

CR 84-206

CERTIFICATE

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STATE OF WISCONSIN)
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DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

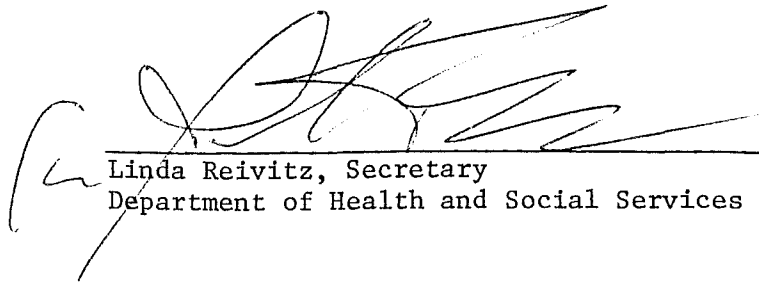
TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Linda Reivitz, Secretary of the Department of Health and Social Services and custodian of the official records of said Department, do hereby certify that the annexed rules relating to parole and probation revocation hearings were duly approved and adopted by this Department on July 17, 1985.

I further certify that this copy has been compared by me with the original on file in this Department and that the same is a true copy thereof, and of the whole of such original

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 17th day of July, 1985.

SEAL:



Linda Reivitz, Secretary
Department of Health and Social Services

9-1-85

ORDER OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
REPEALING, RENUMBERING, AMENDING AND CREATING RULES

To repeal HSS 31.03(2) and Note and (9) and HSS 328.22(4) and (5); to renumber HSS 31.03(1), (4) and (5) and Notes, (7), (8) and (10) and Note; to renumber and amend HSS 31.03(3) and (6) and Notes, (7) Note and (11); and to create HSS 31.04 and Note, relating to parole and probation revocation hearings.

Analysis by the Department of Health and Social Services

The Department's rules for revocation of a correctional client's probation or parole are revised, in the main to substitute a preliminary hearing requirement for a case review prior to revocation. In practice, revocation is preceded by a preliminary hearing, also called a probable cause hearing, rather than by the more expeditious and less formal case review, even though the current rules, s. HSS 31.03, envision a case review. In fact, the case review procedure written into the rules effective January 1, 1982, has never been implemented because its constitutionality has been in doubt.

The revised rules say how revocation proceedings are initiated; identify the circumstances under which a preliminary hearing is not necessary; incorporate criteria, presently found in ch. HSS 328, under which the decision is made to keep or place a client in custody pending final determination of revocation, whether or not there is a preliminary hearing; cover the notice of preliminary hearing; and specify the rights that the probationer or parolee has at the hearing. The revised rules give the client at a preliminary hearing a qualified right to an attorney. There is not an absolute right to an attorney at these hearings because, although the Department favors allowing attorney representation, it has found that attorneys often fail to appear because they are too busy. The rules therefore provide that if an attorney fails to appear, the hearing magistrate will inquire whether an attorney is necessary, and if he or she finds that an attorney is not necessary, the magistrate may proceed with the hearing in the absence of the attorney. While it has been suggested that the Department consider an attorney's repeated failure to appear at the preliminary hearing as a client's waiver of a right to an attorney, the Department believes it unfair to impute an attorney's behavior to the attorney's client.

Pursuant to the authority vested in the Department of Health and Social Services by ss. 46.03(6), 57.06, 227.014(2), and 973.10, Stats., the Department of Health and Social Services hereby repeals, renumbers, amends and creates rules interpreting ss. 46.03(6), 57.06 and 973.10, Stats., as follows:

SECTION 1. HSS 31.03 Note (intro., 5th paragraph) is amended to read:

Note: HSS 31.03 (intro, 5th paragraph). A final revocation hearing to determine whether the parolee violated and whether to revoke occurs within a reasonable time of a ~~case-review preliminary hearing~~ under this section. While no specific time limit is set, it is the department's goal to hold the final hearing within 30 to 40 days of the ~~case-review preliminary hearing~~ if the client is detained following the ~~case-review preliminary hearing~~. This is difficult to accomplish because of the shortage of hearing examiners, the difficulty of accommodating busy attorneys' and agents' schedules, and the shortage of hearing rooms in county jails. It is clear that the public as well as the client have an interest in speedy revocation proceedings. These rules are intended to help expedite the process.

SECTION 2. HSS 31.03 (1) and Note are renumbered 31.03 and Note, and HSS 31.03 Note (3) and (4), as renumbered, are amended to read:

Note: HSS 31.03. Subsection ~~(1)(e)~~ (3) states that an agent may recommend revocation or resolve minor alleged violations by alternatives to revocation. Experience teaches that the latter provision is necessary since minor, often excusable or unintended violations may occur that are handled best by immediate action by the agent. For example, a client may fail to report at the prescribed time, but after investigation the agent may conclude that the failure was reasonable because the client was ill or misunderstood the reporting rule. Some criminal law violations, such as some motor vehicle offenses, also may not require revocation. Revocation may not be appropriate, but a review of the rules, counseling, or a warning may be desirable. Of course, if investigation proves the allegation groundless, that fact should be recorded and no action should be taken against the client. The alternatives noted under sub. ~~(1)(e)~~ ~~2a-e~~ (3) are derived from State ex rel. Plotkin v. DHSS, 63 Wis. 2d 535 (1973). The alternatives noted under sub. ~~(1)(e)-2a-e~~ (3)(b) allow a decision-maker to exercise discretion on a case-by-case basis which is necessary to provide fairness and satisfy the goals under this chapter.

Subsection ~~(1)(d)~~ (4) requires an agent to report all alleged violations to his or her supervisor. Alleged violations, with any action taken under sub. ~~(1)(e)~~ (3), may be reported appropriately in a chronological log summary. However, if revocation is recommended, the agent should submit a report directly to the agent's supervisor. All the information required under this subsection need not be included in a single written report.

SECTION 3. HSS 31.03(2) and Note are repealed.

SECTION 4. HSS 31.03(3) and Note are renumbered 31.05 and Note, and HSS 31.05(1) (intro.) and (a) and (2), (4) (d), (5) (a) and Note (1st to 3rd paragraphs), as renumbered, are amended to read:

HSS 31.05(1) NOTICE. (intro.) If the magistrate, following a preliminary hearing, or the agent's supervisor, when a preliminary hearing is not required, concludes that revocation was recommended under sub. (2)(f) should be pursued, notice of a final revocation hearing shall be sent by the hearing examiner's office within 10 days of the date of the magistrate's decision, or the supervisor's decision if there was no preliminary hearing, case review decision. ~~The~~ to the client, the client's attorney, if any, and the department's representative ~~shall be given written notice of a final revocation hearing.~~ The notice shall include:

(a) The date, time, and place of the hearing and a statement that the client or client's attorney, if any, may, within 5 days of receiving the notice, request in writing that the hearing be rescheduled under the time limits of ~~par.~~ ~~(e)~~ sub. (3);

(2) WAIVER. A client may knowingly, voluntarily, and intelligently waive the right to a final hearing in writing. The waiver shall result in a review under ~~sub. (4)~~ s. HSS 31.06.

(4)(d) Any information, statements, evidence or testimony obtained by the hearing examiner under this section may be used as evidence presented for the purpose of ~~par. (f)~~ sub. (6). If ~~such~~ this evidence is relied on by the hearing examiner, a full record shall be kept. The client shall have access to the information relied upon, but not the identity of the witness. The department shall determine who has access to records ~~of~~ that disclose the identity of witnesses.

(5) PROCEDURE. (a) The hearing shall be conducted in accordance with ~~par-~~
~~(a) sub. (1)~~. The alleged violation shall be read aloud, and all witnesses for
 and against the client, including the client, shall have a chance to speak and
 respond to questions by the client, the client's attorney, if any, and the
 department's representative.

Note: HSS 31.05. Subsection ~~(3)(a)~~ (1) provides for notice to be sent of a
 final revocation hearing. The notice complies with existing practice and
Morrissey. Additional allegations made subsequent to the ~~case-review~~
~~preliminary hearing~~ may be included in this notice. State ex rel. Flowers v.
DHSS, 81 Wis. 2d 376 (1978). The notice must include all alleged violations on
which the Department will rely in pursuing revocation.

A client may waive his or her right to a final revocation hearing. Locklear
v. State, 87 Wis. 2d 392 (Ct. App. 1978).

Subsection (3) provides that a final hearing should take place within a
 reasonable time after a ~~case-review~~ preliminary hearing. The court in Morrissey
 held that a 2 month delay was not unreasonable. As a rule of thumb, it should
 be held within 90 days. See, e.g., Walton v. Wright, 407 F. Supp. 783 (W.D.
Wis. 1976); the per se rulings U.S. ex rel. Hahn v. Revis, 520 F.2d 632 (7th
Cir. 1975), vacated, 560 F.2d 264 (7th Cir. 1977), and Johnson v. Holley, 528
F.2d 116 (7th Cir. 1975) have been vacated by U.S. ex rel. Sims v. Sielaff, 563
F.2d 821 (7th Cir. 1977). However, hearings delayed over 90 days should not be
 lightly approved. The goal of the department is to hold such hearings within 30
 to 40 days of the ~~case-review~~ preliminary hearing.

SECTION 5. HSS 31.03 (4) and (5) and Notes are renumbered HSS 31.06 and
 31.07.

SECTION 6. HSS 31.03 (6), (7) and (8) and Notes are renumbered HSS 31.08,
 31.09, and 31.10, and HSS 31.08 and 31.09 Note, as renumbered, are amended to
 read:

HSS 31.08 CONCURRENT CRIMINAL PROSECUTION AND ACQUITTAL IN CRIMINAL
PROCEEDINGS. All revocation actions under this ~~this section~~ chapter shall
 proceed regardless of any concurrent prosecution of the client for the conduct
 underlying the alleged violation. An acquittal in a criminal proceeding for a
 client's conduct underlying an alleged violation shall not preclude revocation
 of that client's probation and parole for the same conduct.

Note: HSS 31.09. ~~Subsection (7)~~ This section provides for accurate
 recordkeeping of revocation actions.

SECTION 6. HSS 31.03(9) is repealed.

SECTION 7. HSS 31.03 (10) and Note and (11) are renumbered HSS 31.11 and Note and 31.12, and HSS 31.12, as renumbered, is amended to read:

HSS 31.12 HARMLESS ERROR. If ~~a~~ any time requirement under ~~this section~~ chapter is exceeded, the secretary may deem it harmless and disregard it if it does not affect the client's substantive rights ~~of the client~~. Substantive rights are affected when a variance tends to prejudice a fair proceeding or disposition involving a client.

SECTION 8. HSS 31.04 and Note are created to read:

HSS 31.04 PRELIMINARY HEARING. (1) REQUIREMENT. If the agent's immediate supervisor reasonably concludes on the basis of the agent's report under s. HSS 31.03 (4) that revocation proceedings should be started, even if the agent did not recommend revocation, a preliminary hearing shall be held in accordance with this section, unless sub. (2) applies, to determine whether there is probable cause to believe that the client 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) It is waived by the client in writing;
- (b) The client has given and signed a written statement which admits the violation;
- (c) There has been a finding of probable cause in a felony matter and the client 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 conduct that is alleged to be a violation of supervision; or
- (e) The client is not being held in custody.

(3) MAGISTRATE. The preliminary hearing shall be held before a magistrate. The magistrate shall be a supervisor or supervisor's designee who has not been directly involved in the decision to initiate proceedings to revoke the client's probation or parole.

