IN THE

# Supreme Court of Wisconsin

OCONOMOWOC AREA SCHOOL DISTRICT,
PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,
RESPONDENT-RESPONDENT-PETITIONER,

AND

GREGORY L. COTA AND JEFFREY M. COTA,
RESPONDENTS-RESPONDENTS.

On Review of the Decision of the Wisconsin Court of Appeals,
District II, Appeal No. 2022AP1158
On Appeal from the Circuit Court of Waukesha County,
Case No. 2021CV1232,
The Honorable Lloyd V. Carter, Presiding Judge

## PETITION FOR REVIEW

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## INTRODUCTION

The Labor and Industry Review Commission hereby petitions the Wisconsin Supreme Court, pursuant to §§ 808.10 and 809.62, Wis. Stats., to review the decision of the Wisconsin Court of Appeals, District II, in *Oconomowoc Area School District v. Labor and Industry Review Commission, et al.,* Case No. 2022AP1158, filed on January 10, 2024 (recommended for publication).

## ISSUES FOR REVIEW

1. Does information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried pursuant to law enforcement authority, for a municipal offense punishable by a forfeiture, constitute an "arrest record" within the meaning of the Wisconsin Fair Employment Act ("the WFEA") and does the WFEA therefore provide protection against terminations that are based upon this information?

The court of appeals raised this issue *sua sponte* and concluded that the WFEA does not afford protection for adverse employment actions based upon an arrest for a civil municipal forfeiture offense (hereafter referred to simply as a "municipal offense"). No party raised this issue before the court of appeals or the circuit court, and the circuit court did not address the issue.

2. If the Court agrees on the first issue presented, a secondary issue is presented as to whether substantial evidence in the record supports the factual finding of the Labor and Industry Review Commission ("LIRC") that the decision of the Oconomowoc Area School District ("the District") to terminate the employment of Jeffrey Cota and Gregory Cota ("the Cotas") was made on the basis of their arrest records, in violation of the WFEA.

The court of appeals did not directly answer this question. Because the court of appeals found that an arrest for a municipal offense does not constitute an "arrest record" for purposes of the WFEA, it accepted the commission's finding that the District terminated the Cotas' employment based upon the information it received related to the municipal theft charges that had been brought against the Cotas, but nonetheless found that the termination did not violate the WFEA.

The circuit court for Waukesha County specifically found that substantial evidence in the record supported the commission's finding that the District's decision to terminate the employment of the Cotas was made on the basis of the arrest records, in violation of the WFEA. The employer's motive in this case is a simple factual question and not one of pressing statewide concern but, if the Court agrees with the commission's interpretation on the first issue presented, the Court should resolve this second issue, which was not

addressed by the court of appeals. Review of the second issue by this Court would promote efficiency and judicial economy.

## STATEMENT OF CRITERIA SUPPORTING REVIEW

This case meets the criteria set out in § 809.62(1r)(c)2., and 3., Wis. Stat., because a decision by this Court will help develop, clarify, or harmonize the law, and

- the first issue presented is a novel one, the resolution of which will have statewide impact, and
- the first issue presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by this Court.

## STATEMENT OF THE CASE

*Nature of the Case, Procedural Status, and Disposition in the Circuit Court and Court of Appeals*

This case is an appeal of chapter 227 judicial review of an administrative agency decision.

Gregory Cota and Jeffery Cota filed claims of arrest record discrimination with the Department of Workforce Development, Equal Rights Division. An evidentiary hearing was held, and the administrative law judge (ALJ) issued a decision, finding that the Cotas had failed to establish by a preponderance of the evidence that the

District had discriminated against them in violation of the WFEA. *App. 94-105.*

The Cotas filed a timely appeal to LIRC, which reviewed the case *de novo* and issued a decision reversing the decision of the ALJ and finding that the District had terminated the employment of Jeffrey Cota and Gregory Cota because of their arrest records, in violation of the WFEA. *App. 77-103.*

The District sought judicial review of LIRC's decision to the circuit court. The circuit court for Waukesha County, by the Honorable Judge Lloyd Carter, found that there was substantial evidence in the record to support LIRC's determination and therefore affirmed the decision. *App. 46-76.* The circuit court issued an Order Denying the Petition for Judicial Review on June 13, 2022. *App. 45.*

The District appealed the decision of the circuit court to the court of appeals. After initial briefing was complete, the court of appeals, *sua sponte*, ordered supplemental briefing on the issue of whether the WFEA provides protection against adverse employment action based upon an arrest record for a municipal offense. On January 10, 2024, the Wisconsin Court of Appeals, District II, issued a decision in which it accepted LIRC's finding that the District terminated the Cotas based upon information regarding their municipal arrest records, but nonetheless reversed the commission's decision because it concluded that the WFEA

provides no protection against terminations based upon arrest record information if that information involves an arrest for a municipal offense. *App. 3-44.*

*Statement of Facts*

The Oconomowoc Area School District is a governmental entity located in Oconomowoc, Wisconsin. Gregory and Jeffrey Cota were employees of the District. Gregory Cota began working for the District as a grounds crew member in 2006 and was later promoted to head of the grounds crew. Jeffrey Cota began working for the District in 2009 as a grounds crew member. Hearing Transcript ("Tr.") pp. 12-14, 140-141.[2] Gregory Cota and Jeffrey Cota are brothers. *Id.* Garret Loehrer began working on the grounds crew for the District in October of 2012, at the recommendation of Gregory Cota. Tr. 5-6.

In April of 2014, following some disagreements between Loehrer and the Cotas, Loehrer asserted to a supervisor that in the fall of 2012, he and Jeffrey and Gregory Cota had delivered scrap materials belonging to the District to a scrap recycling facility, and that after payment for the scrap materials was received, Gregory Cota had distributed the proceeds among the three of them. Tr. at 574.

[2] "Tr." refers to the transcript from the three-day ERD hearing. This transcript has been reproduced in its entirety at *App. 112-843*. For ease of review, references in this brief are to the transcript page numbers.

The allegation was forwarded to Pam Casey, the District's Director of Human Resources. Tr. 277.

On May 8, 2014, the District began a formal investigation into Loehrer's allegation of theft from the District. Tr. 270. The investigation was conducted by Casey and the District's outside counsel, Mark Olson. Casey and Olson interviewed individuals and reviewed documentation regarding the scrap transactions involving the District. The District's investigation revealed that, between September of 2011 and August of 2013, the recycling facility had paid over $10,613.13 to Loehrer, Newman, and the Cota brothers. However, only $4,929.35 had been turned over to the District. The District was not able to account for $5,683.81, which was considered missing. Tr. at 293.

At the close of the District's investigation, Casey completed a thorough report, dated June 19, 2014. The report concluded that it was "clear that the ability of the Administration to determine which employee or employees are responsible for this cash shortfall is limited by the conflicting allegations which have been produced to the District during the course of this investigation." Tr. at 309.

As a result of the District's internal investigation, Loehrer was suspended for thirty working days for his admitted theft of approximately eighty dollars from the District. Jeffrey Cota was given a 3-day unpaid suspension for using the District's truck to transport personal property.

Gregory Cota was given a 3-day suspension, demoted from his position as head of the grounds crew, and his salary was reduced by one dollar per hour, as discipline for his unauthorized use of a District vehicle. Tr. 34-35, 225.

As a result of information gleaned during her investigation, Casey, the Director of Human Resources, formed the belief that Gregory and Jeffrey Cota had kept scrap money belonging to the District. Casey did not, however, believe, based on its internal investigation, that the evidence warranted termination of the Cotas' employment. Tr. 310, 317, 337, 351, 450, 497. After the issuance of its June 2014 report, the District did not continue to interview witnesses. Tr. 488. Although it contends that its investigation remained open, the lack of any additional investigatory action leads to the reasonable conclusion that, for all practical purposes, the District's investigation was complete once it issued its June 2014 report.

