

Report From Agency

WISCONSIN DEPARTMENT OF CORRECTIONS

**PROPOSED RULE MAKING ORDER
CR 10-125**

INTRODUCTORY CLAUSE

The department of corrections proposes to repeal and recreate ch. DOC 331, relating to the revocation of probation, parole, or extended supervision.

TEXT OF RULE

SECTION 1. DOC 331 is repealed and recreated to read:

Chapter DOC 331

PROBATION, PAROLE, OR EXTENDED SUPERVISION

REVOCAION PROCEDURES

- DOC 331.01 Authority and applicability
- DOC 331.02 Definitions
- DOC 331.03 Violation of supervision
- DOC 331.04 Notice
- DOC 331.05 Preliminary hearing
- DOC 331.06 Final revocation hearing
- DOC 331.07 Waived revocation hearing
- DOC 331.08 Termination of revocation proceedings
- DOC 331.09 Concurrent criminal prosecution and acquittal in criminal proceeding
- DOC 331.10 Records
- DOC 331.11 Special revocation procedures
- DOC 331.12 Harmless error
- DOC 331.13 Post revocation hearing to determine good time forfeiture, reincarceration or reconfinement time

DOC 331.01 Authority and applicability. (1) These rules are promulgated under the authority of s. 227.11, Stats. They interpret ss. 302.11, 302.113, 302.114, 302.335, 304.02, 304.06, 961.47, 971.17, and 973.10, Stats.

(2) This chapter applies to offenders on probation, parole, and extended supervision in the legal custody of the department.

DOC 331.02 Definitions. The definitions in s. DOC 328.03 apply to this chapter. In addition, in this chapter:

(1) “Magistrate” means a supervisor or supervisor’s designee who has not been directly involved in the decision to initiate proceedings to revoke the offender’s supervision.

(2) "Reviewing authority" means the division of hearings and appeals in the department of administration, upon proper notice and hearing, or the department of corrections, if the offender waives a hearing.

DOC 331.03 Violation of supervision. (1) INVESTIGATION. The department shall investigate the facts underlying an alleged violation of supervision and shall meet with the offender to discuss the allegation within a reasonable period of time after becoming aware of the allegation.

(2) RECOMMENDATION. After investigation and discussion under sub. (1), the agent and supervisor shall do one of the following:

(a) Take no action because the allegation is unfounded.

(b) Resolve alleged violations by any of the following:

1. A review of the rules of supervision followed by changes in them where necessary or desirable, including return to court.

2. A formal or informal counseling session with the offender to reemphasize the necessity of compliance with the rules or conditions.

3. A formal or informal warning that further violation may result in a recommendation for revocation.

4. Implementation of an alternative to revocation.

(c) Recommend revocation for an alleged violation.

DOC 331.04 Notice. Within a reasonable time after a determination under s. DOC 331.03 (2) (c), the department shall provide the offender with written notice that the department has recommended revocation. The notice shall contain all of the following:

(1) A statement describing the alleged violation and the rule violated.

(2) The offender's hearing rights, including the right to waive the hearing.

(3) The amount of any time available for good time forfeiture, reincarceration, or reconfinement.

(4) The amount of time recommended by the agent for good time forfeiture, reincarceration, or reconfinement.

DOC 331.05 Preliminary hearing. (1) REQUIREMENT. When revocation is initiated, a magistrate shall conduct a preliminary hearing in accordance with this section to determine whether there is probable cause to believe that the offender violated a rule or a condition of supervision.

(2) EXCEPTIONS. A preliminary hearing need not be held if one of the following is true:

(a) The offender waives the right to a preliminary hearing in writing.

(b) The offender has given and signed a written statement which admits a violation.

(c) There has been a finding of probable cause in a felony matter and the offender is bound over for trial for the same or similar conduct.

(d) There has been an adjudication of guilt by a court for the same or similar conduct.

(e) The offender is not being held in custody under the department's authority.

(f) There has been a finding of probable cause for the same or similar conduct by a court or magistrate in another state.

(3) NOTICE OF PRELIMINARY HEARING. Written notice shall be given to the offender and either the offender's attorney or the state public defender. The notice shall include all of the following:

- (a) The rule or condition that the offender is alleged to have violated.
- (b) A statement that the offender has a right to a preliminary hearing to determine if there is probable cause to believe the offender has violated a rule or condition of supervision.
- (c) A statement that the offender has the right to waive the preliminary hearing.
- (d) A statement that the offender has a qualified right to be represented by an attorney at the preliminary hearing.
- (e) A statement that the offender or offender's attorney, if applicable, may review all relevant evidence to be considered at the preliminary hearing, except evidence that is determined to be confidential.
- (f) An explanation of the possible consequences of any decision.
- (g) An explanation of the offender's rights which shall include all of the following:
 - 1. The right to be present.
 - 2. The right to deny the allegation.
 - 3. The right to present relevant evidence, including witnesses who can give relevant information regarding the violation of the rules or conditions of supervision.
 - 4. The right to receive a written decision stating the reasons for the decision based on the evidence presented.

