Chapter HA 2

PROCEDURE AND PRACTICE FOR CORRECTIONS HEARINGS

Note: 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. 48.357 (5), 302.11 (7), 973.09, 973.10, 973.155, 975.10 (2) and ch. 304 Stats.

(2) SCOPE. This chapter applies to corrections hearings under ss. 302.11 (7), 973.10, 975.10 (2) and ch. 304 Stats. The procedural rules of general application contained in this chapter also apply to youth aftercare revocation proceedings in any situation not specifically dealt with in ch. HSS 343.

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

HA 2.02 Definitions. For purposes of this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

(2) BY A PARTY. Materials filed by a party with the division may be served personally or by first class, certified or registered mail, inter–departmental mail or by facsimile transmission. All correspondence, papers or other materials submitted by a party shall be served on the same date by that party on all other parties to the proceeding. No affidavit of mailing, certification, or admission of service need be filed with the division.

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

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

HA 2.04 Witnesses and subpoenas. An attorney may issue a subpoena to compel the attendance of witnesses under the same procedure as provided by s. 805.07 (1), Stats. If a party is not represented by an attorney, the division or the administrative law judge may issue subpoenas as provided in ch. 885, Stats.

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

HA 2.05 Revocation hearing. (1) NOTICE. Notice of a final revocation hearing shall be sent by the division within 5 days of receipt of a hearing request from the department to the client, the client's attorney, if any, and the department's representative. The notice shall include:

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

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

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

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

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

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

(f) In parole revocation cases:

1. The department's recommendation for forfeiture of good time under ss. DOC 302.23 and 302.24 and any sentence credit in accordance with s. 973.155, Stats.; or

2. The department's recommendation for a period of reincarceration under s. DOC 302.25 and any sentence credit in accordance with s. 973.155, Stats.

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

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

(a) The right to be present;

(b) The right to deny the allegation;

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

(d) The right to present documentary evidence;

(e) The right to question witnesses;

(f) The right to the assistance of counsel;

(g) The right to waive the hearing;

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

(i) The right to appeal the decision in accordance with sub. (8).

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

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

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

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

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

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

(c) The hearing examiner [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 alleged violation shall be read aloud, and all witnesses for and against the client, including the client, shall have a chance to speak and respond to questions.

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

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

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

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

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

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

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

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

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

(b) The administrative law judge shall:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

History: Cr. Register, December, 1991, No. 432, eff. 1–1–92; am. (8) (a), Register, August, 1995, No. 476, eff. 9–1–95.

HA 2.06 Good time forfeiture and reincarceration hearings. (1) APPLICABILITY. This section applies to good time forfeiture hearings under ss. DOC 302.23 and 302.24 and reincarceration hearings under s. DOC 302.25 when the client has waived his or her right to a final revocation hearing.

(2) HEARING. Following receipt of a request from the department for a good time forfeiture or reincarceration hearing, the division shall conduct a hearing at the client's assigned correctional institution to determine the amount of good time to be forfeited or the period of reincarceration. In the case of good time forfeitures for mandatory release parolees, the division shall also determine whether or not good time may be earned on the forfeited good time.

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

(b) The notice shall include:

1. The date, time, place of the hearing and the amount of time available for forfeiture or reincarceration, and;

2. A statement of the client's rights as established under sub. (4).

(4) CLIENT'S RIGHTS. client has the following rights at the hearing:

(a) To be present at the hearing;

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

(c) To present written or documentary evidence.

(5) PROCEDURE. (a) The hearing shall be closed to the public.

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

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

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

1. The nature and severity of the original offense;

2. The client's institutional conduct record;

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

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

(c) The administrative law judge shall decide:

1. In the case of good time forfeiture hearings under ss. DOC 302.23 and 302.24, whether good time should be forfeited, the amount of such forfeiture and, for mandatory release parolees, whether or not good time may be earned on the amount forfeited, or;

2. In the case of reincarceration hearings under s. DOC 302.25, the period of reincarceration.

3. In either case, sentence credit in accordance with s. 973.155 (1), Stats.

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

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

(7) APPEAL. The client or the department may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10 days of the date of the administrative law judge's written decision. If an appeal is filed, the administrative law judge shall prepare a synopsis of the testimony and forward it to the administrator for review. The synopsis may be either written or electronically recorded. The appellant shall submit a copy of the appeal to the other party who has 7 days to respond.

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

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

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

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 billed at $2.50 for each page of transcribed material. 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.

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.