After issuing its June 2014 report, the District turned the matter over to the City of Oconomowoc Police Department, which in turn handed the case over to the Town of Oconomowoc Police Department, as the school is located in the township. Tr. 221. Detective Kristen Wraalstad investigated the missing funds. Det. Wraalstad interviewed witnesses and reviewed documentary evidence, just as the District had done during its investigation. Tr. 286-287. At the conclusion of her investigation, Det. Wraalstad

recommended that the Cotas each be issued a municipal citation for theft. Tr. 220-221, 309-310. Accordingly, on May 15, 2015, the Oconomowoc Police Department issued citations for municipal theft to Jeffrey Cota and Gregory Cota. Tr. at 319.

Casey understood that Det. Wraalstad's recommendation of theft charges was based solely on Loehrer's allegation that he and the Cotas had split scrap money on one occasion in 2012. Tr. 305-307. No additional information regarding the Cotas was produced by way of the police investigation. *Id.*

On May 18, 2015, the District placed the Cotas on unpaid suspension. In similar letters suspending both Cotas, Casey explained, "the issuance of the municipal theft citation clearly calls into question the veracity and truth of the statement you made to the school district during our investigation into these thefts." Tr. 319.

Once the citations were issued, District Attorney Jeffrey Ek prosecuted the cases and stayed in touch with the District regarding the cases. The police investigation into the missing funds revealed that the Cotas' supervisor, Matt Newman, had cashed checks that had been issued for the District's scrap materials at a local tavern and kept the proceeds. Tr. 503. The police department shared this information with the District. Tr. 325-327. Newman was charged with disorderly conduct for his theft of funds from

the District and pled guilty. He was given a suspended jail sentence and was ordered to pay a fine and perform community service. Newman resigned from his employment with the District. Tr. 503.

Casey acknowledged that no new facts regarding the Cotas' conduct were unearthed during the police investigation that she had not already considered at the conclusion of her own investigation. The only new fact discovered was that Newman had cashed checks for scrap belonging to the District. Tr. 586-587. On April 26, 2016, prosecutor Ek informed the District that he believed he could settle the case. Ek sought the District's acceptance of the proposed settlement terms. Ek told the District that he believed he could convict the Cotas, but never said what evidence he possessed that he intended to use to do so. Tr. 230-231, 235, 307, 329, 351-352. Ek went on to tell the District that he proposed dismissing the charges against the Cotas in exchange for their payment of $500, which he characterized as "restitution." The District informed Ek that it was in support of the agreement that the prosecutor hoped to reach with the Cotas. Tr. 325-327.

On April 27, 2016, the District terminated the employment of Gregory Cota and Jeffrey Cota, effective April 30, 2016, by way of letters to each which stated, in part, "The District has learned that you were, in fact, guilty of theft of funds from the School District." Tr. at 331. Casey

explained that she formed this belief based on her communications with the prosecutor in the case. Tr. at 331.

Casey, on behalf of the District, decided to discharge Gregory and Jeffrey Cota because they had been cited for theft, and because the prosecutor had told her that he believed he could convict the Cotas and that he anticipated being able to reach a settlement agreement with them in which they would pay restitution, each of which is an element of an "arrest record" within the meaning of the WFEA. Tr. 497.

## REASONS REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS' DECISION CONTAINS AN ERRONEOUS INTERPRETATION OF THE WISCONSIN FAIR EMPLOYMENT ACT THAT CREATES AN ABSURD RESULT AND THAT WILL HAVE STATEWIDE IMPACT IF ALLOWED TO STAND.

The court of appeals decided this case on an issue that was not raised by any party, holding that, although the WFEA prohibits employers from taking adverse action against their employees on the basis of arrest record, the WFEA does not afford protection to workers who are discriminated against on the basis of record of an arrest if the arrest is for a municipal offense that imposes only a forfeiture, as opposed to a felony or misdemeanor. The Wisconsin Fair Employment Act defines arrest record as:

> …information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted and tried for any felony, misdemeanor *or other offense* pursuant to any law enforcement or military authority.

Wis. Stat § 111.32(1) (emphasis added).

The court of appeals noted correctly that the Cotas were charged with an ordinance violation for which the penalty was a forfeiture, and which was not a felony or misdemeanor. The court zeroed in on the phrase "or other offense" to determine whether a person with an arrest record relating to a municipal ordinance violation could be afforded the protections of the WFEA.

Using tortured logic, the court of appeals concluded that a person arrested for theft in Australia, where the labels "felony" and "misdemeanor" are not used in the descriptions of crimes, would be protected in Wisconsin against discrimination based on his or her Australian theft arrest record, but that a person in Oconomowoc, Wisconsin, investigated by a police detective, prosecuted by a City Attorney, and charged with theft under the city code, would not be protected in Wisconsin against discrimination based on the record of his or her theft charges.

> "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent,

> that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect."

*State ex Rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 662 (Wis. 2004).

The plain language of Wis. Stat. § 111.32(1) makes it clear that the phrase "other offense pursuant to any law enforcement or military authority" must refer to something other than a felony or misdemeanor. In Wisconsin, a "crime" is defined as "conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." Wis. Stat. § 939.12. Crimes are limited to felonies and misdemeanors: "A crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor." Wis. Stat. § 939.60. Since all crimes are, by definition, felonies or misdemeanors, the phrase "or other offense" in the definition of an arrest record must, necessarily, mean something *other than* a felony or misdemeanor.

The definition of an arrest record is further limited to include only offenses where an arrest occurs "pursuant to … law enforcement … authority." The definition of arrest record would not include mere allegations of wrongdoing between two individuals, even if pursued in court. For example, LIRC has previously rejected the theory that the issuance of a temporary restraining order against an

individual constituted an "arrest record" because the TRO was not issued pursuant to law enforcement authority:

> The ALJ rejected the complainant's argument, as does the commission. Actions brought for domestic restraining orders are not pursuant to any law enforcement or military authority. They involve one individual suing another to obtain private relief. The complainant points to the fact that if a restraining order is issued the clerk of court shall notify the sheriff or other law enforcement agency of that fact, and law enforcement will have the authority to arrest the respondent if probable cause exists to believe he has violated the order. The very fact that the law enforcement agency's power to arrest arises after the restraining order has issued demonstrates that the TRO itself is not obtained pursuant to a law enforcement authority. The phrase "pursuant to any law enforcement authority" is interpreted to mean that whatever action is taken against an individual (questioning, apprehending, prosecuting, convicting, etc.), civil or criminal, must have been pursued by a governmental agency (local, state, federal) carrying out its authority to enforce some law, not by one individual against another seeking a private remedy.

*Immel v. Arbor Vitae Woodruff School District*, ERD Case No. CR201501501 (LIRC June 27, 2019). *App. 885-892.*

The phrase "or other offense pursuant to any law enforcement" authority must include offenses which are not "crimes" in the statutory sense of that word, but which have indicia of criminality, namely that the individual has a record of entanglement with law enforcement that may lead to an unfair bias against an employee on the basis of the interaction with law enforcement, even though the employee was never convicted. In this case, the Cotas were charged with theft under a local ordinance adopting the state

criminal statute for theft. The conduct they were charged with was punishable as a class A misdemeanor under the state statute, had the charges been filed that way. The charges were pursued by a prosecutor after a citation was issued by the police, following a police investigation. Undoubtedly, the Cotas were each investigated, questioned, and charged with, an "offense pursuant to … law enforcement … authority."

Instead of applying a plain language interpretation of the statute, the court of appeals concluded that the phrase, "or other offense" as used in the WFEA is meant to refer only to criminal cases in jurisdictions that do not use the labels "felony" and "misdemeanor" in their criminal codes but where the offenses are nonetheless considered criminal in the general sense of that term. The commission agrees that such criminal cases, including the hypothetical Australian charges, would be covered by the definition of "arrest record" under the WFEA. However, the same logic must be applied to reach the conclusion that records arising out of charges for a municipal "offense pursuant to … law enforcement … authority" are also covered under the WFEA. Both types of offenses may not meet a narrow statutory definition of "crime" within a particular jurisdiction but both carry the indicia of criminality based on an arrest for the offense, even without a conviction, which necessitates the protection

against discrimination that was legislatively added to the WFEA and that should not be judicially removed from it.