(4) TIME AND PLACE. The preliminary hearing shall take place as close as feasible to the area of the state in which the alleged violation occurred. It shall take place not sooner than one working day and not later than 5 working days after receipt by the offender of the notice of the preliminary hearing.

(5) QUALIFIED RIGHT TO AN ATTORNEY. If an attorney fails to appear at the preliminary hearing to represent the offender, the magistrate may either proceed with the hearing or postpone the hearing. The hearing shall be postponed to permit representation by an attorney if the offender, after being informed of his or her right to representation, requests an attorney based on a timely and plausible claim that he or she did not commit the alleged violation and the magistrate concludes either that the complexity of the issues will make it difficult for the offender to present his or her case or that the offender is otherwise not capable of speaking effectively for himself or herself.

(6) DECISION. (a) After the preliminary hearing the magistrate shall issue a written decision stating findings, conclusions and reasons for the decision. The decision shall be based on the evidence presented.

(b) The magistrate shall provide copies to the offender within a reasonable time after the preliminary hearing.

(c) If probable cause was found, the division of hearings and appeals shall be contacted in writing to request the scheduling of a final revocation hearing.

(d) If no probable cause was found the revocation process terminates without prejudice.

(7) DETENTION PENDING FINAL HEARING. (a) When there is a preliminary hearing, the magistrate shall decide if the offender is to be detained pending the outcome of the final hearing. When a preliminary hearing is not required because the case meets one of the criteria under sub. (2), a supervisor shall make the detention decision.

(b) The magistrate or supervisor shall consider factors including the following:

- 1. The offender is believed to be dangerous.
- 2. The offender is likely to flee.

3. The offender is likely to engage in criminal behavior before the revocation takes place.

4. The offender is likely to engage in an activity that does not comply with the rules and conditions of supervision.

5. The length of the term to be served upon revocation is great.

(c) A detained offender is not eligible for release during working hours or for any other partial release from detention.

(d) The detention decision made pursuant to par. (b) shall remain in effect until one of the following occurs:

1. The decision of the administrative law judge becomes final.

2. The offender is reinstated.

3. The violation warrant is vacated by the department.

(e) If the department requests review of the administrative law judge's decision, the custody decision made pursuant to par. (b) shall remain in effect.

(f) The secretary may alter the custody decision at any time if the public interest warrants it.

(8) REISSUANCE OF NOTICE. (a) If notice of the preliminary hearing is found to be improper and the impropriety in itself results in the dismissal of the revocation proceedings, the department may issue a proper notice and begin the proceedings again.

(b) If a magistrate decides that there is no probable cause to believe the offender committed the violation and later the department learns of additional relevant information regarding the alleged violation, revocation proceedings may be started again with issuance of a new notice for the preliminary hearing.

DOC 331.06 Final revocation hearing. A final revocation hearing of an offender's supervision shall take place in accordance with procedures set forth in ch. HA 2.

DOC 331.07 Waived revocation hearing. (1) An offender may waive in writing the right to revocation hearing.

(2) The agent shall prepare and send the waiver and a record of documents supporting the recommendation for revocation to the secretary for decision within a reasonable period of time.

(3) The secretary shall issue a written decision to the offender, the offender's attorney, if applicable, the agent, and the supervisory staff member who recommended revocation within 10 days of receipt of the recommendation.

(4) The offender may withdraw a waiver prior to the secretary's decision if the offender establishes that it was not knowingly, voluntarily, or intelligently made.

DOC 331.08 Termination of revocation proceedings. (1) A supervisor may recommend to the regional chief that revocation proceedings be terminated at any time before the administrative law judge's decision is issued.

(2) The regional chief shall determine if there is sufficient basis for terminating the revocation proceedings.

DOC 331.09 Concurrent criminal prosecution and acquittal in criminal proceeding. Any revocation actions under this chapter may proceed regardless of any concurrent prosecution of the offender for the conduct underlying the alleged violation. An acquittal in a criminal proceeding for an offender's conduct underlying an alleged violation shall not preclude revocation of that offender's supervision for that same or similar conduct.

DOC 331.10 Records. A summary of all alleged violations, revocation actions, and proceedings under this section against an offender shall be maintained in the offender's record.

DOC 331.11 Special revocation procedures. All offenders under supervision by the department are subject to revocation under ss. DOC 331.03 to 331.10 except for an offender committed under s. 961.47, Stats. For an offender committed under 961.47, Stats., an agent shall proceed under s. DOC 331.03 (1) and (2) and shall, upon the approval of a supervisor, notify the committing court of the alleged violation and submit a report to the court within a reasonable time after becoming aware of the alleged violation. The court shall decide if the offender shall remain on probation under s. 961.47, Stats.

DOC 331.12 Harmless error. The secretary may deem a failure to comply with a requirement under this chapter as harmless error if it does not prejudice a fair proceeding or disposition.

DOC 331.13 Post revocation hearing to determine good time forfeiture, reincarceration or reconfinement time. (1) APPLICABILITY.

(a) Good time forfeiture hearings apply to offenders who, before June 1, 1984, committed the crime for which they were sentenced to a period of incarceration in the Wisconsin state prison and chose not to have 1983 Wis. Act 528 apply.

(b) Reincarceration hearings apply to offenders who, between June 1, 1984, and December 30, 1999, committed the crime for which they were sentenced to a period of incarceration in the Wisconsin state prison and to any other offender who chose to have 1983 Wis. Act 528 apply, except offenders sentenced under s. 973.01, Stats.

(c) Reconfinement hearings apply to offenders who, on or after December 31, 1999, committed the crime for which they received a bifurcated sentence under s. 973.01, Stats.

(2) HEARING. The offender is entitled to a hearing under sub. (1) (a) (b) or (c) to determine the amount of good time to be forfeited, or the amount of reincarceration or reconfinement time to be served.

(3) WAIVER. The offender may waive, in writing, the right to a hearing. The waiver may be withdrawn by the offender prior to the decision if the offender establishes that it was not knowingly, voluntarily, or intelligently made.

(4) AMOUNT OF TIME AVAILABLE. The agent shall notify the reviewing authority of the amount of good time available for forfeiture, or the amount of reincarceration or reconfinement time available.

(5) CRITERIA. (a) The agent shall recommend to the reviewing authority that a specific amount of good time be forfeited under sub. (1) (a), and whether good time should be earned upon the forfeited good time. Under sub. (1) (b) and (c), the agent shall recommend a specific period of reincarceration or reconfinement. The amount of time shall be expressed in terms of days, months or years. The agent shall include the reasons and facts consistent with the criteria listed in par. (b) that support the recommendation.

(b) The agent shall consider all of the following:

1. The nature and severity of the original offense.
2. The offender's institution conduct record.
3. The offender's conduct and behavior while on supervision.
4. The amount of time left before mandatory release if the offender is a discretionary release parolee.
5. The amount of time necessary to meet the goals and objectives of supervision under ch. DOC 328.
6. The amount of time necessary to protect the public from the offender's further criminal activity, to prevent depreciation of the seriousness of the violation or to provide a confined correctional treatment setting.
7. Other mitigating or aggravating circumstances.

SECTION 2. DOC 331 Appendix is repealed.

RULE SUMMARY

A. Statute interpreted: ss. 302.11, 302.113, 302.114, 302.335, 304.02, 304.06, 961.47, 971.17, and 973.10, Stats.

B. Statutory Authority to Promulgate the Rule: s. 227.11, Stats.

C. Explanation of agency authority:

The department of corrections is responsible for the supervision of offenders who are on probation, parole, or extended supervision. As part of its responsibility of supervising offenders, the department may initiate revocation procedures for those offenders who violate the rules or conditions of community supervision. This chapter addresses revocation procedures.

D. Related statute or rule: Chapter 328, community supervision of offenders

E. Plain Language Analysis:

This rule:

1. Reorganizes and renumbers the chapter.
2. Updates terminology, including references to extended supervision.
3. Creates definitions for the terms: magistrate and reviewing authority.
4. Clarifies the investigatory process the department follows when an offender is believed to have violated the conditions or rules of supervision.

5. Creates a section requiring notice to an offender for whom revocation of community supervision is being recommended following investigation into alleged violations of the conditions or rules of supervision.
6. Clarifies the provision regarding the process for preliminary hearing.
7. Creates a provision which states that the final revocation hearing is conducted by the division of hearings and appeal in the department of administration.
8. Creates a provision which clarifies the process to be followed when an offender waives his or her right to a revocation hearing.
9. Clarifies the process for termination of revocation procedures.
10. Clarifies the impact of concurrent criminal prosecution on revocation procedures.
11. Clarifies the special revocation procedures for an offender committed under s. 961.47, Stats.
12. Clarifies the provision addressing harmless error.
13. Clarifies the procedure to be followed for determining good time forfeiture, reincarceration or reconfinement time.
14. Incorporates the provision addressing reincarceration into the provision which addresses the procedure for determining good time forfeiture and reconfinement time.
15. Removes the provision which addressed tolled time from chapter DOC 331 (s. DOC 331.15). The provision is being recreated in the revised chapter DOC 328 (s. DOC 328.25). Chapter DOC 328 is currently being revised and is being submitted to the legislature contemporaneously with chapter DOC 331. The department does not expect any administrative lapse since both rule revisions will go into effect at the same time.
16. Removes the provision which addressed reinstatement from chapter DOC 331 (s. DOC 331.16). The provision is being recreated in the revised chapter DOC 328 (s. DOC 328.26). Chapter DOC 328 is currently being revised and is being submitted to the legislature contemporaneously with chapter DOC 331. The department does not expect any administrative lapse since both rule revisions will go into effect at the same time.
17. Repeals chapter DOC 331 appendix.

F. Summary of and Comparison with Existing or Proposed Federal Regulations that are intended to address the activities to be regulated by the proposed rule:

There are no federal regulations which address the activities proposed to be regulated by the proposed rule.

G. Comparison of similar rules in adjacent states (Illinois, Iowa, Michigan, and Minnesota)

1. Illinois:

Definitions: The Illinois Administrative Code does not include specific definitions for parole, probation, or extended supervision revocation. However, the code uses the terms “probation” and “parole.”

Violation Determination: Unlike Wisconsin's parole revocation determination procedure, 20 Ill. Adm. Code 1610.140 does not include a pre-revocation investigation and discussion procedure as outlined in DOC 331.05. Illinois also lacks the specific alternatives to revocation enumerated in DOC 331.03(2), including a review of the rules of supervision, formal and informal counseling sessions, formal and informal warnings, or other alternatives to revocation. In contrast to Wisconsin, if the panel determines that a parole violation has occurred, it may either order that parole be continued with or without modifying or enlarging the conditions of the parole agreement or parole the offender to a halfway house.

Hearing Procedure: Similar to the preliminary hearing procedure in Wisconsin, pursuant to 20 Ill. Adm. Code 1610.140(a), a parolee may appear at the hearing and speak in his own behalf and may bring letters, documents, or individuals who can give relevant information to the hearing officer. In Illinois, however, on request of the parolee, persons who have given adverse information on which parole revocation is to be based shall be made available for questioning in his presence. If the hearing officer determines that the informant would be subjected to risk or harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination. The Illinois Code also states that the hearing officer shall not be bound by strict rules of evidence

20 Ill. Adm. Code 1610.140(c) dictates that an offender has the right to counsel at the preliminary hearing and revocation hearing. In contrast to Illinois, the right to counsel at such hearings in Wisconsin is not absolute. As stated in DOC 331.05(7) the magistrate presiding over the hearing may postpone the hearing to permit representation by an attorney if the offender, after being informed of his or her right to representation, requests an attorney. The request must be based on a timely and plausible claim that the offender did not commit the alleged violation, and the magistrate must conclude either that the complexity of the issues will make it difficult for the offender to present his or her case or that the offender is otherwise not capable of speaking effectively for himself or herself.

20 Ill. Adm. Code 1610.140(f) includes a uniquely detailed explanation of the subpoena process for revocation hearings that DOC 331 lacks. Under this section, the Prisoner Review Board or parolee may request by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under investigation or hearing. The attendance of witnesses and the production of documentary evidence may be required from any place in the state to a hearing location within 150 miles of the place where the violation is alleged to have occurred. Witnesses summoned by subpoena are required to be paid the same fees and mileage that are paid witnesses in the circuit courts of the state. Failure to obey such an order may be punished by that court as a contempt of court.

Under DOC 331.08 a supervisor may recommend to the regional chief that revocation proceedings be terminated at any time before the administrative law judge's decision is issued. The regional chief shall determine if there is sufficient basis for terminating the revocation proceedings.

DOC 331.09 makes clear that revocation actions may proceed regardless of any concurrent prosecution of the offender for the conduct underlying the alleged violation. An acquittal in a criminal proceeding for an offender's conduct underlying an alleged violation shall not preclude revocation of that offender's supervision for that same or similar conduct.

Sentence Calculation: Unlike in Wisconsin, Illinois includes a specific provision that offenders adjudicated under the code in effect prior to February 1, 1978 are recommitted for that portion of the imposed maximum term of imprisonment or confinement which had not been served at the time of parole, and, in addition, the parole term less the time elapsed between the parole of the person and the commission of the violation for which parole was revoked, less "good time." Offenders are given credit against the term of recommitment for time spent in custody since parole began which has not been credited against another sentence or period of confinement. If an offender violates mandatory supervised release, he will be reconfined for the unserved portion of the mandatory supervised release period, plus any good time (not to exceed one year) revoked on account of the violation.

In Wisconsin, reincarceration hearings apply to offenders who, between June 1, 1984, and December 30, 1999 committed the crime for which they were sentenced to a period of incarceration and to any other offender who chose to have 1983 Wis. Act 528 apply, except offenders sentenced under s. 973.01. Reconfinement hearings apply to offenders who, on or after December 31, 1999, committed the crime for which they received a bifurcated sentence under s. 973.01. Moreover, DOC 331 states specifically that the offender is entitled to a hearing under sub. (1) (a) (b) or (c) to determine the amount of good time to be forfeited, or the amount of reincarceration or reconfinement time to be served.

Finally, DOC 331.05(9) includes detailed provisions regarding the requirement of and procedure for detention pending a final hearing, while the Illinois Code does not.

2. Iowa:

Definitions: Iowa's Administrative Code does not include specific definitions in connection with parole, probation, or extended supervision revocation. Many of the requirements and procedures in connection with parole violations are enumerated in the Iowa Annotated Statutes, Chapter 908.

Violation Determination:

Pursuant to 201-45.4(1), the district department may at any time report violations of the conditions of parole to the board of parole. Within 10 calendar days of receipt of knowledge of the commission of certain violations, the supervising officer shall make written report to the board of parole of the violations. The report shall include a recommendation or revoke parole or continue the person on parole. When the subject of the report is the commission of a new offense, the supervising officer may withhold recommendation until disposition of the charges in district court. The violations include violation of any federal or state law (simple misdemeanors need not be reported), any violent or assaultive conduct, possession, control, or use of any firearms, imitation firearm, explosives, or weapons as defined in federal or state statutes, possession, continual or problem use, transportation or distribution of any narcotic or other controlled substance, or repeated excessive use of alcohol by the parolee, a parolee whose whereabouts are unknown and has been unavailable for contact for 30 days, or reliable information has been received indicating that the parolee is taking flight or absconding, any behavior indicating the parolee may be suffering from a mental disorder which impairs the parolee's ability to function in the community or which makes the parolee a danger to self or others when the mental disorder cannot be adequately treated while in the community, or other conduct or pattern of conduct in violation of the conditions of parole deemed sufficiently serious by the parole officer. The parole officer or supervisor is authorized to dispose of any other parolee misconduct not required to be reported above.

The Iowa Annotated Statutes, Chapter 908.1 states that a parole officer who has probable cause to believe that a person released on parole has violated the parole plan or the conditions of parole may arrest such person, or the parole officer may make a complaint before a magistrate regarding the violation. If it appears from the complaint or from affidavits filed with it that there is probable cause to believe that the offender has violated the parole plan or the terms of parole, the magistrate shall issue a warrant for the arrest of such person. Moreover, if a parole officer has newly discovered evidence which indicates that a person released on parole should not have been granted parole originally, the officer must present the evidence to the board of parole, and the board may issue an order to rescind the parole.

Iowa law includes the specific provision that if the court revokes the probation of a defendant who received a deferred judgment and imposes a fine, the court shall reduce the amount of the fine by an amount equal to the amount of the civil penalty previously assessed against the defendant pursuant to section 907.14. However, the court shall assess any required surcharge, court cost, or fee upon the total amount of the fine prior to reduction pursuant to this subsection.

Hearing Procedure: Section 908.3 of the Iowa Compiled Statutes makes clear that parole revocation hearings must be held in any county in the same judicial district in which the alleged parole violator had the initial appearance or in the county from which the warrant for the arrest of the alleged parole violator was issued. Moreover, the code specifically requires that such a hearing be conducted by an administrative parole judge who is an attorney. DOC 331 does not include these specific requirements.

Parole violators in Iowa have the right to counsel at parole revocation hearings, pursuant to Section 908.2. However, similar to Wisconsin, the following circumstances must apply: 1) the alleged parole violator lacks skill or education and would have difficulty presenting the alleged parole violator's case, particularly if the proceeding would require the cross-examination of witnesses or would require the submission or examination of complex documentary evidence 2) the alleged parole violator has a colorable claim the alleged violation did not occur, or there are substantial reasons that justify or mitigate the violation and make any revocation inappropriate under the circumstances.

Under Iowa law, a contract attorney with the state public defender may be appointed to represent the alleged parole violator. If a contract attorney is unavailable, an attorney who has agreed to provide these services may be appointed. The appointed attorney shall apply to the state public defender for payment in the manner prescribed by the state public defender. DOC 331 does not include this specific provision regarding appointed counsel.

As in Wisconsin, the Iowa Code allows offenders the right to appeal the revocation of their parole. On appeal or review of the administrative parole judge's decision, the board panel has all the power which it would have in initially making the revocation hearing decision.

Sentence Calculation: In Iowa, if an offender violates his parole by committing a felony, his term of imprisonment as a parole violator is the same as that provided in cases of revocation of parole for violation of the conditions of parole. The new sentence shall be served consecutively with the term imposed for the parole violation, unless a concurrent term of imprisonment is ordered by the court. Similarly, DOC 331.09 provides that any parole revocation actions may proceed regardless of any concurrent prosecution of the offender for the conduct underlying the alleged violation. An acquittal in a criminal proceeding for an offender's conduct underlying an alleged violation does not preclude revocation of that offender's supervision for that same or similar conduct.

In Iowa, if a violation of parole is established, the administrative parole judge has discretion to continue the parole with or without any modification of the conditions of parole. The judge may revoke the parole and require the parolee to serve the sentence originally imposed, or may revoke the parole and reinstate the parolee's work release status.

DOC 331.13 differs slightly from the above. Under the section, an offender's parole agent will recommend a specific period of reincarceration in terms of days, months or years. In making the recommendation, the agent considers the nature and severity of the original offense, the offender's institution conduct record, the offender's conduct and behavior while on supervision, the amount of time left before mandatory release if the offender is a discretionary release parolee, the amount of time consistent with the goals and objectives of supervision under DOC 328, the amount of time necessary to protect the public from the offender's further criminal activity, to prevent depreciation of the seriousness of the violation or to provide a confined correctional treatment setting, and other mitigating or aggravating circumstances.

H. Michigan:

Definitions: Michigan includes some specific definitions in R 791 which differ from Wisconsin's. Pursuant to R 791.7740 "arrest" means either "the placement of a parolee in custody solely for a parole violation" or "the retention in custody of a parolee who has been held on a criminal charge and who has posted bond on that charge and is now held solely as a parole violator." The provisions of the Wisconsin Administrative Code regarding parole, probation, and extended supervision do not define the term arrest. However, the term "physical custody," used in a similar manner, is defined as "actual custody of the person in the absence of a court order granting custody to the physical custodian."

Violation Determination: Under R 791.9930, a probation agent shall petition the sentencing court for a probation revocation hearing when instructed to do so by the court or when the agent believes that revocation is necessary. Such a petition must contain a statement of the specific condition allegedly violated and a brief description of the circumstances of the alleged violation. The probation agent must provide the probationer with a copy of the petition not less than 24 hours before the scheduled hearing. The probation agent shall file a probation violation report with the sentencing court within a reasonable time before the hearing. The report must contain a full description of the alleged violation and the circumstances surrounding it and a summary of the probationer's development and adjustment while on probation. DOC 331.04 requires that a parole violation notice contain more detailed information, including the amount of time recommended and available for good time forfeiture, reincarceration, or reconfinement. Moreover, it only requires that the offender be provided written notice that the department has recommended revocation within a "reasonable time" after the violation determination.

Hearing Procedure: Similar to Wisconsin's qualified right of representation, Michigan Administrative Code R 791.7745 provides that the offender has the right to be represented by counsel at a preliminary revocation hearing as long as 1) the offender requests counsel not less than 24 hours before the hearing, and the parolee has made a claim of innocence which is plausible but may be difficult to prove, 2) there might be substantial reasons which justify or mitigate the violation, which make revocation inappropriate, and which are complex or otherwise difficult to present or 3) the accused is mentally unable to properly present a defense. In all cases where a request for counsel is denied, the grounds for refusal shall be stated in the written report of the hearing.

R 791.7740(2) specifically states that when a parolee is being held on a criminal charge which is also the basis for an alleged parole violation, the preliminary examination on the criminal charge may be substituted for the preliminary parole revocation hearing. If the parolee is bound over on the criminal charge, probable cause must be established to show that the conditions of parole have been violated. If the preliminary examination is waived or the parolee is not bound over on the criminal charge, a preliminary parole revocation hearing may be held unless that hearing is waived by the parolee. Pursuant to DOC 331.09, any revocation actions may proceed regardless of any concurrent prosecution of the offender for the conduct underlying the alleged violation. A criminal acquittal for an offender's conduct underlying an alleged violation does not preclude revocation of that offender's supervision for that same or similar conduct.

Like Wisconsin's, Michigan's preliminary hearing procedures under R 791.7750 allow an offender to waive a preliminary hearing if he or she wishes. DOC 331 includes two circumstances not recognized in Michigan in which a preliminary hearing is not required: 1) there has been an adjudication of guilt by a court for the same or similar conduct, and 2) the offender is not being held in custody under the department's authority. Michigan requires that a parolee who is being held on a criminal charge which is also the basis for an alleged parole violation be given written notice that the results of the preliminary examination on the criminal charge will be used to establish probable cause that parole has been violated.

Unlike Wisconsin and neighboring states, the Michigan Code does not include provisions responsive to the calculation of reincarceration terms following a parole violation.

H. Minnesota:

Definitions: Minnesota's Administrative Code does not include specific definitions in connection with parole, probation, or extended supervision revocation

Violation Determination: As in Wisconsin, offenders may admit the alleged violations any time prior to the hearing. The admission must be in writing. However, Minnesota also requires that the offender must have been notified of the consequences of their admission, including the possibility that they may be returned to a correctional facility for a term of imprisonment specified by the executive officer of hearings and release or a district supervisor.

Hearing Procedure: Minnesota's parole revocation hearing procedure under 2940.4300 is not as detailed as Wisconsin's. Unlike DOC 331, the Minnesota Code specifies that the revocation hearing shall be held near the site of the alleged violation, and conducted by the executive officer of hearings and release or a district supervisor who does not directly supervise the supervising agent alleging the violation. Indeed, in Minnesota, all conditions of parole or supervised release are imposed by the executive officer of hearings and release.

Similarly, Section 2940.0700 of the Minnesota Code specifically provides that all needs assessments, program and projected release plans must be in writing and the central office file copy must be forwarded to the hearings and release unit for informational purposes.

Sentence Calculation: As in Wisconsin, Minnesota's Administrative Code Section 2940.2700 provides that offenders on parole or supervised release may request that the standard or special conditions of release be modified at any time during their term of release. This request must be made in writing through their supervising agent. The agent then submits the request and the supervising agent's recommendation to the hearings and release unit within ten days of its receipt. The executive officer of hearings and release shall review the request and respond in writing within 30 days of the receipt of the request for the modification of the standard or special conditions of release.

The executive officer of hearings and release may authorize the supervising agent to modify the standard or special conditions of release or cause the offender to be brought before the executive officer of hearings and release for a review of the matter of modification. Any modification of the standard or special conditions of release must be in writing and executed with the same formality as the original conditions.

Unlike Wisconsin and neighboring states, the Minnesota Code does not include provisions responsive to the calculation of reincarceration terms following a parole violation.

H. Summary of the factual data and analytical methodologies that DOC used in support of its determination of the rule's fiscal effect on small businesses under s. 227.114, Stats.:

The department of corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

I. Any analysis and supporting documents that DOC used in support of DOC's determination of the proposed rule's effect on small businesses or that was used when the DOC prepared an economic impact report:

Not applicable.

J. Effect on small businesses:

Not applicable.

K. Agency contact person:

Kathryn R. Anderson, Chief Legal Counsel, Department of Corrections
3099 East Washington Avenue, P.O. Box 7925, Madison, WI 53707-7925
(608) 240-5049; FAX (608) 240-3306
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L. Place where comments are to be submitted and deadline for submission:

Written comments on the proposed rule will be accepted and receive consideration if they are received by Wednesday, December 10, 2010. Written comments should be addressed to: Kathryn R. Anderson, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email kathryn.anderson@wisconsin.gov.

EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro), Stats.

FISCAL ESTIMATE: See attached.

FINAL REGULATORY FLEXIBILITY ANALYSIS: The department of corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114., Stats.

STATEMENT EXPLAINING THE NEED FOR THE PROPOSED RULE: The rule addresses two primary needs:

1. Repeals and recreates the DOC 331 to update, renumber and reorder for clarity.
2. Brings the rule into conformity with statutory changes relating to extended supervision.

STATEMENT OF THE BASIS AND PURPOSE OF THE RULE INCLUDING HOW THE RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES

The department of corrections proposes to make modifications and additions to DOC 331 (Probation, Parole, or Extended Supervision Revocation Procedures) for the following purposes:

1. The WI legislature created the concept of bi-furcated sentences with terms of confinement and extended supervision, effective December 31, 1999. Chapter DOC 331 was not changed at the time. The Department seeks to change DOC 331 to better reflect the changes in the law.
2. The Department is seeking revision of DOC 331, which not only reflects changes in law and correctional practice, but also clarifies existing standards. Since the last revision, it became apparent that clarification of many sections was necessary.
3. More details and a listing of significant changes can be found in the Plain Language Analysis Section of this document. (See pages 6 and 7.)

