DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the District of Columbia Code

AGENCY: United States Parole Commission, Justice.

ACTION: Final rule.

SUMMARY: The U.S. Parole Commission is amending its rules which govern the hearing process for District of Columbia parolees and supervised releasees who are arrested on warrants charging them with violations which may result in revocation and return to prison. The amended rules implement a consent decree issued by the U.S. District Court for the District of Columbia, in Long v. Gaines, Civil Action No. 01–0010 (EGS), dated December 17, 2002. This consent decree obliges the Commission to adopt as final rules the interim rules which the Commission published on January 18, 2002, and requires certain additional provisions relating to District of Columbia parolees who are arrested in jurisdictions outside the District of Columbia. The Commission has decided, in addition, to adopt the same procedures for District of Columbia supervised releasees. These procedures are intended to give the Commission a swift and efficient revocation hearing process which will minimize the Commission's use of the jail housing resources of the District of Columbia Department of Corrections, without impeding the Commission's ability to make a thorough assessment of the charges in each case.

DATES: This final rule will take effect February 24, 2003.

FOR FURTHER INFORMATION CONTACT: Michael A. Stover, Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815, telephone (301) 492–5959. Please note that questions about this **Federal Register** publication are welcome, but inquiries concerning individual cases cannot be answered.

SUPPLEMENTARY INFORMATION: In Long v. Gaines, 167 F. Supp. 2d 75 (D.D.C. 2001), the U.S. District Court for the District of Columbia held that the Parole Commission's rules governing the revocation process for District of Columbia parolees were unconstitutional with respect to the time deadlines for making determinations of probable cause and completing the revocation process. On December 17, 2002, the Court vacated its orders and judgment in Long v. Gaines, and entered a consent decree by which the Commission has agreed to withdraw its appeal to the U.S. Court of Appeals for the District of Columbia Circuit, and to adopt as final rules the rules which it adopted to carry out the compliance plan which the district court approved on November 21, 2001. The consent decree also includes certain additional provisions regarding DC Code parolees who are arrested in jurisdictions outside the District of Columbia.

Although the revocation hearing process adopted by these amended rules imposes deadlines for making probable cause and final revocation decisions which are shorter than the Commission believes to be required by the Constitution, the Commission believes that this approach makes sense in the context of a municipal correctional system with seriously strained jail housing resources. The shorter the average stay of each arrested parolee prior to a final disposition of the revocation charges, the faster the parolee can either be released or transferred to a Bureau of Prisons facility, thus limiting the total parolee population in the custody of the DC Department of Corrections at any given time. The most important feature of the revocation system which the Commission has developed as a result of Long v. Gaines is the rule which requires the scheduling of a fixed date for the revocation hearing as soon as probable cause is found, and which prohibits postponement requests submitted to the Commission less than fifteen days before a scheduled hearing except for compelling reasons. By reducing the possibilities for tactical delays which in the past made the Commission's revocation caseload in the District of Columbia nearly unmanageable, this rule permits the Commission to process a very substantial caseload in an orderly manner. An efficient revocation process also maximizes the Commission's ability to revoke the paroles of high-risk parole violators and expeditiously remove them from the community.

Under these amended rules, an examiner of the Commission will make a determination of probable cause no later than five days from arrest, and will hold a revocation hearing not later than 65 days from arrest. The examiner will also have the authority to order the release of the parolee if no probable cause is found, and to set a date for the revocation hearing if probable cause is found. The Commission will issue a final decision no later than 21 days from the revocation hearing (*i.e.*, 86 days from arrest). However, in the case of a parolee who admits all charges, waives the right to a local revocation hearing, or is convicted of a new crime, the Commission will conduct an ''institutional revocation hearing'' as provided in its original rules. The amended rules also require the Commission to ensure that: (1) Each parolee is given notice of the time and purpose of the probable cause hearing and the charged violations; (2) each parolee is provided, prior to the revocation hearing, with disclosure of the evidence to be relied upon by the Commission in determining whether parole was violated and, if so, whether to revoke parole; and (3) each parolee's arguments and evidence are given to the Commission before it renders a final decision.

