

 KENTUCKY CORRECTIONS Policies and Procedures	Policy Number	Total Pages
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Authority/References KRS 196.035, 439.3106, 439.315, 439.340, 439.341, 439.430, 439.470, 439.480, 533.050; SCR 3.700 ; <i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972); <i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973) P&P ACA 2B-05, 2B-06, 2B-07, 2B-08, 2B-09, 2B-10, 2B-11	Subject PRELIMINARY REVOCATION HEARING	

I. DEFINITIONS

“Administrative law judge” means one who presides at an administrative hearing with power to administer oaths, take testimony, rule on questions of evidence and make agency determination of fact.

“Detainer” means a written instrument issued by the Probation and Parole officer as a result of an allegation of a violation of probation or parole that authorizes the temporary confinement of an offender in a jail pending further action by the releasing authority.

“Evidence” means proof submitted to ascertain the truth to include testimony, documents, records, and exhibits.

“Notice of hearing” means a document used to inform the offender of the alleged violation, time and place of preliminary revocation hearing, and rights at the hearing.

“Preliminary revocation hearing” means a hearing conducted to determine whether probable cause exists that the offender has violated probation or parole and at which the administrative law judge (ALJ) gathers factual data to be reported to the releasing authority for review to determine whether a warrant should be issued or final revocation hearing scheduled.

“Releasing authority” means the sentencing court or the Parole Board.

“Revocation hearing” means a hearing before the releasing authority to determine whether the offender is in violation of his probation or parole.

“Working day” means a business day that does not include Saturday, Sunday, or legal holiday.

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II. POLICY

It is the policy of the Department of Corrections to afford offenders alleged to have violated probation or parole with procedural due process which includes the following:

- A. The right to a timely preliminary hearing, before an impartial judge or administrative law judge in or reasonably near the county where the arrest or violation is alleged to have occurred. The accused may waive the right to a hearing site. (2B-06)
- B. The right to a timely revocation hearing before the releasing authority at the discretion of the releasing authority's scheduling.
- C. The right to:
 - 1. Written notice of alleged violations as well as the time and place of preliminary revocation hearing.
 - 2. Disclosure of evidence.
 - 3. Opportunity to present evidence in person and to present witnesses and documentary evidence.
 - 4. The right to confront and cross-examine witnesses. The judge or administrative law judge shall have the discretion to disallow the confrontation of an adverse witness.
 - 5. To have counsel of choice present, or in the case of indigent persons who request assistance to adequately present the case, have counsel appointed.
 - 6. Request postponement of the hearing for good cause. (2B-07)
 - 7. Receive a timely, written decision in parole cases and a written or oral decision in probation cases. (2B-07)

III. PROCEDURES FOR PRELIMINARY REVOCATION HEARINGS

A. Investigation Process

The Probation and Parole officer shall investigate and submit alleged violations of probation or parole according to the procedure established in CPP 27-15-01 (Investigating and Reporting Violations and Unusual Incidents).

B. Scheduling a Preliminary Revocation Hearing for Offenders not in Custody.

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After discussing the case with the supervisor, the officer may decide to schedule a preliminary revocation hearing on the alleged violation, but not to detain the offender at that time. If the offender is not detained based on the alleged violation of probation or parole, the officer shall:

1. Serve a notice of preliminary revocation hearing, stating the alleged violations and the date and place of the scheduled hearing.
2. Notify the releasing authority of the violation by preparing an approved supervision report through the supervisor to the releasing authority. The supervision report shall state that the offender was not detained based on the violation charges.
3. The judge or administrative law judge shall hold the preliminary hearing and determine if probable cause exists on the alleged violations. The administrative law judge shall make a verbal ruling immediately after the conclusion of the hearing, unless the hearing is continued for good cause. The hearing decision may remain open for further evidence upon request for good cause. (2B-09)
4. The administrative law judge shall forward copies of the written results of the hearing to the officer. The officer shall give one copy to the offender and retain a copy in the case record.
5. A copy of the results of the preliminary hearing shall be submitted to the releasing authority by the administrative law judge.
6. The written results of the preliminary hearing shall be given to the offender within twenty-one (21) days of the hearing. (2B-10)

C. Lodging Process

1. Felony Probationer

Unless extenuating or emergency circumstances exist, a warrant shall be obtained from the court, according to procedures established by the Circuit Court. For extenuating and emergency circumstances, see CPP 27-18-01 (Probation and Parole Issuance of Detainer or Warrant).

2. Parolee

Comply with the process outlined in CPP 27-18-01(Probation and Parole Issuance of Detainer or Warrant) and CPP 27-04-02 (External Movement).

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3. Advising of Right to Five (5) Day Waiting Period

When a preliminary revocation hearing is scheduled, the offender shall be advised of the right to a five (5) day waiting period to allow time to gather any evidence or information needed prior to the hearing. (For the purpose of clarification in probation cases, some judicial circuits do not require or wish to have a preliminary revocation hearing; and, therefore, the date of the scheduled revocation hearing shall be at the discretion of the court.) (2B-08)

4. Right to Counsel

Any offender appearing before an administrative law judge may be represented by counsel if he so desires, and may have, upon motion thereof, a continuance for the purpose of obtaining the presence of counsel. Multiple appearances at a hearing without counsel by an offender who is capable of retaining counsel, however, may be deemed as a waiver of counsel.

D. Process for Scheduling of Hearing

A preliminary hearing shall be held within fourteen (14) calendar days of the arrest and detention of the offender, unless good cause is shown for delay or postponement. (2B-05)

1. Probation

The Probation and Parole officer shall contact the court or designated staff to schedule a revocation hearing. The established process for revocation proceedings shall be followed according to the judicial circuit. If a preliminary revocation hearing is desired by the court, the Probation and Parole officer shall follow the procedure outlined for parolees.

2. Parolee

In the case of parolees, the Probation and Parole officer shall schedule the preliminary hearing by contacting the Parole Board or district designee in charge of scheduling hearings. At that time, the Probation and Parole officer shall advise if the offender wishes to waive the five (5) day waiting period.

E. Serving Notice of Preliminary Revocation Hearing and Rights

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1. Parole

- a. The Probation and Parole officer shall prepare the notice of preliminary hearing.
- b. The Probation and Parole officer shall serve written notice of preliminary hearing to the offender within seventy-two (72) hours of the offender being taken into custody, and at least three (3) working days prior to the preliminary revocation hearing. The alleged violations and rights shall be read and explained to the offender when written notice is served. Each alleged violation shall be specific. The dates and times of each alleged violation shall be given. If the violation is a new conviction, the date the conviction occurred shall be included. The offender shall sign the notice in the space marked 'releasee'. Each signature shall be witnessed. If the offender refuses to sign the notice, the last section of the document shall be completed by the Probation and Parole officer and witnessed by a person present at the time the notice was read to the offender. The offender shall be given a copy of the notice of preliminary revocation hearing.
- c. In the case of absconders, the Probation and Parole officer shall follow the procedure outlined in CPP 27-17-01 (Absconder Procedure).
- d. In the absence of the offender's supervising Probation and Parole officer, another Probation and Parole officer shall perform the above duties.

2. Probation

Hearing notice shall be provided as required by the Circuit Court or the Judicial District of the Circuit Court. The court shall be advised of KRS 533.040(3), when applicable.

F. Submission of Supervision Report

An approved supervision report shall be completed outlining the violations. The supervision report shall be forwarded to the releasing authority through the supervisor. The offender SHALL NOT be provided a copy of the supervision report. A copy shall be maintained in the case record.

G. Gathering of Documentation for Evidence

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The officer shall gather evidence to support alleged violations. This evidence may include all testimony of a witness, introduction of records and documents. All court records shall be certified. The officer may have witnesses subpoenaed by making a request to the appropriate releasing authority. When requesting a subpoena, the officer shall provide the name and address of the witness. The request to the Parole Board shall be made not less than seven (7) days in advance of the date of the preliminary hearing. The parole officer shall subpoena all witnesses pertinent to the presentation of the officer's case.

H. Preparation of Notice of Hearing if an Offender is in Custody or Located Out of Judicial District

The offender's supervising officer shall contact the officer in the area where the offender is in custody or located to give the officer the necessary information to complete the notice of preliminary hearing or detainer within seventy-two (72) hours. The supervising officer and assisting officer shall coordinate the execution of the detainer or notice of preliminary hearing to ensure all time frames are met. The assisting officer may conduct the hearing for the supervising officer. If the offender does not waive the preliminary hearing site, transportation arrangements shall be coordinated by the assisting and supervising officers or supervisor.

I. Procedures for Conducting the Preliminary Revocation Hearing

The preliminary hearing shall be conducted in a place reasonably near the county where the alleged violation or arrest occurred, unless waived by the offender. The hearing may be moved to accommodate witnesses. The room shall allow for privacy and quiet, as well as security. The preliminary hearing shall be recorded by the administrative law judge and court. (2B-06)

Procedures for officer's presentation shall be as follows:

1. Personal introduction: after being sworn, officer identifies himself, including his title and district.
2. Background summary of case: officer shall provide the offender's:
 - a. Full name
 - b. Original charge
 - c. Date probated or paroled
 - d. Signed copy of the conditions of supervision

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3. Identification of the Alleged Violation

Provide evidence which supports each violation to include testimony (witnesses), signed documents, or certified records.

4. Amending the Notice of Hearing

The notice may be amended at any time prior to the close of the record of the preliminary revocation hearing, within the discretion of the administrative law judge, provided a finding is made that the substantial rights of the parolee will not be prejudiced by the amendment. A continuance of the proceeding may be granted in the event of this amendment, if the interests of justice so require. Failure to object to any defect in the notice prior to the close of the hearing shall be deemed a waiver of such objection.

5. Defense Testimony

- a. The defense attorney or the offender shall have the right to present evidence to refute the alleged violations.
- b. The defense may introduce statements of extenuating or mitigating circumstances.
- c. The defense shall have the right to cross examine witnesses.
- d. The offender may choose not to present evidence on his own behalf.

6. Further Statements from the Probation and Parole Officer

At the close of the hearing, the Probation and Parole officer shall be provided the opportunity to make any further comments or recommendations. Any comment or recommendation shall be stated prior to the close of the hearing. The officer may request or stipulate alternatives, to include leniency, an increased level of supervision, or in-patient or out-patient counseling. A recommendation or stipulation of alternatives shall only be made if public safety is not endangered.

7. Conclusions

The judge or administrative law judge, upon hearing all of the evidence, shall determine if there is probable cause to believe a violation of probation or parole has occurred. The administrative law judge shall

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orally make findings and rulings on the record immediately after the conclusion of the hearing unless the record remains open upon request for good cause. In probation cases, if probable cause is not found, the Probation and Parole officer shall immediately contact the probating judge for further instructions. (2B-09; 2B-10)

8. Motions

a. Motion to Reset / Motion for Continuance to Another Date

A motion to reset or motion to continue to another date may be used to reschedule a preliminary revocation hearing. A motion to reset shall be used only to advance a hearing to a later date. The officer, parolee, or defense counsel may request the preliminary hearing be reset or continued to another date. The administrative law judge shall complete and sign the appropriate document and distribute accordingly.

b. Motion for Leniency or Indefinite Continuance

Only a Probation and Parole officer may initiate a motion for leniency or indefinite continuance without another date being set. This type of motion may be used in circumstances where the officer desires leniency in the case; or the officer requests that the parolee enroll in a treatment program. The officer shall not initiate the motion unless the parolee or defense counsel agrees to the motion. By agreeing, the parolee is waiving the right to the hearing. (2B-11)

c. A motion to quash shall be initiated by the Probation and Parole officer when a parolee receives a new felony commitment to imprisonment during the pendency of the parole revocation proceeding, thus terminating the parole status by law (KRS 439.352). In this case, further appearance before an administrative law judge shall be unnecessary.

The motion to quash shall be completed as follows:

- (1) Indicate whether the parolee is joining in the motion and whether an attorney is involved.
- (2) The name of the administrative law judge may either be filled in or left blank.

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- (3) Date and sign the motion, along with the parolee and his attorney. Witness the parolee's signature. List the attorney's address.
- (4) If the parolee's attorney has not signed the motion, provide counsel one (1) copy, with the notice completed.
- (5) Send through the supervisor, to the Central Office, marked "TO THE ATTENTION OF THE ADMINISTRATIVE LAW JUDGE". Give one (1) copy to the parolee. Give or send one (1) copy to the attorney. The Parole officer shall retain one (1) copy.

J. Procedures after Preliminary Revocation Hearing Held

1. Parolee

- a. If leniency or a continuance without another date is requested by the Probation and Parole officer and is granted by the administrative law judge, the parolee may be released from custody on that date, or may be held until the actual date of admittance into a treatment program (if recommended). When the parolee is released from custody, the detainer shall be obtained from the jail. The officer shall complete the external movement.
- b. If probable cause is found at the hearing, the parolee shall be held in custody until a decision is made by the Parole Board regarding the issuance of a parole violation warrant.

