

DEPARTMENT OF HEALTH AND SOCIAL SERVICES 231
HSS 328

(4) The following subsection applies to custody decisions during revocation proceedings only.

(a) At a case review under s. HSS 31.03 (2) (a), Wis. Adm. Code, a supervisory staff member shall decide whether a client shall be detained pending further revocation proceedings. This detention decision shall supercede any decision under sub. (3). If a client waives his or her rights to a case review or if a review need not take place, the client shall remain in custody status in accordance with subs. (1)-(3).

(b) A client shall only be detained if a supervisory staff member reasonably concludes under s. HSS 31.03 (2) (a), Wis. Adm. Code, that revocation proceedings shall be pursued and that the client's detention is advisable and consistent with the goals and objectives under this chapter.

(c) Detention is advisable and consistent with the goals and objectives of this chapter if any of the following apply:

1. The client is believed to be dangerous;
2. There is a likelihood that the client will abscond;
3. The client is likely to engage in criminal behavior pending revocation;
4. The client is likely to engage in an activity in noncompliance with the rules and conditions of supervision; or
5. The length of the term to be served upon revocation is great.

(d) A detained client is not eligible for partial release from detention, e.g., release during working hours.

(5) The custody decision made pursuant to sub. (4) shall remain in effect until the date that the decision of the hearing examiner under s. HSS 31.03 (3) (h), Wis. Adm. Code, takes effect and becomes final. If the final hearing examiner's decision is to reinstate the client or to not revoke the client's supervision, and the department requests review of that finding, the custody decision made pursuant to sub. (4) shall remain in effect pending a decision by the secretary. The secretary may alter the custody decision at any time if the public interest warrants it.

(6) A client on parole from a state correctional institution or on felony probation with an imposed and stayed sentence may be detained in an institution pending revocation proceedings.

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

HSS 328.23 Transporting clients in custody. (1) A field staff member may transport a client to jail, institution, court, or other detention facility.

(2) A client may be handcuffed or otherwise appropriately restrained when being transported by field staff. When a client is being taken into custody, it is usually desirable to restrain the client.

(3) Two field staff members shall transport a client whenever feasible, and the client shall be informed of the reasons why he or she is being transported prior to such transport.

HSS 328

(4) If a client is to be transported to Wisconsin from another state, an agent and the agent's supervisor shall determine:

- (a) Whether the client is available for transport;
- (b) Whether an on-site hearing should be held prior to transport;
- (c) Whether extradition matters are resolved;
- (d) Which staff members shall transport the client.

(5) Relevant records relating to transport of a client shall be maintained in the client's record.

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

Subchapter IV—Matters Relating to Revocation

HSS 328.24 Good time forfeiture hearings. (1) **AMOUNT OF TIME AVAILABLE FOR FORFEITURE.** (a) Prior to a client's case review under s. HSS 31.03 (2), Wis. Adm. Code, an agent shall contact in writing the registrar of the institution which has the client's record and advise the registrar of the client's alleged date of violation and request the registrar to provide the amount of client's total good time that is available for forfeiture upon revocation of a parolee's supervision.

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

(2) **AGENT'S RECOMMENDATION.** (a) An agent shall recommend that a specific amount of good time be forfeited upon revocation of a client's supervision. This amount of time shall be expressed in terms of whole days, months, or years, or any combination thereof. The amount of time shall not be expressed in terms of fractions or percentages of time periods. Reasons for the recommendation, including the factual basis for it, shall be given with it.

(b) An agent should consider the following prior to making a forfeiture recommendation:

1. The client's institution conduct record;
2. The nature and severity of the original offense;
3. The client's conduct and behavior while on parole;
4. The amount of time left before mandatory release (if the client is a discretionary release parolee); and
5. Whether forfeiture would be consistent with the goals and objectives of field supervision under this chapter.

(c) If an agent's supervisor approves of the agent's recommendation, it shall be included in the client's chronological history along with a supervisor's comments on the recommendation.

(3) **HEARING.** (a) *General.* A hearing shall be held before an impartial hearing examiner who shall determine, based upon the evidence presented, what amount of good time shall be forfeited following revocation of a client's parole supervision unless the client waives his or her rights to the hearing in accordance with par. (c). This hearing may be held in conjunction with the final revocation hearing.

The application of a less stringent standard for the agent's search or seizure is appropriate, therefore, because of the nature of field supervision.

Subsection (2) regulates personal and strip searches of clients. Such searches may not be conducted without controls. Subsections (2) (a) 1 and 2 define the 2 types of searches. The less intrusive and more common search is a personal search. Strip searches should be conducted infrequently. Body cavity searches, except an inspection of the client's mouth, shall not occur.

Subsection (2) (b) states the circumstances in which a personal search may be conducted. If a staff member has reasonable grounds to believe a client possesses contraband, an immediate search is permissible and may be necessary to prevent disposal of contraband. Such searches are not conducted to harass clients but may be approved after reflection by a supervisory staff member. Random searches should not be conducted frequently, but are thought to be of substantial deterrent value. Subsection (2) (b) 3 permits personal searches in lieu of strip searches, where strip searches are permitted.

Strip searches, by their nature, are unpleasant and degrading to both staff and clients. All wish that such searches were unnecessary. It would be unreasonable, however, to permit random strip searches.

