

APPENDIX A  
OPINION OF THE KANSAS SUPREME COURT

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OPINION OF THE KANSAS COURT OF APPEALS

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ORDER OF DENIAL OF REHEARING AND MODIFICATION

APPENDIX D  
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

430 P.3d 30 (2018)

**Edina HARSAY, Appellant,  
v.  
UNIVERSITY OF KANSAS, Appellee.**

No. 114,292.

**Supreme Court of Kansas.**

Opinion filed November 21, 2018.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 29, 2016. Appeal from Douglas District Court; ROBERT W. FAIRCHILD, judge. Opinion filed November 21, 2018. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

Edina Harsay, appellant, was on the briefs pro se.

Sara L. Trower, associate general counsel and special assistant attorney general, and Michael C. Leitch, associate general counsel and special assistant attorney general, Lawrence, were on the briefs for appellee.

***Syllabus by the Court***

1. K.S.A. 60-518 is applicable to save a Kansas Judicial Review Act action challenging a university

Appendix A

promotion and tenure denial, if the action is refiled within six months of dismissal for lack of prosecution.

2. On the record in this case, a university's decision to deny promotion and tenure was supported by evidence "based on a determination of fact, made or implied by the agency" that was "supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole," as required by K.S.A. 2017 Supp. 77-621(c)(7).

The opinion of the court was delivered by

BEIER, J.: After being denied promotion and tenure at the University of Kansas, Edina Harsay brought this action under the Kansas Judicial Review Act. The district judge dismissed the action for lack of prosecution. Harsay then refiled within six months, relying on K.S.A. 60-518, the savings statute, to make her action timely.

A panel of our Court of Appeals reversed the dismissal, ordering remand to the University to begin the promotion and tenure consideration process anew. The University has successfully petitioned for our review of whether K.S.A. 60-518 should have been applied, and, if so, whether the University's decision to deny Harsay promotion and tenure should be upheld because it was supported by substantial evidence.

We hold K.S.A. 60-518 applied to make Harsay's refiled KJRA action timely; but, because the University's decision was supported by substantial evidence

under K.S.A. 2017 Supp. 77-621(c)(7), that decision must stand.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Harsay was hired for a tenure-track position on the faculty of the University in January 2004.

### ***The University's Promotion and Tenure Process***

The University's multilayered review process for tenure culminates in the granting or the denial of promotion and tenure. Denial leads to termination of employment. Each level of review is independent of the others; no reviewing level is bound by the decision of any other; and each level must base its decision on the applicant's scholarship, teaching, and service to the University.

The process ends with the chancellor's decision. According to the University's rules, the chancellor must consider the entire record before him or her in making the decision. The chancellor's decision is a final agency action under Kansas law.

According to the University, scholarship is an essential aspect of the applicant's record and the tenure review process. Applicants seeking tenure must demonstrate "accomplishment reflecting a sustainable program of scholarly activity," and review of this area must be done "in light of the expectations of the discipline." Scholarship review covers both the quan-

tity and quality of the applicant's work. It also includes evaluation of the work by peers in the applicant's field from outside the University, as well as evaluation of the applicant's reputation in his or her field. An applicant's "teaching (or professional performance), scholarship, and service are characterized as 'excellent,' 'very good,' 'good,' 'marginal,' or 'poor.'" An applicant for tenure must receive at least a rating of "'good'" in all three categories "[a]bsent exceptional circumstances."

### ***Harsay's Dossier***

Harsay's tenure review began in 2009 in her Department of Molecular Biosciences, to which Harsay submitted a promotion and tenure "dossier." The dossier included information about her pertinent scholarship and grants as well as external reviews from peers in her field.

Harsay reported her scholarship as one published article in a scientific journal in 2007; one paper accepted and being prepared for publication, which was published later in 2009; and one manuscript being considered for acceptance for publication.

As for grants, Harsay reported four grants from the National Institutes of Health (NIH) and one grant from the American Heart Association, totaling slightly more than \$600,000. Harsay also included one pending grant from the NIH, one pending grant from the National Science Foundation (NSF), and one pending grant from the Department of Defense, totaling nearly \$3.6 million. Harsay included propos-

als for eight more grants submitted to various organizations but not funded at the time of her application for tenure.

The peers in Harsay's field whose remarks were included in the dossier varied in their opinions regarding her promotion and tenure. Three reviewers recommended Harsay for tenure; three recommended tenure but expressed serious reservations; one refused to endorse her. All reviewers mentioned insufficiency of scholarship. At least one reviewer commented that a low publication rate like Harsay's could make it difficult to maintain funding for her work.

### *Department Level*

The review at the department level of the University resulted in a recommendation for Harsay to receive promotion to associate professor and tenure. The vote was 11 to 6.

In its recommendation letter to the College of Liberal Arts and Sciences committee that would conduct the next level of review, the department review committee noted Harsay's relatively low number of published papers and said that "[t]he question of quantity versus quality was also at the center of the department's discussion." A review by the full department noted that the external reviewers "expressed concerns about her level of productivity." But Harsay "had moderate to good success at obtaining extramural support for her research" and had grants pending or received.

The department's recommendation was forwarded to the College Committee on Appointments, Promotions, and Tenure (the College Committee).

### *College of Liberal Arts and Sciences Level*

The College Committee initially concluded that Harsay did not qualify for promotion and tenure and notified the chair of Harsay's department, Robert S. Cohen, by letter. The College Committee made "this decision ... largely based on research productivity." It requested additional information on Harsay's scholarship and research proposals so that it could make a final recommendation to the body responsible for the next level of review, the University Committee on Promotion and Tenure (the University Committee). The College Committee's letter to Cohen stated that Harsay was to be provided a copy of the letter and an opportunity to respond to its preliminary conclusion.

Cohen responded to the College Committee's request for more information. He told the College Committee that since Harsay submitted the dossier she had successfully published another paper (bringing her total to two) and the third paper mentioned in the dossier, i.e., the "submitted manuscript," had been rejected by a publisher. Cohen also informed the College Committee that two of the three grants listed as pending in the dossier had not been funded and that a decision on the third pending grant was expected within a month.

Harsay also responded to the College Committee's preliminary conclusion. In her letter, she explained

why she believed she had not been given proper credit for her scholarship, the hardships that may have affected her ability to publish more research papers, and the impact of her work. Harsay admitted difficulty in obtaining funding, speculating that it was due to receiving less than the proper amount of credit for some of her scholarship.

Victoria Corbin, the College Committee chair, informed Harsay that, after reviewing her record, the committee finally voted to reject the application for promotion and tenure. Although the committee believed that Harsay met the criteria for teaching and service, it "determined that [Harsay's] level of research accomplishment [was] insufficient and did not meet the criteria for promotion to Associate Professor." The College Committee then told Harsay that her information would be forwarded to the University Committee.

A letter from the College Committee to the University Committee, signed by Corbin, said the College Committee's final vote was 7 to 0, with two abstentions. In its evaluation summary, the College Committee rated Harsay's teaching and professional performance as "Very Good"/"Good," her overall service as "Good," and her research and scholarship as "Marginal"/"Poor." The College Committee letter also incorrectly stated that Harsay had received only two grants from the National Institutes of Health and connected Harsay's lack of publications with a lack of funding: "Lacking sufficient, long[-]term extramural funding in molecular biosciences means fewer scholarly publications can be produced[,] which in turn



negatively affects the ability of [Harsay] to remain competitive for future funding."

The College's interim dean, Gregory B. Simpson, wrote to the University Committee to state his agreement with the College Committee's decision. According to Simpson, Harsay's lack of scholarly articles and inability to acquire sufficient extramural funding outweighed the potential benefits of granting her tenure. In his letter, Simpson repeated the incorrect statement that Harsay had secured only "two smaller grants" instead of the five that she had reported in the dossier. However, he correctly stated that Harsay had two articles "while at KU." After noting that all of the external reviewers had commented on Harsay's low research output, Simpson suggested Harsay not be granted tenure "[b]ased on her relatively weak research record at this point in her career."

### *University Level*

The University Committee conducted a preliminary vote on Harsay's application and rejected it, pointing to Harsay's lack of "research productivity" as the reason for her application's failure.

Per University rules, the University Committee informed Simpson by letter that it had initially voted to deny Harsay tenure and requested additional information to help it reach a final decision. It asked why the department committee had rated "Professor Harsay's research as very good in light of her low productivity and the evaluation of her external re-

viewers." It requested "[a]n assessment of the sustainability of Professor Harsay's research program in the absence of external funding." And it sought "[a] report on the status of the NSF application under review." The University Committee letter to Simpson also stated that Harsay should be notified of the committee's initial decision and afforded an opportunity to defend herself.

Cohen supplied information to Simpson in response to the University Committee's request, saying that the NSF grant was still pending but that "the likelihood for funding is probably quite low as most of the awards from this cycle have already been made." He also defended the department's evaluation of Harsay's research productivity and positively commented on her funding sustainability.

Harsay also responded to the University Committee's initial decision. She acknowledged its concern with the "sustainability of [her] research program" and noted the potential impact of her research. She asserted that funding should not be a problem for her but recognized "my funding situation is currently a hardship for my lab."

The same day, Simpson sent Interim Provost Danny J. Anderson materials the College Committee had collected when the University Committee requested more information.

The University Committee ultimately rejected Harsay's application for promotion and tenure on a 9 to 0 vote, with one abstention.

Anderson sent a letter to Harsay, informing her of the University Committee's decision and stating he agreed with it. He also forwarded the recommendation to the chancellor for her final decision. Anderson's letter to Harsay did not explain in detail why he accepted the University Committee's recommendation, but it did state "the [committee] has recommended that you not be awarded tenure or promotion to Associate Professor... based upon your record of research productivity."

### ***Faculty Rights Board Appeal***

Harsay appealed the decisions of the College Committee and the University Committee to the Faculty Rights Board, claiming that her right to academic freedom had been violated.

The board rejected Harsay's claim, saying in a short letter to Harsay, the chancellor, the associate general counsel for the University, the interim provost, and the vice provost that it found no substantive violation of Harsay's rights as a faculty member, as those rights were defined by the University's rules and regulations. The board recommended that Harsay's case be finally decided by the chancellor.

### ***Chancellor's Decision***

On April 23, 2010, Anderson sent a letter to Harsay to inform her of the chancellor's decision. The letter did not elaborate on rationale, stating simply: "Chancellor [Bernadette] Gray-Little has decided to accept the recommendation of the University Com-

mittee on Promotion and Tenure not to award you tenure or promotion to Associate Professor." The letter also stated that, as a result, Harsay's employment by the University would terminate. The letter itself was "intended to serve as a notice of final agency action."

### ***District Court Action***

Harsay filed a timely petition for judicial review of the University's promotion and tenure decision in the Douglas County District Court. She alleged that the decision was not supported by substantial evidence and was unreasonable, arbitrary, or capricious. See K.S.A. 2017 Supp. 77-621(c)(7), (8) (two of eight grounds for reversal of agency decision under the KJRA).

On June 21, 2012, Harsay's district court action was dismissed for failure to prosecute. Nearly six months later, on December 4, 2012, Harsay refiled the case under the savings statute, K.S.A. 60-518, which provides: "If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff ... may commence a new action within six (6) months after such failure."

The district court ruled against Harsay on the merits of her challenge to the University's decision, holding that the University's denial of promotion and tenure was supported by substantial evidence and was not unreasonable, arbitrary, or capricious.

### ***Court of Appeals Decision***

Harsay appealed, and a panel of our Court of Appeals reversed the district court's decision. *Harsay v. University of Kansas*, No. 114292, 2016 WL 4069604, at \*8-9 (Kan. App. 2016) (unpublished opinion).

The panel cited the Administrative Procedure Act, specifically the requirement in K.S.A. 77-526(c) that a final order shall include

"separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings."

The panel ruled that meaningful appellate review of the University's decision was impossible because its factual findings and legal conclusions in the April 23, 2010, letter were "inadequate to disclose the controlling facts or the basis of the agency's findings." 2016 WL 4069604, at \*8.

The panel accurately pointed out that the College Committee had incorrectly reported to the University Committee that Harsay had only "two small external grants" from the NIH. This report of Dr. Harsay's grant funding was materially in error," because she had been awarded a total of five grants from two

sources at the time of her tenure application. 2016 WL 4069604, at \*8. The panel noted that the University Committee cited no basis for its recommendation that tenure be denied other than Harsay's "record of research productivity," and the chancellor accepted the University Committee's recommendation. 2016 WL 4069604, at \*5.

The panel then continued:

"If the chancellor had before her the correct information on Dr. Harsay's scholarly works and funded research grants over her years at the University, would the chancellor have made the same decision? The chancellor very well may have arrived at the same conclusion that Dr. Harsay should be denied tenure because of an inadequate record of research productivity... [b]ut it is not for us to speculate on whether the chancellor's decision would have been different if she had before her a recommendation from the University Committee based on accurate information." 2016 WL 4069604, at \*9.

The panel thus reversed the district court judgment and remanded the case to the University to restart Harsay's promotion and tenure review process. 2016 WL 4069604, at \*10.

## DISCUSSION

Before reaching the dispositive K.S.A. 60-518 and substantial evidence issues on petition for review, we pause to discuss three preliminary matters briefly.

### Appendix A

First, shortly before the docket to which Harsay's case was assigned was set to begin, Harsay moved to "immediately" file a conditional cross-petition for review. Conditional cross-petitions were allowed for the first time when we amended Supreme Court Rule 8.03, effective July 1, 2018. See Supreme Court Rule 8.03(a)(1). Harsay sought to address two issues — the applicability of K.S.A. 60-518 and the appropriate remedy for her tenure denial. Because these two issues have already been exhaustively covered in both parties' voluminous filings, including supplemental briefs to this court, we deny Harsay's motion. This ruling on the merits of the motion eliminates any necessity to address whether the motion was untimely or otherwise procedurally deficient.

Second, we agree with the University that the KJRA provides the bulk of the statutory infrastructure supporting an action such as Harsay's, which was filed in the district court to challenge a final agency action with which she disagreed. Indeed, Harsay invoked the KJRA's grounds for reversal in her petition, asserting that the University's tenure decision was not supported by substantial evidence, see K.S.A. 2017 Supp. 77-621(c)(7), and was otherwise unreasonable, arbitrary, or capricious, see K.S.A. 2017 Supp. 77-621(c)(8). The panel's citation and quotation of the Administrative Procedure Act demonstrated no contrary understanding of the governing law in a judicial review action. It merely supported the panel's observations of the bare-bones nature of the University's notice of the decisions made at two levels of Harsay's tenure review. These observations and inaccuracy in the count of Harsay's

grants when the College Committee reported its outcome to the University Committee combined to make the panel lose confidence in its ability to perform its mandatory role under the KJRA. See K.S.A. 77-606 (KJRA "exclusive means of judicial review of agency action"). This is not the same thing as disregarding or misunderstanding that role, as the University contends.

Third, we must address preservation of the K.S.A. 60-518 issue. Ordinarily we would not permit a party to raise an issue for the first time in a petition for review. However, an absence of subject matter jurisdiction can be raised at any time — by a party or by the court *sua sponte*, see *Stechschulte v. Jennings*, 297 Kan. 2, 29, 298 P.3d 1083 (2013) (citing *Mid-Continent Specialists, Inc. v. Capital Homes*, 279 Kan. 178, 185, 106 P.3d 483 [2005]); *Ternes v. Galicia*, 297 Kan. 918, 921, 305 P.3d 617 (2013) (citing *Vorhees v. Baltazar*, 283 Kan. 389, 397, 153 P.3d 1227 [2007]) — and compliance with any applicable time limit for challenging an agency action is required to endow a reviewing court with subject matter jurisdiction. See, e.g., *Pieren-Abbott v. Kansas Dep't of Revenue*, 279 Kan. 83, 99, 106 P.3d 492 (2005) ("The rule is well established that the time for taking an administrative appeal, as prescribed by statute, is jurisdictional and delay beyond the statutory time is fatal."); *W.S. Dickey Clay Mfg. Co. v. State Corp. Comm'n of State*, 241 Kan. 744, 749, 740 P.2d 585 (1987) (time limitation for administrative appeal jurisdictional, failure to appeal within statutory limit fatal); *Lakeview Village, Inc. v. Board of Johnson County Comm'rs*, 232 Kan. 711, Syl. ¶ 5,



659 P.2d 187 (1983) (same); *Vaughn v. Martell*, 226 Kan. 658, 661, 603 P.2d 191 (1979) (same). We thus permit the University to raise and argue its position that K.S.A. 60-518 should have been unavailable to make Harsay's refiled KJRA action timely. We see no unfairness in this approach, as Harsay has had ample opportunity to rebut the University on this point.

### ***K.S.A. 60-518***

Having disposed of the three preliminary matters, we turn next to the merits of whether K.S.A. 60-518 applied to save Harsay's case and preserve subject matter jurisdiction. Because this issue requires interpretation or construction of K.S.A. 60-518 and the KJRA, we exercise unlimited review. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015) (statutory interpretation, construction raise questions of law reviewable de novo). And

"[t]he fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there." *In re Estate of Strader*, 301 Kan. 50, 55, 339 P.3d 769 (2014).

Under the KJRA, "[a] petition for judicial review of a final order shall be filed within 30 days after service of the order." K.S.A. 2017 Supp. 77-613. The

parties do not dispute that Harsay initially complied with this deadline by filing her district court petition for judicial review within 30 days of receiving notice of the chancellor's decision. While the action was pending, the 30-day jurisdictional time limit expired.

Again, nearly two years later, Harsay's action was dismissed for failure to prosecute. Within six months of that dismissal, Harsay refiled her KJRA action, relying on K.S.A. 60-518 to make it timely despite the expiration of the 30 days.

K.S.A. 60-518 is not a part of the KJRA but of the Code of Civil Procedure. The University therefore argues that it cannot apply in this case. But, in *Pieren-Abbott v. Kansas Dept. of Revenue*, we held that provisions of the Code of Civil Procedure can apply to appeals taken under the KJRA "if the provision is a logical necessity that is not addressed within the KJRA." 279 Kan. at 97, 106 P.3d 492. In that case, we observed that the procedural rights created by the KJRA are "in addition to those created and imposed by other statutes." 279 Kan. at 96, 106 P.3d 492. And we relied upon summons and service of summons provisions in K.S.A. 8-1020(o) and in the Code of Civil Procedure, specifically K.S.A. 2003 Supp. 60-303, to allow review under the KJRA "to come into being." 279 Kan. at 97, 106 P.3d 492. The KJRA lacked the provisions borrowed from K.S.A. 8-1020(o) and K.S.A. 2003 Supp. 60-303; importing them qualified as a "logical necessity." 279 Kan. at 97, 106 P.3d 492.

Although *Pieren-Abbott* could support application of K.S.A. 60-518 in this case because the KJRA lacks

a savings provision, we need not go so far as to say that any savings provision is a "logical necessity" for the KJRA to perform its function. Rather, we can look to the plain language of K.S.A. 60-518 itself, which states unequivocally that it applies to "*any* action" that is commenced within "due time" and that fails "otherwise than upon the merits" when "the time limit for the same shall have expired." (Emphasis added.) This broad language encompasses a suit such as Harsay's, and this straightforward reading of it is "the best and only safe rule for ascertaining the intention of lawmakers." *Neighbor*, 301 Kan. at 919, 349 P.3d 469. Thus we hold that K.S.A. 60-518 was correctly employed by the district court to allow Harsay's refiled action to proceed.

### ***Substantial Evidence***

With the subject matter jurisdiction question answered, we turn to the merits of the University's decision: Was the denial of promotion and tenure to Harsay, as required by K.S.A. 2017 Supp. 77-621(c)(7), "based on a determination of fact, made or implied by the agency" that was "supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole"?

We have frequently defined "substantial competent evidence" as "that which possesses both relevance and substance and which furnishes a substantial basis in fact from which the issues can reasonably be resolved." See, e.g., *State v. Sharp*, 289 Kan. 72, 88, 210 P.3d 590 (2009). "Substantial competent

evidence," as that phrase is used in myriad cases, is essentially equivalent to "evidence that is substantial" under K.S.A. 2017 Supp. 77-621(c)(7). See *Atkins v. Webcon*, 308 Kan. 92, 96, 419 P.3d 1 (2018) (equating "substantial competent evidence" to "evidence that is substantial").

In addition, the KJRA elaborates on the phrase, "in light of the record as a whole," in K.S.A. 2017 Supp. 77-621(d):

"For purposes of this section, 'in light of the record as a whole' means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record ... cited by any party that supports such finding.... In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review."

The choices involved in the decision to recommend or deny tenure are inherently subjective, involve a series of discretionary decisions made by various groups of people, and are based in part on the business judgment of the University. See *Romkes v. Univ. of Kansas*, 49 Kan.App. 2d 871, 889-91, 317 P.3d 124 (2014) (discussing cases in the context of employment discrimination and tenure). In this case, the Court of Appeals was rightfully concerned with the lack of detail informing Harsay of the chancellor's final call.

But we do not agree with the panel's assertion that meaningful judicial review was precluded. While the notice of the chancellor's decision was short on details, it did say that the chancellor was accepting the recommendation of the University Committee. And the University Committee stated it initially rejected Harsay's application because it was concerned with her research productivity. This concern was reiterated when it had taken its final vote. Furthermore, Harsay explicitly recognized herself that her research record was somewhat thin — a primary concern for the University. The bottom line is that the existence of this concern and the reasons for it are supported at multiple points in the record of the multilayered tenure review process, including in the expressed misgivings of outside peer reviewers.

Harsay is correct when she states that the number of her funded grants was misstated in the College Committee letter signed by Corbin and in the letter from Simpson, and both misstatements are parts of the KJRA "record as a whole." But there is ample other material in the record correctly stating the number of grants, and the University's rules provide clearly that each level of tenure review makes its own evaluation separately from each other level. Harsay directs our attention to no evidence, substantial or otherwise, that demonstrates that the University Committee or the chancellor deviated from their responsibilities to review *all* materials and arrive at *independent* conclusions.

In sum, "in light of the record as a whole," we see plenty of "evidence that is substantial" under K.S.A.

2017 Supp. 77-621(c)(7) to support the University's decision to deny Harsay promotion and tenure. The single inaccuracy twice mentioned on a subject that was but one feature of one criterion in the three-criterion evaluation process did not fatally pollute that process or necessarily detract from or destroy the many accurate elements the decision makers had before them. Harsay's identification of that inaccuracy is not enough to meet her burden to show a lack of the required evidence under K.S.A. 2017 Supp. 77-621(c)(7). Indeed, if we treated this identification otherwise, we would be derelict in our duty to consider the case "in light of the record as a whole."

Finally, we note that Harsay also attempted in the district court and before the Court of Appeals to challenge the University's decision as "otherwise unreasonable, arbitrary or capricious" under K.S.A. 2017 Supp. 77-621(c)(8). She also added an argument before the Court of Appeals that the University incorrectly applied the law under K.S.A. 2017 Supp. 77-621(c)(4), because it relied on finances as well as her scholarship, teaching, and service in denying her promotion and tenure.

As with the question of whether the record as a whole contained substantial evidence to support the University's decision, the Court of Appeals did not reach the merits of these two distinct challenges by Harsay. Nor did it address any potential preservation problem with the K.S.A. 2017 Supp. 77-621(c)(4) argument advanced for the first time on appeal.

We do not reach the merits of these challenges today because we consider them abandoned. Harsay

opposed granting the University's petition for review, did not file a cross-petition for review, and did not attempt to raise either of these two challenges through her eventual motion to file a conditional cross-petition for review. See *State v. Funk*, 301 Kan. 925, 932-33, 349 P.3d 1230 (2015) (issues not fairly included in petition or adequately briefed deemed abandoned). The only petition for review this court granted was filed by the University, and its merits arguments focused only on K.S.A. 2017 Supp. 77-621(c)(7). That issue has been addressed and resolved in the University's favor.

## CONCLUSION

For the reasons set forth above, the Court of Appeals decision is reversed and the judgment of the district court is affirmed.

STEGALL, J., not participating.

JEFFREY E. GOERING, District Judge, assigned.[1]

GOERING, J., concurring:

I agree with the majority that there is substantial evidence in the administrative record as a whole to support the University's decision to deny Edina Harsay promotion and tenure. I write separately because I respectfully disagree with the majority that K.S.A. 60-518 can be applied to actions arising under the Kansas Judicial Review Act (KJRA).

"In construing statutes and determining legislative intent, several provisions of an act, *in pari materia*, must be construed together with a view of recon-

ciling and bringing them into workable harmony if possible. [Citation omitted.]" *State v. Brown*, 272 Kan. 843, 847, 35 P.3d 910 (2001). Accordingly, while the language of K.S.A. 60-518 is broad, that language cannot be considered in a vacuum. K.S.A. 60-518 must be construed with the rest of Article 5 in order to determine the scope of its application. K.S.A. 60-501 plainly limits the application of K.S.A. 60-518 to civil actions: "The provisions of this article govern the limitation of time for commencing *civil actions*, except where a different limitation is specifically provided by statute." (Emphasis added.)

It is well established that administrative appeals to the district court are not "civil actions." *In re Gantz*, 10 Kan.App. 2d 299, 302, 698 P.2d 385 (1985); see also *Kansas Turnpike Authority v. Jones*, 7 Kan.App. 2d 599, Syl. ¶ 1, 645 P.2d 377 (1982) (an appeal to the district court from an administrative decision is not the commencement of a civil action). Rather, administrative appeals are "in the nature of 'judicial review'" of agency decisions. *Flanigan v. City of Leavenworth*, 232 Kan. 522, 528, 657 P.2d 555 (1983); see also *Nurge v. University of Kansas Med. Center*, 234 Kan. 309, 316, 674 P.2d 459 (1983) (the district court in an administrative appeal is a court of error and review). As such, the Legislature never intended K.S.A. 60-518 to be applied to administrative appeals taken under the KJRA.