If the parolee has not been in custody prior to the hearing and probable cause is found at the hearing, the parolee shall be lodged and held in custody until a decision is made by the Parole Board. The only exception to this shall be that leniency was requested by the officer at the preliminary hearing and granted by the administrative law judge.

- (1) If a warrant is issued, the detainer previously filed shall be replaced with the warrant issued.
- (2) If the Parole Board decides not to issue a warrant, the Probation and Parole officer shall be advised and the parolee shall be released from custody on that date and continued under supervision.

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- c. If, at any time, the parolee contacts the Probation and Parole officer requesting a waiver of the final revocation hearing, the officer shall advise the parolee to contact the Kentucky Parole Board and provide the parolee with the telephone number and address of the Parole Board. The parole officer may take a waiver of final revocation hearing to the parolee. If the parolee freely and voluntarily requests to waive the final hearing or requests a serve out, the parolee may sign and date the form and the officer shall witness the signature.

2. Probation

After a preliminary revocation hearing on a probationer, the case shall be referred to the court by the administrative law judge for final revocation determination.

K. Return of Violator

1. Parole

When returning a violator, transportation procedures shall be followed as outlined in CPP 27-21-01 (Apprehension of Probation and Parole Violators). The following documents shall be presented at the institution for admittance of the violator:

- a. Original warrant
- b. Receipt for the return of the violator.

At the final revocation hearing, the Parole Board may subpoena the supervising officer and case records. The officer shall offer any testimony requested by the Board.

2. Probation

In cases of probation revocation, transportation to the institution shall be the responsibility of the local sheriff's office.

L. Procedures to Waive a Preliminary Hearing

The parolee shall admit guilt to the violations to waive the preliminary hearing.
(2B-07)

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1. A hearing date and time shall be obtained from the administrative law judge and the parolee shall be served with a completed notice of hearing. Unless the notice of hearing has already been served, a Probation and Parole officer shall not delay scheduling a preliminary hearing or continue a scheduled hearing to persuade the parolee to waive.
2. The parolee shall be advised that he may waive his preliminary hearing if he admits the alleged violations. The procedure shall be explained in detail to the parolee including an explanation of his right to submit mitigating evidence or a written statement in mitigation.
3. The parolee shall be advised that he has the right to obtain counsel before making this decision. If the parolee wishes to waive counsel, that shall be done in the same manner (sign waiver on Notice of Hearing). If counsel is requested, the same procedures shall be followed as if the case was going to proceed to hearing.
4. Once the officer is convinced that the parolee, without duress, voluntarily wishes to waive his preliminary hearing, the waiver of preliminary hearing shall be explained to the parolee and completed by the parolee and the officer. Defense counsel may be present during this procedure, and shall sign the document.
5. The officer shall advise the parolee that he has the right to submit mitigation evidence to the Parole Board and provide the parole board address. The officer shall offer assistance in mailing a mitigation statement, if requested.
6. The administrative law judge shall be notified as soon as possible after the waiver is effected so that the hearing may be removed from the docket to accommodate other cases.
7. The waiver document shall be submitted in the following manner: Original to Central Office through Supervisor or designee, one (1) copy to the parolee, one (1) copy to the administrative law judge, and one (1) copy shall be retained in the offender's case record. If the violation is a result of a new felony conviction, a copy of the judgement shall be attached to the waiver.
8. The administrative law judge shall review the submitted documents and decide whether to accept the waiver. In making this decision, the administrative law judge shall review the documents for proper completion and to determine that the waiver was made freely, voluntarily and knowingly.

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9. If the waiver is accepted, a brief order shall be entered by the administrative law judge either referring the case to the Board (if no warrant is outstanding) or ordering the parolee's return to the institution (if a valid warrant is outstanding). The Probation and Parole officer shall wait for the Parole Board decision.
10. If the waiver is rejected, the Parole officer shall be notified and a hearing shall be scheduled unless the deficiencies can be corrected. If the deficiencies are corrected, the administrative law judge shall so notify the Probation and Parole officer, who shall address and correct the deficiencies immediately with the parolee and his counsel. If there is not an agreement to correct the deficiencies, a preliminary hearing shall be scheduled immediately.
11. In the event the parolee decides at the last minute to waive, he shall do so in the presence of the administrative law judge who shall send the completed waiver document to Central Office for processing.
12. If the officer wishes to request leniency at the time a waiver of preliminary hearing is executed, the motion for continuance shall be directly attached to the waiver when it is submitted.
13. The waiver of preliminary revocation hearing shall not be required if the offender receives a new felony conviction and is remanded to the Department.