Chapter HSS 31

PROBATION-PAROLE REVOCATION PROCEDURE

Note: Several sections in this chapter have explanatory notes which can be found after the last section in the chapter.

HSS 31.01 Authority and applicability. (1) These rules are promulgated under the authority of s. 227.014(2), Stats. They interpret ss. 46.001, 46.03(6), 53.11, 53.19, 53.31, 57.06, 57.072, 161.47, 971.17, and 973.10, Stats.; ss. 54.04 and 54.07, Stats. (1975); and ch. 48, Stats.

(2) This chapter applies to the adults on probation or parole and youth on aftercare in the legal custody of the department. This chapter will cease to apply to youth on the effective date of revocation rules relating specifically to youth.

History: Cr. Register, December, 1981, No. 312, eff. 1-1-82.

HSS 31.02 Definitions. The definitions under s. HSS 328.03 apply to this chapter.

History: Cr. Register, December, 1981, No. 312, eff. 1-1-82.

HSS 31.03 Revocation of probation and parole. (1) REVOCATION. A client's probation or parole may be revoked and the client transported to a correctional institution or court if the client violates a rule or condition of supervision.

(2) INVESTIGATION. A client's agent shall investigate the facts underlying an alleged violation and shall meet with the client to discuss the allegation within a reasonable period of time after becoming aware of the allegation.

(3) RECOMMENDATION. After investigation and discussion under sub. (2), the agent shall decide whether to:

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

(b) Resolve alleged violations by:

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 client to reemphasize the necessity of compliance with the rules or conditions; or

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

(c) Recommend revocation for an alleged violation.

(4) REPORT. An agent shall report all alleged client violations of the rules or conditions of supervision to the agent's supervisor. The following shall be reported:

(a) The facts underlying the alleged violation, including conflicting versions regarding the nature and circumstances of the alleged violation;

(b) The agent's investigatory efforts and conclusions;

(c) A brief summary of the agent's discussion with the client;

(d) The agent's recommendation regarding disposition and the reasons for it;

(e) A statement as to the custody status of the client;

(f) Any pending criminal charges, guilt plea, confession, or conviction for the conduct underlying the alleged violation; and

(g) Reference to the client's prior adjustment, including but not limited to alleged violations, violations, and abscondings.

History: Cr. Register, December, 1981, No. 312, eff. 1-1-82; r. (2) and (9), renum. (3) to (8), (10) and (11) to be HSS 31.05 to 31.12, Register, August, 1985, No. 356, eff. 9-1-85.

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.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.05 Final revocation hearing. (1) NOTICE. If the magistrate, following a preliminary hearing, or the agent's supervisor, when a preliminary hearing is not required, concludes that revocation 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, 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 and a statement that the client or the 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 sub. (3);

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

(c) A statement that the client has the right to a final revocation hearing before an impartial hearing examiner who shall determine, based upon the evidence presented, whether the client violated the rules or conditions of supervision and shall, after considering any mitigating or extenuating circumstances, determine whether the violation, even though factually established, necessitates revocation;

(d) A statement of the relevant evidence 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. All police reports regarding the allegation;

6. All warrants issued; and

7. Relevant photographs;

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

(f) A statement of which statements from unavailable witnesses will be used and why the witness is unavailable;

(g) The sources of information relied upon unless such disclosure would threaten the personal safety of another;

(h) An explanation of the client's rights at the hearing which are:

1. The right to be present at the hearing;

2. The right to deny the allegation;

3. The right to present witnesses;

4. The right to present documentary evidence;

5. The right to question witnesses in accordance with sub. (4);

6. The right to assistance of counsel;

7. The right to waive a hearing in accordance with sub. (2);

8. The right to receive a written decision stating the reasons for it based upon the evidence presented; and

9. The right to appeal the decision in accordance with sub. (10); and

(i) In parole revocation cases:

1. The agent's recommendation for forfeiture of good time pursuant to s. HSS 31.13 and any sentence credit given in accordance with s. 973.155, Stats., for a client who committed a crime before June 1, 1984, and did not choose to have 1983 Wisconsin Act 528 apply to him or her; or

2. The agent's recommendation for a period of reincarceration pursuant to s. HSS 31.14 and any sentence credit given in accordance with s. 973.155, Stats., for a client who committed a crime on or after June 1, 1984, or for any client who chose to have 1983 Wisconsin Act 528 apply to him or her.

(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 s. HSS 31.06.

(3) TIME. (a) The final revocation hearing shall be held within a reasonable time from the date of the case review decision to recommend revocation and detain the client.

(b) The client or the client's attorney, if any, may request, within 5 days of receiving notice, that the hearing be rescheduled by making a request in writing to the hearing examiner's office stating the reasons for the request. A copy of this request shall be sent to the department's representative by the client or client's attorney.

(4) NONDISCLOSURE OF IDENTITY OF WITNESSES BY DECISION OF THE HEARING EXAMINER. (a) A hearing examiner may decide that a witness shall not be called to testify at a hearing if the physical safety or mental health of another is endangered. The hearing examiner shall indicate the fact of the omission in the hearing record.

(b) A hearing examiner may accept communications from a party seeking permission to withhold the names of any witnesses if disclosure of the witnesses would endanger the physical safety or mental health of another. All such communications should state the reasons supporting nondisclosure.

(c) A hearing examiner may question a witness outside the presence of the client. The examiner shall indicate in the hearing record that such questioning has occurred.

(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 sub. (6). If 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 that disclose the identity of witnesses.

(5) PROCEDURE. (a) The hearing shall be conducted in accordance with 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.

(b) The hearing officer shall weigh the credibility of the witnesses and, where appropriate, state his or her conclusions in the hearing record.

(c) Evidence to support or rebut the allegation may be offered. Evidence gathered by means not consistent with this chapter, ch. HSS 328, or in violation of the law may be admitted as evidence at the hearing.

(d) The hearing examiner may accept hearsay evidence and may require the client or the client's attorney, if any, to submit questions to the hearing examiner to be asked of any witnesses questioned outside the presence of the client.

(e) Repetitious and irrelevant questions shall be forbidden.

(f) The department has the burden of proof to establish, by a preponderence of the evidence, that the client violated the rules or conditions of supervision.

(g) The examiner may take an active role to elicit facts regarding the alleged violation not raised by the client or the client's attorney, if any, or the department's representative.

(h) Alternatives to revocation and notice of an alibi defense offered by the client, the client's attorney, if any, and the department's representative shall be considered by the examiner if the examiner and the other party's representative have received them at least 5 days before the final hearing takes place, unless, for cause, the examiner allows a shorter notice.

(i) A verbatim record shall be kept of the testimony and evidence presented at the hearing.

(j) A continuance may be granted with the consent of both parties. The examiner may issue any necessary recommendation to give the department's representative and the client reasonable opportunity to present a full and fair record.

(6) DECISION. (a) After the hearing, the examiner shall consider only the evidence presented.

(b) The examiner 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; and

4. Make specific findings as to dangerousness, whether a decision not to revoke would unduly depreciate the seriousness of the violation, whether there is a need for further correctional treatment, and whether this is best provided in an institutional setting.

(c) If the examiner finds that a client violated the rules or conditions of supervision, revocation shall not result unless the examiner finds that continuation of supervision would be inconsistent with the goals and objectives of supervision under ch. HSS 328. The specific goal or objective and the reason it would be inconsistent with continuation of supervision shall be expressly stated in the decision.

(d) If the examiner 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.

(e) The examiner shall issue a written decision, based upon the evidence and client's record, to either revoke or not revoke the client's probation or parole. Examiners are encouraged to make the decision at the hearing. The examiner may include recommendations about what action would be in the best interests of the client, what the role of the agent, supervisor or bureau should be in implementing such recommendations, or comments about any other matter relevant to the case.

(f) If an examiner decides to revoke the client's probation or parole, the written decision shall include a determination of sentence credit in accordance with s. 973.155 (1), Stats., and of:

1. The good time forfeited, if any, pursuant to s. HSS 31.13 (4) (f), for the client who committed the crime for which he or she was sentenced before June 1, 1984, and did not choose to have 1983 Wisconsin Act 528 apply to him or her; or

2. The period of reincarceration, if any, pursuant to s. HSS 31.14 (4) (f), for the client who committed the crime for which he or she was sentenced on or after June 1, 1984, and for any client who chose to have 1983 Wisconsin Act 528 apply to him or her.

(7) ORDER. The examiner's order stating the decision to revoke or not revoke and the reasons for it shall be written and forwarded within 10 working days after the hearing to the client, the client's attorney, if any, the agent's supervisor, the regional chief, and the department's representative. An extension of 5 working days is permitted if there is cause for the extension and the examiner notifies the parties of the reasons for it.

(8) EFFECT OF ORDER AND APPEAL. The examiner's order shall take effect and be final 10 working days after the date it is issued unless the client or the client's attorney, if any, or department's representative files an appeal with supporting materials under sub. (10) with the secretary.

(9) SYNOPSIS. If an appeal is filed, a synopsis of the testimony at the hearing shall be prepared by the examiner and forwarded to the secretary prior to the secretary's review. The synopsis may be either written or recorded.

(10) MATERIALS SUBMITTED FOR REVIEW. The client's attorney, if any, the client or the bureau shall submit all relevant materials, including petitions, letters, briefs and reply briefs, to the secretary and the other party. Materials submitted for review shall be filed with the secretary within 10 working days after the date of the decision. An extension of this time limit may be granted by the secretary. Materials postmarked within 10 working days after the date of the decision shall be considered to be filed within the 10 working day limit.

(11) SECRETARY'S DECISION. (a) The secretary shall review the synopsis, the examiner's decision, and all materials submitted for review under sub. (10).

(b) The secretary shall decide to modify, sustain, reverse, or remand the examiner's decision based upon the evidence presented at the hearing and the materials submitted for review.

(c) The secretary's written decision shall be forwarded to the client, the client's attorney, if any, the agent's supervisor, the regional chief, and the department's representative within 7 working days after receipt of the required materials for review, unless the time is extended.

History: Renum. from HSS 31.03 (3) and am. (1) (intro.) and (a), (2), (4) (d) and (5) (a), Register, August, 1985, No. 356, eff. 9-1-85; emerg. am. (10), eff. 11-10-86; r. and recr. (1) (i), cr. (6) (f), Register, February, 1987, No. 374, eff. 3-1-87; am. (10), Register, May, 1987, No. 377, eff. 6-1-87.

HSS 31.06 Procedure when revocation hearings are waived. (1) If a final revocation hearing was waived, the supervisor may recommend revocation. A waiver may be withdrawn by the client prior to the secretary's decision if the client establishes that it was not knowingly, voluntarily, or intelligently made.

(2) If the supervisor recommends revocation, the recommendation shall include the reasons for it and the facts underlying the alleged violation. A record of waivers, confessions, convictions for the conduct underlying the alleged violation, or evidence of a client's guilty pleas or continuation of a criminal proceeding following a determination of probable cause for the conduct underlying the alleged violation shall be prepared. The complete record shall be sent to the secretary within a reasonable period of time after acceptance of the waivers, confession, or record of the guilty plea or conviction.

(3) The secretary shall decide whether to revoke the client's probation or parole.

(4) The secretary's decision shall state the reasons for it based upon the information provided and shall be delivered to the client, the client's attorney, if any, the regional chief, and the supervisory staff member who recommended revocation within 10 days of receipt of the recommendation.

History: Renum. from HSS 31.03 (4), Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.07 Termination of revocation proceedings. The supervisor may recommend to the regional chief that revocation proceedings be terminated without revocation of a client's probation or parole or that the client be released from custody status, or both, at any time before the hearing examiner's decision is issued, if there is sufficient reason for doing so. The regional chief shall decide.

History: Renum. from HSS 31.03 (5), Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.08 Concurrent criminal prosecution and acquittal in criminal proceeding. All revocation actions under this 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 or parole for that same conduct.

History: Renum. from HSS 31.03 (6), Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.09 Records. A summary of all alleged violations, revocation actions, and proceedings under this section against a client shall be maintained in the client's record.

History: Renum. from HSS 31.03 (7), Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.10 Transport to a correctional institution. A client shall be transported to a correctional institution or to court for sentencing as soon as it is feasible after a revocation decision becomes final.

History: Renum. from HSS 31.03 (8), Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.11 Special revocation procedures. All clients are subject to revocation under ss. HSS 31.03 to 31.10 except as noted under this section. Those clients committed under s. 161.47 or 971.17, Stats., or s. 54.04 or 54.07, Stats. (1975), shall follow the revocation procedures under this section and ss. HSS 31.07 to 31.09 as follows:

(1) If a client committed under s. 161.47, Stats., allegedly violates the rules or conditions of supervision, an agent shall proceed as noted under s. HSS 31.03(2) to (4) and shall, upon the approval of a supervisor, notify the committing court of the alleged violation and submit a report under s. HSS 31.03(4) to the court within a reasonable time after becoming aware of the alleged violation. If the court decides that the client should remain on probation, supervision shall continue under the previous rules and conditions unless they are modified by the court.

(2) Clients committed under s. 971.17, Stats., may only have their parole revoked by the court.

(3) If a client committed under s. 54.04, Stats. (1975), allegedly violates the rules or conditions of probation, field staff shall proceed as noted under ss. HSS 31.03(2) to (4) and 31.04 except that a case review shall be held and a decision issued by the supervisor within 96 hours after the detention of the client for the alleged misconduct. The supervisor may extend this time limit for good cause. If the supervisor recommends revocation, the agent shall notify the committing court of the decision within a reasonable period of time. The court shall determine whether revocation shall occur. No final revocation hearing may be held by the department. If the court decides that the client should remain on probation, supervision shall continue under the previous rules and conditions unless they are modified by the court.

(4) If a client committed under s. 54.07, Stats. (1975), allegedly violates the rules or conditions of parole, field staff shall proceed as noted under ss. HSS 31.03 (2) to (4) and 31.04 except that a case review shall be held and a decision issued by the supervisory staff member within 96 hours after the detention of the client for the alleged misconduct. A final revocation hearing shall then be held in accordance with this section.

History: Renum. from HSS 31.03 (10), Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.12 Harmless error. If any time requirement under this chapter is exceeded, the secretary may deem it harmless and disregard it if it does not affect the client's substantive rights. Substantive rights are affected

when a variance tends to prejudice a fair proceeding or disposition involving a client.

History: Renum. from HSS 31.03 (11) and am., Register, August, 1985, No. 356, eff. 9-1-85.

HSS 31.13 Good time forfeiture hearing. (1) APPLICABILITY. This section applies to a client who, before June 1, 1984, committed the crime for which he or she was sentenced and did not choose to have 1983 Wisconsin Act 528 apply to him or her.

(2) AMOUNT OF TIME AVAILABLE FOR FORFEITURE. (a) Prior to a client's preliminary hearing under s. HSS 31.04, the client's agent shall contact in writing the registrar of the institution which has the client's record and advise the registrar to provide the amount of the client's total good time that is available for forfeiture upon revocation of the client's parole supervision.

(b) The agent shall notify the hearing examiner's office before the final revocation hearing of the amount of good time available for forfeiture.

(3) CRITERIA. (a) The agent shall recommend to the hearing examiner's office prior to the final revocation hearing that a specific amount of good time be forfeited and whether good time should be earned upon the forfeited good time upon revocation of a client's supervision. This amount of time shall be expressed in terms of days, months or years, or any combination of days, months and years. The amount of time may not be expressed in terms of fractions or percentages of time periods. The agent shall send with his or her recommendation the reasons and facts consistent with the criteria listed in par. (b) that support the recommendation.

(b) The following shall be considered by the agent in recommending the amount of good time forfeited and whether good time may be earned on the amount of good time forfeited:

1. The nature and severity of the original offense;

2. The client's institution conduct record;

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

4. The amount of time left before mandatory release if the client is a discretionary release parolee;

5. Whether forfeiture would be consistent with the goals and objectives of field supervision under ch. HSS 328;

6. Whether forfeiture is necessary to protect the public from the client's further criminal activity, to prevent depreciation of the seriousness of the violation or to provide a confined correctional treatment setting which the client needs; and

7. Other mitigating or aggravating circumstances.

(c) The agent's supervisor shall review the agent's recommendation for a forfeiture, and the agent's recommendation shall be included in the client's chronological history along with the supervisor's comments on the recommendation.

(4) HEARING. (a) *General.* Unless the client waives his or her right to the hearing in accordance with par. (c), a hearing shall be held before an impartial hearing examiner who shall determine, based upon the criteria listed in sub. (3) (b), the evidence presented and the client's record, what amount of good time shall be forfeited and whether or not good time may be earned on the forfeited good time following revocation of a client's

parole supervision. This hearing may be held in conjunction with the final revocation hearing under s. HSS 31.05.

(b) *Notice.* 1. The client and the client's agent shall be given written notice of the client's right to:

a. A hearing to be held in accordance with this section;

b. Receive a written decision stating the reasons for the decision based upon the evidence presented; and

c. Have the decision reviewed in accordance with par. (h).

2. The notice shall include the date, time and place of the hearing and the amount of good time available for forfeiture.

(c) *Waiver.* 1. A client may waive his or her right to a hearing under this section, if this is done knowingly and voluntarily. The waiver shall be in writing. A waiver of a good time forfeiture hearing may be processed with a waiver of a revocation hearing under s. HSS 31.06. A copy of the client's chronological history, revocation summary and the agent's recommendation under sub. (3) (a) shall be sent to the secretary within a reasonable period of time after acceptance of the waiver.

2. The secretary shall decide whether good time should be forfeited and, if so, the amount of time to be forfeited and whether good time may be earned on the amount forfeited. A forfeiture of time shall be expressed in terms of days, months or years, or any combination of days, months and years. The amount of good time forfeited may not be expressed in fractions or percentages of time periods.

(d) *Time.* The good time forfeiture hearing shall take place either:

1. During or immediately following the final revocation hearing under s. HSS 31.05; or

2. If the client waived his or her right to a final revocation hearing, within a reasonable period of time after the secretary issues a decision under s. HSS 31.06 revoking the client's parole.

(e) *Procedure.* The hearing examiner shall read aloud the agent's recommendation and the client and agent may speak and respond to questions from the examiner. The examiner may admit into evidence the client's institutional conduct record, any documents submitted by the agent to support revocation and forfeiture of good time, and any other relevant documents submitted by the agent or client. A verbatim record of the hearing shall be kept.

(f) *Decision.* 1. After the hearing, the examiner shall consider only the record of the final revocation hearing, if any was held, any record kept under this chapter, the revocation decision and the reasons for it, testimony at the hearing, and the client's record.

2. The examiner shall determine:

a. Whether good time should be forfeited and whether or not good time may be earned on the amount forfeited; and

b. If good time should be forfeited, the specific number of days, months or years, or any combination of days, months and years, that shall be

forfeited. The amount of good time forfeited may not be expressed in fractions or percentages of time periods.

3. Good time may not be forfeited unless the examiner finds that forfeiture is necessary to protect the public from the client's further criminal activity, to prevent depreciation of the seriousness of the violation or to provide a confined correctional treatment setting which the client needs. The specific goal or objective and the reason it would be inconsistent with the continuation of supervision shall be expressly stated in the decision. No more good time may be forfeited than is necessary to achieve these goals and objectives.

4. The examiner shall issue a written decision, based upon the criteria listed in sub. (3) (b), the evidence presented and the client's record, indicating the forfeiture or non-forfeiture of the client's good time, whether or not good time may be earned on the amount forfeited, the amount of time tolled in accordance with s. 57.072, Stats., and the sentence credit earned pursuant to s. 973.155 (1), Stats.

(g) *Order.* The examiner's written order stating the decision and the reasons for it shall be mailed within 10 working days after the hearing to the client and the division. The time limits start on the day after the end of the hearing and include the date of mailing. If a hearing was held under par. (d) 1, this order shall be incorporated into the order under s. HSS 31.05 (7).

(h) *Effect of order and request for review.* 1. An order pursuant to a hearing under par. (d) 1 shall take effect and be reviewed in accordance with s. HSS 31.05 (8).

2. An order pursuant to a hearing under par. (d) 2 or (c) shall take effect and be final 10 days after the date it was mailed unless the client or the division requests a review of the forfeiture decision by the secretary within that time. Written notice of the request shall be sent to the secretary and the other party.

3. The hearing examiner shall notify the registrar at the institution where the client is to be received following revocation as soon as possible after the forfeiture decision becomes final and shall send a copy of the order to the registrar within 10 working days after its effective date.

(i) *Materials submitted for review.* All materials submitted to aid the secretary in review of the forfeiture decision shall be received by the secretary within 10 working days after the request for review is received by the secretary. An extension of this time limit may be granted by the secretary.

(j) *Secretary's decision.* 1. The secretary shall review the record of the hearing, the revocation decision and the reasons for it, the client's record, and all materials submitted for review under par. (i).

2. The secretary shall decide to modify, reverse or affirm the examiner's forfeiture decision based upon the evidence presented.

3. The secretary's written decision, stating the reasons for it, shall be mailed to the client and the agent within 10 days after the date that all materials under par. (i) are due. The secretary may extend the time limit by informing the client and agent in writing of the extension. Specific reasons for the extension shall be included in the notice of extension.

shall order that the client be reincarcerated no longer than is necessary to achieve the goals and objectives of supervision.

4. The examiner shall issue a written decision, based upon the evidence presented and the client's record, indicating the period of reincarceration ordered, if any.

(g) *Order.* The examiner's written order stating the decision and reasons for it shall be mailed within 10 working days after the hearing to the client and the division's representative and agent. The time limits start on the day after the end of the hearing and include the date of mailing. If a hearing was held under par. (d)1, this order shall be incorporated into the order under s. HSS 31.05 (7).

(h) *Effect of order and request for review.* 1. An order pursuant to a hearing under par. (d)1 shall take effect and be reviewed in accordance with s. HSS 31.05 (8).