Subsection (2) (c) identifies the circumstances in which such searches are permitted. The rule is written to limit the use of strip searches in two principal ways. First, the rule identifies the specific situations in which clients may be strip searched. All of these situations are ones in which contraband may be moved most frequently or where the danger created by the presence of contraband is so great as to require the authority to exist for strip searches. The other limitation is to permit such searches only if there are reasonable grounds for the search.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the United States Supreme Court held that strip searches, including visual body cavity inspections, were permissible any time a pretrial detainee had contact with a member of the public. This principle is applied in this section, as well as in other situations where the likelihood of contraband being moved or the danger created by the contraband is such that, in the judgment of correctional officials, a search should be permissible.

Subsection (2) (c) states that a strip search may be made if there are reasonable grounds to believe that the client possesses contraband. This is a less than probable cause standard, but more than mere suspicion. It is the same standard as in sub. (2) (b) 1.

Subsection (4) (e) indicates the conditions for a search when the client is not present. The agent may enter in any way that does not do damage to the property. Subsection (4) requires supervisor approval unless the search is conducted in exigent circumstances. Examples of exigent circumstances are where drugs or other contraband would be destroyed if the premises were not searched; or if it were feared that the parolee had a gun and might use it; an immediate search would be necessary to seize it before that could occur.

Subsection (5) states the policy that the dignity of clients should be preserved when searches are conducted. Searches are unpleasant for everyone involved. Recognition of this and attempts to preserve dignity may have a humanizing influence on the process.

Subsection (6) also regulates the manner of conducting searches. It requires that the client be informed that a search is about to occur, its nature, and the place it is to be made unless it is a random search. By informing the client orally, the staff member may enlist the client's cooperation and make the search easier on all concerned.

Of course, it is not possible to give advance notice of a random search. This would defeat its purpose. However, it is important that clients who are likely to be searched pursuant to sub. (2) (c) and (2) (b) 3 be aware that such searches may be conducted.

Subsection (7) indicates what should be considered in determining if there are reasonable grounds for a search. Errors and abuse of search authority may be due to inadvertence and poor judgment. This section seeks to avoid abuses and errors.

Often, very general information is not reliable because its lack of detail suggests it is hypothetical or incomplete. Specificity on the other hand, usually suggests a more reliable grasp of the relevant facts. Consistency of information is also important. If a report is internally inconsistent, this makes it less reliable. Subsection (7) (c) requires attention to the specificity and consistency of information. Of course, specificity or the lack of it is helpful in evaluating information.

Subsection (7) (d) requires attention to the reliability of the informant, if one exists. Has the person supplied accurate information in the past? Does he or she have a reason to mislead? These are helpful questions to ask in evaluating an informant's reliability.

HSS 328 Appendix

Subsection (7) (e) suggests that attention must be paid to the activity of any client who may be involved with the subject of the search. If a client acts in a way that is consistent with the possession of contraband by another client, this bears on the decision whether to search the client suspected of possessing contraband.

Subsection (7) (f) indicates that the client should be talked to before the search. Sometimes, this will elicit information helpful in determining whether a search should be made.

What a staff member observed, information from a reliable source, prior seizures of evidence from the client, and the experience of the staff member are all also relevant to the determination to be made by the supervisor.

This section is in substantial compliance with *ACA*, standard 3151. See 15 *Cal. Adm. Code* 2511 that provides for warrantless searches of a client, a client's residence or property, at any time, without a finding of reasonable grounds to believe that the client possesses contraband, as a condition of parole.

Note: HSS 328.22. The department interprets ss. 57.06 (3) and 973.10 (1), Stats., to mean that if the department alleges that any rule or condition of supervision has been violated by a client, the department may take physical custody of the client for the investigation of the alleged violation. The investigation of whether revocation is warranted includes an investigation of alternatives to revocation. While it is thought best to rely on law enforcement authorities' expertise in taking persons into custody, this is not always practical and staff may exercise their authority at these times.

There are times when an agent may be incapable of obtaining custody of a client, without a risk of harm to the agent, another person, or property. In these difficult cases, an agent must exercise good judgment in attempting to take custody of the client where no assistance from law enforcement authorities is feasible. The agent must strike a balance between the need for immediate custody, the danger posed, and the chances of success of obtaining custody without harm to anyone.

There are two situations where a client must be taken into custody: when a client has a prior record of assaultive or dangerous conduct and is arrested, and when the client's alleged violation involves assaultive or dangerous conduct. Sub. (1). In addition, a client may be taken into custody after an alleged violation by the client regardless of its nature or the client's prior record, for disciplinary purposes, for an investigation, or to prevent violations by a client. Sub. (2).

Subsection (4) (a) requires the supervisory staff member under HSS 328.24 (2) to decide whether to detain a client pending the outcome of the revocation process. The criteria for this decision are provided under sub. (4) (b). If the client's release from custody pending the outcome of the revocation process is inconsistent with the goals of supervision under this chapter, the client should be detained.

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

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

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

The criteria under this section for taking a client into custody and detaining the client, along with the reasonable time limits imposed under ch. HSS 31 for the revocation process should not unfairly deprive a client of his or her conditional liberty under supervision. When through the actions of the client, his or her attorney, or the department, the time periods under ch. HSS 31 are exceeded, the *Barker* factors to consider the reasonableness of the delay and further detention must be taken into account.

See the note to ch. HSS 31, Wis. Adm. Code.