(4) NOTICE. Written notice of the preliminary hearing shall be given to the client and either the client's attorney or the state public defender if the client claims to be or appears indigent and is not represented by a private attorney. The notice shall include:

- (a) The rule or condition that the client is alleged to have violated;
- (b) The facts underlying the alleged violation;
- (c) A statement that the client has a right to a preliminary hearing before an impartial magistrate who shall determine if there is probable cause to believe the person has committed the alleged violation;
- (d) A statement that the client has the right to waive the preliminary hearing;
- (e) A statement that the client has a qualified right to be represented by an attorney at the preliminary hearing;
- (f) A statement that the client and client's attorney, if any, may review all relevant evidence in the client's supervision file to be considered at the preliminary hearing, unless that evidence is otherwise confidential, such as the identity of confidential informants;
- (g) An explanation of the possible consequences of any decision; and
- (h) An explanation of the client's rights at the preliminary hearing which include:
 - 1. The right to be present;
 - 2. The right to deny the allegation and speak on his or her behalf;

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; and

5. A qualified right to an attorney. If an attorney fails to appear at the preliminary hearing to represent the client, 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 client, after being informed of his or her right to representation, requests an attorney based on a timely and colorable 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 client to present his or her case or that the client is otherwise not capable of speaking effectively for himself or herself.

(5) DETENTION PENDING FINAL HEARING. (a) When there is a preliminary hearing, the magistrate shall decide if the client is to remain in detention or is to be taken into custody and detained pending the outcome of the final hearing. When there is no preliminary hearing because the case meets one of the criteria under sub. (2), the agent's immediate supervisor shall make that decision.

(b) Detention is advisable and consistent with the goals and objectives of this chapter if one of the following is true:

1. The client is believed to be dangerous;
2. There is a likelihood that the client will flee;
3. The client is likely to engage in criminal behavior before the revocation takes place;

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

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

(c) A detained client 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 the date that the decision of the hearing examiner takes effect and becomes final. If the final decision of the hearing examiner is to reinstate the client or to not revoke the client's supervision, and the department requests review of that finding, the custody decision made pursuant to par. (b) shall remain in effect pending a decision by the secretary. The secretary may alter the custody decision at any time if the public interest warrants it.

(6) 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 client of the service of notice of the preliminary hearing. The time limits do not apply if the preliminary hearing has been postponed under sub. (4)(h)5 or if the time limits are waived in writing by the client.

(7) DECISION. (a) After the preliminary hearing, the magistrate shall decide based upon the evidence presented whether there is probable cause to believe that the client committed the conduct and that the conduct constitutes a violation of the rules or conditions of supervision. The revocation process terminates without prejudice if the magistrate concludes that there is no probable cause.

(b) The magistrate shall issue a written decision stating his or her findings and conclusions and giving reasons for the decision. The decision shall be based on the evidence presented. The magistrate shall provide copies to the client within a reasonable time after the preliminary hearing. If probable cause was found, the immediate supervisor shall contact the hearing examiner's office in writing and request the scheduling of a final revocation hearing.

(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 client 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.

Note: HSS 31.04. Section HSS 31.04 specifies the steps to be taken in a preliminary hearing. If the client waives the preliminary hearing, the final hearing should be held as soon as practicable.

Subsection (1) states that the only purpose of a preliminary hearing is to determine whether there is probable cause to believe the client committed the alleged violation. This narrow focus complies with constitutional requirements while ensuring that the preliminary hearing will not duplicate the final hearing.

Subsection (2) specifies the times when it is not necessary to hold a preliminary hearing because there is no necessity to determine probable cause. Courts applying Morrissey and Scarpelli have concluded that the right to a preliminary hearing is not absolute. There is no right to a preliminary hearing when there has been no loss of conditional liberty. Therefore, there is no right to a preliminary hearing when the department has not detained the client pending the final revocation hearing (United States v. Scuito, 531 F.2d. 842, 846 (7th Cir. 1976)). Other circumstances in which there has been no loss of conditional liberty, and therefore no right to a preliminary hearing, include

those in which the client is already incarcerated pursuant to a valid conviction on another charge, United States v. Langford, 369 F. Supp 1107, 1108 (N.D. Ill. E.D. 1973); Moody v. Daggett, 429 U.S. 78, 86, note 7 (1976). One court has found that a preliminary hearing is not required when the client is detained only briefly, United States v. Basso, 632 F.2d. 1007, 1012-13 (2d. Cir. 1980), cert. denied 450 U.S. 965 (1981).

