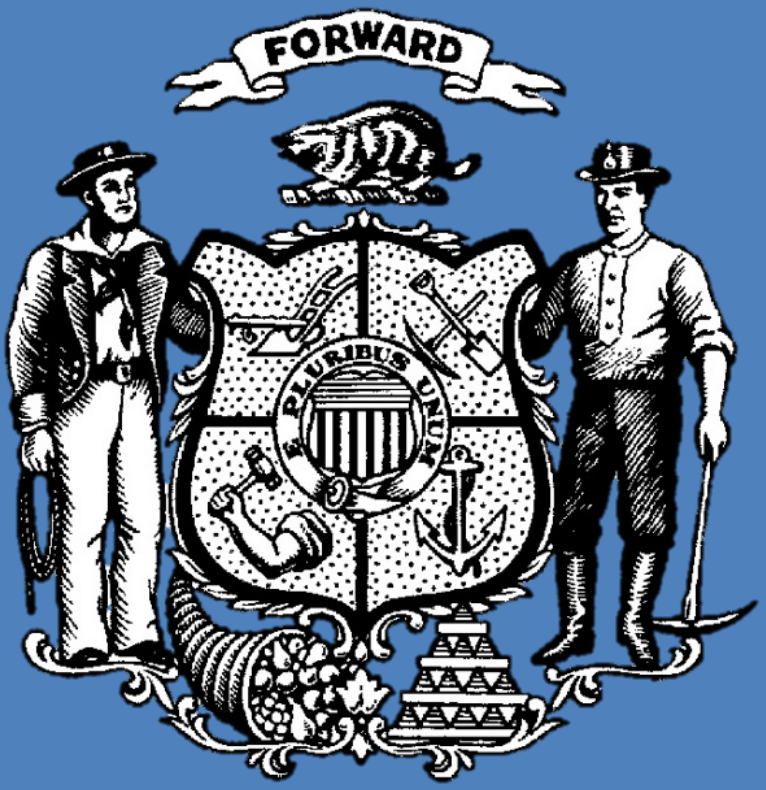
Resource Handbook for Community Supervision Revocation Hearings

2016 Edition



STATE OF WISCONSIN
Division of Hearings and Appeals

Introduction

The Wisconsin Department of Corrections (DOC) has legal custody of offenders on probation, parole, or extended supervision. In 2015, the DOC employed approximately 1,220 agents to supervise nearly 68,000 adult offenders in the community. In furtherance of the goals of community supervision, offenders are subject to certain conditions and rules.

If those conditions and rules are not followed, the DOC may recommend revocation of an offender's supervision. The Division of Hearings and Appeals (DHA) is the state agency responsible for final revocation hearings. These hearings are typically held in a county jail or state correctional institution where the offender is being detained. The DHA employs administrative law judges (ALJ) to conduct the hearings. In 2015, DHA ALJs conducted 3212 revocation hearings. Nearly half of these were by videoconference, meaning the ALJ, agent, and/or witness(es) appeared from a different physical location. At a revocation hearing, the DOC has the burden to prove that an offender violated the terms of supervision and revocation is warranted as a result. For each hearing, an ALJ will evaluate the evidence presented and make credibility determinations to decide whether an offender violated his/her supervision and, if so, whether revocation of supervision should result. The ALJ will also determine the period of time an offender must be re-confined in the cases of parole and extended supervision revocation.

Various court decisions, statutes, and administrative rules contribute to the body of law that governs the revocation process. The DHA previously issued two publications devoted to the legal framework for revocation hearings: a 2002 Resource Book for Probation and Parole Revocation Hearings and a 2011 caselaw supplement. This 2016 edition, entitled Resource Handbook for Community Supervision Revocation, serves to combine and update those publications in a topical format that is arranged chronologically according to the supervision process.

Every effort has been made to ensure the references and citations herein are accurate and current. As with any compilation of reference materials, the reader is cautioned to refer to original source material to avoid inadvertent errors or omissions. Editorial comments are intended to guide the reader; they are the considered thoughts and opinions of the editors.

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The Circuit Court's Role

Wisconsin law provides for three types of adult community supervision: probation, parole, and extended supervision. By imposing probation or a sentence upon conviction for a crime, the circuit court effectively commences the supervision process.

Probation

Probation occurs when a circuit court withholds sentencing or imposes a sentence but stays its execution, and in either case, places the offender on probation for a stated period of time. Wis. Stat. § 973.09. Probation is considered an alternative to a sentence. "The view that probation is not a sentence and that the imposition of incarceration as a condition of probation is likewise not a sentence has been generally accepted." *Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43, 45 (1974) (citations omitted).

Court-ordered conditions of probation

Circuit courts have broad discretion to impose conditions of probation. *See* Wis. Stat. § 973.09(1)(a) (the court may "impose any conditions which appear to be reasonable and appropriate"). These conditions will be upheld on appeal so long as they further the interests of rehabilitation and protection of a state or community interest. *State v. Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993).

Consecutive probation

When probation is ordered consecutive to another sentence that involves prison time, probation does not begin until the offender has served the initial prison sentence and completed the subsequent period of parole or extended supervision. *Grobarchik v. State*, 102 Wis. 2d 461, 307 N.W.2d 170 (1981).

Refusing probation

Offenders have the right to refuse probation at any time from sentencing through discharge. *State v. McCready*, 234 Wis. 2d 110, 608 N.W.2d 762 (Ct. App. 2000).

The circuit court may construe as rejection an offender's refusal to sign rules of probation. *State v. Pote*, 2003 WI App 31, 260 Wis. 2d 426, 659 N.W.2d 82 (if an offender refuses to sign rules, the DOC agent may petition the circuit court for a review hearing where the circuit court may withdraw probation and sentence the offender).

Parole

Parole generally applies to offenders who committed a crime prior to 2000. These offenders are eligible for discretionary parole after serving about 25% of their sentence in confinement. Wis. Stat. § 304.06(1)(b). Offenders are entitled to "mandatory release" on parole upon serving two-thirds of the sentence. Wis. Stat. § 302.11(1).

Extended Supervision

Extended supervision generally applies to offenders who committed felony crimes on or after December 31, 1999 or misdemeanor crimes on or after February 1, 2003. Wis. Stat. § 973.01(1). The circuit court will impose a bifurcated sentence that specifies an initial period of incarceration and a subsequent period of extended supervision in the community. Wis. Stat. § 973.01(2). An offender is entitled to release to extended supervision after serving the prison portion of the sentence. Wis. Stat. § 302.113(2).

Court-ordered conditions of extended supervision

Circuit courts may impose conditions upon the term of extended supervision. Wis. Stat § 973.01(5). These conditions will be upheld on appeal so long as they further the interests of rehabilitation and protection of a state or community interest. *State v. Miller*, 2005 WI App 114, ¶ 11, 283 Wis. 2d 465, 701 N.W.2d 47.

Judgments of Conviction

Circuit court sentences and conditions are memorialized in judgments of conviction. These are orders of the circuit court which neither the DOC nor DHA have authority to modify. *Bartus v. Dep't of Health & Soc. Servs.*, 176 Wis. 2d 1063, 1082, 501 N.W.2d 419 (1993) (citations omitted).

DOC Community Supervision

Community supervision occurs when an offender is placed on probation or has completed the prison portion of his or her sentence. The DOC has jurisdiction over offenders on any type of community supervision. Wis. Stat. §§ 973.10 (probation), 304.06(3) (parole), 302.113(8m) (extended supervision).

Rules Generally

In addition to any court-ordered conditions, offenders are required to follow standard and special rules of community supervision imposed by the DOC agent. Wis. Stat. § 973.10(1).

The DOC has wide latitude when imposing rules of supervision. Rules need not necessarily relate to a conviction or underlying offense. They need only:

(1) Serve the rehabilitative and protective objectives of supervision, *State v. Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993); and

(2) Be precise enough to put an offender on fair notice of what conduct is prohibited, *State v. Koenig*, 2003 WI App 12, ¶ 9, 259 Wis. 2d 833, 656 N.W.2d 499.

Rules can even impinge upon an offender's constitutional rights so long as they are not overly broad and reasonably relate to rehabilitation. *Krebs v. Schwartz*, 212 Wis. 2d 127, 131, 568 N.W.2d 26 (Ct. App. 1997).

Offenders are expected to obey the law as a condition of supervision regardless of rules. This is because some conditions of supervision are so essential that they automatically inhere in the concept of supervision; adhering to the criminal law is one of them. *State ex rel. Rodriguez v. Dep't of Health & Soc. Servs.*, 133 Wis. 2d 47, 52, 393 N.W.2d 105 (Ct. App. 1986). An offender on supervision cannot seriously contend that s/he can violate the law without affecting supervision status, regardless of whether there are signed rules of supervision. *Id*.

Challenging rules

The DHA has no authority to modify or void rules. An offender who disagrees with the DOC's general rules of supervision must follow the DOC's administrative process to dispute them. Wis. Admin. Code § DOC 328.12. An offender who disagrees with special or court-ordered conditions of supervision can ask the circuit court to hear the challenge. *State ex rel. Taylor v. Linse*, 161 Wis. 2d 719, 469 N.W.2d 201 (Ct. App. 1991).

Unsigned rules

An offender is bound by his/her written rules even if s/he refuses or neglects to sign them, so long as the agent establishes, explains, and provides written rules and informs the offender of possible consequences for not following them. Wis. Admin. Code § DOC 328.04(2).

Refusal to sign rules may be construed as rejection of probation. *State v. Pote*, 2003 WI App 31, 260 Wis. 2d 426, 659 N.W.2d 82.

Rules Specifically

The courts have weighed in on the suitability of certain rules. Consider the following examples.

Absconding

Not advising one's agent of one's whereabouts, commonly known as absconding, is a serious violation that often goes to the heart of supervision. *State ex. rel Shock v. Dep't of Health & Soc. Servs.*, 77 Wis. 2d 362, 368-69, 253 N.W.2d 55 (1977). If the agent does not know where the supervisee is, there can hardly be any supervision. *Id*.

Leaving the state without permission, even with plans to return, justified revocation of probation. *State ex rel. Solie v. Schmidt*, 73 Wis.2d 76, 242 N.W.2d 244 (1976).

Failure to account for whereabouts as instructed by an agent, even for a short period of time, was both a rational basis and adequate ground for revocation. *State ex rel. Cutler v. Schmidt*, 73 Wis. 2d 620, 622, 244 N.W.2d 230 (1976).

Alcohol consumption

Revocation was necessary for the offender's alcohol consumption because not revoking would likely result in similar conduct on the offender's part, thus depreciating the seriousness of his violation. *State ex rel. Eckmann v. Dep't of Health & Soc. Servs.*, 114 Wis. 2d 35, 46, 337 N.W.2d 840 (Ct. App. 1983).

A "no-alcohol" condition was reasonable in view of the offender's historical criminal history involving alcohol. *State ex rel. Mulligan v. Dep't of Health & Soc. Servs.*, 86 Wis. 2d 517, 521, 273 N.W.2d 290 (1979).

A special "no drinking" condition took on added importance when considering that drinking played an important part in the underlying conviction. A violation of that condition alone warranted revocation. *Van Ermen v. State Dep't of Health & Soc. Servs*., 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

Electronic monitoring program (EMP)

The DOC has discretion to place offenders on electronic monitoring. *State ex rel. Macemon v. McReynolds*, 208 Wis. 2d 594, 561 N.W.2d 779 (Ct. App. 1997).

Failure to support children or family

The DOC may place limits on an offender's ability to have more children. *State v. Oakley*, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200 (the rule restriction reasonably related to the offender's past offenses; he already had nine children and was convicted and on supervision for refusing to support them).

A requirement to take one's family "off the county welfare roll" and make a good-faith effort to support one's family were reasonable conditions of supervision where offender was convicted of non-support. *State v. Garner*, 54 Wis. 2d 100, 104–05, 194 N.W.2d 649 (1972).

Geographical restrictions

Whether a geographical limitation is sufficiently narrowly drawn is determined by looking at the specific facts and circumstances of each case. *State v. Stewart*, 2006 WI App 67, ¶¶ 18-19, 291 Wis. 2d 480, 713 N.W.2d 165. *See e.g. State v. Nienhardt*, 196 Wis. 2d 161, 164-66, 537 N.W.2d 123 (Ct. App. 1995) (upholding a condition of probation banishing the offender from the city of Cedarburg); *State v. Simonetto*, 2000 WI App 17, ¶¶ 1, 3, 232 Wis. 2d 315, 606 N.W.2d 275 (upholding a condition of probation prohibiting the offender from going "where children may congregate").

Faith-based treatment

The DOC may place offenders in faith-based treatment programming so long as the offender has the option of participating in a secular program. *Freedom from Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003). Moreover, agents are allowed to recommend faith-based programs when the program is consonant with the offender's religious beliefs. *Id*.

New criminal behavior

Violating the law while on supervision is such a serious violation that it alone may justify revocation. *State ex rel. Rodriguez v. Dep't of Health & Soc. Servs.*, 133 Wis. 2d 47, 52, 393 N.W.2d 105 (Ct. App. 1986).

Possessing a firearm

The legislature determined that felons are more likely to misuse firearms. *State v. Coleman*, 206 Wis. 2d 199, 210, 556 N.W.2d 701 (1996). The law prohibiting felons from possessing firearms is "aimed not at punishment but at protecting public safety through firearm regulation." *State v. Thiel*, 188 Wis. 2d 695, 706-07, 524 N.W.2d 641 (1994).

Psychotropic medications

The DOC may require the involuntary administration of psychotropic drugs so long as they are "medically indicated to accomplish the goals" of supervision. *Felce v. Fiedler*, 974 F.2d 1484, 1495-96 (7th Cir. 1992).

Refusing to provide a statement to the DOC

So long as the DOC has given the requisite warnings and grant of immunity, the DOC may seek revocation when an offender refuses to provide a truthful statement accounting for his or her whereabouts and activities. *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977) (creating what is commonly referred to as "the *Evans* warning"), *State v. Thompson*, 142 Wis. 2d 821, 833–34, 419 N.W.2d 564, 568 (Ct. App. 1987) (expanding immunity under *Evans* to all criminal proceedings, including for purposes of impeachment and rebuttal), and *State ex rel. Douglas v. Hayes*, 2015 WI App 87, 365 Wis. 2d 497, 872 N.W.2d 152 (clarifying that the agent must advise the offender that compelled information will enjoy both use and derivative use immunity); s*ee also State ex rel. Struzik v. Dep't of Health & Soc. Servs.*, 77 Wis. 2d 216, 224, 252 N.W.2d 660 (1977) (an offender's responsibility to answer his/her agent's questions or face possible revocation if s/he does not is a price society has a right to exact for the privilege of conditional liberty).

Relationship and association restrictions

A condition prohibiting the offender from entering into an intimate or sexual relationship without first discussing it with and obtaining agent approval was upheld. *Krebs v. Schwarz,* 212 Wis. 2d 127, 131, 568 N.W.2d 26 (Ct. App. 1997).

A condition requiring the offender to immediately introduce to her agent any person she was dating so that they could discuss her prior record was constitutional. *State v. Koenig*, 2003 WI App 12, 656 N.W.2d 499 (Wis. Ct. App. 2002).

A condition prohibiting contact with the "drug community" was upheld where the term "drug community" was defined for the offender as any place were drugs were being possessed, used, or sold. *State v. Trigueros*, 2005 WI App 112, ¶ 14, 282 Wis. 2d 445, 701 N.W.2d 54.

Rules defined by reference to statute

A rule prohibiting contact with gang members and engaging in gang activity was not unreasonably vague because the relevant terms were defined in the criminal code. *State v. Lo***,** 228 Wis. 2d 531, 599 N.W.2d 659 (Ct. App. 1999).

A condition requiring the offender to immediately introduce to her agent any person she was dating was not unreasonably vague because the relevant term "dating relationship" was defined by statue. *State v. Koenig*, 2003 WI App 12, 656 N.W.2d 499 (Wis. Ct. App. 2002).

Rules specific to offenders supervised as sex offenders

A condition prohibiting a sex offender from going places "where children might congregate" was constitutional and not overly broad. *State v. Simonetto***,** 2000 WI App 17, 232 Wis. 2d 315, 606 N.W.2d 275.

The DOC may by rule require a convicted sex-offender to notify his immediate neighbors of his sex-offender status. *State ex rel. Kaminski v. Schwartz***,** 2001 WI 94, 245 Wis. 2d 310, 630 N.W.2d 164 (2001).

Rule 1 was sufficiently narrow to construe as a violation the sexually violent offender's use of a sexual-performance-enhancing drug, especially considering he attempted to conceal his use which demonstrated he knew using it fell within the range of conduct prohibited by the rule. *In re Commitment of Burris*, 2004 WI 91, 273 Wis. 2d 294, 682 N.W.2d 812 (2004).

It was a reasonable and appropriate condition of supervision to require an offender convicted of sexual assault to pay for DNA/genetic testing to determine paternity of a child conceived as a possible result of the sexual assault. *State v. Beiersdorf*, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997).

Treatment – refusing to admit guilt

The DOC can seek revocation for an offender's failure to admit guilt in a treatment setting regardless of what type of plea led to the underlying conviction. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998) (a plea of no contest and an Alford plea place a defendant in the same position as though he had pled guilty or been found guilty after trial).

When the offender has no future threat of incrimination based upon his underlying offense, s/he has no right against self-incrimination with regard to admitting the facts surrounding the conviction. Thus, if the offender refuses to admit guilt as part of a mandatory treatment program, the DOC may revoke supervision based on the refusal. *State v. Carrizales*, 191 Wis. 2d 85, 528 N.W.2d 29 (Ct. App. 1995).

However, if future criminal proceedings are possible, an offender need only make self-incriminating statements (such as admitting guilt or previously undisclosed offenses) if the DOC provides sufficient warning and a grant of immunity (pursuant to *Evans*, 77 Wis. 2d 225, *Thompson*, 142 Wis. 2d 821, and *Douglas*, 2015 WI App 87). *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 22, 257 Wis. 2d 40, 654 N.W.2d 438.

Treatment – refusing to cooperate

An offender who poses a continued danger and needs treatment can be revoked for refusing it based on religious beliefs when the DOC has made reasonable efforts to accommodate the religious views. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 517 N.W.2d 540 (Ct. App. 1994).

DOC Jurisdiction over Rule Violations

As the entity with legal custody and control over offenders on supervision, the DOC is charged with investigating alleged rule violations and responding to founded violations. Wis. Admin. Code § DOC 331.03.

The DOC will maintain jurisdiction beyond the original discharge date to respond to a violation as long as, prior to expiration of the "term of supervision," the DOC:

(1) Commences an investigation; or

(2) Issues a violation report; or

(3) Issues an apprehension request concerning an alleged violation. Wis. Stat. § 304.072(3).

The "term of supervision" during which one of these steps must be taken pursuant to Wis. Stat. § 304.072(3) is interpreted broadly to include conduct during the entire underlying sentence, not just the most current period of supervision. *See State Dept. of Corrections v. Schwarz*, 2005 WI 34, 279 Wis. 2d 223, 693 N.W.2d 703 (the DOC has jurisdiction to revoke supervision for any violation occurring between the offender's initial release on supervision and the date of discharge on the underlying sentence regardless of whether there was a previous revocation;

jurisdiction is not limited to violations that occurred during the offender's most current period of supervision). *See also State ex rel. McElvaney v. Schwarz*, 2008 WI App 102, 313 Wis. 2d 125, 756 N.W.2d 441.

The DOC may also have jurisdiction to revoke supervision before an offender's actual release to the community. Where an inmate violates supervision rules or conditions immediately and simultaneously with his/her scheduled mandatory release date causing continued detention, the offender's status changes from a prisoner serving a sentence to a parolee detained on a parole hold and therefore the DOC has jurisdiction to seek revocation. *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶ 30, 278 Wis. 2d 24, 692 N.W.2d 219. In other words, the DOC need not go through a ritual of releasing uncooperative inmates on their mandatory release date just to place a parole hold on them for violations. *Id*. at ¶ 29. *But see State ex rel. Woods v. Morgan*, 224 Wis. 2d 534, 540, 591 N.W.2d 922 (Ct. App. 1999) (the offender was a prisoner subject to prison inmate rules, not on parole subject to revocation, when he committed a violation while still incarcerated after his mandatory release date).

Chapter 980 commitment

The DOC maintains jurisdiction during an offender's concurrent chapter 980 commitment and may initiate revocation of supervision for conduct during the commitment. *State ex rel. Tyler v. Wiedenhoeft*, Appeal No. 2012AP2766, 2013 Wisc. App. LEXIS 693, 2013 WI App 115, ¶ 4, 350 Wis. 2d 507, 838 N.W.2d 137 (unpublished) (*citing In re Gilbert*, 2012 WI 72, ¶45, 342 Wis. 2d 82, 106, 816 N.W.2d 215 and *State ex rel. McElvaney v. Schwarz*, 2008 WI App 102, ¶¶ 15–19, 313 Wis.2d 125, 756 N.W.2d 441).

Alternatives to Revocation (ATR)

If the DOC finds that an offender has violated supervision rule(s), it has discretion to offer an ATR. In exercising that discretion, the DOC must consider whether alternatives are available and feasible but is not required to try all available ATRs before seeking revocation. *Van Ermen v. Dep't of Health & Soc. Servs.*, 84 Wis. 2d 57, 67, 267 N.W.2d 17 (1978).

Discharging from Community Supervision

The department has jurisdiction over an offender until the issuance of a legally valid discharge certificate at the end of the court-imposed term of supervision. *See State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶ 41, 353 Wis. 2d 307, 845 N.W.2d 373; s*ee also Rodriguez v. Dep't of Health & Soc. Servs.*, 133 Wis. 2d 47, 51, 393 N.W.2d 105 (Ct. App. 1986).

Only a valid written discharge certificate will effectuate lawful discharge. A discharge certificate issued in error is not lawful and will not deprive the DOC of jurisdiction. *See Greer*, 353 Wis. 2d 307 (clerical error prompting an erroneous discharge will not constitute a lawful discharge) and *Rodriguez*, 133 Wis. 2d 47 (an agent's erroneous belief or statements about discharge will not amount to lawful discharge).

The Division of Hearings and Appeals

Authority to Conduct Hearings

The Division of Hearings and Appeals (DHA) employs administrative law judges (ALJ) to serve as neutral hearing examiners for DOC contested hearings. The majority of these hearings involve revocation of supervision, but DHA conducts other types of DOC hearings as well. Each is summarized below.

Final revocation hearings

The DHA, not the circuit court, is authorized to conduct final revocation hearings. *See State v. Horn*, 226 Wis. 2d 637, 646, 594 N.W.2d 772 (1999) (citations omitted) (the legislature prescribes criminal penalties and the manner of their enforcement, the courts impose the penalty, and the executive branch grants paroles and pardons).

The ALJ is responsible for:

(1) Evaluating the evidence presented, determining witness credibility, and making findings based on the facts as to whether an offender committed the alleged conduct and whether it constitutes a violation of supervision, Wis. Admin. Code §§ HA 2.05(6)(b), (7)(b);

(2) Deciding, if a violation was proven, whether revocation of supervision should result or whether there are appropriate alternatives to revocation (ATR), Wis. Stat. § 301.03(3), Wis. Admin. Code § HA 2.05(7);

(3) Deciding, if revocation is ordered, the period of re-confinement up to the remaining sentence for extended supervision or parole, Wis. Stat. §§ 302.113(9)(am) (ES) and 302.11(7)(am) (parole), Wis. Admin. Code §§ HA 2.05(7) and 2.06; and

(4) Deciding, if revocation is ordered, whether an offender is entitled to sentence credit, Wis. Stat. § 973.155(2), Wis. Admin. Code §§ HA 2.05(7)(b)5, 2.06(6)(c)3.

Good time forfeiture (old law) hearings

Good time forfeiture hearings apply to offenders serving a sentence for crimes committed before June 1, 1984. Wis. Admin. Code § DOC 331.13(1)(a). Good time is the credit awarded a prisoner for good conduct, which can reduce the time spent in prison during a sentence. Offenders are entitled to a hearing and due process before their good time can be forfeited. Wis. Admin. Code § DOC 331.13(2). *See Putnam v. McCauley*, 70 Wis. 2d 256, 234 N.W.2d 75 (1975); s*ee also State ex rel. Hauser v. Carballo*, 82 Wis. 2d 51, 261 N.W.2d 133 (1978). The rules applicable to these hearings may be found in pre-1984 Wis. Stat. § 53.11.

The DHA is the reviewing authority for these hearings and determines whether good time should be forfeited, if so how much, and whether good time may be earned on the forfeited good time. Wis. Admin. Code § DOC 331.02(2); Wis. Admin. Code § HA 2.06.

Parole recission hearings

If a parole grant has been issued but a change in circumstances results in its subsequent denial prior to the offender's release from prison, the offender is entitled to a due process hearing before the DHA. Wis. Admin. Code § PAC 1.07(7). S*ee State ex rel. Purifoy v. Malone*, 2002 WI App 151, ¶ 19, 256 Wis. 2d 98, 648 N.W.2d 1; s*ee also Klinke v. Dep't of Health & Soc. Servs.*, 87 Wis. 2d 110, 273 N.W.2d 379 (Ct. App. 1978). The DHA hearing examiner makes findings of fact, conclusions of law, and a recommendation. *Id.* The chairperson of the parole commission makes the final decision. *Id.*

Juvenile aftercare

The DHA is authorized to conduct youth aftercare revocation hearings under Wis. Admin. Code Ch. DOC 393. Wis. Admin. Code §§ DOC 393.03(16), 393.18; Wis. Admin. Code § HA 2.01(2). Youth who are on supervised aftercare are entitled to due process just as adult offenders subject to revocation are. *G.G.D. v. State*, 97 Wis. 2d 1, 292 N.W.2d 853 (1980).

Autonomy

The DHA is an autonomous entity contained within the executive branch of the state and is attached to the Department of Administration. Wis. Stat. § 15.103(1).

The DHA is entirely independent of other government agencies, including the DOC. *George v. Schwarz*, 2001 WI App 72, ¶21, 242 Wis. 2d 450, 626 N.W.2d 57.

The DHA and its ALJs are not bound by:

(1) DOC manuals, guidelines, or recommendations as to revocation or re-confinement decisions, *George*, 242 Wis. 2d 450; or

(2) DOC agents' representations to offenders or agreements made between agents and offenders or offenders' counsel, *State ex rel. Lewis v. Dep't of Health & Soc. Servs.*, 89 Wis. 2d 220, 278 N.W.2d 232 (Ct. App. 1979).

Controlling the Hearing

ALJs are given wide latitude regarding their control of hearings. They have "[c]ontrol over the required proceedings…" to assure that "…delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur." *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972).

ALJs may take an active role in hearings to elicit facts not raised by the parties. Wis. Admin. Code § HA 2.05(6)(g). Further ALJs may issue any necessary recommendation to give the

parties a reasonable opportunity to present a full and fair record. Wis. Admin. Code § HA 2.05(6)(i).

Subpoenas and Contempt

Attorneys and the DOC may issue subpoenas to compel witnesses to hearings. The DHA or an ALJ may do so if an offender is not represented by an attorney. Wis. Admin. Code § HA 2.04.

An individual who fails to follow the directives of a subpoena and a witness or party who engages in otherwise contemptuous behavior may be fined or subject to a contempt order should the DHA or ALJ petition the circuit court for remedial or punitive contempt sanctions. *See* Wis. Stat. §§ 785.06, 805.07 and 885.12.

Ex parte Communication

Ex parte communication is a generally prohibited communication between one party and the ALJ when the other party is not present.

Parties shall not engage in *ex parte* communication with the assigned ALJ while a matter is pending. *State ex rel. Gibson v. Dep't of Health & Soc. Servs.*, 86 Wis. 2d 345, 354-355, 272 N.W.2d 395 (Ct. App. 1978).

Parties also shall not submit evidence *ex parte*, meaning without notice to the other party and without an opportunity for the other party to respond. *Ramaker v. State*, 73 Wis. 2d 563, 243 N.W.2d 534 (1976).

Presumption of Impartiality

As administrative adjudicators, ALJs enjoy a presumption of honesty and integrity. A strong showing to the contrary is required to rebut this presumption. *Marder v. Bd. of Regents of University of Wis. Sys.*, 286 Wis.2d 252, 271-73, 706 N.W.2d 110 (2005) (citations omitted).

The Revocation Hearing

If the DOC recommends revocation of supervision, the matter is referred to the DHA for a revocation hearing. A revocation hearing is "a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

Establishing a Rule Violation

The DOC has the burden to prove by a preponderance of the evidence that an offender violated the rules of supervision as alleged. Wis. Admin. Code § HA 2.05(6)(f). Preponderance of the evidence means that it is more likely than not that an event occurred. *Black's Law Dictionary* 1201 (7th ed. 1999); *see also* Blinka, *Wisconsin Evidence* § 301.1 at 64 (2nd ed. 2001).

At hearing, either party may offer evidence to support or rebut allegations. Wis. Admin. Code § HA 2.05(6)(c). The ALJ will consider only the evidence presented and weigh witness credibility to decide whether the client committed the conduct underlying the alleged violation(s) and if so whether the conduct constitutes a violation. Wis. Admin. Code §§ HA 2.05(6)(b), (7)(a),(b).

Evaluating the *Plotkin* Factors for Revocation

The DHA will consider revocation for any and all violations which the DOC properly alleged and proved at hearing. *See In re Commitment of VanBronkhorst*, 2001 WI App 190, 247 Wis. 2d 247, 633 N.W.2d 236 (analogizing the rights of offender on Chapter 980 release to one on supervision, the Court prohibited revocation based upon a rule violation that was not alleged in the pleadings); *see also* Wis. Admin. Code § HA 2.05(7)(b).

Although every rule violation does not result in automatic revocation, *Snajder v. State*, 74 Wis. 2d 303, 316, 246 N.W.2d 665 (1976), a single violation can be both a necessary and sufficient ground for revocation, *State ex rel. Plotkin v. Dep't of Health & Soc. Servs.*, 63 Wis.2d 535, 544, 217 N.W.2d 641 (1974), Wis. Admin. Code § HA 2.05(7)(b)3.

Thus, once an ALJ determines that an offender violated his/her rules, the next inquiry is whether revocation should result or whether there are appropriate alternatives to revocation (ATR). Wis. Admin. Code § HA 2.05(7)(b)3. This inquiry is "not purely factual but also predictive and discretionary." *Morrissey*, 408 U.S. at 479-480.

Plotkin is the seminal case on the exercise of discretion to determine whether revocation should occur. It held that revocation should not be the disposition unless the ALJ finds on the basis of the original offense and the intervening conduct of the offender that:

(1) Confinement is necessary to protect the public from further criminal activity by the offender; or

(2) The offender is in need of correctional treatment which can most effectively be provided in a confined setting; or

(3) It would unduly depreciate the seriousness of the violation if the offender's supervision were not revoked; and

(4) There are no appropriate alternatives to revocation. *Plotkin*, 63 Wis. 2d at 544-45; Wis. Admin. Code § HA 2.05(7)(b)3.

These are commonly referred to as the "*Plotkin* factors."

Re-confinement / Reincarceration

If an ALJ decides to revoke extended supervision or parole, the ALJ must then determine the period of time an offender will be returned to prison for re-confinement / reincarceartion, taking into consideration the following criteria:

(1) The nature and severity of the original offense;

(2) The offender's institutional conduct record;

(3) The offender's conduct and behavior while on community supervision; and

(4) The amount that is necessary to protect the public from the risk of further criminal activity, to prevent the undue depreciation of the seriousness of the violation or to provide confined correctional treatment. Wis. Admin. Code §§ HA 2.05(7)(f), 2.06(6)(b).

The ALJ is authorized to return a revoked offender to prison for a period of time up to the remainder of the underlying sentence, Wis. Stat. §§ 302.113(9)(am) (ES) and 302.11(7)(am) (parole), regardless of the DOC's recommendation or guidelines, *George v. Schwarz*, 2001 WI App 72, ¶ 30, 242 Wis. 2d 450, 626 N.W.2d 57.

Due Process in Revocation Hearings

Morrissey v. Brewer, 408 U.S. 471 (1972), is the seminal case on due process in revocation hearings. The following list conveys some of the most significant guidance *Morrissey* and its progeny have provided regarding the process due in revocation hearings:

(1) Revocation hearings are administrative civil proceedings, not criminal proceedings, *State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶ 28, 236 Wis.2d 473, 613 N .W.2d 591; Wis. Admin. Code Ch. HA 2;

(2) An offender facing revocation is not afforded the full panoply of rights due a defendant in a criminal proceeding, *Morrissey*, 408 U.S. at 480;

(3) The due process considerations afforded an offender facing revocation come from the Fourteenth Amendment because an offender's liberty, albeit conditional, is valuable, *Morrissey*, 408 U.S. at 481-482;

(4) Revocation proceedings must minimally include written notice of the claimed violations, disclosure of evidence, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), a neutral and detached hearing body (members of which need not be judicial officers or lawyers), and a written statement by the factfinder as to the evidence relied on and the reasons for revoking supervision, *Morrisey*, 408 U.S. at 488-489; and

(5) Due process applies with equal force to parole or probation revocation, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Hearing Rights

Right to hearing within a reasonable time

By statute and administrative rule, the DHA shall begin a revocation hearing within 50 calendar days after the DOC detains an offender for revocation. Wis. Stat. § 302.335(2)(b); Wis. Admin. Code § HA 2.05(4).

This time limit is directory, not mandatory, so failure to meet it will not deprive the DHA of authority to hold the hearing. *State ex rel. Jones v. Div. of Hrgs. & Appeals*, 195 Wis. 2d 669, 672, 536 N.W.2d 213 (Ct. App. 1995).

Due process merely requires that delays in scheduling the hearing be reasonable. *See e.g. State ex rel. Flowers v. Dep't of Health & Soc. Servs.*, 81 Wis. 2d 376, 396, 260 N.W.2d 727 (1978) (two-month delay was reasonable), *Morrissey v. Brewer*, 408 U.S. at 488 (two-month delay not unreasonable), *U.S. v. Scott*, 850 F.2d 316, 320 (7th Cir. 1988) (13-month delay did not violate due process right to prompt revocation hearing).

Adjournments

ALJs have discretion to reschedule or adjourn a scheduled revocation hearing for good cause upon taking into consideration the following factors: (1) the timeliness of the request, (2) the reason for the change, (3) whether the offender is detained, (4) where the offender is detained, (5) why the offender is detained, (6) how long the offender has been detained, (7) whether any party objects, (8) the length of any resulting delay, (9) the convenience or inconvenience to the parties, witnesses, and the DHA, and (10) whether the offender and his or her attorney, if any, have had adequate notice and time to prepare for the hearing. Wis. Admin. Code § HA 2.05(4)(b).

Right to be competent for hearing

Reason to doubt an offender's competency may arise at any time during a revocation proceeding and may be raised by an offender, the offender's counsel, the DOC, or the ALJ. *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 519, 563 N.W.2d 883 (1997). No formal motion is necessary. *Id.*

The ALJ must determine whether there are facts supporting doubt about the offender's competency. *Id.* at 519. If there are, then the ALJ must initiate a competency proceeding with the circuit court by promptly forwarding the following to the circuit court in the county where the offender was sentenced:

(1) A written request for a competency determination;

(2) A copy of the revocation file; and

(3) The ALJ's written statement explaining grounds for finding reason to doubt the offender's competency. *Id.* at 520.

The revocation proceeding will be stayed until the circuit court makes a competency determination. *Id*. at 516.

Right to representation by counsel at hearing

There is no unqualified constitutional right to legal representation at a revocation hearing. *State ex rel. Cresci v. Schmidt*, 62 Wis. 2d 400, 215 N.W.2d 361 (1974).

However, by administrative rule, offenders do have an unqualified right to counsel at revocation proceedings in Wisconsin. Wis. Admin. Code § HA 2.05(3)(f).

The Public Defender's Office may appoint counsel for indigent offenders facing revocation. Wis. Stat. § 977.05(6)(h). *See also* Wis. Stat. § 304.06(3) (the DOC shall refer to the Public Defender offenders who claim or appear to be indigent).

Voluntary waiver of right to counsel

An offender may decide to proceed without counsel. This is commonly referred to as "*pro se*" representation.

When an offender elects to proceed without counsel, ALJs should ensure that this decision is knowing, intelligent, and voluntarily. This includes considering that the offender made a deliberate choice, is aware of the challenges and disadvantages of self-representation, is aware of the seriousness of the charges against him/her, and is aware of the potential penalties. ALJs should also ensure that the offender is competent to proceed without counsel. This includes consideration of the offender's education, literacy, fluency in English, and any disabilities that my affect the offender's ability to communicate. *See State v. Coleman*, 2002 WI App 100, ¶¶ 13-14, 253 Wis. 2d 693, 644 N.W.2d 283 (citations omitted).

Forfeiture of right to counsel by conduct

An offender may forfeit his right to counsel by his/her behavior.

Even in a criminal proceeding where the right to counsel is rooted in the 6th Amendment, a defendant may by his/her conduct forfeit that right. *State v. Coleman*, 2002 WI App 100, ¶ 16, 253 Wis. 2d 693, 644 N.W.2d 283 (citation omitted). It follows that offenders in revocation hearings with a less absolute right may similarly forfeit it. Such situations are unusual, most often involving a "manipulative or disruptive" party. *Id.* However, so long as the purpose and effect of a party's conduct is to frustrate the orderly and efficient progression of a case, s/he will have forfeited the right to counsel. *Id.* at ¶¶ 16-17.

Right to the effective assistance of counsel

Where there is a statutory right to the assistance of counsel, that "right includes the right to effective counsel;" otherwise the right to counsel would be of little value. *State ex rel. Schmelzer v. Murphy*, 201 Wis.2d 246, 253, 548 N.W.2d 45

(1996). *See Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). How an offender can raise a claim of ineffective assistance of revocation counsel, however, appears undecided.

In *State v. Ramey*, 121 Wis.2d 177, 178, 359 N.W.2d 402 (Ct.App.1984), the Wisconsin Court of Appeals held that a writ of certiorari challenging counsel's effectiveness at a revocation hearing is "not a proper subject for review of an administrative action."

Later, in *State ex rel. Vanderbeke v. Endicott*, 210 Wis.2d 502, 522, 563 N.W.2d 883 (1997), the Wisconsin Supreme Court cited *Ramey* for the holding that "habeas rather than certiorari is the appropriate procedure for an allegation of ineffective assistance of counsel at a probation revocation proceeding when additional evidence is needed."

Very recently, in *State ex rel. Redmond v. Foster*, No. 2014AP2637, 2016 WL 1689985 (Wis. Ct. App. Apr. 27, 2016), the Wisconsin Court of Appeals was asked to decide whether the mechanism in *State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis.2d 745, 678 N.W.2d 361 (reopening a revocation proceeding based upon newly discovered evidence) actually provides the proper means by which to bring a claim for ineffective assistance of revocation counsel. The issue was certified to the Wisconsin Supreme Court and the certification request remained pending at the time of publication of this Resource Handbook.

Right to present a defense at hearing

These examples are not exhaustive of all possible defenses an offender may or may not raise at a revocation hearing.

Self-defense

An offender facing revocation of supervision may claim self-defense in response to DOC allegations. *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 586, 326 N.W.2d 768 (1982) (a claim of self-defense is available to everyone in society whether on supervision or not).

Mental disease or defect is *not* a defense

The nature of revocation hearings does not allow a defense of not guilty by reason of mental disease or defect. *See State ex rel. Lyons v. Dep't of Health & Soc. Servs.*, 105 Wis. 2d 146, 150, 312 N.W.2d 868 (Ct. App. 1981).

Right to present an Alternative to Revocation (ATR) at hearing

Proposed ATRs offered by an offender or an offender's counsel will be considered only if the ALJ and DOC agent receive notice of them at least five days before the hearing. Wis. Admin. Code § HA 2.05(6)(h).

Right to present an alibi defense at hearing

Any alibi defense offered by an offender or an offender's counsel will be considered only if the ALJ and DOC agent receive notice of it at least five days before the hearing. Wis. Admin. Code § HA 2.05(6)(h).

Evidence in Revocation Proceedings

With the exception of certain privileges, the formal rules of evidence do not apply in revocation proceedings. Wis. Stat. § 911.01(4); Wis. Admin. Code § HA 2.05(6)(e).

Hearsay Evidence

Admissibility

Hearsay is admissible in revocation proceedings. Wis. Admin. Code § HA 2.05(6)(d). This is because the rules of evidence do not apply and revocation proceedings are intended to be more flexible and informal than criminal proceedings. These purposes are served by allowing ALJs to consider evidence that would not be admissible in a criminal trial, such as letters, affidavits, and other forms of hearsay. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

Admissibility is not the same as reliability. Hearsay evidence, however admissible, cannot form the basis for a violation unless it has sufficient indicia of reliability and there is good cause to dispense with confrontation of a live witness.

Confrontation and Good Cause

A criminal defendant's right to confront and cross-examine adverse witnesses comes from the Sixth Amendment. *State v. Patino*, 177 Wis. 2d 348, 362, 502 N.W.2d 601 (Ct. App. 1993). The rules of evidence apply in such criminal proceedings, so hearsay evidence must fall under an enumerated hearsay exception to be admissible. *Id*.

In contrast, an offender's right to confront and cross-examine adverse witnesses in a revocation hearing stems from due process considerations under the Fourteenth Amendment and the rules of evidence do not apply. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Accordingly, hearsay evidence may be admitted into the revocation hearing record, but an ALJ may rely on it as substantive evidence of a violation only if it bears sufficient indicia of reliability and there is good cause to dispense with confrontation. *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 20, 250 Wis. 2d 214, 640 N.W.2d 527.

Good cause is determined by balancing an offender's interest in cross-examining a witness against the DOC's interest in denying confrontation, which may include consideration of the reliability of the evidence and the difficulty, expense, or other barriers to obtaining live testimony. *Simpson* at ¶ 18. The more reliable the proffered

evidence, the less necessary to show that obtaining a witness's live testimony would have been difficult. *Simpson* at ¶21. Good cause may also be found where evidence offered in lieu of an adverse witness's live testimony would be admissible under the rules of evidence. *Simpson* at ¶ 22. But in any event, the party offering hearsay evidence must show that it is reliable and have a good explanation for not producing the witness. *Simpson* at ¶ 22.

The ALJ should make a specific finding of good cause in any case where hearsay evidence is offered in lieu of an adverse witness's live testimony. *Simpson* at ¶ 15. The requirement for making a good cause finding does not ever simply "vanish" regardless of how reliable the hearsay may be. *Simpson* at ¶ 15 (declining to extend *Egerstaffer v. Israel*, 726 F.2d 1231 (7th Cir.1984)). Failure by an ALJ to make a specific finding of good cause will be subject to the harmless error analysis and considered harmless where good cause exists, its basis is found in the record, and its finding is implicit in the ALJ's ruling. *Simpson* at ¶ 16.

Simpson does not change the mandate that a supervision violation cannot be proved entirely by "unreliable hearsay." *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 583, 326 N.W.2d 768 (1982). But it adds that even if hearsay is reliable, the ALJ must still make a finding that good cause exists to excuse the absence of live testimony.

Hearsay Exceptions and Good Cause

Although not binding as to admissibility, the hearsay exceptions enumerated in Wis. Stat. § 908.03 can assist the ALJ in the good cause balancing test. This is because hearsay evidence that falls into an exception category is generally considered to have some indicia of reliability, *see State v. Patino*, 177 Wis.2d 348, 372, 502 N.W.2d 601 (Ct. App. 1993) (citation omitted), and the Court indicated in *Simpson* that an ALJ can find good cause when hearsay evidence falls under an exception within the rules of evidence, *Simpson* at ¶22, ¶ 22 n. 5.

Consider the following examples:

911-call recordings

911 evidence falls under the present sense impression hearsay exception and may also qualify as an excited utterance exception. *State v. Ballos*, 230 Wis. 2d 495, 505, 506, 602 N.W.2d 117 (Ct. App. 1999).

DOC records

DOC records fall under the public records hearsay exception. *State ex rel. Prellwitz v. Schmidt*, 73 Wis. 2d 35, 39, 242 N.W.2d 227 (1976).

Police reports

Police reports may fall within the business records exception relating to memorandum made in the course of a regularly conducted activity. *State v. Gilles*, 173 Wis. 2d 101, 113, 496 N.W.2d 133 (Ct. App. 1992). But when a police report

contains out-of-court assertions by others, an additional level of hearsay is contained in the report and an exception for that hearsay must also be found. *Mitchell v. State*, 84 Wis. 2d 325, 330, 267 N.W.2d 349 (1978) (citing Wis. Stat. § 908.05).

Child hearsay

When the proffered hearsay evidence is a child's statement, special considerations including, but not limited to, the following may apply.

The residual hearsay exception

The Wisconsin Supreme Court has enumerated a non-exclusive set of factors to consider in assessing whether a child's hearsay statements fall under the residual hearsay exception:

(1) The characteristics of the child making the statement, including age, proficiency at communicating, ability to understand others' statements and questions, understanding of the difference between truth and falsehood, and fear of consequence expressed by the child which might affect motivation to tell the truth.

(2) The person to whom the child made the statement, paying special attention to the relationship between the child and the person, whether the relationship might impact the statement's trustworthiness, and any motivation by the recipient to fabricate or distort the statement.

(3) The circumstances under which the child made the statement, including relation in time to the incident, the availability of a person in whom the child might confide, and other contextual factors that might tend to affect the trustworthiness of the statement.

(4) The content of the statement itself. Does the statement display any signs of deceit or falsity? Does it reveal knowledge a child of that particular age would not ordinarily know?

(5) Other corroborating evidence, such as physical evidence, statements made to others, and opportunity or motive, which should be examined for consistency with the statement.

State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis. 2d 214, 640 N.W.2d 52 (citing *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988)).

The excited utterance exception

A broad and more liberal interpretation is given to what constitutes an excited utterance when applied to young children especially when the child is alleged to

have been the victim of sexual assault. *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 684, 230 N.W.2d 890 (1975).

Audiovisual recordings of children

Section 908.08, Wis. Stats., governs the admission of audiovisual-recorded statements made by children. It explicitly applies to revocation hearings. Its purpose was to make it easier to use videotaped statements of children in criminal trials and related hearings. *State v. Snider*, 2003 WI App 172, ¶ 13, 266 Wis. 2d 830, 668 N.W.2d 784. It provides two distinct paths by which a child's audiovisual recorded statement may be admitted at a revocation hearing.

One way is that it falls into a hearsay exception, including the residual hearsay exception, regardless of whether the requirements of Wis. Stat. §§ 908.08(2) and (3) have been met. Wis. Stat. § 908.08(7); s*ee also State v. Snider*, 2003 WI App 172, ¶¶ 12-13, 266 Wis. 2d 830, 668 N.W.2d 784.

The other way is that the enumerated requirements set forth in Wis. Stat. § 908.08 subsections (2) and (3) have been met. *Id*.

Witness Testimony

Child testimony

A young child's testimony need not be formally "sworn" to qualify as an oath or affirmation. *State v. Hanson*, 149 Wis. 2d 474, 439 N.W.2d 133 (1989). There should be a record about the child's ability to understand the difference between the truth and a lie, which may be considered in giving weight to the testimony. *Id*.

Protecting a witness

As an alternative to excluding a witness's live testimony entirely, an ALJ may order special witness protections such as a screen, one-way mirror, televised or videotaped testimony, or even exclusion of an offender from the hearing room. Wisconsin Administrative Code section HA 2.05(5) was created for this purpose and drew guidance from *State v. Thomas*, 150 Wis. 2d 374, 442 N.W.2d 10 (1989). *See* Ch. HA 2 Appendix, Note HA 2.05. *Thomas* is a criminal case in which the court allowed a child victim to provide videotaped testimony while protected by a screen from viewing the defendant. In upholding these protective measures, the court held that there should be an individualized finding that a particular witness needs special protection from further traumatization and the proponent of the witness has the burden of showing it. *Thomas* at 393.

In keeping with this philosophy, § HA 2.05(5) provides that a witness's identity may be withheld from the offender if disclosure of the identity would threaten the safety of the witness or someone else and a witness's testimony may be taken outside the offender's presence when there is substantial likelihood that the witness will suffer significant

psychological or emotional trauma if testimony occurs in the offender's presence or when there is substantial likelihood that the witness will not be able to give effective, truthful testimony in the offender's presence.

Before allowing protective measures, the ALJ must first give the offender and her/his attorney an opportunity on the record to oppose it.

In the event an ALJ ultimately allows protective measures, the ALJ must indicate it in the record along with the reasons for it, and must give the offender an opportunity to submit questions to be asked of the witness.

The Fifth Amendment

A witness testifying at a revocation hearing may invoke his/her Fifth Amendment right against self-incrimination. Because revocation hearings are civil proceedings, an ALJ may make a negative inference from this. *See Evans v. City of Chicago*, 513 F.3d 735, 741 (7th Cir. 2008) (taking a negative inference against a witness who invokes the Fifth Amendment in a civil case is permissive); *In re High Fructose Corn Syrup Antitrust Litig*., 295 F.3d 651, 663 (7th Cir.2002) (the "general rule is that an adverse inference may be drawn from [a refusal to testify on the grounds of self-incrimination] in a civil case").

Offender's Statements

An offender's statements to third parties can serve as evidence at a revocation hearing. These may include, by way of example, statements to friends or police officers. These statements would not be hearsay assuming the third party testifies at the revocation hearing. *See* Wis. Stat. § 908.01(4)(b)1 (a statement is not hearsay if it is offered against a party and is the party's own statement); s*ee also State v. Benoit*, 83 Wis.2d 389, 402, 265 N.W.2d 298 (1978) (any prior out-of-court statements by a party, whether or not made against interest, are not hearsay.)

An offender's statements to his/her agent are compelled as a result of standard rules of supervision requiring offenders to provide truthful accounts upon agent demand. Such statements could contain incriminating information. Accordingly, agents must advise the offender of his/her obligation to truthfully and correctly answer questions regarding his/her whereabouts and activities, that failure to do so is a violation of supervision for which revocation could result, and that neither the information provided nor any evidence derived therefrom can be used against the offender in any future criminal proceeding. This serves as a dual warning and grant of immunity to the offender, at which point the offender must decide whether to answer his/her agent's questions or pay the price of possible revocation for remaining silent. *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977) (creating what is commonly referred to as "the *Evans* warning"), *State v. Thompson*, 142 Wis. 2d 821, 833–34, 419 N.W.2d 564, 568 (Ct. App. 1987) (expanding immunity under *Evans* to all criminal proceedings, including for purposes of impeachment and rebuttal), and *State ex rel. Douglas v. Hayes*, 2015 WI App 87, 365 Wis. 2d 497, 872 N.W.2d 152 (clarifying that the agent must advise the offender that compelled information will enjoy both use and derivative use immunity); *see also State ex rel. Struzik v. Dep't of Health & Soc. Servs.*, 77 Wis. 2d 216, 224, 252 N.W.2d 660 (1977) (an offender's responsibility to answer

his/her agent's questions or face possible revocation for refusal "is a price society has a right to exact for the privilege of conditional liberty").

Standard rules of supervision also require offenders to cooperate with treatment. The warnings and immunity required by *Evans*, *Thompson*, and *Douglas* apply with equal force to statements offenders are compelled to provide in a treatment setting when future criminal proceedings are possible. *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 22, 257 Wis. 2d 40, 654 N.W.2d 438.

Other Evidence

Illegally-obtained evidence

Evidence obtained in violation of the law or DOC policy is admissible in revocation hearings. Wis. Admin. Code § HA 2.05(6)(c); s*ee also Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014 (1998).

Offender's intervening criminal conduct

A conviction for new criminal conduct while on supervision is definitive proof of a violation for the same conduct. Wis. Admin. Code § HA 2.05(6)(f); *State ex rel. Leroy v. Dep't of Health & Soc. Servs.*, 110 Wis. 2d 291, 329 N.W.2d 229 (Ct. App. 1982); *State ex rel. Flowers v. Dep't of Health & Soc. Servs.*, 81 Wis. 2d 376, 260 N.W.2d 727 (1978). The new conviction cannot be contested at a revocation hearing concerning the same conduct because the legal burden is higher in criminal proceedings than in a revocation hearing. *Morrissey*, 408 U.S. 471, 490 (1972) (a revocation hearing is not a proper forum to re-litigate issues already decided against an offender in criminal proceedings).

Conversely, an acquittal on a criminal charge does not equate to definitive rebuttal of an alleged violation, and proceeding with revocation after an acquittal does not constitute double jeopardy. *Flowers*, 81 Wis. 2d at 387.

If a conviction for intervening criminal conduct prompted revocation but is later overturned, revocation may nevertheless stand so long as the record contained other support for revocation. *Hughes v. State*, 28 Wis. 2d 665, 137 N.W.2d 439 (1965).

If an offender is later convicted of a crime for allegations the DOC previously failed to prove at a revocation hearing, a second hearing can be held based on new evidence in the form of the judgment of conviction. *Leroy*, 110 Wis. 2d 291.

In a revocation hearing, the DOC does not have to prove the elements of a crime to prove an allegation of a rule violation that arises from the same conduct. *State ex rel. Lyons v. Dep't of Health & Soc. Servs.*, 105 Wis. 2d 146, 150, 312 N.W.2d 868 (Ct. App. 1981).

Polygraph results

The results of polygraph tests are not admissible as evidence in revocation proceedings. *State v. Ramey*, 121 Wis. 2d 177, 181, 359 N.W.2d 402 (Ct. App. 1984).

Possession of a prohibited item

Physical possession is not necessarily required to find an offender guilty of possessing contraband. *State v. Allbaugh*, 148 Wis. 2d 807, 813, 436 N.W.2d 898 (Ct. App. 1989) (citation omitted). Possession may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his/her exclusive or joint dominion and control, provided that the accused has knowledge of its presence. *Allbaugh*, 148 Wis. 2d at 814 (citation omitted).

Mere proximity to contraband is not enough to impute possession. *Allbaugh*, 148 Wis. 2d at 812 (citation omitted). Nor does residency alone establish a resident's constructive possession of contraband inside the premises. *Schwartz v. State*, 192 Wis. 414, 418, 212 N.W. 664 (1927). But facts can buttress the inference of knowing possessing from joint occupancy of premises, including, for example, an offender's access to areas where the contraband was found, whether the contraband was in "plain view," and the presence of items linked to the contraband, such as items used to manufacture or package illegal drugs. *Allbaugh*, 148 Wis. 2d at 813 (citations omitted).

Presentence Investigation (PSI)

Because Wis. Stat. § 972.15 does not explicitly grant the DHA the ability to use presentence investigations at revocation hearings, the general rule is that presentence investigations are not admissible and must be kept confidential.

Read-in charges

No admission of guilt is required, or should be deemed, for a read-in charge to be considered for purposes of sentencing and to be dismissed. *State v. Straszkowski*, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, *abrogating State v. Cleaves*, 181 Wis.2d 73, 510 N.W.2d 143 (Ct. App. 1993).

Time Calculations

Tolling

If the DOC (in the case of an offender on probation, parole or extended supervision who is reinstated or waives a revocation hearing) or the DHA (in the case of a revocation hearing) determines that an offender has violated the terms of his or her supervision, the DOC or the DHA "may toll all or any part of the period of time between the date of the violation and the date an order of revocation or reinstatement is entered, subject to credit according to the terms of s.

973.155 for any time the parolee, probationer or person on extended supervision spent confined in connection with the violation." Wis. Stat. § 304.072(1).

Custody Credit Generally

Correct determinations of custody credit must be made in every revocation case. The underlying purpose of custody credit is to afford fairness and ensure that an offender does not serve more time than that for which s/he was sentenced. *State v. Johnson*, 2007 WI 107, ¶ 37, 304 Wis. 2d 318, 735 N.W.2d 505. Custody credit is granted for periods of time during which an offender was actually in custody and the custody was in connection with the course of conduct for which the sentence was imposed. Wis. Stat. § 973.155. An offender seeking custody credit in Wisconsin has the burden of demonstrating both custody and its connection with the course of conduct for which the Wisconsin sentence was imposed. *State v. Carter*, 2010 WI 77, ¶11, 327 Wis. 2d 1, 7, 785 N.W.2d 516 (citation omitted).

If an offender waives his/her right to a revocation hearing, the DOC determines custody credit. Wis. Stat. § 973.155(2). If an ALJ renders a revocation decision, the ALJ determines custody credit. Wis. Stat. § 973.155(2). When probation with a withheld sentence is revoked, the DOC or ALJ's custody credit findings are merely a recommendation to the sentencing court who will make custody credit findings in conjunction with sentencing after revocation.

The definition of "custody" in Wis. Stat. § 946.42(1)(a) is used to determine whether a person is in custody for credit purposes. *State v. Sevelin*, 204 Wis. 2d 127, 554 N.W.2d 521 (Ct. App. 1996). The general rule is that custody is triggered whenever an offender could be charged with escape for leaving his/her status. Wis. Stat. § 946.42; *State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536. Courts have decided the following statuses do <u>not</u> constitute custody for purposes of credit:

EMP

State ex rel. Simpson v. Schwarz, 2002 WI App 7, ¶¶ 33-35, 250 Wis. 2d 214, 640 N.W.2d 527.

Home detention

State v. Swadley, 190 Wis. 2d 139, 526 N.W.2d 778 (Ct. App. 1994); *State v. Pettis*, 149 Wis. 2d 207, 441 N.W.2d 247 (Ct. App. 1989).

Treatment facility

State v. Cobb, 135 Wis. 2d 181, 400 N.W.2d 9 (Ct. App.1986).

Detainer

State v. Demars, 119 Wis. 2d 19, 24, 349 N.W.2d 708 (Ct. App. 1984).

Street time

State ex rel. Ludtke v. Dept. of Corrections, 215 Wis. 2d 1, 572 N.W.2d 864 (Ct. App. 1997); *State v. Aderhold*, 91 Wis. 2d 306, 284 N.W.2d 108 (Ct. App. 1979).

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Thorson v. Schwarz, 2004 WI 96, 274 Wis. 2d 1, 681 N.W.2d 914.

Applying Custody Credit to Multiple Wisconsin Sentences

Offenders may have multiple sentences to which custody credit will apply. When the underlying sentences are concurrent, credit will generally apply to all of the concurrent sentences. *State v. Ward*, 153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App. 1989). This is true so long as the time in custody was in connection with the conduct resulting in the initial sentence. *See State v. Johnson*, 2009 WI 57, 318 Wis. 2d 21, 767 N.W.2d 207 (custody credit does not apply to all sentences simply because the sentences are concurrent and imposed at the same time).

When there are consecutive sentences, the law provides that they are to be treated as one continuous sentence. Wis. Stat. §§ 302.11(3) (parole), 302.113(4) (ES). This is true regardless of whether the consecutive sentences are parole, extended supervision, or both. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 44, 300 Wis. 2d 381, 732 N.W.2d 1. The offender will first serve all of his/her initial confinement then all of the extended supervision and/or parole at once. *State v. Polar*, 2014 WI App 15, ¶ 13, 352 Wis. 2d 452, 842 N.W.2d 531. Upon revocation, custody credit is applied to an offender's consecutive sentences on a day-for-day basis, in a mathematically linear fashion, to the sentence first imposed, and cannot be duplicitively credited to more than one of the sentences. *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988); *see also State v. Wolfe*, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655 (explaining application of sentence credit to the first imposed sentence). As a practical matter, this means that as time passes the DOC generally allows cases running in a consecutive string to discharge in the order they were sentenced. Upon such a discharge, any hold time served during the term of supervision through the date of discharge is applied to the service of the discharged case. As such, holds served during the service of a discharged case cannot be applied to the revocation of a consecutive case that is still active because it would result in duplicate credit.

Applying Foreign Custody Credit to Wisconsin Sentence

The requirement that an offender is entitled to credit toward the service of his/her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed applies with similar force to custody served in a non-Wisconsin jurisdiction. That is, if an offender is held in custody in another state on a DOC warrant, s/he is entitled to custody credit in Wisconsin.

It becomes more complicated if new criminal charges attach to the out-of-state custody hold. There are three significant caveats to keep in mind. First, credit is triggered on the date the Wisconsin DOC issues a warrant, as opposed to the date of arrest which may be different. *See State v. Carter*, 2010 WI 77, ¶ 33-34, 327 Wis. 2d 1, 785 N.W.2d 516. And a Wisconsin warrant

is different from a detainer; the latter may not trigger sentence credit because it does not carry any custodial mandate. *Id.* at ¶ 33. Second, credit is awarded only until the offender is sentenced on the new charges. This is because sentencing on the new charges effectively severs the connection between the custody and Wisconsin. *See State v. Beets*, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (holding that a sentence on one offense severs any connection with custody on an unrelated offense). Third, credit will be awarded for presentence custody in the foreign jurisdiction only if the sentence on the new charges is concurrent to Wisconsin. That is, an offender can receive credit for a single episode of custody toward two (or more) sentences only for sentences which are concurrent, otherwise it would constitute impermissible double credit. *State v. Rohl*, 160 Wis.2d 325, 227, 330, 466 N.W.2d 208 (Ct. App. 1991) *citing State v. Boettcher*, 144 Wis.2d 86, 100, 423 N.W.2d 533, 539 (1988); *see also State v. Martinez*, 2007 WI App 225, 305 Wis. 2d 753, 741 N.W.2d 280.

Post-Revocation Hearing

Appeal to the Administrator

Either party may appeal the ALJ's decision to the DHA Administrator within ten days of the date of the decision. The appealing party must provide a copy of the appeal to the other party, who then has seven days to provide a response. The appeal may be dismissed if the non-appealing party does not receive a timely copy of the appeal. Wis. Admin. Code § HA 2.05(8).

On appeal, the DHA Administrator performs a *de novo* review of the evidence presented before the ALJ. *State ex rel. Foshey v. Dep't of Health & Soc. Servs.*, 102 Wis. 2d 505, 516, 307 N.W.2d 315 (Ct. App. 1981). Upon considering the evidence presented at the revocation hearing and materials submitted for review, the DHA Administrator may modify, sustain, reverse, or remand the ALJ's decision and will provide a written decision to all parties, usually within 21 days after receipt of the appeal. Wis. Admin. Code § HA 2.05(9).

Parties can be represented, but there is no right to counsel in an administrative appeal. *State ex rel. Mentek v. Schwarz*, 2000 WI App 96, ¶ 18, 235 Wis. 2d 143, 154, 612 N.W.2d 746, 751, *rev'd on other grounds*, 2001 WI 32, ¶ 19, 242 Wis. 2d 94, 624 N.W.2d 150.

Appeal to the Circuit Court

Judicial review of a revocation decision is by certiorari in the county in which the client was last convicted of an offense for which the client was on supervision. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971); Wis. Stat. § 801.50(5). There is no administrative, statutory, or constitutional right to counsel for certiorari. *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 3, ¶ 22, 270 Wis. 2d 235, 677 N.W.2d 259.

Certiorari is not a *de novo* review and the DHA will be given deference. The circuit court is limited to ascertaining whether substantial evidence exists in support of the DHA's decision. *State ex rel. Cox v. State, Dep't of Health & Soc. Servs.*, 105 Wis. 2d 378, 382, 314 N.W.2d 148, 150 (Ct. App. 1981). It will review only whether: (1) the DHA stayed within its jurisdiction; (2)

the DHA acted according to law; (3) the DHA's actions were arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) the evidence presented was such that the DHA might reasonably make the decision it did. *Van Ermen v. Dep't of Health & Soc. Servs.*, 84 Wis. 2d 57, 63-64, 267 N.W.2d 17 (1978).

Newly Discovered Evidence (*Booker* motion)

A claim that newly discovered evidence entitles a revoked offender to an evidentiary hearing to determine whether a new revocation hearing should be conducted is governed by the same standard for granting a new trial in a criminal case. That standard was set forth in *State v. Bembenek*, 140 Wis.2d 248, 409 N.W.2d 432 (Ct.App.1987) and made applicable to revocation proceedings by *State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶ 12, 270 Wis. 2d 745, 678 N.W.2d 361. The standard is a five-prong test, requiring the movant to show all of the following: (1) the evidence came to the moving party's knowledge after hearing, (2) the moving party was not negligent in seeking to discover it, (3) the evidence is material to the issue, (4) the testimony is not merely cumulative to the testimony which was introduced at hearing, and (5) it is reasonably probable that a different result would be reached at a new hearing.

Whether a *Booker* motion sufficiently alleges facts which, if true, would entitle the movant to relief is a question of law. *Booker*, 2004 WI App at ¶15. If the DHA refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the movant is not entitled to relief, the circuit court's review on appeal will be limited to whether the DHA erroneously exercised its discretion in making this determination. *Id*.

The Hearing Record

Each ALJ makes an electronic audio record of all testimony at a revocation hearing pursuant to Wis. Stat. § 973.10(4). Under the authority of Wisconsin Statutes Chapter 19, the DHA Division Administrator and his/her designee(s) are the legal custodian of the DHA's records.

Requesting a copy of a record

Records requests may be emailed to: DHAmail@Wisconsin.gov

Records requests may be mailed to: Division of Hearings and Appeals
Administrative Services Supervisor
5005 University Avenue, Suite 201
Madison, WI 53705

Costs for records

Digital hearing recording

Upon request, a copy of an audio-recorded hearing will be provided on a compact disc (CD) at a cost of $10.00 per CD. This cost includes postage and handling.

Electronic and photographic records

Upon request for a record that is stored on media other than printed or written documents, the requester will be charged for the actual cost of recovery and duplication, material, and postage.

Hearing transcript

The DHA will prepare a written transcript at the request of a judge who has granted a petition for judicial review of the revocation decision. Wis. Stat. § 973.10(4).

If a transcript of the record has not previously been prepared, the DHA will prepare a transcript upon written request. The requester will be charged a transcription production fee of $3.40 per page for each page of transcribed material. This cost includes postage and handling. Second copies will be provided at a cost of $.10 per page of copied material. This cost includes postage and handling.

If a transcript of the record was previously prepared by the DHA, the DHA will provide copies upon written request at a cost of $.10 per page of copied material. This cost includes postage and handling.

The requester may receive the transcript document on a compact disc (CD) in the format which it was created at a cost of $15.00 per CD. This cost is in addition to the transcription preparation fee if the record had not previously been transcribed.

Other documents

Copies of other documents of four pages or less will be provided without charge. Requests involving five pages or more will be provided at a cost of $.25 per page beginning with page one. This cost includes postage and handling.

Location fee

If the requested materials are in a file currently stored at the Records Center, the requestor will be charged a file retrieval fee of $2.50 in addition to any other costs incurred. If the cost of locating the records exceeds $50.00, the requester will also be charged the actual necessary and direct cost of location.

Prepayment of costs

If the costs for requested records exceed $5.00, copies will be provided only upon prepayment of the required fee. Wis. Stat. § 19.35(3)(f). For a transcript not previously prepared, prepayment of 70% of the estimated cost is required.

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Legislation Index

Wisconsin Statutes
(Wisconsin statute citations are to 2013-14 unless otherwise noted.)

Division of Hearings and Appeals Administrative Code

Department of Corrections Administrative Code

Parole Commission Administrative Code

Acknowledgements

The Resource Book for Probation and Parole Revocation Hearings was originally created by Donald R. Schneider, who at the time worked as legal counsel for the Department of Corrections. Its initial purpose was to assist probation and parole agents. Mr. Schneider later joined the Division of Hearings and Appeals as an Administrative Law Judge where he continued to update it. ALJ Schneider passed away shortly after his last edition of the Resource Book.

The Resource Book remained unchanged until 2002, when several Division of Hearings and Appeals ALJs undertook the task of updating it for a broader audience and modernizing it for distribution online. Editor-in-Chief Mayumi Ishii worked together with Editors William Coleman, Andrew Riedmaier, Kevin Schram, and Beth Whitaker to produce the 2002 edition. It was dedicated to the memory of ALJ Schneider.

As years went by and new case law was created, ALJ Ishii compiled and summarized new law into an informal supplement. That 2011 supplement was made available online alongside the 2002 edition of the Resource Book.

This 2016 Resource Handbook for Community Supervision Revocation aimed to combine and update the 2002 edition and 2011 supplement, as well as incorporate new law that developed in the meantime. ALJ Rachel Pings served as Editor-in-Chief. Editors included Law Clerk Bryant Ray, Legal Intern Eileen Dorfman, and Legal Intern Rachel Snyder.

Reference

Register May 2010 No. 653

Chapter HA 2
PROCEDURE AND PRACTICE FOR CORRECTIONS HEARINGS

Division of Hearings and Appeals Note (CR 09−101): For a further explanation of the provisions in ch. HA 2, see the appendix following the last section of this chapter.

HA 2.01 Application of rules.

(1) AUTHORITY. These rules are promulgated under the authority of s. 301.035 (5), Stats., and interpret ss. 302.11 (7), 302.113 (9) (am), 302.114 (9) (am), 938.357 (5), 973.09, 973.10, 973.155, 975.10 (2), Stats., and ch. 304, Stats.

(2) SCOPE. This chapter applies to corrections hearings under ss. 302.11 (7), 973.10, 975.10 (2) and ch. 304, Stats. The procedural rules of general application contained in this chapter also apply to youth aftercare revocation proceedings in any situation not specifically dealt with in ch. DOC 393.

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, November, 1999, No. 527; CR 01−018: am. Register September 2001 No. 549, eff. 10−1−01; **corrections in (1) made under s. 13.92 (4) (b) 7., Stats., Register May 2010 No. 653.**

HA 2.02 Definitions. For purposes of this chapter:

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

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

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

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

(5) "Day" means any working day, Monday through Friday, excluding legal holidays, except as specifically provided otherwise in s. HA 2.05 (4) (a).

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

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

Division of Hearings and Appeals Note (CR 09−101): "Offender" as used in this chapter was intended to have the same meaning as "client". A definition of "offender" will be created by future rule making.

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

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

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

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92; CR 01−018: am. (8), Register September 2001 No. 549, eff. 10−1−01.

HA 2.03 Service of documents.

(1) BY THE DIVISION. The division may issue decisions, orders, notices and other documents by first class mail, inter−departmental mail, electronic mail or by facsimile transmission.

(2) BY A PARTY. Unless specified otherwise by law or this chapter, materials filed by a party with the division may be delivered personally or by first class, certified or registered mail, inter− departmental mail, electronic mail or by facsimile transmission. All correspondence, papers or other materials submitted by a party shall be provided on the same date by that party to all other parties to the proceeding. No affidavit of mailing, certification, or admission of service need be filed with the division.

(3) FILING DATE. Materials mailed to the division shall be considered filed with the division on the date of the postmark. Materials submitted personally or by inter−departmental mail or electronic mail shall be considered filed on the date they are received by the division. Materials transmitted by facsimile shall be considered filed on the date they are received by the division as recorded on the division facsimile machine.

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92; **CR 09−101: am. Register May 2010 No. 653, eff. 6−1−10.**

HA 2.04 Witnesses and subpoenas. An attorney may issue a subpoena to compel the attendance of witnesses under the same procedure as provided by s. 805.07 (1), Stats. The secretary of the department of corrections, or any person authorized by the secretary to act in his or her stead, may issue a subpoena to require the attendance of witnesses, on behalf of the department of corrections, in any community supervision revocation proceeding as provided by s. 301.045, Stats. If a person on community supervision is not represented by an attorney, the division or the administrative law judge may issue subpoenas as provided in ch. 885, Stats.

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92; **CR 09−101: am. Register May 2010 No. 653, eff. 6−1−10.**

HA 2.05 Revocation hearing.

(1) NOTICE. Notice of a final revocation hearing shall be sent by the division within 5 days of receipt of a hearing request from the department to the offender, the offender's attorney, if any, and the department's representative. The notice shall include:

(a) The date, time, and place of the hearing;

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

(c) A statement of the rights established under sub. (2);

(d) Unless otherwise confidential or disclosure would threaten the safety of a witness or another, a list of the potential evidence and potential witnesses to be considered at the hearing which may include any of the following:

1. Any documents.
2. Any physical or chemical evidence.
3. Results of a breathalyzer test.
4. Any statements by the offender.
5. Police reports regarding the allegation.
6. Warrants issued.
7. Photographs.
8. Witness statements.

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

(f) In parole revocation cases:

1. The department's recommendation for forfeiture of good time and any sentence credit in accordance with s. 973.155, Stats.; or
2. The department's recommendation for a period of reincarceration and any sentence credit in accordance with statutes.

(g) In extended supervision cases under s. 302.113 (9) (am), Stats., the department's recommended period of reconfinement.

(h) In extended supervision cases under s. 302.114 (9) (am) or 302.1135, Stats., for persons serving a life sentence, the department's recommended period of time for which the person shall be reconfined before being released again to extended supervision.

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

(3) OFFENDER'S RIGHTS. The offender's rights at the hearing include any of the following:

(a) The right to attend the hearing in person or by electronic means.

(b) The right to deny the allegation.

(c) The right to be heard and to present witnesses.

(d) The right to present documentary evidence.

(e) The right to question witnesses.

(f) The right to the assistance of counsel.

(g) The right to waive the hearing.

(h) The right to receive a written decision stating the reasons for it based upon the evidence presented.

(4) TIME.

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

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

1. The timeliness of the request;
2. The reason for the change;
3. Whether the client is detained;
4. Where the client is detained;
5. Why the client is detained;
6. How long the client has been detained;
7. Whether any party objects;
8. The length of any resulting delay;
9. The convenience or inconvenience to the parties, witnesses and the division; and
10. Whether the client and the client's attorney, if any, have had adequate notice and time to prepare for the hearing.

(c) Any party requesting that a hearing be rescheduled shall give notice of such request to the opposing party.

(5) PROTECTION OF A WITNESS.

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

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

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

(6) PROCEDURE.

(a) The hearing may be closed to the public and shall be conducted in accordance with this chapter. The administrative law judge may conduct the hearing by video conference. The hearing may also be conducted by telephone conference if all parties agree. If all parties do not agree to conduct a hearing by telephone conference, the administrative law judge may conduct the hearing by telephone conference if there is no factual dispute regarding the violations alleged by the department or when the administrative law judge determines that good cause exists to conduct the hearing by telephone conference. All witnesses for and against the offender, including the offender, shall have a chance to speak and respond to questions.

(b) The administrative law judge shall weigh the credibility of the witnesses.

(c) Evidence to support or rebut the allegation may be offered. Evidence gathered by means not consistent with ch.

DOC 328 or in violation of the law may be admitted as evidence at the hearing.

(d) The administrative law judge may accept hearsay evidence.

(e) The rules of evidence other than ch. 905, Stats., with respect to privileges do not apply except that unduly repetitious or irrelevant questions may be excluded.

(f) The department has the burden of proof to establish, by a preponderance of the evidence, that the client violated the rules or conditions of supervision. A violation is proven by a judgment of conviction arising from conduct underlying an allegation.

(g) The administrative law judge may take an active role to elicit facts not raised by the client or the client's attorney, if any, or the department's representative.

(h) Alternatives to revocation and any alibi defense offered by the client or the client's attorney, if any, shall be considered only if the administrative law judge and the department's representative have received notice of them at least 5 days before the hearing, unless the administrative law judge allows a shorter notice for cause.

(i) The administrative law judge may issue any necessary recommendation to give the department's representative and the client reasonable opportunity to present a full and fair record.

(7) DECISION.

(a) The administrative law judge shall consider only the evidence presented in making the decision.

(b) The administrative law judge shall:

1. Decide whether the client committed the conduct underlying the alleged violation;

2. Decide, if the client committed the conduct, whether the conduct constitutes a violation of the rules or conditions of supervision;

3. Decide, if the client violated the rules or conditions of supervision, whether revocation should result or whether there are appropriate alternatives to revocation. Violation of a rule or condition is both a necessary and a sufficient ground for revocation of supervision. Revocation may not be the disposition, however, unless the administrative law judge finds on the basis of the original offense and the intervening conduct of the client that:

a. Confinement is necessary to protect the public from further criminal activity by the client; or

b. The client is in need of correctional treatment which can most effectively be provided if confined; or

c. It would unduly depreciate the seriousness of the violation if supervision were not revoked.

4. Decide, if the client violated the rules or conditions of supervision, whether or not the department should toll all or any part of the period of time between the date of the violation and the date an order is entered, subject to credit according to s. 973.155, Stats.

5. Decide, if supervision is revoked, whether the client is entitled to any sentence credits under s. 973.155, Stats.

(c) If the administrative law judge finds that the client did not violate the rules or conditions of supervision, revocation shall not result and the client shall continue with supervision under the established rules and conditions.

(d) The administrative law judge shall issue a written decision based upon the evidence with findings of fact and conclusions of law stating the reasons to revoke or not revoke the client's supervision. The administrative law judge may, but is not required to, announce the decision at the hearing.

(e) If an administrative law judge decides to revoke the offender's parole, the decision shall apply the criteria established in s. HA 2.06 (6) (b) and shall include a determination of:

1. Good time forfeited, if any, under ch. 302, Stats., and, for mandatory release parolees, whether the offender may earn additional good time; or

2. The period of reincarceration, if any, under ch. 302, Stats.

(f) If an administrative law judge decides to revoke a period of extended supervision under s. 302.113 (9) (am), Stats., the administrative law judge shall include a determination of the period of reconfinement taking into consideration the following criteria:

1. The nature and severity of the original offense;

2. The offender's institutional conduct record;

3. The offender's conduct and behavior while on community supervision;

4. The amount of reconfinement that is necessary to protect the public from the risk of further criminal activity, to prevent the undue depreciation of the seriousness of the violation or to provide confined correctional treatment.

(g) If an administrative law judge decides to revoke a period of extended supervision for a person serving a life sentence under s. 302.114 (9) (am), Stats., the decision shall consider the criteria established in s. HA 2.05 (7) (f), and shall include a determination of the period of time for which the person shall be incarcerated before being eligible for release to extended supervision.

(h) The administrative law judge's decision shall be written and forwarded within 10 days after the hearing to the client, the client's attorney, if any, and the department's representative. An extension of 5 days is permitted if there is cause for the extension and the administrative law judge notifies the parties of the reasons for it.

(i) The administrative law judge's decision shall take effect and be final 10 days after the date it is issued unless the client or the client's attorney, if any, or the department's representative files an appeal under sub. (8).

(8) APPEAL.

(a) The client, the client's attorney, if any, or the department representative may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10

days of the date of the administrative law judge's written decision.

(b) The appellant shall submit a copy of the appeal to the other party who has 7 days to respond. An appeal may be dismissed if the other party does not receive a timely copy of the appeal.

(9) ADMINISTRATOR'S DECISION.

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

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

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92; am. (8) (a), Register, August, 1995, No. 476, eff. 9−1−95; CR 01−018: cr. (1) (g) and (h) and (7) (f) and (g), am. (7) (d), renum. (7) (f) and (g) to be (7) (h) and (i), Register September 2001 No.549, eff. 10−1−01; **CR 09−101: am. (1) (intro.), (b), (d) (intro.), 1. to 7., (f) 1., 2., (g), (h), (3) (intro.) to (h), (6) (a), (7) (e), (f), (h), (8) (b), cr. (1) (d) 8., r. (3) (i) Register May 2010 No. 653, eff. 6−1−10; correction in (7) (g) made under s. 13.92 (4) (b) 7., Stats., Register May 2010 No. 653.**

HA 2.06 Good time forfeiture, reconfinement and reincarceration hearings.

(1) APPLICABILITY. This section applies to good time forfeiture hearings, reconfinement and reincarceration hearings when the offender has waived his or her right to a final revocation hearing.

(2) HEARING. Following receipt of a request from the department for a good time forfeiture, reconfinement or reincarceration hearing, the division shall conduct a hearing at the offender's assigned correctional institution. The administrative law judge may conduct the hearing in person or by telephone or video conference to determine the amount of good time to be forfeited or the period of reincarceration or reconfinement. In the case of good time forfeitures for mandatory release parolees, the division shall also determine whether or not good time may be earned on the forfeited good time.

(3) NOTICE.

(a) Notice of the hearing shall be sent to the offender, the offender's agent and the correctional institution.

(b) The notice shall include:

1. The date, time, place of the hearing and the amount of time available for forfeiture, reconfinement or reincarceration, and;
2. A statement of the offender's rights as established under sub. (4).

(4) OFFENDER'S RIGHTS. The offender has the following rights at the hearing:

(a) To be present at the hearing in person or by telephone or video conference;

(b) To speak and respond to questions from the administrative law judge, and;

(c) To present written or documentary evidence.

(5) PROCEDURE.

(a) The hearing shall be closed to the public and may be conducted by video conference. The hearing may also be conducted by telephone conference.

(b) The administrative law judge shall read aloud the department's recommendation and may admit into evidence the offender's institutional conduct record, any documents submitted by the department and any written, oral or documentary evidence presented by the offender.

(6) DECISION.

(a) The administrative law judge shall consider only the evidence presented at the hearing in making the decision.

(b) The following criteria shall be considered by the administrative law judge in determining the amount of good time forfeited or the period of reincarceration:

1. The nature and severity of the original offense;
2. The client's institutional conduct record;
3. The client's conduct and behavior while on parole;
4. The amount of good time forfeiture or the period of reincarceration that is necessary to protect the public from the risk of further criminal activity, to prevent the undue depreciation of the seriousness of the violation or to provide confined correctional treatment.

(c) The administrative law judge shall decide:

1. Whether good time should be forfeited, the amount of such forfeiture and, for mandatory release parolees, whether or not good time may be earned on the amount forfeited, or;
2. In the case of reincarceration hearings, the period of reincarceration.
3. In either case, sentence credit in accordance with s. 973.155(1), Stats.

(d) The administrative law judge's decision shall be written and forwarded within 10 days after the closing of the record to the offender, the department's representative and the correctional institution.

(e) The administrative law judge's decision shall take effect and be final 10 days after the date it is issued unless the client or the department files an appeal under sub. (7).

(7) APPEAL. The offender or the department may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10 days of the date of the administrative law judge's written decision. The appellant shall submit a copy of the appeal to the other party who has 7 days to respond.

(8) ADMINISTRATOR'S DECISION.

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

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

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92; **CR 09−101: am. (title), (1), (2), (3) (a), (b) 1., 2., (4) (intro.), (a), (5), (6) (c) 1., 2., (d), (7) Register May 2010 No. 653, eff. 6−1−10.**

HA 2.07 Transcripts. Hearings shall be recorded electronically. The division shall prepare a transcript of the testimony only at the request of a judge who has granted a petition for certiorari review of a revocation decision or upon prepayment of the cost of transcription of the record. The amount charged for each page of transcribed material shall be determined by the administrator and will be published in the public notice for access to records displayed at all division offices and on the internet at http://dha.state.wi.us/home/RecordsPolicy.htm. Any party may also record the hearing at his or her own expense.

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92; am. Register, August, 1995, No. 476, eff. 9−1−95; **CR 09−101: am. Register May 2010 No. 653, eff. 6−1−10.**

HA 2.08 Harmless error. If any requirement of this chapter or ch. DOC 328 or 331 is not met, the administrative law judge or administrator may deem it harmless and disregard it if the error does not affect the client's substantive rights. Substantive rights are affected when a variance tends to prejudice a fair proceeding or disposition.

History: Cr. Register, December, 1991, No. 432, eff. 1−1−92.