



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FOO/163184

PRELIMINARY RECITALS

Pursuant to a petition filed January 12, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Waushara County Human Services in regard to FoodShare benefits (FS), a hearing was held on March 17, 2015. Following the hearing, and due to lingering unanswered questions on the part of ALJ, the the ALJ scheduled further proceedings in order to obtain detailed testimony of the lab director from the lab which conducted the drug test. Those further proceedings were heard on March 26, 2015, at Wautoma, Wisconsin.

The issue for determination is whether the agency erred in sanctioning petitioner from the FS program for a positive drug test.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: [Redacted]
Waushara County Human Services
213 W. Park Street
PO Box 1230
Wautoma, WI 54982-1230

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Waushara County.

2. Petitioner applied for FS on November 19, 2014.
3. Petitioner has a felony drug conviction within the past 5 years of his application.
4. Petitioner underwent drug testing at Options Lab on December 9, 2014. The test yielded a result of 39.9 ng/ml for THC, the active ingredient in marijuana.
5. On December 15, 2014, the agency sent notice to petitioner informing him that he would be sanctioned from the FS program for one year following his positive drug test.
6. Petitioner requested a hearing.

### **DISCUSSION**

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, requires those convicted of a drug felony committed after August 22, 1996 to submit to and pass a random drug test to obtain or retain eligibility for food stamps. Those who fail the tests are ineligible for one year. *FoodShare Wisconsin Handbook*, § 3.19.1. The petitioner is a drug felon who applied for FoodShare on November 19, 2014. A test given on December 12, 2014 indicated a positive result for THC. Applicants who are drug felons convicted within 5 years prior to application, must pass a drug test.

Petitioner argued that the test must have been wrong as he has not used marijuana. Petitioner argued that the positive result was likely because his girlfriend used marijuana near him. The record supports a finding that this result is not a false positive. The agency's witness from the testing lab credibly testified that it would be impossible or nearly so for a person to have this test result due to secondhand marijuana smoke. Petitioner did not present any testimony or other evidence in support of his supposition that the positive result is a false and unreliable result, or that the test is an unreliable test.

While I noted and remain intrigued about the lack of guidance in the federal regulations regarding what quantitative measure should be considered "positive" result, I must recognize that the 39.9 ng/ml result from this test is positive rather than negative in that it reflects the presence of some THC rather than no THC. Based on the record at hearing, the counties of which the lab director was familiar all use the 20 ng/ml threshold as a basis for determining a positive result. Under this threshold, petitioner's test was positive.

If it were established that the test is unreliable or that other Wisconsin counties use a different threshold measure to determine a positive for a FS sanction then I would have been compelled. I played "devil's advocate" in an effort to create a thorough record as ALJ's are required to do. Based on the record in this matter, I have no basis to believe that other counties use a different threshold or that the testing protocol used in this case is unreliable. I must affirm the county action.

### **CONCLUSIONS OF LAW**

The agency has erred in verification procedures, likely causing the loss of benefits to the household; the matter will be remanded for review and re-determination using the drug test results of November 18, 2008, as if provided to the agency on November 1, 2008.

**NOW, THEREFORE, it is**

**ORDERED**

That the matter is remanded to the county agency with instructions to: rescind the action discontinuing the Frey household's FS in November, 2008; accept a copy of the drug test results from the Division of Hearings & Appeals by mail as if received on November 1, 2008; review and re-determine the households eligibility for FS retroactive to November 1, 2008, using the test results as required; and issue all FS to

which the household was otherwise entitled, if any, retroactive to November 1, 2008. These actions shall be completed within 10 days of the date of this Decision.

### CONCLUSIONS OF LAW

**THEREFORE, it is**

**ORDERED**

#### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 17th day of April, 2015

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\sJohn P. Tedesco  
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 April 17, 2015.

Waushara County Human Services  
Division of Health Care Access and Accountability