Chapter DOC 331

APPENDIX

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: DOC 331.03. 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. DDOC, 77 Wis. 2d 362 (1977);State ex rel. Flowers v. DDOC, 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. DDOC, 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 fromState ex rel. Plotkin v. DDOC, 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: DOC 331.04. Section DOC 331.04 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 Scarpellihave 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. denied450 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. DDOC, 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: DOC 331.06. 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: DOC 331.07. 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: DOC 331.08. 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–Zazueta v. U.S., **225 F.2d 60 (1955).**

Note: DOC 331.09. This section provides for accurate recordkeeping of revocation actions.

For further information regarding client transport under s. DOC 331.10, see DOC 328.23.

Note: DOC 331.11. 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'sStandards 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: DOC 331.13. 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. DDOC, 71 Wis. 2d 112 (1976).) Only that much time should be forfeited as will achieve the goals and purposes of revocation.

See DOC 331.15 for a discussion of tolled time.

Note: DOC 331.14. 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. DOC 331.13 have been incorporated into this section.

Note: DOC 331.15. 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: DOC 331.16. 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. DOC 331.15 regarding tolled time.