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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 REPLY BRIEF

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## INTRODUCTION

The basis for Dean O'Donnell's arguments derives from one sentence in the introductory paragraph of this Court's decision (Decision) in Prof. Krishnan's first appeal:

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.

AR 79, Decision, ¶1.

Agreeing with Hearing Officer Busto (Mr. Busto), Dean O'Donnell contends that the statement above directed the Hearing Panel (Panel) to supplement the evidentiary record even to the extent of revisiting findings and conclusions that this Court determined were supported by evidence in the record. As we described in the Opening Brief, this expansive interpretation of the quoted statement resulted in a re-writing of the record that was before the Panel when it decided Prof. Krishnan's adjudication petition in January 2008. In order to understand what this Court directed the Panel to do on remand requires consideration of the entirety of the Decision. *Kolatch v. I. Rome & Sons*, 137 Wash. 268, 270-271, 240 P. 38 (1926).

## ARGUMENT

**An Examination of the Entirety of the Decision Reveals the Scope of the “Hearing” on Remand that this Court Ordered.**

As an initial matter the term “record” requires scrutiny. Both Mr. Busto and Dean O’Donnell implicitly equate the record that was before the Panel with that which was before this Court. Second, Mr. Busto and Dean O’Donnell read into the quoted statement language that the entirety of the Decision does not suggest. Under that reading the quoted statement above would reflect a concern that the record lacked evidence as to whether Dean O’Donnell’s decision not to reappoint Prof. Krishnan was affected by impermissible or irrelevant considerations.

Dean O’Donnell ignores, however, the reality that the record before the Panel differed from that before this Court in at least one significant respect: The agency record before this Court consisted of the record before the Panel and, among other things, the Decision of the Hearing Panel (2008 Decision). The significance of the inclusion of the 2008 Decision becomes apparent from an examination of this Court’s Decision. The introductory paragraph of the Decision comprises two parts: the essential conclusion that this Court reached and the resulting action that it mandated. The remainder of the Decision explains how this Court arrived at the conclusion and provides the basis for understanding what the Court ordered the Panel to do on remand.

A necessary starting point for understanding what the Court ordered derives from the Court's discussion of the findings that evidence in the record before the Panel supported:

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.

AR 82, Decision, fn. 5.

[T]he 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 substantial evidence standard.

AR 85, Decision, ¶19.

[T]he 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.

AR 85, Decision, ¶20.

In simple terms, the Court determined that sufficient evidence in the record before the Panel supported consistent findings that: the input the Review Committee received from the internal and the external

reviewers was uniformly positive; the Review Committee did not refer to a significant amount of that uniformly positive input; the Review Committee's generally negative opinion of Prof. Krishnan's research and scholarship was not supported by the uniformly positive input from the internal and external reviewers; and the Review Committee's Report (Report) was flawed because it did not refer to a significant amount of uniformly positive input from internal and external reviewers.

The import of this Court's determination for the scope of the Panel's task should be obvious: There was no need for the Panel to take evidence on whether the reviewers had raised concerns about Prof. Krishnan's research and scholarship or whether the Report was flawed. No, as the Court made clear, evidence in the record before the Panel provided a sufficient basis for answering those questions.

What troubled this Court was, in contrast to the Panel's consistent findings set forth above, inconsistent findings on two critical issues. First, did Dean O'Donnell, pursuant to University policies and procedures, base his decision not to reappoint Prof. Krishnan, at least in part, on the Report? The Court explained:

[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 itself was affected by irrelevant or impermissible considerations.

AR 84, Decision, ¶17. This Court explained, further, that although evidence in the record was sufficient to support either finding, the Panel found both that Dean O'Donnell did and did not base his decision, at least in part, on the Report:

[T]he 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 83, Decision, ¶16.

The essence of the last sentence quoted above bears repeating. Evidence in the record before the Panel was sufficient to support either of two findings: (1) Dean O'Donnell's decision not to reappoint was not based, even in part, on the flawed Report. (2) Dean O'Donnell's decision not to reappoint Prof. Krishnan was based, at least in part, on the flawed

Report. Thus, as an initial matter, the Panel was to do no more than choose one of the two and refer to the evidence already in the record that supported its choice.

As noted above, without instructing the Panel which finding to select, this Court unambiguously signaled which of the two was more appropriate:

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 . . .

AR 84, Decision, ¶17.

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.

AR 84, Decision, fn. 18.

Further, the Court left no doubt that if the Panel were to select, on remand, the first of the two findings, then it would have to conclude that Dean O'Donnell violated University policies and procedures. If, however, the Panel were to select the second finding, i.e., the one "most strongly supported by the evidence," there would be a need to resolve the second inconsistency:

[T]he 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 84, Decision, ¶18.

As the paragraph above indicates, the inconsistent conclusions to which this Court referred did not derive from insufficient evidentiary support for findings that, in turn, would support either of the conclusions. As to the first of those conclusions, the Court did not point to particular evidence in the record before the Panel that supported the conclusion. In contrast, similar to what it stated regarding whether Dean O'Donnell based his decision not to reappoint, at least in part, on the Report, the Court explained that

[a]s 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 84, Decision, fn. 19.

The “discrepancy” to which the Court referred derived from findings supported by evidence in the record: There was a significant amount of uniformly positive input from internal and external reviewers; the Report did not refer to a significant amount of that uniformly positive input from internal and external reviewers; the Review Committee’s generally negative opinion of Prof. Krishnan’s research and scholarship was not supported by the uniformly positive input from external reviewers; and the Report was flawed because its equivocal recommendation was not supported by the uniformly positive input from the internal and external reviewers. The determinative effect of the “discrepancy” and Dean O’Donnell’s independent review, taken together, for the 2008 Decision appears at page 17 of that document:

As previously stated, the Review Committee’s actions suggest that its review of the external letters may have been affected by irrelevant or impermissible factors. However, O’Donnell had the final authority to make the decision whether to renew Krishnan’s appointment, not the Review Committee. Had O’Donnell accepted the Review Committee’s Recommendation without more, then his decision would have been affected by irrelevant or

impermissible factors. However, he instead conducted an independent, fair review of Krishnan's scholarship and research and came up with his own conclusion. ***In effect, he repaired the damage done to the process by the Review Committee. For this reason, the Panel concludes that Krishnan has not carried his burden of proving that O'Donnell's decision was improper.*** (Emphasis supplied.)

AR 1321.

The only reasonable inference one can draw from the highlighted sentences above is straightforward: Had Dean O'Donnell not conducted an independent, fair review that repaired the damage done by the Review Committee to the review/reappointment process, the Panel would have concluded Prof. Krishnan had carried his burden of proving that Dean O'Donnell's decision was improper.

**An Examination of the Decision Coupled with Applicable Portions of the Agency Record Before the Court at the Time of its Decision Belies Dean O'Donnell's Arguments.**

The essence of Dean O'Donnell's legal argument finds expression in a single paragraph:

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 "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.

Resp. Br. at 20-21.

In simple terms, Dean O'Donnell contends that the absence of an explicit directive limiting the Panel on remand to consideration of evidence in the record that was before it in the first hearing compels an inference regarding the scope of the hearing on remand. According to this line of reasoning, the Court afforded the Panel discretion to consider whatever new evidence it might choose to entertain, even if doing so would result in the Panel's reversing itself on findings that the Court had determined were sufficiently supported by evidence in the record before the Panel at the first hearing. In order to accept this line of argument one would have to ignore the Court's unambiguous statements, set forth above, that evidence in the record was sufficient to support either of the Panel's conclusions as to (a) whether Dean O'Donnell based his decision not to reappoint, at least in part, on the Report and (b) whether his decision not to reappoint was affected by impermissible or irrelevant considerations.

Regardless, Dean O'Donnell points to, first, footnote 20 of the Decision without reproducing the language in the footnote. Contrary to what Dean O'Donnell contends, the language does not support his argument. To the contrary, it demonstrates the validity of Prof. Krishnan's position regarding the scope of the hearing on remand:

*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.”).

AR 84, Decision, fn. 20.

Adverting to that language Dean O'Donnell glides past the obvious question that one must answer to understand the import of the language from RCW 34.05.562(2) that the Court reproduced: Given that the Court's concern focused on its inability to discern from the record the Panel's findings on crucial issues, what were the inadequacies in the record that underlay the concern? To answer that question one needs to focus on the last clause in the quoted language from the statute: “but the agency failed to prepare or preserve an adequate record.” As we explained above, the agency, i.e., the University, prepared a record which contained, among other things, a copy of the 2008 Decision. The only

portion of the record the Court pointed to when it stated that it could not discern what the Panel had decided as to “crucial” issues was precisely the 2008 Decision. Again, there is nothing in the Decision that would lead a reader to infer that the Court had determined the record prepared by the agency to be devoid of evidence that would be sufficient to support findings on those “crucial” issues. To the contrary, again as we explained above, the Court stated clearly that evidence in the agency record would support specific findings on those “crucial” issues if the Panel had made such specific findings.

In a cursory recitation of the events in *Sweeny v. Sweeny*, 52 Wn.2d 337, 324 P.2d 1096 (1958), Dean O’Donnell claims that that case directly supports his argument. A more complete recitation of the events demonstrates the opposite. To begin, the case that Dean O’Donnell cites is the third in a set of reported appellate decisions arising out of the divorce action to which the Sweenys were parties. The first case, *Sweeny v. Sweeny*, 43 Wn.2d 542, 262 P.2d P.2d 207 (1953), arose after Mr. Sweeny had prevailed on a motion to modify a divorce decree so as to obtain sole custody over the estranged couple’s minor son. He based the motion on events that had transpired subsequent to the entry of the divorce decree. The Washington Supreme Court affirmed the decision of the trial court. *Id.* at 543-545, 553.

Months later, based on events occurring subsequent to the entry of the modified decree that granted custody to Mr. Sweeny, Ms. Sweeny filed a petition for modification in an effort to regain custody of her son. The trial court concluded that the best interests of the minor son would be served by granting custody to Ms. Sweeny. The court declined, however, to grant Ms. Sweeny's request because it believed that the decision in *Sweeny v. Sweeny*, 43 Wn.2d 542, precluded it from doing so. Subsequently, the Washington Supreme Court stated that the trial court was incorrect. In fact, the trial court had a duty to exercise discretion to determine Ms. Sweeny's petition based on the facts before it. Again, Ms. Sweeny based her petition on alleged changes in circumstances during the period subsequent to the entry of the modified decree that gave custody to Mr. Sweeny. Instead of basing its decision as to Ms. Sweeny's request on the evidence regarding those alleged changes, the trial court denied the request based on the decision in Ms. Sweeny's first appeal. Stating explicitly that it had no opinion as to whether the best interests of the minor child would be served by granting Ms. Sweeny's request, the Washington Supreme Court remanded the case to the trial court for "further proceedings not inconsistent" with the views that the Supreme Court had expressed in its decision. *Sweeny v. Sweeny*, 48 Wn.2d 872, 873, 876, 878, 297 P.2d 610 (1956).

At the proceeding that resulted following the remand by the Washington Supreme Court, Mr. Sweeny sought to introduce new evidence of changed circumstances that arose subsequent to the trial on Ms. Sweeny's earlier petition for modification of the divorce decree. Over her objection, the trial court granted Mr. Sweeny's request and, based on the evidence from the earlier trial and the new evidence, denied Ms. Sweeny's petition. Ms. Sweeny appealed. *Sweeny v. Sweeny*, 52 Wn.2d at 338.

Focusing on whether the trial court had, by admitting new evidence, violated the mandate issuing from the decision in Ms. Sweeny's second appeal, the Washington Supreme Court noted, among other things:

There was no direction that new findings be entered upon the evidence contained in the appeal record, or that the "further proceedings" be limited to the trial court's consideration of that record only.

*Id.* at 339. The sentiments expressed above did not, however, determine whether the trial court had violated the mandate.

To answer the question the Washington Supreme Court cited, as it had in Ms. Sweeny's second appeal, the requirement that decisions regarding child custody be determined by ascertaining what would serve the best interests of the minor child. Performing that assessment necessitated considering evidence of changed circumstances existing

during the entire period following the entry of the modified decree that Ms. Sweeny sought to modify. A failure to consider such evidence would have placed the trial court in the same circumstance that resulted in the remand from the Washington Supreme Court at the conclusion of Ms. Sweeny's second appeal. *Id.* at 339-341.

The appellate saga of the Sweenys summarized above embodies teachings of considerable utility for Prof. Krishnan's appeal. First, in contrast to what the Washington Supreme Court noted regarding the mandate in Ms. Sweeny's second appeal, as we explained above, at numerous places in the Decision this Court referred specifically to evidence in the agency record that sufficiently supported findings the Panel needed to make. Further, this Court opined as to which of the inconsistent findings/conclusions that evidence most likely supported. Thus this Court did direct that "new findings be entered upon the evidence contained in the appeal record."

Second, in Ms. Sweeny's second appeal the Washington Supreme Court remanded for the determination of an issue on which there was not sufficient evidence in the existing record before the trial court: Did the minor child's best interest require awarding custody to his mother? Consistent with the intent of that remand, in Ms. Sweeny's third appeal the Washington Supreme Court declared that the evidentiary record at the trial

court would have been inadequate had the trial court not granted Mr. Sweeny's request to introduce additional evidence. In short, the *Sweeny* cases teach that when the evidentiary record is inadequate to support a finding/conclusion, on remand a trial court must take new evidence on the question at issue. Again, as we explained above, this Court did not even suggest that the evidentiary record was inadequate to support findings/conclusions on "crucial" issues. This Court stated precisely the opposite. Consequently, the decision in the third *Sweeny* appeal is "directly on point" only to the extent that it supports the contrapositive of what Dean O'Donnell contends: When a reviewing court explains that an agency record contains evidence sufficient to support either of two inconsistent findings/conclusions, on remand the agency is not to consider new evidence regarding the issues attached to those findings/conclusions.

In an effort to demonstrate the functional equivalent of "black is actually white" Dean O'Donnell asserts that "Professor Krishnan's Argument that the Evidence on Remand Interfered with Facts that had Been Conclusively Established in His Favor, Has No Merit." Resp. Br. at 26. The tortured argument offered in support of that assertion focuses primarily on Prof. Krishnan's claim that this Court determined that sufficient evidence in the record before the Panel supported a finding that

the review letters were uniformly positive. The truth of Prof. Krishnan's claim derives from footnote 5 in the Decision, set forth above:

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.

The only "input" the Review Committee used from internal and external reviewers took the form of review letters from those reviewers. This Court's use of the term "uniformly positive" to characterize the input in those letters compels a simple conclusion: This Court, just as Prof. Krishnan claimed, determined that sufficient evidence in the record before the Panel supported a finding that the review letters were uniformly positive. Not surprisingly, Dean O'Donnell points to nothing in the Decision that even suggests the Court wished to have the Panel re-visit its determination that the review letters were uniformly positive: There is nothing in the Decision suggestive of such a desire.

Next, Dean O'Donnell asserts:

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

Resp. Br. at 28-29.

The fatal infirmity in the line of reasoning above is that it rests on an incorrect statement regarding the nature of the “reference” letters. Again, contrary to Dean O’Donnell’s assertion on the matter, this Court did rule that sufficient evidence in the record supported a finding that the letters were uniformly positive. Apparently, Dean O’Donnell cannot imagine any “logical” reason why, if it determined that sufficient evidence supported that finding, this Court would remand the case to the Panel. Consequently, it must be, according to Dean O’Donnell’s “logic,” that because the Court remanded to the Panel, there was no ruling that sufficient evidence supported a finding of uniformly positive review letters. Again, as footnote 5 demonstrates, the Court did, in fact, rule that sufficient evidence in the record supported a finding of uniformly positive review letters.

Continuing with his effort to effect a sleight of mind, Dean O’Donnell in another paragraph “argues” as follows:

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.<sup>122</sup> 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 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.

Resp. Br. 29-30.

As the Opening Brief and the earlier discussion in this brief make clear, Prof. Krishnan has not argued that "this Court held there to be sufficient evidence in the record to eliminate any factual dispute about whether the Report resulted from the consideration of impermissible or

irrelevant factors.” To the contrary, he simply pointed to this Court’s language that sufficient evidence in the record before the Panel at the first hearing supported a conclusion either that the Report may have been affected by impermissible or irrelevant considerations or that the Report was affected by such considerations. Further, Prof. Krishnan adverted to footnote 19 as indicative of the only evidence in the record before the Panel on the matter to which the Court referred.

Second, Prof. Krishnan has not ignored the fact that he bore the burden of demonstrating that Dean O’Donnell’s decision not to reappoint was improper. The central issue in this appeal is whether the Panel violated this Court’s mandate by taking new evidence and in the process re-writing the record.

Next is the “argument” that

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.

The word “facially” appears nowhere in the Decision. Regardless, its appearance in his brief is consistent with Dean O’Donnell’s persistent dismissive view of the significance of the discrepancy between the uniformly positive letters and the Review Committee’s negative

assessment of Prof. Krishnan's research and scholarship. Again, although Dean O'Donnell wants to believe otherwise, this Court determined that sufficient evidence in the record supported a finding that the letters were uniformly positive.

Further, the "argument" above ignores the other set of inconsistent findings that the Court directed the Panel to resolve: Did Dean O'Donnell base his decision not to reappoint, at least in part, on the Report?

Consequently, it is incorrect that

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.

Finally, there is the creative argument

[t]hat 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.

Based on that contention, one would be excused for believing that the evidentiary hearing on remand was designed to benefit Prof. Krishnan.

After all, "he received another hearing" and, according to Dean O'Donnell, a fair one at that.

This characterization of what transpired on remand ignores reality.

Over the repeated objections of Prof. Krishnan's counsel, Mr. Busto

allowed Dean O'Donnell to offer new evidence in the form of testimony of Prof. Campbell and Prof. Cao, both of whom Dean O'Donnell could have called but chose not to do so at the first hearing. And what did Prof. Campbell and Prof. Cao testify about? They testified about precisely the same topics, and more, about which Prof. Jenekhe testified at length in response to numerous questions from Prof. Krishnan, Dean O'Donnell, Mr. Busto, and all five members of the Panel. Further, as we explained above, nowhere in the Decision did this Court state that the Panel needed to conduct an evidentiary hearing to "clear up the facts" left unclear as the result of the first hearing. The agency record before this Court was not inadequate because the "facts" were not clear. No, that record was inadequate because, despite the clarity of the essential facts, the Panel arrived at inconsistent findings/conclusions on crucial issues.

