



## State of Wisconsin DIVISION OF HEARINGS AND APPEALS

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### Clearinghouse Rule 09-101

## PROPOSED RULE MAKING ORDER

### INTRODUCTORY CLAUSE

The Division of Hearings and Appeals proposes an order to amend Chapter HA2 relating to the procedure and practice for corrections hearings before the Division.

### ANALYSIS PREPARED BY THE DIVISION DIVISION OF HEARINGS AND APPEALS

#### Statutes interpreted

Sections 301.035, 302.11(7), 302.113(9), 302.114(9), 938.357(5), 973.10, 973.115(2) and 975.10(2) and ch. 304 authorize the division to conduct administrative hearings and to enter orders revoking or not revoking various types of community supervision by the Department of Corrections. The proposed rule changes relate to the procedures for such hearings.

#### Statutory authority

Section 301.035 (5), Stat., gives the division authority to promulgate its rules of procedure. This chapter applies to corrections hearings under sections 302.11 (7), 973.10, 975.10 (2) and ch. 304, Stats. The procedural rules of general application contained in this chapter also apply to youth aftercare revocation proceedings in any situation not specifically dealt with in ch. DOC 393.

#### Explanation of Agency Authority

If a person on probation supervision violates a condition or rule of probation, Section 973.10(2), Stats. allows the Department of Corrections to initiate a proceeding before the division and allow the division to conduct administrative hearings and enter an order either revoking or not revoking probation. If a person on parole or extended supervision violates a condition or rule of parole or extended supervision, ch. 304, allows the Department of Corrections to initiate a proceeding before the division and allow the division to conduct administrative hearings and enter an order either revoking or not revoking parole or extended supervision. If a juvenile violates a condition or rule of

aftercare status, Section 938.357(5), allows the Department of Corrections to initiate a proceeding before the division and allow the division to conduct administrative hearings and enter an order either revoking or not revoking the aftercare status of a juvenile. The division's rules govern procedures in these hearings.

**Related statute or rule**

Sections 301.035 (5), 302.11 (7), 302.113 (9) (am), 302.114 (9) (am), 938.357 (5), 973.09, 973.10, 973.155, 975.10 (2), and ch. 304.

**Plain language analysis**

Section by section details of this rule order are outlined as follows:

Section 1: HA 2.03 is amended to allow documents to be issued or filed by electronic means as well as personally, United States mail, inter-departmental mail or facsimile transmission. This amendment is to acknowledge the current technology for sending documents and reflects the current procedure of the division.

Section 2: HA 2.04 is amended to allow the secretary of the department of corrections or any person authorized by the secretary to act in his or her stead, to issue a subpoena to require the attendance of witnesses, on behalf of the department of corrections, in any community supervision revocation proceeding. The secretary is authorized by sec. 301.045 to issue subpoenas in corrections matters. This amendment also allows that a department of corrections agent, who is representing the department of corrections at the revocation hearing, to issue subpoenas as has been the regular practice for revocation hearings. Although the division reserves the right to issue subpoenas directly, the agents are in a better position to issue the necessary subpoenas and the division's responsibility should be limited to cases where the division is asked to modify or cancel a subpoena.

Section 3: HA 2.05(1) is amended to delete unnecessary statutory references. This section is also amended to require that reference to any witness statements that will be part of the Department of Correction's evidence shall be included in the notice of the hearing to the offender. This section is also amended to add the word "potential" to the list of evidence and witnesses to reflect that the department may not actually bring this evidence or call these witnesses when the hearing takes place.

Section 4: HA 2.05(3) is amended to allow the client to attend the hearing by electronic means. The next section explains the authority for this change in more detail. This section is also amended to delete the unnecessary reference to the administrative appeal which is addressed in HA 2.05(8).

Section 5: HA 2.05(6) is amended to allow a revocation hearing to take place by video conferencing or by telephone. The ability to conduct revocation hearings by videoconference or telephone is the practice of the division at this time. This allows the hearings to be done in a timely manner even when the number of hearing requests increase, while the number of administrative law judges do not. Videoconference or

telephone hearings satisfy the due process required for revocation hearings. In *Morrissey v. Brewer*, the United States supreme court held that the minimum requirements of due process in relation to a community supervision revocation hearing must include the opportunity to be heard in person and the right to confront and cross-examine adverse witnesses. 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). While *Morrissey* specifically provided for the right to “confront and cross-examine adverse witnesses” absent a showing of good cause, 408 U.S. at 489, 92 S.Ct. 2593, the Supreme Court clarified in *Gagnon* that it “did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence,” 411 U.S. at 782 n. 5, 93 S.Ct. 1756. Given that the Supreme Court held that these types of statements can substitute for live testimony in some cases, it is not “objectively unreasonable” to conclude that it would have approved of videoconferencing. While videoconferencing was not available in the early 1970s, and thus was not contemplated by the Supreme Court in *Morrissey*, it provides a person on community supervision with the right to observe and respond to the testimony of his accuser. Videoconferencing also provides the right to cross examine at the hearing. Moreover, if the parties agree or if there are no factual issues regarding the violations alleged by the department, the person on community supervision will be afforded the required due process by appearing by telephone.

Section 6: HA 2.05(7) is amended to delete unnecessary statutory and administrative rule references. HA 2.05(7)(f)3 is amended to replace the term “parole” with the more inclusive term “community supervision.” HA 2.06(7)(h) is amended to replace the term “hearing” with the term “close of the record” which allows for situations where the record is held open for a specified period of time after the hearing.

Section 7: HA 2.05(8) is amended to allow for an administrative appeal to be dismissed if the opposing party does not receive a timely copy of the appeal which is necessary to allow both parties to participate in an administrative appeal.

Section 8: The title to HA 2.06 is amended to add the term reconfinement to reflect that the division now has the authority to order reconfinement in extended supervision cases under section 302.113(9) and 302.114(9), Stats.

Section 9: HA 2.06(1) is amended to delete unnecessary statutory references. HA 2.06(1) is further amended to add the term reconfinement to this section to reflect that the division now has the authority to order reconfinement in extended supervision cases under section 302.113(9) and 302.114(9), Stats.

Section 10: HA 2.06 (2), (3), (4) and (5) are amended to allow this type of hearing to take place by video conferencing or by telephone. These hearings are normally conducted by telephone. There is no factual dispute in these hearings regarding the alleged violations of community supervision. The only issue in these hearings is the length of incarceration to be determined by the administrative law judge.

Section 11: HA 2.06(6) is amended to delete unnecessary and outdated statutory references. HA 2.06(6)(d) is amended to replace the term “hearing” with the term “close of the record” which allows more time for situations where the record is held open for a specific period of time after the hearing.

Section 12: HA 2.06(7) is amended to delete the requirement for a synopsis which is not required by statute and not the practice of the division. A digital recording of all revocation hearings is available for review when necessary.

Section 13: HA 2.07 is amended to delete the reference to the amount charged per page for transcripts. This amount is outdated and not the correct amount charged by the division. The amount charged is determined by the administrator for the division and can be found in the public notice for access to records and on the internet at <http://dha.state.wi.us/home/RecordsPolicy.htm>.

### **Comparison with federal regulations**

There are no federal regulations governing practice and procedure before the division. While there are procedures for federal parole revocation hearings before the federal parole commission, they are not comparable to the hearings conducted by the division.

### **Comparison with rules in adjacent states**

There are no comparable state regulations governing hearings for revocation of a person’s community supervision by the department of corrections.

### **Summary of factual data and analytical methodologies**

The division has not collected any data nor adopted a methodology in connection with its development of these proposed rule changes. The proposed changes generally are intended to clarify the rules, bring the rules into conformity with applicable practice and update the rules to reflect changes in technology.

### **Analysis and supporting documentation used to determine effect on small business**

The division has not collected any data in connection with its determination of the impact of these proposed rule changes on small business or in preparation of an economic impact report.

### **Effect on Small Business**

This proposed rule does not have a significant effect on small business.

### **Fiscal Estimate**

The division has already substantially reduced travel expenditures by conducting hearings by videoconference or telephone conference that would have been necessary if required to travel in person to each revocation hearing location.

### **Agency Contact Person and Submission of Written Comments**

The division's contact person is Diane E. Norman, Assistant Administrator for the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705; telephone: 608-266-7667; email: DHAmail@wisconsin.gov.

## TEXT OF RULES

SECTION 1. HA 2.03 is amended to read:

### **HA 2.03 Service of documents.**

(1) BY THE DIVISION. The division may ~~serve~~ issue decisions, orders, notices and other documents by first class mail, inter-departmental mail, electronic mail or by facsimile transmission.

(2) BY A PARTY. Unless specified otherwise by law or these rules, mMaterials filed by a party with the division may be ~~serve~~ delivered personally or by first class, certified or registered mail, inter-departmental mail, electronic mail or by facsimile transmission. All correspondence, papers or other materials submitted by a party shall be ~~serve~~provided on the same date by that party ~~onto~~ all other parties to the proceeding. No affidavit of mailing, certification, or admission of service need be filed with the division.

(3) FILING DATE. Materials mailed to the division shall be considered filed with the division on the date of the postmark. Materials submitted personally or by inter-departmental mail or electronic mail shall be considered filed on the date they are received by the division. Materials transmitted by facsimile shall be considered filed on the date they are received by the division as recorded on the division facsimile machine.

SECTION 2. HA 2.04 is amended to read:

**HA 2.04 Witnesses and subpoenas.** An attorney may issue a subpoena to compel the attendance of witnesses under the same procedure as provided by s. 805.07 (1), Stats. The secretary of the department of corrections or any person authorized by the secretary to act in his or her stead, may issue a subpoena to require the attendance of witnesses, on behalf of the department of corrections, in any community supervision revocation proceeding. If a ~~party~~person on community supervision is not represented by an attorney, the division or the administrative law judge may issue subpoenas as provided in ch. 885, Stats.

SECTION 3. HA 2.05(1) is amended to read:

### **HA 2.05 Revocation hearing.**

(1) NOTICE. Notice of a final revocation hearing shall be sent by the division within 5 days of receipt of a hearing request from the department to the client, the client's attorney, if any, and the department's representative. The notice shall include:

(a) The date, time, and place of the hearing;

(b) The conduct that the client is alleged to have committed and the rule or condition that the client is alleged to have violated;

(c) A statement of the rights established under sub. (2);

(d) Unless otherwise confidential or disclosure would threaten the safety of a witness or another, a list of the potential evidence and witnesses to be considered at the hearing which may include reference to:

1. Any documents;

2. Any physical or chemical evidence;

3. Results of a breathalyzer test;

4. Any ~~incriminating~~ statements by the client;

5. Police reports regarding the allegation;

6. Warrants issued; ~~and~~

7. Photographs; and

8. Witness statements.

(e) A statement that whatever information or evidence is in the possession of the department is available from the department for inspection unless otherwise confidential;

(f) In parole revocation cases:

1. The department's recommendation for forfeiture of good time ~~under ss. DOC 302.23 and 302.24~~ and any sentence credit in accordance with s. 973.155, Stats.; or

2. The department's recommendation for a period of reincarceration ~~under s. DOC 302.25~~ and any sentence credit in accordance with statute s. 973.155, Stats.

(g) In extended supervision cases under s. 302.113 (9) (am), Stats., the department's recommended period of ~~incarceration~~ reconfinement.

(h) In extended supervision cases under s. 302.114 (9) (am), Stats., for persons serving a

life sentence, the department's recommended period of time for which the person shall be incarcerated before being eligible for release to extended supervision.

SECTION 4. HA 2.05(3) is amended to read:

**(3) CLIENT'S RIGHTS.** The client's rights at the hearing include:

- (a) The right to ~~be present~~ attend the hearing in person or by electronic means;
- (b) The right to deny the allegation;
- (c) The right to be heard and to present witnesses;
- (d) The right to present documentary evidence;
- (e) The right to question witnesses;
- (f) The right to the assistance of counsel;
- (g) The right to waive the hearing; and
- (h) The right to receive a written decision stating the reasons for it based upon the evidence presented; and
- ~~(i) The right to appeal the decision in accordance with sub. (8)~~

SECTION 5. HA 2.05(6) is amended to read:

**(6) PROCEDURE.**

- (a) The hearing may be closed to the public, may be conducted by video conference and shall be conducted in accordance with this chapter. The hearing may also be conducted by telephone conference if all parties agree, if there is no factual dispute regarding the violations alleged by the department or when the administrative law judge determines that good cause exists to conduct the hearing by telephone conference. ~~The alleged violation shall be read aloud, and a~~All witnesses for and against the client, including the client, shall have a chance to speak and respond to questions.
- (b) The administrative law judge shall weigh the credibility of the witnesses.
- (c) Evidence to support or rebut the allegation may be offered. Evidence gathered by means not consistent with ch. DOC 328 or in violation of the law may be admitted as evidence at the hearing.
- (d) The administrative law judge may accept hearsay evidence.

(e) The rules of evidence other than ch. 905, Stats., with respect to privileges do not apply except that unduly repetitious or irrelevant questions may be excluded.

(f) The department has the burden of proof to establish, by a preponderance of the evidence, that the client violated the rules or conditions of supervision. A violation is proven by a judgment of conviction arising from conduct underlying an allegation.

(g) The administrative law judge may take an active role to elicit facts not raised by the client or the client's attorney, if any, or the department's representative.

(h) Alternatives to revocation and any alibi defense offered by the client or the client's attorney, if any, shall be considered only if the administrative law judge and the department's representative have received notice of them at least 5 days before the hearing, unless the administrative law judge allows a shorter notice for cause.

(i) The administrative law judge may issue any necessary recommendation to give the department's representative and the client reasonable opportunity to present a full and fair record.

SECTION 6. HA 2.05(7) is amended to read:

**(7) DECISION.**

a) The administrative law judge shall consider only the evidence presented in making the decision.

(b) The administrative law judge shall:

1. Decide whether the client committed the conduct underlying the alleged violation;

2. Decide, if the client committed the conduct, whether the conduct constitutes a violation of the rules or conditions of supervision;

3. Decide, if the client violated the rules or conditions of supervision, whether revocation should result or whether there are appropriate alternatives to revocation. Violation of a rule or condition is both a necessary and a sufficient ground for revocation of supervision. Revocation may not be the disposition, however, unless the administrative law judge finds on the basis of the original offense and the intervening conduct of the client that:

a. Confinement is necessary to protect the public from further criminal activity by the client; or

b. The client is in need of correctional treatment which can most effectively be provided if confined; or

c. It would unduly depreciate the seriousness of the violation if supervision were not revoked.

4. Decide, if the client violated the rules or conditions of supervision, whether or not the department should toll all or any part of the period of time between the date of the violation and the date an order is entered, subject to credit according to s. 973.155, Stats.

5. Decide, if supervision is revoked, whether the client is entitled to any sentence credits under s. 973.155, Stats.

(c) If the administrative law judge finds that the client did not violate the rules or conditions of supervision, revocation shall not result and the client shall continue with supervision under the established rules and conditions.

(d) The administrative law judge shall issue a written decision based upon the evidence with findings of fact and conclusions of law stating the reasons to revoke or not revoke the client's supervision. The administrative law judge may, but is not required to, announce the decision at the hearing.

(e) If an administrative law judge decides to revoke the client's parole, the decision shall apply the criteria established in s. HA 2.06 (6) (b) and shall include a determination of:

1. Good time forfeited, if any, ~~under ss. DOC 302.23 and 302.24~~ and, for mandatory release parolees, whether the client may earn additional good time; or
2. The period of reincarceration or reconfinement, if any, ~~under s. DOC 302.25 or,~~

(f) If an administrative law judge decides to revoke a period of extended supervision under s. 302.113 (9) (am), Stats., the administrative law judge shall include a determination of the period of ~~inarceration~~reconfinement taking into consideration the following criteria:

1. The nature and severity of the original offense;
2. The client's institutional conduct record;
3. The client's conduct and behavior while on ~~parole~~community supervision;
4. The amount of ~~inarceration~~reconfinement that is necessary to protect the public from the risk of further criminal activity, to prevent the undue depreciation of the seriousness of the violation or to provide confined correctional treatment.

(g) If an administrative law judge decides to revoke a period of extended supervision for a person serving a life sentence under s. 302.114 (9) (am), Stats., the decision shall consider the criteria established in s. HA 2.05 (7) (f), and shall include a determination of

the period of time for which the person shall be incarcerated before being eligible for release to extended supervision.

(h) The administrative law judge's decision shall be written and forwarded within 10 days after the hearing closing of the record to the client, the client's attorney, if any, and the department's representative. An extension of 5 days is permitted if there is cause for the extension and the administrative law judge notifies the parties of the reasons for it.

(i) The administrative law judge's decision shall take effect and be final 10 days after the date it is issued unless the client or the client's attorney, if any, or the department's representative files an appeal under sub. (8).

SECTION 7. HA 2.05(8) is amended to read:

**(8) APPEAL.**

(a) The client, the client's attorney, if any, or the department representative may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10 days of the date of the administrative law judge's written decision.

(b) The appellant shall submit a copy of the appeal to the other party who has 7 days to respond. An appeal may be dismissed if the other party does not receive a timely copy of the appeal.

SECTION 8. The title of HA 2.06 is amended to read:

**HA 2.06 Good time forfeiture, reconfinement and reincarceration hearings.**

SECTION 9. HA 2.06(1) is amended to read:

**(1) APPLICABILITY.** This section applies to good time forfeiture hearings ~~under ss. DOC 302.23 and 302.24 and~~, reconfinement and reincarceration hearings ~~under s. DOC 302.25~~ when the client ~~has~~ waived his or her right to a final revocation hearing.

SECTION 10. HA 2.06(2), (3), (4) and (5) are amended to read:

**(2) HEARING.** Following receipt of a request from the department for a good time forfeiture or reincarceration hearing, the division shall conduct a hearing at the client's assigned correctional institution or by telephone or video conference to determine the amount of good time to be forfeited or the period of reincarceration. In the case of good time forfeitures for mandatory release parolees, the division shall also determine whether or not good time may be earned on the forfeited good time.

**(3) NOTICE.**

(a) Notice of the hearing shall be sent to the client, the client's agent and the correctional institution.

(b) The notice shall include:

1. The date, time, place of the hearing and the amount of time available for forfeiture or reincarceration, and;

2. A statement of the client 's rights as established under sub. (4).

(4) CLIENT'S RIGHTS. client has the following rights at the hearing:

(a) To be present at the hearing in person or by telephone or video conference;

(b) To speak and respond to questions from the administrative law judge, and;

(c) To present written or documentary evidence.

(5) PROCEDURE.

(a) The hearing shall be closed to the public and may be conducted by video conference. The hearing may also be conducted by telephone conference.

(b) The administrative law judge shall read aloud the department's recommendation and may admit into evidence the client's institutional conduct record, any documents submitted by the department and any written, oral or documentary evidence presented by the client.

SECTION 11. HA 2.06(6) is amended to read:

(6) DECISION.

(a) The administrative law judge shall consider only the evidence presented at the hearing in making the decision.

(b) The following criteria shall be considered by the administrative law judge in determining the amount of good time forfeited or the period of reincarceration:

1. The nature and severity of the original offense;

2. The client's institutional conduct record;

3. The client's conduct and behavior while on parole;

4. The amount of good time forfeiture or the period of reincarceration or reconfinement that is necessary to protect the public from the risk of further criminal activity, to prevent

the undue depreciation of the seriousness of the violation or to provide confined correctional treatment.

(c) The administrative law judge shall decide:

1. ~~In the case of good time forfeiture hearings under ss. DOC 302.23 and 302.24,~~ ~~Whether~~ Whether good time should be forfeited, the amount of such forfeiture and, for mandatory release parolees, whether or not good time may be earned on the amount forfeited, or;
2. In the case of reincarceration hearings ~~under s. DOC 302.25,~~ the period of reincarceration.
3. In either case, sentence credit in accordance with s. 973.155 (1), Stats.

(d) The administrative law judge's decision shall be written and forwarded within 10 days after the hearing closing of the record to the client, the department's representative and the correctional institution.

(e) The administrative law judge's decision shall take effect and be final 10 days after the date it is issued unless the client or the department files an appeal under sub. (7).

SECTION 12. HA 2.06(7) is amended to read:

(7) APPEAL. The client or the department may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10 days of the date of the administrative law judge's written decision. ~~If an appeal is filed, the administrative law judge shall prepare a synopsis of the testimony and forward it to the administrator for review. The synopsis may be either written or electronically recorded.~~ The appellant shall submit a copy of the appeal to the other party who has 7 days to respond.

SECTION 13. HA 2.07 is amended to read:

**HA 2.07 Transcripts.** Hearings shall be recorded electronically. The division shall prepare a transcript of the testimony only at the request of a judge who has granted a petition for certiorari review of a revocation decision or upon prepayment of the cost of transcription of the record ~~billed at \$2.50 for each page of transcribed material.~~ The amount charged for each page of transcribed material shall be determined by the administrator and will be published in the public notice for access to records displayed at all division offices and on the internet at <http://dha.state.wi.us/home/RecordsPolicy.htm>. Any party may also record the hearing at his or her own expense.