2. An order pursuant to a hearing under par. (d)2 or (c) shall take effect and be final 10 days after the date it was mailed unless the client or the division requests a review by the secretary within that time. Written notice of the request shall be sent to the secretary and the other party.

3. The hearing examiner shall notify the registrar at the institution where the client is to be received following revocation as soon as possible after the decision becomes final and shall send a copy of the order to the registrar within 10 working days after its effective date.

(i) *Materials submitted for secretary's review.* All materials submitted by the client or the bureau to aid the secretary in review of the examiner's decision shall be received by the secretary within 10 working days after the request for review is received by the secretary. An extension of this time limit may be granted by the secretary.

(j) *Secretary's decision.* 1. The secretary shall review the record of the hearing, the revocation decision and the reasons for it, the client's record, and all materials submitted for review under par. (i).

2. The secretary shall decide to modify or affirm the examiner's reincarceration decision based upon the evidence presented.

3. The secretary's written decision, stating the reasons for it, shall be mailed to the client and the agent within 10 days after the date that all materials under par. (i) are due. The secretary may extend the time limit by informing the client and agent in writing of the extension. Specific reasons for the extension shall be included in the notice of extension.

(5) RECORDS. Relevant records relating to reincarceration shall be maintained as part of the client's record.

History: Cr. Register, February, 1987, No. 374, eff. 3-1-87.

HSS 31.15 Tolled time. (1) In this section, "tolled time" means the period of time between the date of a client's violation and the date the client's probation or parole is reinstated or revoked.

(2) The period of a client's probation or parole ceases to run during tolled time in accordance with s. 57.072, Stats., subject to sentence credit for time the client spent in custody pursuant to s. 973.155 (1), Stats. If a client is subsequently reinstated rather than revoked, time shall be tolled

only if the reinstatement order concludes that the client did in fact violate the rules or conditions of his or her supervision.

(3) The amount of time to be tolled is officially determined by a hearing examiner or is the secretary's decision in accordance with s. HSS 31.13 or 31.14.

History: Cr. Register, February, 1987, No. 374, eff. 3-1-87.

HSS 31.16 Reinstatement. (1) GENERAL. Reinstatement may only take place in accordance with this section.

(2) DEFINITION. For purposes of this section, "reinstatement" means the return of a client to field supervision after either:

(a) A client's personal written admission of a violation of the rules or conditions of supervision; or

(b) A finding by a hearing examiner or the secretary under this chapter that the client committed a violation of the rules or conditions of supervision sufficient to warrant revocation.

(3) ADMISSION. (a) A client may knowingly and voluntarily make a written admission, signed and witnessed, of a violation of the rules or conditions of supervision sufficient to warrant revocation, and request reinstatement. The request shall acknowledge:

1. The date of the violation; and

2. That the client is aware that the period between the date of violation and the date of reinstatement or revocation may be tolled, i.e., the period of the client's commitment term ceases to run during this period of time.

(b) A staff member may accept a client's written admission and request, and shall submit it with the report under s. HSS 31.03 (4) to a supervisory staff member.

(c) The supervisory staff member shall decide whether to accept the admission and request, recommend reinstatement, and forward the admission, request and recommendation to the secretary for approval, or continue with revocation proceedings. Reinstatement shall only be recommended when it is consistent with the goals and objectives of supervision under ch. HSS 328. The recommendation shall include a statement of the reasons for it.

(d) The secretary shall decide within 5 working days after receiving an admission and request and the supervisory staff member's recommendation whether to order reinstatement. A copy of the secretary's decision, stating the reasons for it, shall be sent to the client and the supervisory staff member.

(e) If the secretary decides that reinstatement should not occur, the revocation process may be initiated in accordance with s. HSS 31.03.

(4) FINDING OF VIOLATION BY HEARING EXAMINER. (a) Under s. HSS 31.05 (7), a hearing examiner may order a client reinstated after finding that the client committed a violation of the rules or conditions of supervision. Reinstatement may only be ordered when it is consistent with the goals and objectives of supervision under ch. HSS 328. The order shall include a statement of the reasons for it.

(b) The date of a client's violation and the date that the client was reinstated shall be stated in the hearing examiner's order for reinstatement.

(c) A hearing examiner's order for reinstatement may be appealed to the secretary in accordance with s. HSS 31.05 (8) to (11).

(5) RECORDS. Relevant records relating to a client's reinstatement shall be maintained as part of the client's records.

History: Cr. Register, February, 1987, No. 374, eff. 3-1-87.

Note: Providing a revocation procedure that is fair and effective, reasonably speedy and which does not hinder the overall correctional process is a difficult challenge. These objectives are sometimes in conflict. For example, it is important to give adequate and timely notice to a client and his or her attorney of revocation proceedings. At the hearings, the client should have the opportunity to examine and cross-examine witnesses. But there are costs involved in this. The period during which a client is subject to revocation proceedings can be very stressful. The client may be in custody. These 2 facts can seriously interrupt the correctional process. This is also true when a client is in an adversary relation to an agent, who probably will continue to supervise the client when the client returns to the community, or with parents, friends, or teachers who have information related to the revocation decision.

These are just a few examples of the issues that must be resolved in developing a fair, efficient revocation procedure that is consistent with these and the other objectives of this chapter.

The broad outlines for the revocation process have been drawn by the U.S. Supreme Court. This framework, which will be developed briefly here, leaves the state with some flexibility to devise a procedure that fairly resolves the sometimes conflicting goals of the supervision.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the U.S. Supreme Court outlined the procedures for adult parole revocation. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the U.S. Supreme Court held that the procedures in *Morrissey* applied to the revocation of adult probation as well.

A final revocation hearing to determine whether the parolee violated and whether to revoke occurs within a reasonable time of a preliminary hearing under this chapter. 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 preliminary hearing if the client is detained following the preliminary hearing. This is difficult to accomplish because of the shortage of hearing examiners, the difficulty of accommodating busy attorney's and agent's 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.

Revocation of parole under *Morrissey* requires an effective two-step process or a prompt final hearing. The hearing should be held within a reasonable time after a decision to pursue revocation at the preliminary hearing. The requirements for the hearing are:

(1) That the parolee must be given written notice of the alleged violations;

(2) That the parolee is entitled to disclosure of the evidence against him or her;

(3) That the parolee has the right to appear and speak on his or her own behalf;

(4) That the parolee has the right to present witnesses and evidence;

(5) That the parolee has the right to confront and cross-examine witnesses against him or her; and

(6) That the parolee has the right to receive a written decision, stating the reasons for it, based upon the evidence presented.

Morrissey gave the states flexibility to implement these requirements. The revocation procedures in this chapter reflect an attempt to provide a fair procedure that is also efficient and speedy.

Note: HSS 31.03. Subsection (1) states that a client may be revoked for violating the rules or conditions of supervision. The rules or conditions may proscribe an activity which is not in itself a violation of the criminal law. *State v. Evans*, 77 Wis. 2d 225 (1977). Some examples of violations for which revocation may result are failure to account for one's whereabouts, failure to report, absconding, leaving the state without an agent's permission, failure to notify an

agent of a change of address, and consumption of alcoholic beverages. See e.g., *State v. Garner*, 54 Wis. 2d 100 (1972); *State ex rel. Cressi v. Schmidt*, 62 Wis. 2d 400 (1974); *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 620 (1976); *State ex rel. Prellwitz v. Schmidt*, 73 Wis. 2d 35 (1976); *State v. Evans*, 77 Wis. 2d 225 (1977); *State ex rel. Shock v. DHSS*, 77 Wis. 2d 362 (1977); *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376 (1978); *State v. Gerard*, 57 Wis. 2d 611 (1973), *appeal dismissed*, 414 U.S. 804 (1973); *State ex rel. Mulligan v. DHSS*, 86 Wis. 2d 517 (1979).

Subsection (2) provides for an agent's investigation after an alleged violation. The investigation should be thorough since the information uncovered may form the basis of a decision to revoke a client's probation or parole. It should also be performed as soon as possible after the alleged violation so as not to cause undue interruption of a client's supervision. This is consistent with existing practice.

Subsection (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 a 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. (3) are derived from *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535 (1973). The alternatives noted under sub. (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 (4) requires an agent to report all alleged violations to his or her supervisor. Alleged violations, with any action taken under sub. (3) may be appropriately reported in a chronological log summary. However, if revocation is recommended, the agent should submit a report directly to the agent's supervisor. All of the information required under this subsection need not be included in a single written report.

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 violation 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's 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 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 requirement 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.

Note: HSS 31.05. Subsection (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 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 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 preliminary hearing.

The requirement for a speedy final hearing is not only designed to satisfy *Morrissey* requirements. It also recognizes the public interest in speedy revocation and fairness to the client. While it may be more convenient for the parties, both the state and the client's attorney, to have long periods of time to prepare for the hearing, there are other interests that require attention. It makes correctional sense to hold a speedy final hearing because a client is usually detained in a county jail pending the outcome of the revocation process. Detaining a client in a county jail has the adverse effects including lack of programs for the client, high cost to the counties and the state, and overcrowding of the county jails.

Subsection (4) provides a hearing examiner with the authority not to call a witness or not to allow the identity of a witness into the written record. Such information shall, however, be maintained in a confidential record. This is consistent with *Morrissey*. An examiner may decide to exercise this authority after receiving an *ex parte* communication requesting such nondisclosure for specific reasons. For example, if a 5 year old child was sexually assaulted by a client, it may be wise not to call the child to testify at the hearing. A child may become confused and frightened during the hearing and may be unable to provide any useful information. Also, the child's presence at the hearing may cause the child needless anxiety and may only serve to complicate the feelings he or she has over the alleged incident. A gentle conversation between the child and the examiner, away from the client and in the comforting presence of the child's parents may be the best way to elicit the necessary informaion without unduly harming the child. Witnesses should not be called and information about a witness' identity should not be kept from the client or the client's attorney unless the examiner specifically finds that such disclosure would endanger someone. Information, facts, evidence, or testimony obtained by the hearing examiner may be considered as evidence presented at the hearing, and are available to the client and client's attorney.

Subsection (5) presents a general description of what is to occur at the hearing. The hearing examiner should weigh the credibility of the witnesses. *State ex rel. Cresci v. Schmidt*, 62 Wis. 2d 400 (1974). Formal rules of evidence are not applicable at revocation hearings. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540 (1971); *State v. Gerard*, 57 Wis. 2d 611, *appeal dismissed*, 414 U.S. 804 (1973). Hearsay evidence is admissible, but hearsay evidence alone is insufficient for revocation. It may be too costly to call every witness to testify and examiners should be particularly able to weigh the value of hearsay. If an examiner is not satisfied after receiving hearsay evidence, the witness may be required to appear.

Subsection (5)(c) provides that evidence gathered pursuant to a search in violation of this chapter or the law may be admitted as evidence in a revocation hearing. There are several reasons for this. First, this encourages the making of adequate administrative rules. If such evidence could not be used, it is likely that there would be an undesirable change in the substance of the rules. This is so because the rules relating to searches are more strict than the requirements of the U.S. Constitution.

Second, this reflects the view that an exclusionary rule is not an effective way of encouraging compliance with the rules. Rather, enforcing the rules should be left to the department. This is a more desirable and effective way of enforcing compliance.

Third, to exclude the evidence is to misplace emphasis. The primary justification for excluding it is to exact compliance. *Elkins v. U.S.*, 364 U.S. 206 (1960). How the evidence was found does not bear on the issue of the guilt or innocence of the possessor of it. The responsibility for enforcement, an extremely important matter, should be addressed independently. Further, if the issue of admissibility were permitted to be litigated, it would likely delay administrative action against the staff member who violated the rule. This is the experience in the police field, where recommendations similar to the ones in these rules were made. American Bar Association's Project on Standards For Criminal Justice, *Standards Relating to the Urban Police Function* (1973), standard 4.4 There is great value in proceeding promptly against such staff members. This is the most effective deterrent to violation of the rules.

Primarily because the exclusion of evidence obtained as the result of an unreasonable search and seizure would not serve to deter future illegal search activity, a majority of jurisdictions take the view that such evidence is admissible in a probation revocation hearing even though it would not be admissible in a criminal prosecution to determine guilt. *U.S. ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (D.C. La 1970), *aff'd*, 438 F.2d 1027 (5th Cir. 1971), *cert. den.*, 404 U.S. 880 (1971); *Bruno v. State*, 343 So. 2d 1335 (1977); *Owens v. State*, 354 So. 2d 118 (1978); *State v. Spratt*, 386 A.2d 1094 (RI, 1978); *People v. Dowery*, 20 Ill. App. 3d 738, 312 NE 2d 682 (1974), *aff'd 62 Ill. 2d 200 (1975); People v. Coleman*, 13 Cal.3d 867, 533 P.2d 1024 (1975). Other than *ex parte* communication allowed under this section, *ex parte* communications should be avoided while the case is pending. *State ex rel. Gibson v. DHSS*, 86 Wis. 2d 345 (Ct. App. 1978); *Ramaker v. State*, 73 Wis. 2d 563 (1976).

Records of the department are admissible at the revocation hearing pursuant to the public records exception to the hearsay rule. S. 908.03(8), Stats.; *State ex rel. Prellwitz v. Schmidt*, 73 Wis. 2d 35 (1976).

If the client offers a defense to the allegation, the examiner must consider it. *Snajer v. State*, 74 Wis. 2d 303 (1976).

The hearing examiner may take an active role at the hearing. Such a role need not affect neutrality and adds to the likelihood of making an informed decision. The examiner must consider all alternatives to revocation timely presented by the parties. Delays to allow the development of alternatives are not encouraged. A record must be kept of the proceedings. The record must be comprehensive and adequate. *Coleman v. Percy*, 86 Wis. 2d 336 (Ct. App. 1978). The procedure outlined under this subsection is in substantial accord with existing practice, but the hearsay provisions have been altered somewhat.

Subsection (6) provides for a written decision based upon the evidence. See, e.g., *State ex rel. RR v. Schmidt*, 63 Wis. 2d 82 (1974); *Zizzo v. U.S.*, 470 F. 2d 105 (7th cir. 1972), *cert. den.*, 409 U.S. 1012 (1972).

The hearing examiner's decision must be included in an order that must be forwarded within 10 working days after the hearing. Subsection (7). Bench orders are encouraged when they are consistent with sound, informed decision-making.

Subsection (8) provides that an examiner's order shall become effective and final 10 working days after it is issued, unless an appeal is filed within that time. This is advantageous to the client and department in that prolonged delay in implementing the order may be detrimental to continuity of supervision, particularly if the client is in custody. The client or bureau representative may request review of the examiner's decision by appealing to the secretary. The reasons for the request must be stated.

Subsection (11) provides for a decision by the secretary. When a hearing examiner's decision is overruled by the secretary, and a client's probation is revoked, a decision stating the reasons for it based upon the evidence must be provided. *Ramaker v. State*, 73 Wis. 2d 563 (1976).

Note: HSS 31.06. This section provides the procedure for revocation when the client has waived the right to a preliminary hearing, or a preliminary hearing and final hearing. A supervisory staff member should assemble all relevant information and documents and forward them for review by the secretary. Experience teaches that the secretary's decision usually results in revocation. The department is encouraged to ask a client to have the assistance of legal counsel before accepting such waivers. Sometimes, however, this is not possible and uncounseled waivers are permitted.

Note: HSS 31.07. This section provides the supervisor with the authority to terminate revocation proceedings without revocation. For example, if clear evidence arises that the client did not commit the alleged violation, proceedings should be halted.

Note: HSS 31.08. This section provides for concurrent revocation and prosecution proceedings. See 65 *Op. Atty. Gen.* 20 (1976).

Delays in the revocation process may cause undue anxiety for the client, and may cause severe interruptions in supervision. It is in the client's interests to obtain a speedy informed decision regarding revocation.

The few court cases found on the subject of acquittals have taken the position that an acquittal in a criminal proceeding does not preclude revocation of supervision on the same charge because of the differences in nature of the 2 proceedings and to the different levels of proof involved therein. See, e.g., *Johnson v. State*, 240 Ga. 526, 242 S.E. 2d 53 (1978), *Bernal-Zazuela v. U.S.*, 225 F.2d 60 (1955).

Note: HSS 31.09. This section provides for accurate recordkeeping of revocation actions.

For further information regarding client transport under s. HSS 31.10, see HSS 328.23.

Note: HSS 31.11. This section provides the procedures for revocation for those clients on probation or parole committed under ss. 161.47 and 971.17, Stats., and ss. 54.04 and 54.07, Stats. (1975). Special revocation procedures for these clients are provided for under ss. 161.47 (1), 971.17 (2) and (3), Stats., and ss. 54.05 and 54.11, Stats. (1975). This section is consistent with these statutory provisions and the goals and objectives under this chapter.