*Black's Law Dictionary, 4th Edition, Revised* (the latest edition available in 1977 when the definition of "arrest record" was added to the Wisconsin Statutes) defines "offense" as:

> A crime or misdemeanor; a breach of the criminal laws. … It is used as a *genus*, comprehending every crime and misdemeanor, or as a *species,* signifying a crime not indictable but punishable summarily by the forfeiture of a penalty.

*Id.* (emphasis added). Given that "other offense" is contained in the phrase, "felony, misdemeanor, or other offense" and therefore must mean something other than felony or misdemeanor, the only meaning that it can have from the dictionary definition is the final one: an act "punishable summarily by the forfeiture of a penalty."

In its decision, the court of appeals noted, "The canon of construction known as *ejusdem generis*, … provides that 'when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed,' *ejusdem generis*, BLACK'S LAW DICTIONARY (10th ed. 2014)."

The court of appeals reasoned that this canon supports a finding that the phrase "or other offense" must mean a crime, as defined in the Wisconsin statutes, given that the first two words in the list ("felony" and "misdemeanor") are both crimes within the State of Wisconsin. It went on to

conclude that the term "other offense" must refer to an offense that would be a crime in Wisconsin but that arose in a different jurisdiction where other words are used to describe offenses that would be considered crimes here.

This explanation is an unnecessarily contorted reading of the plain language of the statute. The phrase "felony, misdemeanor, or other offense pursuant to any law enforcement … authority" should be easily and plainly understood to mean any felony or misdemeanor or other offense similar to a felony or misdemeanor in that it involves law enforcement and is not simply a matter between two private parties. This would include Australian criminal offenses and would also include non-criminal Wisconsin offenses that have indicia of criminality.

The court of appeals' decision has been ordered published, so its incorrect interpretation of the Wisconsin Fair Employment Act will have significant statewide effect beyond this case. This Court should grant review because this case is one that meets the criteria set out in Wis. Stat. § 809.62(1r)(c) 2. and 3. A decision by this Court would correct what LIRC respectfully asserts is the court of appeals' overly-narrow and unworkable interpretation of the definition of "arrest record" which, if allowed to stand, will have absurd and far-reaching results.

In *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21, this Court

ended its former practice of deferring to administrative agencies' legal conclusions. Instead, this Court held that it will give "due weight" to the experience, technical competence and specialized knowledge of an administrative agency. *Tetra Tech*, 2018 WI 75, ¶108. This, the Court explained, is not deference to an agency's interpretation or application of the law, but a matter of persuasiveness. Id. at ¶¶ 78-79. A reviewing court benefits from the agency's analysis, particularly when the statute being interpreted is one the agency was charged with administering and the agency has at least some expertise in the interpretation of the statute. Id. at ¶¶ 84, 73, n.42. In this case, the commission has interpreted the meaning of "other offense" consistently, since the inception of the Act's prohibition on arrest record discrimination, to include municipal offenses.[3] The long history of this interpretation, untouched by

[3] *See*, *Hart v. Wausau Insurance Companies*, ERD Case No. 8401264 (LIRC, April 10, 1987) (finding that an employer's discharge of an employee based on its belief that the employee had been convicted of a municipal ordinance violation for theft constituted a violation of the WFEA); *Lefever v. Pioneer Hi Bred International, Inc.,* ERD Case No. CR20602178 (LIRC May 14, 2010) (finding driving citations for speeding to be substantially related to the circumstances of the job); *Marcin v. Charter Communications LLC.,* ERD Case No. 201201053 (LIRC July 14, 2015) (finding that an employer's suspension of an employee because of arrest for a municipal disorderly conduct ordinance violation was prohibited under the WFEA); *Staten v. Holton Manor*, ERD Case No. CR201303113 (LIRC January 30, 2018) (finding non-criminal ordinance violations for disorderly conduct to be "other offenses"); *Immel v. Arbor Vitae Woodruff School District,* ERD Case No. CR201501501 (LIRC June 27, 2019) (interpreting "other offense pursuant to law enforcement authority" to include civil offenses).

changes from the legislature, supports this Court's due weight consideration of the commission's historical view of the statute's meaning.

## II. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS LIRC'S FACTUAL FINDING THAT THE DECISION OF THE SCHOOL DISTRICT TO TERMINATE THE COTAS' EMPLOYMENT OF WAS MADE ON THE BASIS OF THEIR ARREST RECORDS, IN VIOLATION OF THE WFEA, AND THE MERE FACT THAT THE DISTRICT CONDUCTED AN INTERNAL INVESTIGATION DOES NOT ABSOLVE IT OF LIABILITY FOR DISCRIMINATION ON THE BASIS OF ARREST RECORD.

If this Court concludes that the Cotas' municipal violation was an "other offense" constituting an "arrest record" for purposes of the WFEA, then it should decide whether LIRC's finding that the Cotas were discharged based upon their arrest records was supported by substantial evidence in the record.

The court reviews LIRC's decision – not the ALJ's decision. Administrative law judges conduct hearings on discrimination complaints and make findings and orders. *See* Wis. Stat. § 111.39(4)(a)-(c). LIRC retains the ultimate responsibility, however, for finding the facts and for making decisions under the WFEA. *See* Wis. Stat. § 111.39(5)(b); *Xcel Energy Servs. v.* LIRC, 2013 WI 64, ¶ 56, 349 Wis. 2d 234, 833 N.W.2d 665.

LIRC's findings of fact must be affirmed if they are supported by substantial evidence in the record. *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion after considering all the record evidence. *Id.* Substantial evidence does not mean a preponderance of the evidence. *Id.* An agency's findings of fact may be set aside only when a reasonable fact finder could not have reached the findings from all the evidence before the agency, including the available inferences from that evidence. *Id.*

It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. *Hamilton v. ILHR Dep't*, 94 Wis. 2d 611, 621, 288 N.W.2d 857 (1980). Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. *See Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 2002 WI App 175, ¶29 n. 3, 256 Wis. 2d 941, 649 N.W.2d 356.

The weight and credibility of the evidence are matters for the agency, and not for the reviewing court, to determine. *See Milwaukee Symphony Orchestra*, 2010 WI 33, ¶32; Wis. Stat. § 227.57(6). When more than one inference reasonably can be drawn, the agency's finding is conclusive. *Id.*

In a chapter 227 judicial review proceeding, the burden is on the party seeking to overturn the agency's decision. *See City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). The burden is not on the agency to justify its decision. *Id.* In this case, the District bears the burden of demonstrating why a court should overturn LIRC's decision.

This case turns on a question of motive. The sole issue for LIRC's consideration was why the District discharged the Cotas. In an employment discrimination case, an employer's motivation is a factual determination. *Currie v. State Dep't of Indus., Labor & Human Rels.*, 210 Wis. 2d 380, 390 n.4, 565 N.W.2d 253 (Ct. App. 1997).

After considering all the evidence presented and weighing the credibility of the witnesses, LIRC found that the District's decision to discharge the Cotas was motivated by the Cotas' arrest records and would not have happened without consideration of their arrest records. For purposes of its review the court of appeals accepted, without specifically deciding, the commission's finding that the District terminated the Cotas' employment based upon the information it received related to the municipal theft charges that had been brought against the Cotas, but nonetheless found that the termination did not violate the WFEA because it concluded that the Cotas' records of municipal arrests were not covered by the WFEA. If the

Court finds that arrest records arising out of municipal offenses are covered by the WFEA, it must conclude that the Cotas were discharged because of their arrest records because substantial evidence in the record supports LIRC's factual finding as to the District's motive in this case.

The Court must uphold LIRC's factual determination that the District's decision to discharge the Cotas was based on arrest record if it finds any evidence in the record that a reasonable mind might accept as adequate to support that conclusion. *See Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674.

The decision to discharge in this case was made by Pam Casey, the District's Director of Human Resources. LIRC considered all of the testimony presented in the case and was persuaded by the evidence that the Cotas' arrest records were the motivating factor in her decision. The weight and credibility of the evidence are matters for the agency, and not for the reviewing court, to determine. *Id.* at ¶32; Wis. Stat. § 227.57(6).

LIRC had ample evidence on which to base its finding that the District's decision to discharge was based on the Cotas' arrest records, and not solely on the District's internal investigation.

The District asserts that it made the decision to terminate based on its internal investigation. However,

Casey testified that "at the conclusion of [her] internal investigation" she did not believe that termination was warranted," even though she knew that $4,200 was missing:

> Q Okay. You are not aware of anything in any of the documents that have been presented in the case, including the police reports and your internal investigation, that puts any of the extra $4,200 on the Cota brothers, right?
> A Not specifically.
> Q Okay. Except for the money that Garret says he split?
> A And the petty cash, which is suspicious in my mind.
> Q *But it wasn't suspicious enough in your mind to terminate the Cotas' employment at the conclusion of your internal investigation?*
> A *That's correct.*

Tr. 336-337 (emphasis added).

LIRC's findings of fact must be affirmed if they are supported by substantial evidence in the record, "even if they are contrary to the great weight and clear preponderance of the evidence." *Hoell v. LIRC*, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994). The weight and credibility of the evidence are matters for the agency, and not for the reviewing court, to determine. *See Milwaukee Symphony Orchestra*, 2010 WI 33, ¶32; Wis. Stat. § 227.57(6). When more than one inference reasonably can be drawn, the agency's finding is conclusive. *Id.*

In this case, LIRC had ample evidence, including direct testimony from the District's Director of Human Resources, from which LIRC could reasonably conclude that

the District's decision to discharge the Cotas was based on information that it received from the prosecutor, including his personal belief that he would be successful in convicting them, if he were to go ahead with trial. The motive behind the District's decision to discharge is a question of fact, and one that must be upheld in light of the substantial evidence that LIRC relied upon in reaching that conclusion.

In *City of Onalaska v. LIRC*, 120 Wis. 2d 363, 367, 354 N.W.2d 223 (Ct. App. 1984)[4], the Court held that:

> To discharge an employe *because of* information indicating that the employe has been questioned by law enforcement or military authority is to rely on an assertion by another person or entity. If, as here, the employer discharges an employe *because* the employer concludes from its own investigation and questioning of the employe that he or she has committed an offense, the employer does not rely on information indicating that the employe has been questioned, and therefore does not rely on an arrest record, as defined in sec. 111.325(h), Stats.

*Id.* (emphasis added).

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[4] *City of Onalaska v. LIRC*, 120 Wis. 2d 363, 367, 354 N.W.2d 223 (Ct. App. 1984), the case on which the District's entire defense relies, involved a traffic ticket for "Racing" under § 346.94(4) of the 1979 Wisconsin Statutes. The penalty was a civil forfeiture. *App. 844-846.*

The defense recognized in *Onalaska* is a factual one, not a legal loophole. In that case, the Court simply acknowledged that when the employer discharges an employee because of its own investigation, the discharge is not because of an arrest record. This was a factual finding. The *Onalaska* decision did not create an exception that allows an employer to discharge an employee because of an arrest record simply because the employer also conducted an internal investigation. An employer may avoid liability under the *Onalaska* theory only where the employer's decision to discharge the employee was solely because of the internal investigation and not because of the arrest record.

The critical question which needs to be answered to properly apply *Onalaska* in a case such as this, where an employer has both learned of and about an employee's arrest from the arresting authorities and has learned information about the employee's conduct independently of the arresting authorities, is the question of the employer's motivation. The question is whether the employer made the decision to discharge the employee because of the information it acquired from the arrest and the arresting authorities, or because of the information it acquired through its own investigation independent of the arresting authorities. *Betters v. Kimberly Area Schools*, ERD Case No. 200300554 (LIRC July 30, 2004), *App. 847-867*. In this case, the District made the decision to discharge the

employee because of information it acquired from the arresting authorities, in violation of the WFEA.

The WFEA prohibits discrimination in employment on the basis of arrest record. This prohibition extends to instances where the employer had more than one reason for deciding to act, if one of the reasons was an impermissible reason. In order to prove discrimination under the WFEA, a complainant must prove that a protected characteristic was a "determining factor" in the decision. A "determining factor" is more than "a factor."

In *Hoell v. LIRC*, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994), the Court recognized that it is a violation of the WFEA to make an employment decision which is even in part because of a protected basis. Although different consequences result, depending on whether a decision (1) was based solely on a protected basis, (2) was based in part on a protected basis and would not have been made if based only on neutral factors, or (3) was based in part on a protected basis but would still have been made even if based only on neutral factors, these consequences relate only to the appropriate remedy in each kind of case. In all three kinds of cases, the employer's decision is an act of unlawful discrimination in violation of the WFEA. *Id.*

In the present case, LIRC acknowledged that more than one motive existed for discharging the Cotas, including both information gained as a result of the employer's own

investigation, and information it acquired from the arresting authorities. However, in weighing the evidence, LIRC concluded that the discharge would not have occurred without the impermissible consideration of the Cotas' arrest records:

> "The respondent's own testimony made clear that its decision to terminate the Cotas was the result of information it had received from the prosecutor. Each of the three determinative reasons cited by the respondent for discharging the Cotas was a component of the arrest record. Thus, the respondent's reliance on those three facts in reaching the decision to discharge the Cotas constitutes arrest record discrimination, in violation of the Act."

*App. 87.*

Specifically, LIRC found that the District would not have terminated the employment of the Cotas without being motivated to do so based on their arrest records:

> "As far back as April of 2014, the respondent had formed a belief that the Cotas had retained scrap funds belonging to the District based on its own internal investigation. However, the respondent was not motivated to act on that belief alone. It was not persuaded to discharge the Cotas until it received arrest record information from the prosecutor in 2016."

*Id.*

Because the District's decision was based, at least in part, on the employees' arrest records, the District engaged in illegal discrimination. And because the District would not have reached that conclusion in the absence of the arrest record information, the Cotas are entitled to reinstatement and lost wages as a result of the termination.

## CONCLUSION

Since the Wisconsin Fair Employment Act was amended in 1977 to add "arrest record" to its list of protected classifications, LIRC has consistently applied the provision to all arrest records, including those for felonies, misdemeanors, and forfeitures. Cases involving arrest records arising out of forfeiture offenses have been heard and decided by the court of appeals and were never rejected on the basis that the prohibition on arrest record discrimination does not apply in cases involving forfeitures. The recent decision of the court of appeals upends decades of consistent application of the statute, which has been untouched by the legislature in the wake of these decisions.

The court of appeals set aside LIRC's plain language interpretation of the statute in favor of a tortured analysis that renders an absurd result. The Supreme Court should reject the court of appeals' interpretation and find, instead, that "other offense" includes all offenses charged by law enforcement or military authority that are akin to criminal offenses covered by the statute.

If the Court finds that the municipal charge of theft issued in this case constitutes an "other offense" within the meaning of the Act, then the Court should also consider whether LIRC's factual finding regarding the District's motive in discharging the Cotas is supported by substantial evidence in the record. Review of this second issue would

preserve judicial economy and would allow the court to clarify the limited scope of *Onalaska.* Because LIRC's decision was supported by ample evidence that the District's decision to terminate the Cotas was based, at least in part, on their arrest records, it should be affirmed.

Respectfully submitted,

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## CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this petition for review conforms to the rules for a petition for review contained in § 809.62(2) and (4) and 809.19(8)(b), (bm) and (8g). The length of this petition is 7,016 words.

February 9, 2024

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