



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/158980

PRELIMINARY RECITALS

Pursuant to a petition filed July 09, 2014, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was held on August 05, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the agency correctly sanctioned Petitioner for a positive drug test when Petitioner has a valid prescription for the only drug for which he tested positive.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Pang Thao-Xiang
Milwaukee Enrollment Services
1220 W Vliet St, Room 106
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Corinne Balter
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner applied for FS benefits on June 17, 2014. In his application Petitioner stated that he had been convicted of a felony drug offense in the last five years.

3. Petitioner received FS benefits from June 17, 2014 through June 30, 2014. Petitioner's monthly FS benefit amount was \$88.
4. Petitioner completed a drug test, which was positive for amphetamines.
5. The agency received the drug test results and on July 7, 2014 sent Petitioner a notice stating that he was being sanctioned for failing the drug test as a felony drug offender. This sanction meant that he was ineligible for FS benefits for one year.
6. Petitioner has a valid prescription for Adderall, an amphetamine, and takes that medication in conformity with his prescription.
7. Petitioner filed a request for fair hearing received by the Division of Hearings and Appeals on July 8, 2014.

DISCUSSION

On November 13, 2013 the Division of Hearings and Appeals sent a proposed decision to the Department of Health Services. That proposed decision addressed the issue of discontinuance of FS benefits because of a failed drug test. In that case that Petitioner also had a valid prescription for opiates, and had tested positive for opiates. The Division concluded that the Petitioner remained eligible for FS benefits because he had a valid prescription for the drugs for which he tested positive. On December 13, 2013 Deputy Secretary of the Department of Health Services adopted that proposed decision as the final order of the agency.

That decision written by ALJ David Fleming stated the following:

If a person has been convicted of a drug-related felony, s/he is ineligible for FoodShare subject to state rules concerning regaining eligibility. 7 C.F.R. §273.11(m). In Wisconsin anyone convicted of a drug-related felony within five years prior to the FS application must pass a drug test to gain eligibility. §49.79(5), Stats; FoodShare Wisconsin Handbook (FSH), §3.19.1. A new applicant can be tentatively approved for FoodShare if s/he agrees to take a drug test but benefits are discontinued if they fail the drug test. *Id.* If the drug test is positive, the person is ineligible for twelve months. If the person refuses to take the test, FoodShare are denied. S/he can reapply and agree to take the drug test. *Id.*, § 3.19.1.1.

□

The agency contends that the literal letter of the policy requires that it discontinue Petitioner's FoodShare eligibility and, though Petitioner was legally using the drugs he tested positive for, the law and policy makes no exception.

While I understand the agency interpretation, it is not logical. As a hypothetical – a person in the end stages of cancer being given morphine for pain by his/her medical team would be disqualified; indeed, any medical care involving a substance that results in a positive drug test would disqualify the individual from receipt of FoodShare.

A final decision is binding on the agency. Wis. Stat. § HA 3.09(13). The Deputy Secretary adopted this proposed decision as the final decision making it a binding decision.

This case is nearly identical to the case discussed in the decision written by ALJ Fleming. Petitioner is a drug felon. He does not dispute that fact, and agreed to take a drug test. The drug test was positive for amphetamines. Petitioner presented proof that a doctor prescribes him Adderall, an amphetamine.

Petitioner's drug test was negative for all other drugs including cocaine, cocaine metabolite, ecstasy, LSD, opiates, and THC.

The agency does not dispute that Petitioner has a valid prescription. Rather the agency continues to apply the literal letter of the policy requiring that it discontinue Petitioner's FS eligibility making no exception for Petitioner's valid prescription.

I would note that courts routinely allow people on bond in criminal cases or on supervision for a criminal drug offense to take medication in conformity with a doctor's prescription. The agency allows drug felons to receive food benefits if the drug felon passes a drug test. The only drug in this Petitioner's system was a drug that a doctor had prescribed him. After the agency adopted the proposed decision from the Division of Hearings and Appeals, the agency should no longer be applying such a literal reading of the state statute, and should apply the reasonable exceptions commonly allowed by Wisconsin courts.

CONCLUSIONS OF LAW

The Petitioner remains eligible for FS as he has a valid prescription for the drug for which he tested positive.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to restore Petitioner's FS eligibility backdated to July 1, 2014 within 10 days of the date of the decision in this matter.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

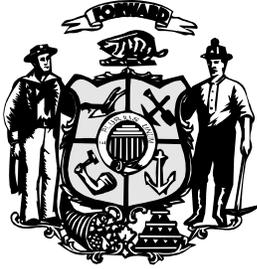
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 13th day of August, 2014

\sCorinne Balter
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on August 13, 2014.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability