

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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TIMOTHY MALCHOW, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0585

Case Type: PA

DECISION NO. 39942

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**Appearances:**

Timothy Malchow, N3672 Red Oak Dr., Campbellsport, Wisconsin, appearing on his own behalf.

Andrea L. Olmanson, Attorney, Department of Corrections, 3099 East Washington Ave., P.O. Box 7925, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On May 16, 2023, Timothy Malchow filed an appeal with the Wisconsin Employment Relations Commission regarding the decision by the State of Wisconsin Department of Corrections (DOC) not to hire him for a Corrections Program Supervisor position. The matter was assigned to Hearing Examiner Katherine Scott.

A telephone hearing was held on July 19, 2023, by Examiner Scott. The parties submitted written arguments on July 28, 2023. On August 7, 2023, Examiner Scott issued a Proposed Decision and Order, affirming that the decision by the DOC not to hire Timothy Malchow was neither an illegal act nor an abuse of discretion. The parties did not submit objections to the Proposed Decision by the deadline given of August 14, 2023.

Being fully advised on the premises, the Commission makes and issues the following:

**FINDINGS OF FACT**

1. Timothy Malchow (Malchow) applied for a position with the State of Wisconsin Department of Corrections (DOC) as a Corrections Program Supervisor at Kettle Moraine Correctional Institution (KMCI).

2. The Corrections Program Supervisor position required case management experience to be well qualified for the position.
3. Malchow did not have any case management experience listed on his resume.
4. Due to Malchow's lack of case management experience, subject matter experts gave Malchow's application a score of 70, and he was not invited to interview for the position.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

### **CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to Wis. Stat. § 230.44 (1)(d).
2. The State of Wisconsin Department of Corrections did not act illegally or abuse its discretion by failing to hire Timothy Malchow.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

### **ORDER**

The State of Wisconsin Department of Corrections' decision not to hire Timothy Malchow is affirmed.

Issued at Madison, Wisconsin, this 24<sup>th</sup> day of August 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Section 230.44(1)(d), Stats., provides that “[a] personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.” An illegal act is one that is contrary to Wisconsin civil service statutes or administrative rules. An abuse of direction is when an agency exercises discretion “to an end or purpose not justified by and clearly against reason and evidence.”

The appellant bears the burden of proof. *See Moeller-Bunker v. DWD*, Dec. No. 36786 (WERC, 5/17). Here, Malchow bears the burden of proving that his non-selection was either illegal (contrary to Wisconsin civil service statutes or administrative rulings) or an abuse of direction (not justified by and clearly against reason and evidence).

Applicants for the Corrections Program Supervisor position submit their resume to the DOC Human Resources Department. Their applications are reviewed by subject matter experts, employees who have done the job or are very familiar with the position. The subject matter experts give applications a score of 100 (“more than acceptable”), 70 (“acceptable”), or non-passing based on whether their resumes meet the position’s qualification criteria. The HR Department then establishes a register of applicants with passing scores and notifies them of their eligibility. The HR Department then sends a list of the five applicants with the highest scores – plus any tying scores – to the hiring institution, which may then invite the applicants to interview for the position.

Malchow had applied for a Corrections Program Supervisor position 18 times. On previous occasions, his resume was given a score of 100, and he was invited to interview for the position. He has never made it past the interview stage.

However, when Mr. Malchow re-applied for the position in 2023, the DOC had updated its criteria for the position to include case management experience. In other words, in order to gain a score of 100 (“more than acceptable”), applicants had to have experience providing case management. Malchow’s resume contains no case management experience, and so his resume was given a score of 70 (“acceptable”). As a result, he was not invited to interview for the position.

If benchmark answers were developed by a panel of well qualified job experts and were not clearly ridiculous or offensive to common sense, they could not be found to be invalid. *York v. DP*, 78-42-PC, 7/18/80. Here, the benchmark answers were developed by Deputy Warden Lisa Reible and Office of Program Services Director Alisha Kraus. The Corrections Program Supervisor would be responsible for supervising social workers, who are themselves responsible for case management, and the position’s qualification criteria was updated to reflect that by requiring case management experience to be well qualified for the position. Since supervisors are better able to manage employees if they are familiar with the type of work the employees are doing,

this requirement is not clearly ridiculous or offensive to common sense. Therefore, the DOC's requirement of case management experience to be well qualified for the Corrections Program Supervisor position cannot be found to be invalid.

Malchow argues that the DOC has interviewed and hired "one or more employees" who have no case management experience for the position. However, he provided no examples of these employees.

Malchow further alleges that DOC hiring is more a matter of networking than qualifications. However, he provided no evidence to support this contention. The DOC, in contrast, provided evidence of an unbiased and thorough hiring process for the Corrections Program Supervisor position.

Since Malchow did not meet the qualification criteria for the position he wished to interview and be hired for, his non-selection was neither illegal nor an abuse of discretion. Given the foregoing, the Commission affirms the DOC's decision not to hire Malchow as a Corrections Program Supervisor.

Issued at Madison, Wisconsin, this 24<sup>th</sup> day of August, 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman