evidence. Analogously, here direct evidence of bias or animus toward Prof. Krishnan on the part of Review Committee members would be difficult, or, more likely, impossible to come by, as Prof. Jenekhe’s testimony set forth above indicates. Further, the fact that Prof. Jenekhe could produce no notes of Review Committee meetings -- AR 610, l. 8-16; AR 612, l. 23-25; AR 613, l. 1-3; AR 314, l. 10-18 -- added to the need for Prof. Krishnan to rely on circumstantial evidence. Again, footnote 19, set forth above, indicates that such evidence already in the record was sufficient to support a conclusion that if Dean O’Donnell considered the Report, his decision was affected by impermissible or irrelevant factors.

Finally, as he made clear at the pre-hearing conference, Hearing Officer Busto focused on the last sentence in the first paragraph of the September 28, 2009 decision as justification for conducting a fact-finding evidentiary hearing beyond the scope of what the remainder of that decision directed. AR 122, l. 8-13. Again, Prof. Krishnan repeatedly argued that the Court did not call for such a hearing. In fact, the last sentence of the September 28, 2009 decision does not contain the word “hearing.”

Prof. Krishnan’s contention that evidence in the existing record was sufficient to allow the Hearing Panel to comply with the Court’s directive on remand is consistent with the reality that the word “hearing” has many meanings. Courts throughout the country are aware of this reality and frequently cite to Judge Henry J. Friendly’s classic article on the subject: Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975). For example, in *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 51-52, 873 P.2d 498 (1994), the Washington Supreme Court cited the article for the proposition that

[t]he term "hearing" may connote a written rather than oral hearing or a different panoply of procedures in any given case. Friendly, at 1270-71.

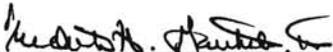
Because the evidence already in the record was sufficient to allow the Hearing Panel to comply with the Court’s directive on remand, a

written hearing would have been altogether appropriate to decide the issues that the Hearing Panel had before it.

#### CONCLUSION

In the original hearing on Prof. Krishnan's petition for adjudication the Hearing Panel found that because the Review Committee had, in essence, incorrectly represented the contents of review letters in its Report, that Report was flawed. Subsequently, this Court ordered that the Hearing Panel engage in limited fact finding. Disregarding that directive, and extensive evidence already in the record, the Hearing Panel conducted a hearing *de novo*. As a result, what had been a flawed Report was no longer flawed. Consequently, the Hearing Panel avoided having to decide whether because Dean O'Donnell considered the flawed Report, his decision not to reappoint Prof. Krishnan could stand. For the reasons set forth above, Prof. Krishnan submits that the Hearing Panel's decision on remand failed to comply with the Court's directive, was arbitrary and capricious, and must be reversed. Pursuant to RCW 4.84.350 Prof. Krishnan requests reasonable attorney's fees and costs incurred in pursuing his two appeals and two petitions for judicial review.

Respectfully submitted this 23<sup>rd</sup> day of August 2012.

  
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No. 68877-4

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
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, 18<sup>th</sup> 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 [harntson@u.washington.edu](mailto:harntson@u.washington.edu).

Dated this 23rd day of August 2012.

  
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