CR 91-82

STATE OF WISCONSIN)
) SS
DIVISION OF HEARINGS AND APPEALS)

I, David H. Schwarz, Administrator of the Division of Hearings and Appeals and custodian of the official records, certify that the annexed rules, relating to corrections related hearings and to other proceedings before the Division of Hearings and Appeals, were duly approved and adopted by this Division on October 30, 1991. I further certify that this copy has been compared by me with the original on file in this Division and that it is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Division of Hearings and Appeals at 5005 University Avenue, Suite 201, in the city of Madison, this 30th day of October, 1991.

DAVID H. SCHWARZ, ADMINISTRATOR

1-1-92

ORDER OF
THE DIVISION OF HEARINGS AND APPEALS
REPEALING, RENUMBERING, AMENDING,
REPEALING AND RECREATING AND CREATING RULES

To repeal HA 1.06(3); to renumber HA 1.02(1) to (4); to amend HA 1 (title); 1.01, 1.04(3) and (4); 1.05; 1.06(2)(d); 1.07; 1.08; 1.10; 1.11; 1.12; 1.13; 1.14(2),(4) and (5); 1.15; 1.16(1) and (3); 1.17(1); 1.18(1) to (3) and 1.19; to repeal and recreate HA 1.03 and to create HA 2.

ANALYSIS PREPARED BY THE DIVISION OF HEARINGS AND APPEALS

1989 Act 107 transferred responsibility for corrections related hearings, principally probation and parole revocation hearings, from the Department of Health and Social Services to the Division of Hearings and Appeals on January 1, 1990. Non-statutory provisions of the Act provide that existing rules of the Department of Health and Social Services on these hearings remain in effect until modified or rescinded by the Division of Hearings and Appeals or until January 1, 1992, whichever occurs first.

These rules fulfill the legislative mandate of 1989 Act 107 and recreate procedural rules to govern probation and parole revocation hearings. They replace ss. HSS 31.05, HSS 31.13(4), and HSS 31.14(4), Wis. Admin. Code. The remaining portions of ch. HSS 31 dealing with substantive probation and parole issues relating to the Department of Corrections have been separately promulgated by the Department of Corrections in ch. DOC 331.

Although these rules are taken largely from s. HSS 31.05, some revisions are made and some new rules are created to address subjects not previously covered by the existing administrative rules. Notes on the history and intent of these revisions are attached to the rules. Unless otherwise noted, the revisions are intended to simplify and clarify the language of ss. HSS 31.05, HSS 31.12, HSS 31.13(4), and HSS 31.14(4), and are not meant to change the original intent of those rules.

Application of rules. Prior to January 1, 1990, the Division of Hearings and Appeals conducted contested case hearings under ch. 227, Wis. Stats., for various state agencies, principally the Department of Natural Resources (natural resource hearings), the Department of Health and Social Services (nursing home hearings), and the Department of Justice (crime victim hearings). The existing division rules found in ch. HA 1 conform to the contested case provisions of ch. 227. Because the

contested case provisions of ch. 227 do not apply to probation and parole revocation proceedings, the corrections rules have been promulgated in a separate chapter, HA 2, and it is intended that the rules found in ch. HA 1 have no application in corrections hearings.

Definitions. The corrections definitions are taken from existing corrections rules found at ch. DOC 328. The definition of "day" has been clarified to mean actual working days consistent with the intent of the prior rule. The term "administrative law judge" is new and is consistent with terminology used by the Department of Industry, Labor and Human Relations in employment compensation, workers' compensation, and equal rights hearings.

Service of documents. These rules will permit the parties in both contested case hearings and corrections hearings to file documents by regular first class mail, inter-departmental mail and by facsimile transmission in addition to the more formal methods of personal service, registered or certified mail. The intent of these changes is to reduce administrative costs associated with the hearing process and to give the parties the convenience of filing documents by facsimile transmission.

Witnesses and subpoenas. These rules will allow attorneys of record to issue subpoenas under the same procedure as provided by s. 805.07(1), Stats. Although the Division reserves the right to issue subpoenas directly, the attorneys are in a better position to issue the necessary subpoenas and the Division's responsibility should be limited to cases where a party is not represented by counsel or where the Division is asked to modify or cancel a subpoena.

Revocation hearings. The broad outlines of the probation and parole revocation hearing process were first drawn by the Supreme Court in Morrissey v Brewer, 408 US 471 (1972), and Gagnon v Scarpelli, 411 US 778 (1973). The first administrative rules on the subject of probation and parole revocations were enacted by the Department of Health and Social Services in 1981 at s. HSS 31.05. Those rules have continued in effect to the present time with little change. Although these rules recreate substantial portions of s. HSS 31.05, some of the language has been revised to conform the rules with existing practice and case law. The notice provisions, for example, have been clarified to more closely follow the holding in Morrissey. The substantive rights of the client, previously identified in the Notice section, have been relocated to a separate subsection of the rule. The previous requirement that the Notice of Hearing contain a statement on unavailable witnesses has been eliminated and a new provision has been added to allow the Department of Corrections to add new revocation allegations or modify the previous allegations.

The former rules provided that revocation hearings be held within a "reasonable time" from the date that the Department of Corrections decided to revoke supervision. These rules recognize the additional requirement that hearings for persons confined in

a county facility must begin within 50 calendar days of the client's detention as mandated by s. 302.335, Stats. To this end, the rules also create new criteria for continuing and adjourning revocation hearings.

The former rules contained a complicated and somewhat ambiguous provision for protecting the identity, safety or mental health of a witness. That provision, which allowed an examiner to accept "communications" from a party seeking permission to withhold the names of any witness because of a concern over the physical safety or mental health of the witness, was difficult to implement and failed to give the examiner clear guidance on when it was appropriate to take such action. These rules create new special protective procedures for witnesses and redefine the standards for such action in clear, concise language. The rules are intended to permit the use of protective procedures such as a screen, one-way mirror, televised or videotaped testimony and, if necessary, exclusion of a client from a hearing room when such action is necessary to protect a witness from the substantial likelihood of significant psychological or emotional trauma or to enable a witness to give effective, truthful testimony at the hearing.

These rules reflect the historical fact that the hearings most often occur in a jail or other secure detention facility and the belief that such hearings are not a "meeting" of a "governmental body" as those terms are used in sec. 19.82, Stats. Accordingly, the hearings are not open to the public. The rules also expressly provide that the formal rules of evidence do not apply in revocation hearings as provided by s. 911.01(4)(c), Stats., and provide that a supervision violation is proven by a judgement of conviction stemming from the conduct underlying an allegation. The latter provision reflects a belief that a probationer or parolee should not be allowed to relitigate issues determined in other forums, as in the situation presented when the revocation is based on conviction of another crime.

Although the original revocation criteria were patterned after the criteria announced in State ex. rel. Plotkin v H&SS, 63 Wis. 2d 535 (1974), variance from the actual Plotkin language and the inclusion of an additional rule which required that revocation should not result unless the examiner found that continuation of supervision would be inconsistent with the goals and objectives of supervision under ch. HSS 328 led to confusion over the revocation criteria. To eliminate this confusion, these rules provide that the revocation criteria are the same as announced in Plotkin and that revocation may occur if any one of the Plotkin criteria is satisfied and the administrative law judge finds there are no appropriate alternatives to revocation.

Prior to January 1, 1990, revocation appeals were reviewed by the secretary of the Department of Health and Social Services. These rules direct that such appeals are to be reviewed by the Division Administrator as provided in s. 301.035(4), Stats. The Division Administrator's decision is the final decision and is not subject to further administrative review. These rules also

provided a clearer statement of the time limits for administrative appeals and for the subsequent review procedures. In the past, the secretary of the Department of Health and Social Services had seven working days to decide the appeal from the date the secretary received the record and synopsis of testimony from the Department's Office of Administrative Hearings. Since preparation of the record and synopsis and testimony often took several weeks, the secretary's final decision was similarly delayed. These rules recognize the time required for preparation of the record and synopsis and provide that the Administrator has only 21 working days from the date the appeal is received to issue the final decision.

Good time forfeiture and reincarceration hearings. These rules combine the former provisions of ss. HSS 31.13 and HSS 31.14 in one combined hearing section. The appeal procedures are also clarified in conformity with s. HA 2.05(7).

Transcripts. Under these rules, production of a corrections transcript requires a writ of certiorari or prepayment of the transcription costs. Persons may also tape record the hearing at their own expense.

Harmless error. The harmless error provisions of the former rules are broadened to include variance from procedural requirements as well as variance from time limits. As in the past, an error can be found harmless only if it does not affect the client's substantive rights.

The division's authority to repeal, renumber, amend, repeal and recreate and create these rules is found in ss. 48.357(5), 50.04(4)(e), 50.04(5)(e), 227.43, 227.44, 301.035(5), 302.11(7), 304.06(3), 304.06(3e), 949.11, 973.10, and 975.10(2), Stats.

SECTION 1. HA 1 (title) is amended to read:

HA 1 (title) PROCEDURE AND PRACTICE FOR CONTESTED CASES.

SECTION 2. HA 1.01 is amended to read:

HA 1.01 APPLICATION OF RULES. These rules shall apply in all contested case proceedings and hearings before the division of hearings and appeals under ch. 227, Stats., except as specifically provided otherwise. Agencies for which the division conducts proceedings, such as the departments of natural resources and justice, may have specific regulations which govern the conduct of those proceedings.

SECTION 3. HA 1.02(1) to (4) are renumbered HA 1.02(2) to (5).

SECTION 4. HA 1.02(1) is created to read:

HA 1.02(1) "Administrative law judge" means an administrative hearing examiner employed by the division of hearings and appeals.

SECTION 5. HA 1.03 is repealed and recreated to read:

HA 1.03 SERVICE OF DOCUMENTS. (1) BY THE DIVISION. The division may serve decisions, orders, notices and other documents by first class, certified, registered or inter-departmental mail or by facsimile transmission.

(2) BY A PARTY. Materials filed by a party with the division may be served personally or by first class, certified or registered mail, inter-departmental mail or by facsimile transmission. All correspondence, papers or other materials submitted by a party shall be served on the same date by that party on 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 by personal service or by inter-departmental 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.

Note: The mailing address of the division is:
5005 University Avenue

Suite 201
Madison, Wisconsin 53705-5400
The facsimile transmission number of the division is:
(608) 267-2744

SECTION 6. HA 1.04(3) is amended to read:

HA 1.04(3) FILING AND SERVICE. Appeals shall be filed with the division within 10 days after appellant receives notice of the action that is being contested. ~~Appeals are deemed to be filed upon deposit in the U.S. mails, as evidenced by postmark, or upon personal service on the division.~~ The appellant shall also serve a copy of the appeal on the Bureau of Quality Compliance, Division of Health, Department of Health and Social Services, Madison, Wisconsin, 53702 on the same date that the appeal is filed with the division.

SECTION 7. HA 1.04(4) is amended to read:

HA 1.04(4) NOTICE OF HEARING. The division shall serve a ~~A~~ notice of hearing and, where appropriate, a notice of a prehearing conference ~~shall be served~~ on the parties ~~by the division~~ pursuant to s. 227.44(2), Stats. The notice shall ~~will~~ identify the ~~hearing examiner~~ administrative law judge designated by the administrator to be presiding officer.

SECTION 8. HA 1.05 is amended to read:

HA 1.05 FORMS OF OTHER PETITIONS FOR REVIEW. Petitions shall conform with the applicable statute as to form, content, number of signatories and verifications. All petitions shall be filed within the time specified by statute or administrative code, or, where no time is specified, within 30 days of the date of the order or decision to be reviewed. Petitions ~~are deemed~~

~~filed upon deposit in the U.S. mails, as evidenced by postmark, or upon personal service on the division.~~shall be filed and served in accordance with s. HA 1.03. The division may request additional information concerning any petition or request filed under this section. The division may deny any such petition or request where the information required or requested under this section is not provided.

SECTION 9. HA 1.06(2)(d) is amended to read:

HA 1.06(2)(d). Such other information as the division or the ~~hearing examiner~~ administrative law judge may deem appropriate.

SECTION 10. HA 1.06(3) is repealed.

SECTION 11. HA 1.07 is amended to read:

HA 1.07 PLACE OF HEARINGS. Unless otherwise specifically provided by law, all hearings shall be held at the offices of the Division of Hearings and Appeals~~, 6300 University Avenue, Suite 200, Middleton, Wisconsin,~~ or at the location designated by the ~~hearing examiner~~ administrative law judge. ~~in the hearing notice.~~

SECTION 12. HA 1.08 is amended to read:

HA 1.08 CHANGES IN TIME OR PLACE OF HEARING; ADJOURNMENTS; FAILURES TO APPEAR. (1) CHANGES. Requests for changes in the time and place of a scheduled hearing will be granted only for good cause. A request received after any required newspaper publication or legal notice will be rescheduled only if the person requesting the change bears the cost of such change and the ~~examiner~~ administrative law judge deems such change

appropriate under the circumstances presented.

(2) ADJOURNMENT. The ~~hearing examiner~~ administrative law judge may adjourn a hearing for good cause and the hearing shall be reset or reconvened at his or her discretion.

(3) FAILURE TO APPEAR. (a) If an applicant for a permit or license fails to appear at a hearing following due notice, the ~~hearing examiner~~ administrative law judge may dismiss the application unless the applicant shows good cause for the failure to appear. If an applicant fails to submit proof of publication and notice as required by statute, the ~~hearing examiner~~ administrative law judge may dismiss the application and cancel the hearing.

(b) If a respondent in an enforcement proceeding fails to appear, the ~~hearing examiner~~ administrative law judge may take testimony and issue, modify or rescind the order as may be appropriate, unless good cause is shown for the failure to appear.

(c) If a petitioner or appellant in a proceeding fails to appear, the ~~hearing examiner~~ administrative law judge may dismiss the petition unless the petitioner or appellant shows good cause for the failure to appear.

SECTION 13. HA 1.10 is amended to read:

HA 1.10 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 division or the ~~hearing examiner~~ administrative law judge may also issue

subpoenas to compel the attendance of witnesses at hearings or discovery proceedings under this section. A subpoena requiring the production of material may be issued if the person requesting such subpoena specifies the documents to be presented by the subpoenaed witness and the request is deemed reasonable by the ~~examiner~~ administrative law judge. Sections 814.67, 885.06 and 885.07, Stats., shall govern the payment of witness fees and expenses.

SECTION 14. HA 1.11 is amended to read:

HA 1.11 PRESERVATION OF TESTIMONY AND DISCOVERY. The division or any party involved in a proceeding before the division may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the ~~hearing examiner~~ administrative law judge may allow a shorter or longer time for discovery or preserving testimony than is allowed by ch. 804, Stats. For good cause, the ~~hearing examiner~~ administrative law judge may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden, as provided in s. 804.01(3), Stats. or orders as provided in s. 804.12, Stats. to compel discovery and for sanctions.

SECTION 15. HA 1.12 is amended to read:

HA 1.12 CONFERENCES. (1) CALL AND PURPOSE. The ~~hearing examiner~~ administrative law judge may call a conference at any time prior to or during the course of a hearing, and may require the attendance of all persons who are or wish to be certified as parties to the proceeding. The purposes of such conferences shall

be to consider:

(a) Clarification of issues;

(b) Amendments to the pleadings;

(c) Admissibility of evidence;

(d) The possibility of obtaining admissions or stipulations of fact and of documents which will avoid unnecessary proof;

(e) The limitation of the number of witnesses;

(f) The identification of all parties to the proceeding; and

(g) Such other matters as may aid in the disposition of the matter.

(2) RECORDING STIPULATIONS. The ~~hearing examiner~~ administrative law judge may record any stipulations made at a conference. Stipulations or other agreements made at a conference shall bind the parties in the subsequent course of the proceeding.

(3) DECISION ON BRIEFS. If a prehearing conference is held and the parties agree that there is no material dispute of fact raised by the pleadings, the ~~hearing examiner~~ administrative law judge may cancel the hearing and may decide the matter on the basis of briefs or stipulations submitted by the parties.

SECTION 16. HA 1.13(1), (3)(b) and (4) to (6) are amended to read:

HA 1.13 CONDUCT OF HEARINGS. (1) PROCEDURE. The ~~hearing examiner~~ administrative law judge will open the hearing and make a concise statement of its scope and purposes. Appearances shall be entered on the record. Parties may make motions or opening

statements.

(3) ORDER OF PROCEEDINGS. (b) In any other proceeding, the ~~examiner~~ administrative law judge will apply normal rules of procedure used in the courts in determining the appropriate order of presentation of a case and on whom the burden of proof should fall.

(4) OFF RECORD. Proceedings may be conducted off the record only when the ~~hearing examiner~~ administrative law judge permits. If a discussion off the record is deemed pertinent by the ~~hearing examiner~~ administrative law judge, he or she may summarize it on the record.

(5) OBJECTIONS TO EVIDENCE. Any argument before the ~~examiner~~ administrative law judge on objections to receipt of evidence or on motions to strike will be recorded and parties will be afforded the opportunity to make an offer of proof. An offer of proof shall be in the form directed by the ~~examiner~~ administrative law judge.

(6) CONTEMPT. Contemptuous conduct at a hearing shall be grounds for exclusion from the hearing. ~~Other actions may be taken by the~~ The division or the ~~examiner~~ administrative law judge may take other actions which are authorized by statute and are appropriate under the circumstances.

SECTION 17. HA 1.14(2) is amended to read:

HA 1.14(2) ADMISSIBILITY. Evidence submitted at the time of the hearing need not be limited to matters set forth in the pleadings, petitions or applications. If such variances occur,

the pleadings petitions or applications shall be considered amended by the record. The ~~hearing examiner~~ administrative law judge may grant such continuances as may be necessary to give other parties adequate time to prepare evidence to rebut that involved in any such variances.

SECTION 18. HA 1.14(4) is amended to read:

HA 1.14(4) PETITIONS. Petitions or other written communications not admissible as evidence may be filed with the ~~hearing examiner~~ administrative law judge but will not be part of the record.

SECTION 19. HA 1.14(5) is amended to read:

HA 1.14(5) EXHIBITS AND PREPARED TESTIMONY. Parties offering documentary exhibits or prepared testimony may be ordered by the ~~hearing examiner~~ administrative law judge to furnish copies to all other parties in advance of the hearing and to provide such reasonable time as the ~~hearing examiner~~ administrative law judge may order to enable review of the prepared ~~written~~ testimony and exhibits. Upon compliance ~~therewith~~ with such order, ~~such written~~ prepared testimony ~~and exhibits~~ may be admitted in evidence as though given orally, providing the authors are present and available for cross-examination.

SECTION 20. HA 1.15 is amended to read:

HA 1.15 CLOSE OF HEARING. (1) CLOSING AND BRIEFS. A hearing in a contested case shall be closed upon completion of the submission of all evidence and expiration of the period fixed

for filing of briefs. If the time for filing briefs has expired and the brief of one or more parties is not filed within such time, the ~~hearing examiner~~ administrative law judge may proceed to the determination of the case. The administrative law judge may grant an extension ~~Extension~~ of time to file briefs ~~may be granted by the hearing examiner~~ upon a showing of good cause.

(2) ADDITIONAL EVIDENCE. If by stipulation of the parties, documentary evidence is permitted to be submitted after the close of testimony, the record will be closed when such documentary evidence is received by the division or when the specified time for furnishing it has elapsed without its being furnished. The ~~hearing examiner~~ administrative law judge may, upon the request of ~~the stipulating parties~~ a party, extend the time originally prescribed for filing such additional evidence.

SECTION 21. HA 1.16(1) is amended to read:

HA 1.16 TRANSCRIPTS. (1) METHOD AND COPIES. Hearings shall be recorded either stenographically or electronically. A typed transcript will be made when it is determined that one is necessary by the division or the ~~hearing examiner~~ administrative law judge. If a transcript is made by the division copies shall be furnished to all persons upon request and ~~payment~~ prepayment of a reasonable fee, as determined by the division. If no transcript is deemed necessary by the division and a party requests that one be prepared, that party shall be responsible for ~~all~~ costs of transcript preparation. If several parties request transcripts, the division may divide the costs of

transcription equally among the parties. In lieu of a transcript the division may provide any person requesting a transcript with a copy of the tape recording of the hearing upon payment of a reasonable fee. All requests for transcription shall be made at the hearing or in writing and sent to the ~~hearing examiner~~ administrative law judge who presided at the hearing.

SECTION 22. HA 1.16(3) is amended to read:

HA 1.16(3) CORRECTIONS. Any party, within 14 days of the date of mailing of the transcript, may file with the ~~hearing examiner~~ administrative law judge a notice in writing of any claimed error, and shall mail a copy of such notice to each party of record. Other parties may contest any claimed error within 20 days of the date of the mailing of the transcript by notifying the ~~hearing examiner~~ administrative law judge and other parties of record. All parties ~~will~~ shall be advised by the ~~hearing examiner~~ administrative law judge of any authorized corrections to the record.

SECTION 23. HA 1.17(1) is amended to read:

HA 1.17 BRIEFS. (1) TIME SCHEDULE FOR FILING OF BRIEFS. Parties shall indicate on the record after the close of testimony at the hearing whether they desire to file briefs. The ~~hearing examiner~~ administrative law judge may establish a schedule for the filing of briefs. The party or parties having the burden of proof shall file the first brief. Other parties may then file response briefs, which may be replied to. In the alternative, the ~~hearing examiner~~ administrative law judge may direct that the

briefs of all parties be filed simultaneously.

SECTION 24. HA 1.18(1) is amended to read:

HA 1.18 DECISION. (1) FORM. After the record is closed in each proceeding the ~~hearing examiner~~ administrative law judge shall prepare written findings of fact, conclusions of law, and, except in the case of proceedings under s. 227.46(3)(b), Stats., either a proposed or a final decision. Said decision shall be in accordance with the provisions of ss. 227.46 and 227.47, Stats.

SECTION 25. HA 1.18(2) is amended to read:

HA 1.18(2) PARTIES. The ~~hearing examiner~~ administrative law judge shall prepare a list of persons who are certified as parties and set forth such list in the decision. For purposes of certifying parties under s. 227.47, Stats., and this section, the ~~hearing examiner~~ administrative law judge shall consider the following criteria:

(a) The nature of the agency proceeding;

(b) The persons on whom the decision will have an effect and the amount of that impact; and

(c) The nature of the participation by those involved in the proceeding, including attendance at hearings, cross-examination of witnesses, and submission of briefs.

SECTION 26. HA 1.18(3) is amended to read:

HA 1.18(3) SERVICE. Every decision when signed shall be served ~~by personal delivery or mailing a copy to~~ upon each party to the proceeding or ~~to~~ upon the party's attorney of record.

SECTION 27. HA 1.19 is amended to read:

HA 1.19 REOPENING HEARINGS. When a hearing in a proceeding has been closed, no further evidence shall be received, except by order of the division or the ~~hearing examiner~~ administrative law judge. A closed case may be reopened for the taking of further evidence upon application of a party showing to the division's or the ~~hearing examiner's~~ administrative law judge's satisfaction that the evidence is newly discovered and was not available at the time of the hearing and that the evidence is necessary for a just disposition of the case.

SECTION 28. HA 2 is created to read:

CHAPTER HA 2

PROCEDURE AND PRACTICE

FOR CORRECTIONS HEARINGS

HA 2.01 APPLICATION OF RULES

(1) AUTHORITY

(2) SCOPE

HA 2.02 DEFINITIONS

(1) ADMINISTRATIVE LAW JUDGE

(2) ADMINISTRATOR

(3) CLIENT

(4) CONDITIONS

(5) DAY

(6) DEPARTMENT

(7) DIVISION

(8) REVOCATION

(9) RULES

(10) SUPERVISION

HA 2.03 SERVICE OF DOCUMENTS

(1) BY THE DIVISION

(2) BY A PARTY

(3) FILING DATE

HA 2.04 WITNESSES AND SUBPOENAS

HA 2.05 REVOCATION HEARING

(1) NOTICE

(2) AMENDMENTS

(3) CLIENT'S RIGHTS

(4) TIME

(5) PROTECTION OF WITNESSES

(6) PROCEDURE

(7) DECISION

(8) APPEAL

(9) ADMINISTRATOR'S DECISION

HA 2.06 GOOD TIME FORFEITURE AND REINCARCERATION HEARINGS

(1) APPLICABILITY

(2) HEARING

(3) NOTICE

(4) CLIENT'S RIGHTS

(5) PROCEDURE

(6) DECISION

(7) APPEAL

(8) ADMINISTRATOR'S DECISION

HA 2.07 TRANSCRIPTS

HA 2.08 HARMLESS ERROR

HA 2.01 APPLICATION OF RULES. (1) AUTHORITY. These rules are promulgated under the authority of s. 301.035(5), Stats., and interpret ss. 48.357(5), 302.11(7), 973.09, 973.10, 973.155, 975.10(2) and ch. 304 Stats.

(2) SCOPE. This chapter applies to corrections hearings under ss. 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. HSS 343.

HA 2.02 DEFINITIONS. For purposes of this chapter:

(1) "Administrative law judge" means an administrative hearing examiner employed by the division of hearings and appeals.

(2) "Administrator" means the administrator of the division of hearings and appeals.

(3) "Client" means the person who is committed to the custody of the department of corrections and is the subject of the corrections hearing.

(4) "Conditions" means specific regulations imposed on the client by the court or department.

(5) "Day" means any working day, Monday through Friday, excluding legal holidays, except as specifically provided

otherwise in s. HA 2.05 (4)(a).

(6) "Department" means the department of corrections.

(7) "Division" means the division of hearings and appeals.

(8) "Revocation" means the removal of a client from probation or parole or youth aftercare supervision.

(9) "Rules" means those written department regulations applicable to a specific client under supervision.

(10) "Supervision" means the control and supervision of clients exercised by the department of corrections.

HA 2.03 SERVICE OF DOCUMENTS. (1) BY THE DIVISION. The division may serve decisions, orders, notices and other documents by first class mail, inter-departmental mail or by facsimile transmission.

(2) BY A PARTY. Materials filed by a party with the division may be served personally or by first class, certified or registered mail, inter-departmental mail or by facsimile transmission. All correspondence, papers or other materials submitted by a party shall be served on the same date by that party on 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 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.

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. If a party is not represented by an attorney, the division or the administrative law judge may issue subpoenas as provided in ch. 885, Stats.

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 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;

(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 DOC 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 s. 973.155, Stats.

(2) AMENDMENTS. Any notice information required under s. HA 2.05(1) may be amended and additional allegations may be added by the department if the client and the attorney, if any, are given written notice of the amendment at least 5 days prior to the hearing and the amendment does not materially prejudice the client's right to a fair hearing.

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

(a) The right to be present;

(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;

(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).

(4) TIME. (a) If a client is detained in a county jail or other county facility pending disposition of the hearing, the division shall begin a hearing within 50 calendar days after the person is detained by the department in the county jail or county facility. If not so detained, the hearing shall begin within a reasonable time from the date the hearing request is received.

(b) A hearing may be rescheduled or adjourned for good cause taking into consideration the following factors:

1. The timeliness of the request;

2. The reason for the change;

3. Whether the client is detained;

4. Where the client is detained;

5. Why the client is detained;

6. How long the client has been detained;

7. Whether any party objects;

8. The length of any resulting delay;

9. The convenience or inconvenience to the parties, witnesses and the division; and

10. Whether the client and the client's attorney, if any, have had adequate notice and time to prepare for the hearing.

(c) Any party requesting that a hearing be rescheduled shall

give notice of such request to the opposing party.

(5) PROTECTION OF A WITNESS. (a) The identity of a witness may be withheld from the client if disclosure of the identity would threaten the safety of the witness or another.

(b) Testimony of a witness may be taken outside the presence of the client when there is substantial likelihood that the witness will suffer significant psychological or emotional trauma if the witness testifies in the presence of the client or when there is substantial likelihood that the witness will not be able to give effective, truthful testimony in the presence of the client at hearing. The administrative law judge shall indicate in the record that such testimony has been taken and the reasons for it and must give the client an opportunity to submit questions to be asked of the witness.

(c) The hearing examiner shall give the client and the client's attorney an opportunity on the record to oppose protection of a witness before any such action is taken.

(6) PROCEDURE. (a) The hearing may be closed to the public and shall be conducted in accordance with this chapter. 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.

(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.

(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 probation or parole. 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. 2.06(6)(b) and shall include a determination of:

1. Good time forfeited, if any, under ss. DOC 302.23 and DOC 302.24 and, for mandatory release parolees, whether the client may earn additional good time; or

2. The period of reincarceration, if any, under s. DOC 302.25.

(f) The administrative law judge's decision shall be written and forwarded within 10 days after the hearing 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.

(g) 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).

(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. 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.

(b) The appellant shall submit a copy of the appeal to the other party who has 7 days to respond.

(9) ADMINISTRATOR'S DECISION. (a) The administrator may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review.

(b) The administrator shall forward a written appeal decision to the client, the client's attorney, if any, and the department's representative within 21 days after receipt of the appeal, unless the time is extended by the administrator.

HA 2.06 GOOD TIME FORFEITURE AND REINCARCERATION HEARINGS.

(1) APPLICABILITY. This section applies to good time forfeiture hearings under ss. DOC 302.23 and DOC 302.24 and

reincarceration hearings under s. DOC 302.25 when the client has waived his or her right to a final revocation hearing.

(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 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. The client has the following rights at the hearing:

(a) To be present at the hearing;

(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.

(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.

(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 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 DOC 302.24, 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 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).

(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.

(8) ADMINISTRATOR'S DECISION. (a) The administrator may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review.

(b) The administrator shall forward a written appeal decision to the client and the department's representative within 21 days after receipt of the appeal, unless the time is extended by the administrator.

HA 2.07 TRANSCRIPTS. Hearings shall be recorded either stenographically or 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. Any party may also record the hearing at his or her own expense.

HA 2.08 HARMLESS ERROR. If any requirement of this chapter or ch. DOC 328 is not met, the administrative law judge or administrator may deem it harmless and disregard it if the error does not affect the client's substantive rights. Substantive rights are affected when a variance tends to prejudice a fair proceeding or disposition.

The rules contained in this order shall take effect on January 1, 1992 or on the first day of the month following publication in the Wisconsin Administrative Register, whichever occurs later, as provided in s. 227.22(2), Stats.

Division of Hearings and Appeals

Dated: October 30, 1991

By: David H. Schwarz

Seal:

David H. Schwarz
Administrator

NOTES TO CHAPTER HA 2

1989 Act 107 transferred responsibility for corrections related hearings from the Department of Health and Social Services to the Division of Hearings and Appeals on January 1, 1990. These rules fulfill the legislative mandate of 1989 Act 107 and recreate procedural rules to govern corrections hearings. They replace ss. HSS 31.05, HSS 31.13(4) and HSS 31.14(4), Wis. Admin. Code. Although these rules are largely taken from the HSS rules, some revisions are made and some new provisions are created to address subjects not covered by the previous rules. Unless otherwise noted, the changes are intended to simplify and clarify the rules and are not meant to change the original intent. The remaining portions of ch. HSS 31 dealing with substantive probation and parole issues have been separately promulgated by the Department of Corrections in ch. DOC 331.

Note: HA 2.01 APPLICATION OF RULES. Sec. 227.03(4), Stats., provides that the contested case provisions of ch. 227 do not apply to proceedings involving the revocation of parole or probation. Accordingly, it is intended that the provisions of ch. HA 1 not apply in corrections proceedings.

Note: HA 2.02 DEFINITIONS. The definitions come from ch. DOC 328. The definition of "day" has been clarified to mean actual working days in conformity with practice and its usage in s. HSS 31.05. The term "administrative law judge" is new.

Note: HA 2.03 SERVICE OF DOCUMENTS. This section is new and will permit the parties to file documents by regular first class mail, inter-departmental mail and by facsimile transmission in addition to the more formal methods of personal service, registered or certified mail. The changes are intended to reduce administrative costs associated with the hearing process and to give the parties the convenience of filing documents by facsimile transmission. The mailing address of the division is: 5005 University Ave., Suite 201, Madison, WI 53705-5400. The facsimile transmission number of the division is: (608) 267-2744.

Note: HA 2.04 WITNESSES AND SUBPOENAS. These rules will allow attorneys to issue subpoenas under the same procedure as provided by s. 805.07(1), Stats. Although the division reserves the right to issue subpoenas directly, the attorneys are in a better position to issue the necessary subpoenas and the division's responsibility should be limited to cases where a party is not represented by an attorney or where the division is asked to modify or cancel a subpoena.

Note: HA 2.05 REVOCATION HEARINGS. This section replaces s. HSS 31.05 which was developed in 1981 from the broad outlines of the revocation process drawn by the U.S. Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Like the prior rules, these rules reflect an attempt to provide a fair hearing procedure that is also efficient and speedy.

Subsection (1) is patterned after s. HSS 31.05(1) and requires the notice of hearing to be issued within 5 working days of receipt of the hearing request. Subsection (1)(b) has been revised to clarify that the notice must contain a statement of the alleged violation in addition to the rule or condition violated. Subsection (1)(d) reflects actual practice and clarifies that only a listing of evidence and witnesses is required. It also allows the department to withhold disclosure of such information if it is confidential or if disclosure would threaten the safety of a witness or another. Subsection (1)(e) clarifies that prehearing disclosure of evidence should come from the department rather than from the division. The former provision which required identification of unavailable witnesses in the notice has been eliminated because: such information is rarely, if ever, known to the department at the time the notice is issued; these issues can be better addressed at the hearing, and; witnesses are otherwise identified under subsection (1)(d).

Subsection (2) is new and conforms to the holding in *State ex rel. Flowers v. DHSS*,81 Wis. 2d 376 (1978).

Subsection (3) is taken from s. HSS 31.05(1)(h).

Subsection (4) replaces s. HSS 31.05(3) and recognizes the requirement that hearings for persons confined in a county facility must begin within 50 calendar days of detention as mandated by s. 302.335, Stats. Subsection (4)(b) replaces the former "five-day" rule of s. HSS 31.05(3)(b), incorporates factors necessary to determine compliance with s. 302.335, Stats., and incorporates postponement criteria used by courts as summarized in *State v. Wedgeworth*, 100 Wis. 2d 514 (1981). The former "five-day" rule is unworkable because many valid reasons for postponements arise more than five days after the notice is issued. The division does not interpret s. 302.335, Stats., or s. HA 2.05(4) as a jurisdictional time limit.

Subsection (5) replaces s. HSS 31.05(4) and creates new special protective procedures for witnesses in light of the decision in *State v. Thomas*, 150 Wis. 2d 374 (1989). Although the confrontation rights applicable in a revocation hearing are not the same as those in a criminal proceeding, the standards and criteria for special protective procedures described in *Thomas* are informative and have provided the basis for these revised procedures. This section is broader than *Thomas*, however, in that it applies to all witnesses whenever the requisite need is established. This subsection is intended to permit use of protective procedures such as a screen, one-way mirror, televised or video taped testimony and, if necessary, exclusion of a client from the hearing room when such action is necessary to protect a witness from the substantial likelihood of significant psychological or emotional trauma or to enable a witness to give effective, truthful testimony at the hearing.

Subsection (6) presents a description of what is to occur at the hearing. The provision that the hearings are not open to the public reflects the historical fact that the hearings most often occur in a jail or other secure detention facility and the belief

that such hearings are not a "meeting" of a "governmental body" as those terms are used in sec. 19.82, Stats. The rule on the inapplicability of the rules of evidence comes from s. 911.01(4)(c), Stats. The rule that a judgement of conviction conclusively proves a violation comes from *State ex rel. Flowers v. H&SS Department,* 81 Wis. 2d 376,389 (1977), citing *Morrissey v. Brewer,* 408 U.S. 471, 484 (1972) and reflects a belief that a parolee or probationer should not be allowed to relitigate issues determined in other forums, as in the situation presented when the revocation is based on conviction of another crime. No distinction is made between judgements resulting from trial and those resulting from a plea.

Subsection (7) replaces s. HSS 31.05(6). The revocation criteria of subsection (7)(b)3 come from the holding in *State ex rel. Plotkin v. H&SS Department*, 63 Wis. 2d 535 (1974) and replace the former language found at s. HSS 31.05(6)(b)4. The changes are appropriate to clarify the criteria and to clarify that revocation may occur if the administrative law judge finds that any one of the *Plotkin* criteria is met and that there are no appropriate alternatives to revocation. The former provision of s. HSS 31.05(6)(c), citing the goals and objectives of supervision under ch. DOC 328, has been eliminated because it was not in complete harmony with the *Plotkin* criteria and generated confusion over the revocation standard. Tolled time is permitted by s. 304.072, Stats. Sentence credit is required under s. 973.155, Stats.

Subsection (8) replaces ss. HSS 31.05(9) and HSS 31.05(10). Prior to January 1, 1990, revocation appeals were reviewed by the secretary of the department of health and social services. These rules direct that such appeals be reviewed by the division administrator as provided in s. 301.035(4), Stats. The administrator's decision is the final decision and is not subject to further administrative review. The appeal, including all supporting materials and arguments, must be filed by the appellant within 10 working days of the decision. The opposing party then has 7 working days to respond. The parties are not responsible for assembling the record or reviewing the synopsis of testimony as these functions are performed by the division.

Subsection (9) replaces s. HSS 31.05(11). In the past, the secretary of the department of health and social services had 7 working days to decide the appeal from the date the secretary received the record and synopsis from the department's office of administrative hearings. Since assembly of the record and preparation of the synopsis often took several weeks, the secretary's final decision was similarly delayed. These rules recognize the time required for assembly of the record and preparation of the synopsis and provide that the division has only 21 working days from the date the appeal is received to issue the final decision.

Judicial review of a revocation decision is by certiorari in the county in which the client was last convicted of an offense for which the client was on parole or probation. See: *State ex*

rel. Johnson v. Cady, 50 Wis. 2d 540 (1971) and s. 801.50(5), Stats.

Note: HA 2.06 GOOD TIME FORFEITURE AND REINCARCERATION HEARINGS. This section combines the former provisions of ss. HSS 31.13 and HSS 31.14 in one combined hearing section. These procedures are used only when the client waives a revocation hearing but does not waive a good time forfeiture or reincarceration hearing. The appeal procedures are clarified in conformity with the appeal procedures created in s. HA 2.05(7).

Note: HSS 2.07 TRANSCRIPTS. Under this section, production of a transcript requires a writ of certiorari or prepayment of the transcription costs. A transcript is not prepared until the writ or prepayment is received and will require several weeks to complete. A party may also tape record the hearing at their own expense.

Note: HSS 2.08 HARMLESS ERROR. This section broadens the harmless error provisions of the former rules to include variance from procedural requirements as well as variance from time limits. As in the past, an error can be found harmless only if it does not affect the client's substantive rights.