There is no right to a preliminary hearing when some other body already has determined that there is probable cause to believe that the person has committed the violations complained of. The Supreme Court stated in Morrissey that a parolee "obviously . . . cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." Morrissey, 408 U.S. at 490, 92 S. Ct. at 2605. Courts have interpreted this language to mean that a preliminary hearing is not required where the person has been convicted of a crime upon which the probation or parole revocation is based because conviction conclusively establishes the fact of violation, Jones v. Johnston, 534 F.2d. 353, 357 (D.C. Cir. 1976), Moody v. Daggett, 429 U.S. 78 (1976), United States ex rel. Sims v. Sielaff, 563 F.2d. 821 (7th Cir. 1977); where another authorized body has determined that probable cause exists, United States v. Strada, 503 F.2d. 1081, 1084 (8th Cir. 1974); where the facts conclusively establish that probable cause exists, as, for example, in the situation where the client is arrested in another state for violating a condition that the client not leave the client's own state without the agent's permission, Stidham v. Wyrick, 567 F.2d. 836, 837-38 (8th Cir. 1977), Barton v. Malley, 626 F.2d. 151, 159 (10th Cir. 1980), but see U.S. v. Companion, 454 F.2d. 308 (2d Cir. 1976) in which a preliminary hearing was required even where a probationer was arrested in a distant state and a condition of parole was that he not travel; where the person pleads guilty to the crime underlying a revocation, Reese v. United States Board of Parole, 530 F.2d. 231, 234 (9th Cir. 1976); and where the person admits the violation in a signed statement, suggested in Morrissey v. Brewer, supra, 408 U.S. at 476-77, 92 S. Ct. at 2598, and State ex rel. Beougher v. Lotter, 91 Wis. 2d. 321, 328, 283 N.W.2d. 588 (Ct. App. 1979).

Subsection (4) provides for notice of the preliminary hearing. Where applicable, the division's bureau of adult institutions should notify the state public defender's office of the hearing as soon as possible. If the supervisor reviews the report submitted by an agent and concludes that a hearing is necessary, notice of the hearing should be sent to the client, the client's attorney, if any, and agent. The notice must state the rights that the client has at the hearing. The notice and list of rights are in substantial accord with existing practice and Morrissey.

The preliminary hearing provides only a qualified right to an attorney. If an attorney fails to appear at the hearing, the hearing examiner may either proceed with the hearing or postpone the hearing upon determining that the client is entitled to an attorney. Criteria for that decision are taken from Gagnon v. Scarpelli, 411 U.S. 778 (1973). This requirement attempts to accommodate both the need for an attorney and the need to hold the preliminary hearing quickly. Past practice has shown that many preliminary hearings are delayed because counsel fails to appear. Any delays due to client's counsel failure to appear will not be counted against the department. See Barker v. Wingo, 407 U.S. 514 (1972).

Subsection (5) explains when taking a client into custody pending final revocation is appropriate. A client may not be detained without limit. In State ex rel. Sims v. Sielaff, 563 F.2d 821 (7th Cir. 1972), the court held that a client's right to release pending revocation should be determined according to the speedy trial standards of Barker v. Wingo, 407 U.S. 514 (1972). The relevant but not exclusive factors are:

1. The length of the delay;
2. The reasons for the delay (e.g., whether attributable to the revokee or the state);
3. The assertion of the right to a speedy hearing; and
4. Possible prejudice.

The court recognized the difficult balancing test required. The state must justify the delay, except where the delay is due to the client's own actions. Even then, the state has the duty to proceed expeditiously. A client in custody elsewhere on other convictions or unrelated cases suffers no deprivation of protected liberty sufficient to invoke the due process right to an immediate hearing on the issue of revocation. "The linchpin of [Moody v. Daggett, 429 U.S. 79 (1976)] is that no process is due a parolee facing revocation until his life, liberty, or property interests are impaired by the revocation proceedings." Sims at 826.

The criteria under this subsection for taking a client into custody and detaining the client, along with the reasonable time limits imposed for the revocation process, should not unfairly deprive a client of his or her conditional liberty under supervision. When, through the actions of the client, his or her attorney, or the department, the time periods are exceeded, the Barker factors to consider the reasonableness of the delay and further detention must be taken into account.

Subsection (6) sets the time limits for initiating the preliminary hearing. Timeliness is important to ensure the prompt gathering and preservation of evidence and to ensure the speedy resolution of the allegations which may enable the client to continue with supervision without undue interruption. These limits are consistent with the requirement under Morrissey. This subsection also requires a review in an area of the state close to the arrest or alleged violation to permit the client to prepare a defense and to put it on the record before memories have dimmed and before he or she is removed to a distant part of the state. State ex rel. Flowers v. DHSS, 81 Wis. 2d 376 (1978). However, where an alleged violation has occurred at a distant location, there are acceptable alternatives to holding the review at the place of the alleged violation. For example, transporting witnesses to the hearing or, where appropriate, conventional substitutes for live testimony including affidavits, depositions, and documentary evidence, may be resorted to, consistent with the requirements of due process. State ex rel. Harris v. Schmidt, 69 Wis. 2d 668 (1975).

Subsection (8) allows the department to reissue a notice when there are mistakes in the notice that do not affect the substance of the preliminary hearing but cause the notice to be dismissed. It also allows the department to reissue a dismissed notice if the department discovers relevant new information about the alleged violation. This information must not have been known to the department prior to issuance of the first notice. It may not be information that was known but not used.

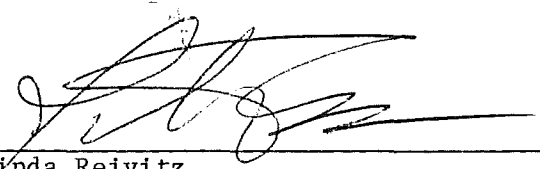
SECTION 9. HSS 328.22(4) and (5) are repealed.

The repeals and rules contained in this order shall take effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s. 227.026(1), Stats.

Department of Health and Social Services

Dated: July 17, 1985

By:



Linda Reivitz
Secretary

SEAL:

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State of Wisconsin

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

1 West Wilson Street, Madison, Wisconsin 53702

Anthony S. Earl
Governor

Linda Reivitz
Secretary

July 17, 1985

Mailing Address:
Post Office Box 7850
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Mr. Orlan Prestegard
Revisor of Statutes
411 West, State Capitol
Madison, Wisconsin 53702

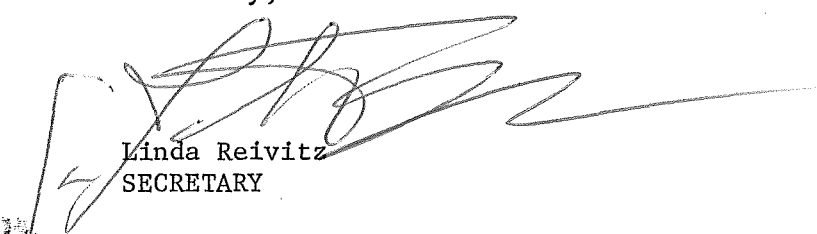
Dear Mr. Prestegard:

As provided in s. 227.023, Stats., there is hereby submitted a certified copy of HSS 31, administrative rules relating to parole and probation revocation hearings.

These rules are also being submitted to the Secretary of State as required by s. 227.023, Stats.

These rule changes do not affect small businesses as defined in s. 227.016(1)(a), Stats.

Sincerely,



Linda Reivitz
SECRETARY

Enclosure