In *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 106 P.3d 492 (2005), this court held that provisions of the Code of Civil Procedure can be applied to appeals taken under the KJRA "if the provision is a logical necessity that is not addressed under



the KJRA." 279 Kan. at 97, 106 P.3d 492. In *Pierren-Abbott*, this court addressed the service of a summons necessary to initiate judicial review of an administrative decision suspending driving privileges. This court held that because the service of a summons was required to effectuate judicial review, but the method of serving process was not mentioned in the KJRA, the use of the Code of Civil Procedure became a "logical necessity." 297 Kan. at 97, 298 P.3d 333.

The KJRA does not have a savings statute. Nevertheless, the savings statute in K.S.A. 60-518 is not necessary to carry out the functions of the KJRA. Thus, the application of K.S.A. 60-518 to the KJRA is not a "logical necessity" in order for judicial review of an agency action to take place. To the contrary, as the facts of this case demonstrate, the application of the savings statute to administrative appeals defeats the purpose of K.S.A. 77-613(d) which ensures the timely commencement of judicial review of an agency's final order by requiring that a petition for judicial review be filed within 30 days after the agency action.

For the foregoing reasons I would find that Har-say's appeal to the district court was not initiated within the time prescribed by K.S.A. 77-613(d) and would dismiss the appeal on that basis.

[1] REPORTER'S NOTE: District Judge Goering was appointed to hear case No. 114,292 vice Justice Stegall under the authority vested in the Supreme Court by art. 3, § 6(f) of the Kansas Constitution.

NOT DESIGNATED FOR PUBLICATION

No. 114,292

IN THE COURT OF APPEALS OF  
THE STATE OF KANSAS

EDINA HARSAY, Appellant,

v.

THE UNIVERSITY OF KANSAS,

Appellee.

MEMORANDUM OPINION

Appeal from Douglas District Court; ROBERT W.  
FAIRCHILD, judge. Opinion filed July 29, 2016.  
Reversed and remanded with directions.

Edina Harsay, of Lawrence, appellant pro se.

Sara L. Trower, associate general counsel and  
special assistant attorney general, for appellee.

Before GREEN, P.J., MCANANY and ATCHESON,  
JJ.

*Per Curiam:* Dr. Edina Harsay, a former assistant professor in the Department of Molecular Biosciences at the University of Kansas (University), appeals the ruling of the district court finding no legal impropriety in the University's decision to deny her promotion to associate professor with tenure.

Dr. Harsay joined the University's faculty in January 2004 as an assistant professor in the De-

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partment of Molecular Biosciences on track for a possible tenured position. The University's tenure track is a 7-year up-or-out process. Under this process, Harsay was on probation for a period of 7 academic years. During 2009, the sixth year of her employment, the University conducted a review to determine her eligibility for tenure.

The University denied tenure, so Harsay was terminated from her position at the end of her seventh year, the 2010-2011 academic year.

### ***Tenure Review Process***

At the time of Dr. Harsay's promotion and tenure review, the University's procedure involved a multi-level review process set forth in the University's Faculty Senate Rules and Regulations (FSRR), Article VI. In Dr. Harsay's case, the Department of Molecular Biosciences conducted the initial review of her application for promotion and tenure; the College of Liberal Arts and Science's College Committee on Appointments, Promotion, and Tenure (College Committee) conducted the intermediate level review; and the University Committee on Promotion and Tenure (University Committee) conducted the university level review. After the university level review, Dr. Harsay's complete promotion and tenure application, including the recommendations of each review committee, was forwarded to the University's chancellor for a final determination on tenure. The chancellor's decision was the final agency action, and no further administrative review was permitted following the chancellor's decision.

### **Appendix B**

The FSRR required that Dr. Harsay's application receive an independent review at each review level:

"Each level of review, including the initial review, the intermediate review . . . , and the university level review, conducts an independent evaluation of a candidate's record of performance and makes independent recommendations to the Chancellor. Later stages of review neither affirm nor reverse earlier recommendations, which remain part of the record for consideration by the Chancellor. It is the responsibility of each person involved in the review process to exercise his or her own judgment to evaluate a faculty member's teaching (or professional performance), scholarship, and service based upon the entirety of the data and information in the record. No single source of information, such as peer review letters, shall be considered a conclusive indicator of quality."

The provost was required to provide "guidelines for compiling and evaluating a candidate's record." FSRR § 6.3.4. Under FSRR § 6.3.4.2, those guidelines were to include

"a summary evaluation section to be prepared by the committee at each level and shared with the candidate upon completion of the initial review and intermediate review, if one is conducted. The evaluation section shall include:

"(a) the recommendation of the committee, its rating of the candidate in the areas of teaching (or professional performance), scholarship, and service, and a statement of the reasons for those ratings."

The University's promotion and tenure standards provide:

"6.2.3. Scholarship. Scholarship is an essential component of the University's mission as a center of learning, and the award of tenure and/or promotion in rank must be based on a record of accomplishment reflecting a sustainable program of scholarly activity. Evaluation of scholarship must be undertaken in light of the expectations of the discipline."

Under section 6.2.3.1, scholarship includes "traditional academic research and publication." Under section 6.2.3.2, in considering a promotion to a tenured position the reviewers consider the quality and quantity of the candidate's publications, "external reviews of the candidate's work by respected scholars or practitioners in the field, the candidate's regional, national, or international reputation, and other evidence of an active and productive scholarly agenda."

The departmental review criteria further provide:

"A ranking of 'very good' in research requires publication of original work in peer-reviewed journals. It is essential that this work includes research that was carried out at [the University], or is otherwise distinguishable from studies conceived by the faculty

member's doctorate and post-doctorate advisors. The quality and quantity of the published work needs to be sufficiently high to establish the faculty member as an important contributor to his or her field. It is also essential that the faculty member has demonstrated success at obtaining extramural funding to support his/her research program and that there is a reasonable level of assurance that they will maintain a productive research program of high scholarship for the foreseeable future."

### ***Departmental Review***

In 2009, consistent with the University's promotion and tenure procedures, Dr. Harsay submitted an application for promotion and tenure with supporting materials showing her record of achievement. In her application, Dr. Harsay stated that since her appointment at the University she had

- 1 published journal article
- 1 "paper in press"
- 1 submitted manuscript.

With respect to research grants, she reported the following five funded grants:

1. National Institutes of Health (NIH) R21 NS061754-01 (\$138,934 total cost; \$25,000 additional direct cost pending approval of second stage of project; 9/30/07—8/31/09 plus requested extension)

2. American Heart Association, 0760054Z (\$143,000 total cost; 1/1/2007—12/31/2008)
3. NIH X01MH077628-01 (resource award, 5/10/2006—1/31/2007)
4. NIHRO3NS050784 (\$70,000 total cost; 9/30/2004—8/30/2006)
5. NIH P20 RR15563 (\$250,000 total cost; 8/1/2004—4/30/2007).

She reported three additional pending research grants:

1. NIH1R01GM (\$1,795,027 total cost; 04/01/2010—03/31/2015)
2. National Science Foundation (\$1,388,027 total cost; 01/01/2010—12/31/2014)
3. Department of Defense (\$404,329 total cost; 01/01/2010—12/31/2011).

She also had submitted eight grant proposals that had not been funded. These were to the American Cancer Society, the Prevent Cancer Foundation, the National Science Foundation, and five to the NIH.

Dr. Harsay also provided with her application the evaluations of seven external reviewers, who had commented on her application for promotion and tenure. The reviews were generally favorable to Dr. Harsay, though several reviewers were concerned her publication rate was low for a tenure candidate in her field. A reviewer also expressed that it may be

difficult for Dr. Harsay to maintain an externally funded research program with a low publication rate.

The six-member Departmental Committee voted five to one in favor of tenure. A majority of the committee members rated Dr. Harsay's teaching and research records as "Very Good," and the committee unanimously rated her service record as "Very Good."

In its recommendation letter to the College Committee, the Departmental Committee discussed Dr. Harsay's research record:

"Dr. Harsay currently has one paper published based on research she has performed at [the University].

....

"In addition, she has two manuscripts currently submitted for publication. A revised version of [one of the manuscripts] is currently undergoing review. The editor of the paper has written our department chair, Dr. Robert Cohen, explaining his great interest in publishing the manuscript, and his expectation that the current version will be accepted for publication. . . .

....

"A third manuscript has been submitted to [another academic journal]. This is also a substantial paper, with a total of 10 figures and tables. . . .

....



"... Dr. Harsay has also been successful at obtaining significant grant support for her research. She has been funded by the Cancer Experimental Therapeutics COBRE as a project [primary investigator], and by the American Heart Association grant. Her high throughput screening and characterization of the compounds she identified has been funded by an NIH R03 award, an NIH X01 Resource Award, and is currently funded by an NIH R21. She currently has proposals under review at the NIH, the NSF, and the Department of Defense."

In its evaluation, the Departmental Committee concluded:

"Overall, Dr. Harsay's major publication record consists of 2 strong papers submitted for publication, (of which one seems very likely to be accepted) and one extremely strong published paper. Her outside review letters confirm that Dr. Harsay's contributions are of extremely high quality. At the same time, the outside reviews all mention that Dr. Harsay's productivity ... could be higher. She has thus far been successful at obtaining sufficient grant support to maintain a laboratory with an active research program capable of generating data of extremely high quality, and that has had a significant impact on her field."

On October 14, 2009, the Departmental Committee gave its recommendation to the tenured faculty members of the Molecular Biosciences Department.

The faculty members voted 11 to 6 to recommend promotion to associate professor with tenure. Two of the favorable votes were cast as "exceeds expectations," and nine of the favorable votes were cast as "meets expectations."

When the Departmental Committee advised the College Committee of this action, the department's chair, Dr. Robert Cohen, provided to the College Committee an evaluation of Dr. Harsay's application and discussed her research record. Dr. Cohen commented: "The question of quantity versus quality was . . . at the center of the Department's discussion of Dr. Harsay's promotion and tenure dossier."

### ***College of Liberal Arts and Sciences Review***

At the intermediate level of review, the nine-person College Committee performed an initial review of Dr. Harsay's application and determined she did not meet the criteria for promotion and tenure, noting its decision was "largely based on research productivity."

On December 9, 2009, before issuing a final recommendation, the College Committee contacted Dr. Cohen and requested updated information concerning Dr. Harsay's research papers, either submitted or accepted for publication, and the status of any pending research proposals.

On December 14, 2009, Dr. Cohen responded to the College Committee's inquiry. In the letter, he explained that Dr. Harsay had two published journal articles and a third article which had been rejected

despite generally favorable reviews. The publication's editor encouraged her to resubmit the paper after addressing the reviewers' comments. Dr. Cohen noted that Dr. Harsay planned to resubmit the third article within the month. With regard to research grants and proposals, Dr. Cohen provided an update on Dr. Harsay's research grants:

"Three grants, one each to the NIH, NSF, and Department of Defense (DOD), were listed as pending on Dr. Harsay's Blue Book

"The NIH and DOD grants were not funded.

"Dr. Harsay's NSF grant is still pending. My understanding is that she spoke to her program administrator yesterday and was told that a decision on the grant should be rendered within a month."

On December 15, 2009, Dr. Harsay also submitted a written response, which further discussed her research record and sought reconsideration of the committee's initial determination.

The College Committee voted seven to zero, with two abstentions, to recommend against a promotion to associate professor with tenure. In making its recommendation, the committee rated Dr. Harsay's teaching as "Very Good"/"Good," her service as "Good," and her research scholarship as "Marginal"/"Poor."

In his December 28, 2009, letter, Dr. Corbin informed Dr. Harsay of the College Committee recommendation and explained:

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"The committee arrived at our assessment of your work after a careful consideration of your statements on the blue form, your record of teaching, research, and service, peer evaluations of your teaching, and outside reviews of your scholarship. We concluded that your record of teaching evaluations, teaching materials, and other assessments show work that exceeds departmental standards for promotion and tenure. Your record of service also met criteria for promotion and tenure. However, [the College Committee] determined that your level of research accomplishment is insufficient and did not meet the criteria for promotion to Associate Professor. For these reasons, the committee has not recommended you for promotion to associate professor with tenure."

On December 28, 2009, Interim Dean Gregory Simpson concurred with the College Committee's negative recommendation. In his letter to the University Committee but not to Dr. Harsay, he stated:

"Although Professor Harsay's teaching and service meet the criteria for promotion and tenure, her research does not. Her scholarly output has been low (two articles while at [the University]), and she has not been successful in securing significant extramural funding to support her research (although she has received two smaller grants). She works in an area in which such funding is necessary to sustain a productive research program, and the failure to obtain such resources further hurts her ability to publish her work at an ap-

propriate rate. Her external reviewers all noted that her research output was low."

Interim Dean Simpson concluded, based on her "relatively weak research record at this point in her career," Dr. Harsay did not qualify for promotion to associate professor with tenure.

Also on December 28, 2009, Dr. Victoria Corbin, the chair of the College Committee, advised the University Committee of the College Committee's recommendation, stating:

"[T]he [College Committee] agreed with outside evaluators in her discipline who commented on low research productivity (2 published paper) as an issue in her tenure application. In addition, [the College Committee] notes that she has been unable to successfully compete for significant extramural funding, although she did have two small external grants from the National Institutes of Health. The department expectations include '... the faculty member's ability to obtain the funding needed to support his or her research program in the long-term.' Lacking sufficient, long term extramural funding in molecular biosciences means fewer scholarly publications can be produced which in turn negatively affects the ability of the investigator to remain competitive for future funding. . . . [The College Committee] believes that this overall low level of scholarly accomplishment is insufficient and does not meet expectations for promotion to the rank of Associate Professor."

In reporting these results to Dr. Harsay, the College Committee only provided the conclusory statement that her research accomplishments were insufficient. On the other hand, the College Committee provided a more detailed explanation to the University Committee. The College Committee reported that Dr. Harsay had "been unable to successfully compete for significant extramural funding, although she did have two small external grants from the National Institutes of Health."

### *University Review*

At the university level of review, the University Committee, comprised of 10 voting members broadly representative of the faculty, reviewed Dr. Harsay's application for promotion to associate professor with tenure. After completing an initial review of the prior recommendations, the University Committee informed Dr. Harsay that it had voted that she did not meet the criteria for promotion and tenure based on her record of research productivity.

On February 11, 2010, in order to aid in reaching a final determination, the committee requested the following additional information: (1) a report on the status of Dr. Harsay's NSF application; (2) a basis for the department's evaluation of Dr. Harsay's research as "very good" considering her low research productivity and the evaluation of the external reviewers; and (3) an assessment of the sustainability of Dr. Harsay's research program in the absence of external funding.

On February 17, 2010, Dr. Cohen provided the University Committee with the requested additional information. Dr. Cohen, the acting chair of the Department of Molecular Biosciences, stated the NSF grant application was still pending but noted Dr. Harsay "should be able to finish two ongoing projects within the next year, each leading to the publication of a peer-reviewed research article." Dr. Cohen also noted that Dr. Harsay's research was gaining momentum in terms of excitement and had a good chance of being funded in the near future. With regard to the Departmental Committee's rating, he explained: "There is a persuasive sentiment in the department that Dr. Harsay is capable of hitting a homerun. She is totally dedicated to her science." He further explained that Dr. Harsay's research had produced seminal or near-seminal publications and her current research appeared likely to boost her career and greatly enhance her prospects for future funding.

In February 22, 2010, Interim Dean Simpson hand delivered to the interim provost the additional documents the College Committee had collected regarding Dr. Harsay.

The University Committee voted nine to zero to deny promotion to associate professor with tenure, with one committee member abstaining.

On March 4, 2010, Interim Provost and Executive Vice Chancellor Danny Anderson informed Dr. Harsay of the University Committee's negative recommendation. In the letter, he advised Dr. Harsay of her options to either provide the chancellor a written

response to the negative recommendation or file an appeal with the University's Faculty Rights Board. Anderson stated: "This recommendation has been forwarded to Chancellor Gray-Little for her review and final decision." The parties do not cite, and we do not find, any specific findings by the University Committee to support its recommendation other than a reference to Dr. Harsay's deficient "record of research productivity."

### ***Faculty Rights Board Appeal***

On March 15, 2010, Dr. Harsay appealed the University Committee's decision to the Faculty Right's Board, claiming "the lack of fair representation by natural scientists [in the review process] ... resulted in the use of inappropriate review criteria ... in violation of [her] academic freedom rights." At this point, she was not aware of the mistake made by the College Committee in reporting to the University Committee her history of research grant funding.

The Board reviewed Dr. Harsay's appeal on April 2, 2010, and ultimately denied it, finding no substantive violations to faculty rights as defined in the University's rules and regulations.

### ***Chancellor Review***

On April 23, 2010, Interim Provost Anderson informed Dr. Harsay of the chancellor's decision. The substantive portion of the letter is as follows:



"After careful review, Chancellor Gray-Little has decided to accept the recommendation of the University Committee on Promotion and Tenure not to award you tenure or promotion to Associate Professor at the University of Kansas.

"In accordance with the policies of the Kansas Board of Regents and the Rules and Regulations of the Faculty Senate, I am notifying you that your appointment for the 2010-2011 academic year will be a terminal appointment."

### *District Court Review*

Dr. Harsay filed a petition for judicial review in the Douglas County District Court. About 2 years later, on June 21, 2012, the case was dismissed without prejudice for failure to prosecute. Almost 6 months later, on December 4, 2012, Dr. Harsay re-filed her petition in the district court seeking judicial review of the University's action. The University filed its responsive pleading in mid-January 2013. A scheduling order was entered the next month, and Dr. Harsay filed her supporting brief on April 8, 2013. In her supporting brief, Dr. Harsay contended the University's decision to deny her promotion to associate professor with tenure was not supported by substantial evidence and was otherwise unreasonable, arbitrary, or capricious.

The University filed its brief in June 2013, and Dr. Harsay filed her reply brief the following month. The district court then took the matter under ad-

visement. Almost 2 years later, on June 24, 2015, the district court issued a memorandum decision ruling in favor of the University. The district court found that the University's action was supported by substantial evidence and was not unreasonable, arbitrary, or capricious.

Dr. Harsay appeals. The appeal was perfected and briefing was complete in March 2016. The matter was placed on the first available Court of Appeals docket in May 2016. Thus, our first opportunity to consider the issues raised by Dr. Harsay is 6 years after the chancellor's decision.

### ***Analysis***

On appeal, Dr. Harsay asserts: (1) the University's action was unreasonable, arbitrary, or capricious; (2) the district court erred in ruling that substantial competent evidence supported the University's decision; and (3) the University misinterpreted or misapplied the law in denying her promotion to associate professor with tenure.

The Kansas Judicial Review Act (KJRA) governs an appellate court's review of an agency decision. K.S.A. 77-601 *et seq.*; *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 361-62, 212 P.3d 239 (2009). An appellate court presumes the agency action was valid; on appeal, the party claiming an invalid action of the agency has the burden of establishing such invalidity. K.S.A. 2015 Supp. 77-621(a)(1); *Romkes v. University of Kansas*, 49 Kan. App. 2d 871, 880, 317 P.3d 124 (2014). An appellate

court exercises the same statutorily limited review of an agency action as does a district court—as though the appeal had been made directly to the appellate court. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010); *Romkes*, 49 Kan. App. 2d at 880.

Dr. Harsay argues that because the explanations that were given for recommending the denial of promotion and tenure were contradicted by the facts in the record, the University's decision to deny her promotion to associate professor with tenure was not supported by substantial evidence and was unreasonable, arbitrary, or capricious.

### ***The Agency's Findings***

In advising Dr. Harsay of the chancellor's decision, the interim provost stated: "The University of Kansas is an agency of the State of Kansas, and this letter is intended to serve as a notice of a final agency action by the University of Kansas." K.S.A. 77- 526(c) requires:

"A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accom-

panied by a concise and explicit statement of the underlying facts of record to support the findings."

Meaningful appellate review is precluded when an administrative agency's factual findings and legal conclusions are inadequate to disclose the controlling facts or the basis of the agency's findings. *Jones v. Kansas State University*, 279 Kan. 128, 142, 106 P.3d 10 (2005).

Dr. Harsay disclosed in her application for a promotion and tenure that she had one published journal article, one revised manuscript that was currently undergoing review and was likely to be published, and one manuscript that had been submitted for publication. She also disclosed five funded research grants while working at the University plus three additional pending grant applications. In recommending a promotion and tenure, the Departmental Committee recognized these scholarly works and her grant-funded research projects.

The matter was then sent to the College Committee. The College Committee initially voted against tenure and requested that Dr. Cohen, acting chair of the Department of Molecular Biosciences, provide an update on Dr. Harsay's publications and research grants.

Dr. Cohen responded that Dr. Harsay now had two published articles; and although the third paper had been rejected for publication, Dr. Harsay was planning to resubmit it later that month after making revisions in line with the reviewers' comments.

With regard to pending research grant applications, Dr. Cohen reported that two had been turned down and the third was still pending and should be decided on within a month.

The College Committee then recommended to the University Committee that Dr. Harsay not be promoted, noting Dr. Harsay's two published papers and Dr. Harsay's inability "to successfully compete for significant extramural funding, although she did have two small external grants" from the NIH. This report of Dr. Harsay's grant funding was materially in error to Dr. Harsay's disadvantage on a point of substantial importance in the University's tenure decision.

The matter was then sent to the University Committee. The University Committee requested an update from Dr. Cohen on Dr. Harsay's pending NSF grant application. Dr. Cohen reported that the NSF grant application was still pending. The University Committee recommended to the chancellor that tenure be denied "based upon [Dr. Harsay's] record of research productivity." The University Committee made no other findings in support of its decision.

In the final agency action, the chancellor "decided to accept the recommendation of the University Committee." The chancellor did not specify the basis for the decision to deny tenure.

We could piece together the bases for the chancellor's decision from the analysis of the recommendation of the University Committee if the University Committee had made findings that were specific and

consistent with the record. Such was the case in *Romkes v. University of Kansas*, 49 Kan. App. 2d 871, 888, 317 P.3d 124 (2014). But here, the sole expressed basis for the University Committee's recommendation was Dr. Harsay's "record of research productivity." That record apparently came from the College Committee's recommendation which was based on incorrect information.

We recognize that decisions on tenure involve a "large mix of factors, from the subjective qualities of the candidate to institutional priorities having nothing to do with the candidate." *Pyo v. Stockton State College*, 603 F. Supp. 1278, 1282 (D. N.J. 1985). "[P]ractical considerations make a challenge to the denial of tenure at the college or university level an uphill fight—notably the absence of fixed, objective criteria for tenure at that level." *Blasdel v. Northwestern University*, 687 F.3d 813, 815 (7th Cir. 2012). As a result, courts are loath to interfere in tenure decisions.

If the chancellor had before her the correct information on Dr. Harsay's scholarly works and funded research grants over her years at the University, would the chancellor have made the same decision? The chancellor very well may have arrived at the same conclusion that Dr. Harsay should be denied tenure because of an inadequate record of research productivity. As stated in *Blasdel*, 687 F.3d at 816, "In some academic fields . . . research requires costly laboratories financed by grants from the federal government or from foundations. Proficiency in obtaining grants is a highly valued capability in such fields; and scholars differ in their ability to obtain grants."

But it is not for us to speculate on whether the chancellor's decision would have been different if she had before her a recommendation from the University Committee based on accurate information. Such speculation would turn our court into a "Super-Tenure Review Committee." *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980).

As a result, we see no alternative but to remand this case for further consideration by the University's various tenure committees, starting with the Departmental Committee, based on Dr. Harsay's correct history of research productivity and scholarly works. See *Jones*, 279 Kan. at 142 (citing *Gas Service Co. v. Kansas Corporation Commission*, 4 Kan. App. 2d 623, 626, 609 P.2d 1157, *rev. denied* 228 Kan. 806 [1980]) ("The appropriate remedy for inadequate findings in a final order of an administrative agency is to remand for additional findings of fact and conclusions of law.").

The timing of such an order is admittedly troublesome. This comes over 6 years after the chancellor's decision, and at least part of the delay can be attributed to Dr. Harsay's inaction. An award of tenure has significant ramifications for both the candidate and the educational institution, resulting in something of an academic marriage. The relationship is not a commitment to be entered into lightly or based on a courtship from bygone years. Thus, it would be improvident and unfair to both parties to suggest the decision should now be based simply on a review of the record compiled and considered in 2009 and 2010. Without some further consideration by the University, we would be forced to rely on our own

view of the current record and our sense of the significance of Dr. Harsay's actual research productivity. And this we cannot do. Indeed, it would be the worse available choice.

Rather, the tenure determination should be returned to the initial stage at the departmental level. Dr. Harsay should then supplement the existing materials with a detailed account of her relevant professional activities after leaving the University. Dr. Harsay's candidacy for tenure then may be evaluated through the customary process by academics and administrators regularly charged with that duty, using a base of correct information freshly assembled to facilitate the making of their decision.

Reversed and remanded for further proceedings.



Case 114292 CLERCK OF THE APPELLATE COURTS  
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**IN THE SUPREME COURT OF  
THE STATE OF KANSAS**

No. 114,292

Edina Harsay,  
*Appellant,*

v.

University of Kansas,  
*Appellee.*

**ORDER**

The court has considered and denies Appellant's motion for rehearing or modification.

Appellee's response is noted.

BY ORDER OF THE COURT this 28th day of February 2019.

/s/ Lawton R. Nuss

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LAWTON R. NUSS,  
Chief Justice

Stegall, J., recused.

Appendix C

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **Fourteenth Amendment to the Constitution of the United States, Section 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Standards of Review under the Kansas Judicial Review Act: Kan. Stat. Ann. § 77-621 *et seq.***

#### **77-621. Scope of review.**

(a) Except to the extent that this act or another statute provides otherwise:

- (1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and
- (2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or more of the following:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
  - (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
  - (3) the agency has not decided an issue requiring resolution;
  - (4) the agency has erroneously interpreted or applied the law;
  - (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
  - (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
  - (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
  - (8) the agency action is otherwise unreasonable, arbitrary or capricious.
- (d) For purposes of this section, "in light of the record as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any de-

terminations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

(e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error.