Next, Dean O'Donnell erroneously asserts that Prof. Krishnan would have this Court apply the *McDonnell Douglas* burden shifting framework to his case. Prof. Krishnan referred to that framework only in the context of discussing footnote 19 in the Decision. Recall that in footnote 19 this Court explained that although there was no direct evidence of impermissible or irrelevant considerations in the record, the discrepancy between the positive review letters and the Review Committee's negative opinion of Prof. Krishnan's research and

scholarship could allow a reasonable fact finder, by implication the Panel, to conclude that the decision not to reappoint was affected by such factors. The import of the Court's remarks in footnote 19 is clear: Prof. Krishnan did not need to introduce direct evidence of impermissible or irrelevant considerations in order to carry his burden. At a minimum, the U.S. Supreme Court's adoption of the *McDonnell Douglas* burden shifting framework reflects the reality that direct evidence of discrimination is difficult to obtain. Similarly difficult to obtain is direct evidence of impermissible or irrelevant considerations in a decision whether to reappoint a faculty member to an endowed chair position. Again, the point of citing the *McDonnell Douglas* burden shifting framework was simply that, as the Court's discussion in footnote 19 reflects, Prof. Krishnan did not need to provide direct evidence of impermissible or irrelevant considerations; circumstantial evidence would suffice.

Finally, Dean O'Donnell asserts repeatedly that in the first and second hearings the Panel determined that Prof. Krishnan did not carry his burden of proving that Dean O'Donnell's decision not to reappoint was improper. Missing from these repeated assertions is what the Panel identified as *the* reason for its decision in the first hearing:

In effect, [Dean O'Donnell] repaired the damage done to the process by the Review Committee. For this reason, the

Panel concludes that Krishnan has not carried his burden of proving that O'Donnell's decision was improper.

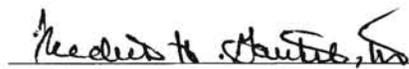
AR 1321. Thus, because Prof. Krishnan did not prove that Dean O'Donnell's independent review was affected by impermissible or irrelevant considerations, the Panel concluded that Prof. Krishnan had not carried his burden. As this Court explained, however, a decision not to reappoint solely on the basis of the independent review would have violated University policies and procedures. Consequently, had the Panel determined that the Dean O'Donnell did not base his decision to reappoint at least in part on the Report, Prof. Krishnan would have carried his burden. Of course, the Panel articulated inconsistent findings on the issue.

#### CONCLUSION

It is clear from the Panel's articulation of *the* reason for its decision to rule against Prof. Krishnan in the first hearing that the Review Committee "damaged" impermissibly the review/reappointment process. In the words of the Court the damage manifested in a "discrepancy." Prof. Krishnan has repeatedly referred to the discrepancy as a misrepresentation of the uniformly positive contents of the external letters. According to the American Heritage Dictionary of the English Language, 3<sup>rd</sup> Ed., "discrepancy" is "a divergence . . . , as between facts." "Misrepresent" means "to give an incorrect or misleading representation of." The Court

determined that the Review Committee's representation of the review letters as raising concerns about Prof. Krishnan's research and scholarship did not square with the uniformly positive input that the reviewers provided in the review letters. In short, the Review Committee misrepresented the review letters. Exceeding the scope of the Court's instructions on remand, the Panel, at the direction of Mr. Busto, took new evidence on issues about which the Court was clear that sufficient evidence in the record existed to resolve. The result was, as Prof. Krishnan described in the Opening Brief, that the Panel ignored the extensive testimony of Prof. Jenekhe and re-wrote the record so as to justify its original decision that Prof. Krishnan had not carried his burden of proving that Dean O'Donnell's decision not to reappoint was improper. For this and the reasons set forth above and in the Opening Brief, Prof. Krishnan asks the Court to reverse the Panel's Decision on Remand.

Respectfully submitted this 31<sup>st</sup> day of October 2012.



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

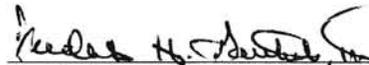
Respondent.

I, Frederick H. Gautschi, III, counsel for Appellant Kannan Krishnan in the above-captioned appeal, certify that on October 31, 2012, I placed in the U.S. mail a copy of Prof. Krishnan's Reply 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 Prof. Krishnan's Reply Brief and a copy of this Certificate of Service to Helen Arntson at [harntson@u.washington.edu](mailto:harntson@u.washington.edu).

Dated this 31st day of October 2012.



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