This chapter is in substantial accord with the American Correctional Association's *Manual of Standards for Adult Probation and Parole Field Services* (1977), standards 3141-3144 and 3146; the American Correctional Association's *Manual of Standards for Adult Parole Authorities* (1976), standards 1098-1104; the American Bar Association's *Standards Relating to Probation* (Approved Draft, 1970) standards 5.1 and 5.4; and 15 *Cal. Adm. Code*, 2616-2618, 2635, 2636(a) and (b), 2643, 2645-2646, 2665-2667, 2668(a), (b), and (c).

Note: HSS 31.13. This section applies to clients who are not subject to 1983 Wisconsin Act 528 because they committed crimes before June 1, 1984, and did not choose to have the act apply to them. Clients on discretionary or mandatory release parole who are not subject to Act 528 and who have their supervision revoked under this chapter are entitled to a forfeiture hearing under this section. The hearing is held to determine the amount of good time credit a client should forfeit, if any, and whether good time may be earned on the amount forfeited as a result of a violation.

To ensure a fair, effective, and reasonably speedy revocation and forfeiture process which does not hinder the correctional process, several important features have been incorporated into this section.

First, an agent must contact the registrar from the institution which has the client's record prior to the preliminary hearing to determine the amount of time available for forfeiture. The amount of time may significantly affect the client's decision to waive his or her rights to a final revocation hearing under this chapter, the client's interest in proposing alternatives to revocation, as well as the supervisory staff member's and hearing examiner's decision to pursue revocation. Hence, the amount of good time available for forfeiture must be included in the notice of the hearing.

Second, the agent must recommend that a specific amount of time be forfeited and whether good time may be earned in the future on the amount forfeited. For the reasons stated above, this should be included in the notice of the final revocation hearing and the forfeiture hearing and in the client's record.

Third, unless it is waived by the parolee, a good time forfeiture hearing must be held during or immediately after a final revocation hearing, or within a reasonable time after a secretary's decision to revoke a client's parole. Since the factual basis for loss of good time credit has been adequately and fairly explored at the final revocation hearing or by the secretary, and since a final written decision to revoke must exist prior to an effective forfeiture decision, additional procedures are unnecessary. *Sillman v. Schmidt*, 394 F. Supp. 1370 (W.D. Wis. 1975).

Fourth, the department must exercise good judgment in determining how much good time, if any, the parolee will forfeit and whether good time may be earned in the future on the amount forfeited. *Putnam v. McCauley*, 70 Wis. 2d 256 (1975). (The decision in *Putnam* is not retroactive. *State ex. rel. Renner v. DHSS*, 71 Wis. 2d 112 (1976).) Only that much time should be forfeited as will achieve the goals and purposes of revocation.

See HSS 31.15 for a discussion of tolled time.

Note: HSS 31.14. This section applies to clients who are subject to 1983 Wisconsin Act 528 because they committed crimes on or after June 1, 1984, or because they chose to have the act apply to them. Clients on discretionary or mandatory release parole who are subject to the act and who have their supervision revoked under this chapter are entitled to a reincarceration hearing. The hearing is held to determine how much, if any, of the remainder of a client's sentence he or she should serve in prison. The remainder of a client's sentence is the entire sentence, less time served in custody prior to release. To ensure a fair, effective, and reasonably speedy revocation and reincarceration decision which does not impede the correctional process, features similar to the forfeiture hearing procedures described in s. HSS 31.13 have been incorporated into this section.

Note: HSS 31.15. Time is only "tolled" for clients whom the department decides have violated terms of their probation or parole sufficiently to warrant revocation. A client who commits a violation loses credit for having served time on his or her sentence for the days between the date of the violation, as determined by the agent, and the date of a decision to reinstate or revoke. For example, a client who absconds for 6 months, and is returned to custody for an additional 3 months before a decision on revocation is rendered, is tolled 9 months. However, the time the client is in custody between the violation and the reinstatement decision is credited back to the client. The client in the example would get back 3 months of the 9 months

tolled, for an effective tolled time of 6 months. This effective tolled time is then added to the end of the client's period of commitment to the department. The client in the example would remain under the department's custody for 6 months longer than the court initially ordered. See ss. 57.072 and 973.155, Stats., for further explanation.

Section 57.072, Stats., provides for a tolling of time on a client's probation or parole during the period of time between the effective date of a client's violation and the date that the client's supervision was reinstated or revoked subject to credit for time spent in custody in accordance with s. 973.155 (1), Stats.

Note: HSS 31.16. Reinstatement is an alternative to revocation of a client's supervision after a finding or admission that the client violated the rules or conditions of supervision.

Subsections (3) and (4) provide the only procedures for reinstatement. A client who has been given notice of revocation proceedings under this chapter may be reinstated by the hearing examiner or secretary. Reinstatement in lieu of any pending revocation proceedings is also possible. But here, it is important to provide the client wishing to admit he or she committed the violation with complete information regarding the consequences of such an action, e.g., the exact period of time that will be tolled and the amount of good time that may be forfeited or the period of reincarceration that may be ordered if reinstatement is ordered. It is only when the client is aware of the consequences of an admission and request for reinstatement that it may be knowingly and intelligently given. In addition, an admission and request must not be coerced. Only voluntary admissions and requests for reinstatement may be accepted.

The secretary may make the final decision about reinstatement to provide for uniformity and fairness in decisionmaking.

See s. HSS 31.15 regarding tolled time.