PUBLIC HEARINGS:

A. Two public hearings were held on the rule: November 30, 2010 in Milwaukee, WI and November 30, 2010 in Madison, WI. There was no formal testimony received at either of the public hearings.

B. List of persons who appeared or registered for or against the proposed rule at the public hearings:

In person:

Public Hearing held on November 30, 2010 in Milwaukee, WI

There were no appearances.

Public Hearing held on November 30, 2010 in Madison, WI

There were no appearances.

Persons who submitted written comments

There were no comments received from the public.

LEGISLATIVE COUNCIL STAFF CLEARINGHOUSE REPORT:

See attached.

RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS IN THE CLEARINGHOUSE REPORT:

2. **Form, Style and Placement in Administrative Code**

Comment (a): The plain language analysis of the rule summary states that the proposed rule moves two provisions from ch. DOC 331 to ch. DOC 328; however, the proposed rule does not include these provisions.

Response: Accepted. The department is simultaneously revising ch. DOC 328 (community supervision of offenders) and ch. DOC 331 (probation, parole, or extended supervision revocation procedures). The two provisions (s. DOC 331.15, tolled time, and s. DOC 331.16, reinstatement) are being repealed under this rule order. However, the provisions as revised are being recreated in the revised ch. DOC 328 (ss. DOC 328.25 and 328.26). The department revised to plain language analysis to clarify its intent.

Comments (b) through (e).

Response: Accepted.

4. **Adequacy of References to Related Statutes, Rules and Forms**

Comment (a): In s. DOC 331.01 (1), why is s. 973.125, Stats., cited?

Response: Accepted. The department has deleted the citation.

Comments (b) and (c).

Response: Accepted.

5. **Clarity, Grammar, Punctuation and Use of Plain Language**

Comment (a).

Response: Accepted. With respect to the identified discrepancy in the comparison between Michigan and Wisconsin provisions, the department clarified the text to identify the two circumstances which are recognized in Wisconsin but which are not recognized in Michigan.

Comments (b) through (e).

Response: Accepted.

Comment (f). In s. DOC 331.05 (3) (intro.), must a written notice be given to the state public defender regardless of whether the state public defender has agreed to represent the offender?

Response: Explanation. The department provides notice to the state public defender in order to give the agency an opportunity to determine whether the offender is eligible for its services.

Comment (g).

Response: Accepted.

Comment (h). In s. DOC 331.05 (3) (intro.), “all of the following” should be inserted before the colon. Also, should the phrase “or supervisor” be inserted after the word “magistrate?”

Response: Accepted in part and rejected in part. With regard to the first comment, the department accepts the comment. With regard to the second, the department does not agree that the suggested language should be added since a supervisor does not conduct preliminary hearings, only a magistrate does.

Comment (i). In s. DOC 331.05 (7) (b) (intro.), “that include but are not limited to” should be replaced by “including.” Also, the notation “stats” should be replaced by the notation “Stats.”

Response: Accepted in part. With regard to the first comment, the department accepts the comment. With regard to the second, the department could not find the word “stats” or “Stats.” in the identified section. However, the department did note that in s. DOC 331.11 the word “stats” occurred. The department changed the word to “Stats.”

Comments (j) and (k).

Response: Accepted.

Comment (l). In s. DOC 331.13 (5) (b) (intro.), “All of” should be inserted at the beginning of the sentence. Also in subd. 5., “consistent with” should be replaced with “necessary to meet.”

Response: Accepted. The department rewrote the beginning sentence of s. DOC 331.13 (5) (b) (intro.) to be in the active voice.

EXPLANATION OF ANY CHANGES THAT HAVE BEEN MADE TO THE PLAIN LANGUAGE ANALYSIS OR THE FISCAL ESTIMATE:

Changes to the Plain Language Analysis:

The department revised paragraphs 15 and 16 to clarify the actions it is taking with respect to rule provisions which address “tolled time” and “reinstatement.” Currently, the provisions are found in ch. DOC 331 (s. DOC 331.15, tolled time, and s. DOC 331.16, reinstatement). The department determined that the provisions should be in ch. DOC 328 (community supervision of offenders). The department is simultaneously revising the ch. DOC 328 and ch. DOC 331. The two provisions (s. DOC 331.15, tolled time, and s. DOC 331.16, reinstatement) are being repealed under this rule order. However, the provisions as revised are being created in the revised ch. DOC 328 (ss. DOC 328.25 and 328.26).

Changes to the Fiscal Estimate:

There were no changes to the fiscal estimate.