With respect to parolees arrested outside the District of Columbia, but within the Washington DC Metropolitan Area, and who have not sustained new criminal convictions, the rules provide that an examiner of the Commission will conduct a probable cause hearing within five days of the parolee's arrival at a facility where probable cause hearings are conducted. Normally, the probable cause hearing will be conducted at the DC Jail following the transfer of the parolee from the local jail facility (in Maryland or Virginia) to which the parolee was taken immediately following arrest. The U.S. Marshals Service has issued instructions to all of its U.S. Marshals regarding timely notifications and transfers of parolees for probable cause hearings, which should make it possible for this new procedure to be successful.

Finally, the Commission has decided to extend the revocation procedures set forth in these rules to District of Columbia supervised release cases, even though District of Columbia supervised releasees are not members of the Long v. Gaines class and are not covered by the consent decree of December 17, 2002. (Sentences imposed for D.C. Code crimes committed within the District of Columbia since August 5, 2000, no longer include parole, but instead carry terms of supervised release which come under the Commission's jurisdiction.) In the Commission's judgment, these rules provide the most efficient revocation system for both parolees and supervised releasees in the District of Columbia, and correspondingly the best means of protecting the public safety.

Implementation

The Commission's regulations at 28 CFR 2.98 through 2.105, and 28 CFR 2.211 through 2.218, as amended by this

publication, will be followed by the Commission in the case of all District of Columbia Code parolees and supervised releasees who are arrested and held in the Washington, DC metropolitan area on warrants charging a violation or violations of parole or supervised release. In the case of District of Columbia Code parolees and supervised releasees who are arrested and held outside the Washington, DC metropolitan area on warrants charging a violation or violations of parole or supervised release, the revocation rules applicable to U.S. Code parolees shall apply. Where preliminary interviews are required, the Commission will request the local U.S. Probation Office to conduct a preliminary interview as required by 28 CFR § 2.48 (a) within 3 to 5 days of the Commission being notified by the U.S. Marshals Service of the parolee's arrest, unless exceptional circumstances require additional time not to exceed 10 days.

Regulatory Assessment Requirements

The U.S. Parole Commission has determined that these final rule amendments do not constitute a significant rule within the meaning of Executive Order 12866. The amended rules will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b), and are deemed by the Commission to be rules of agency practice that do not substantially affect the rights or obligations of non-agency parties pursuant to Section 804(3)(C) of the Congressional Review Act.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and parole.

Adoption of Amended Rules

Accordingly, the interim rule amendments to 28 CFR Part 2, Subchapter C, Sections 2.98 through 2.105, which were published at 67 FR 2569 on January 18, 2002, are adopted by the Commission as final rules with revisions to Section 2.101 as set forth below. In addition, the Commission adopts amendments to 28 CFR Part 2, Subchapter D, which are also set forth below.

PART 2—[AMENDED]

1. The authority citation for 28 CFR Part 2 continues to read as follows:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. Revise §2.101 (a) and (b), to read as follows:

§ 2.101 Probable cause hearing and determination.

(a) *Hearing.* A parolee who is retaken and held in custody in the District of Columbia on a warrant issued by the Commission, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission no later than five days from the date of such retaking. A parolee who is retaken and held in custody outside the District of Columbia, but within the Washington DC metropolitan area, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission within five days of the parolee's arrival at a facility where probable cause hearings are conducted. The purpose of a probable cause hearing is to determine whether there is probable cause to believe that the parolee has violated parole as charged, and if so, whether a local or institutional revocation hearing should be conducted. If the examiner finds probable cause, the examiner shall schedule a final revocation hearing to be held within 65 days of such parolee's arrest.

(b) *Notice and opportunity to postpone hearing.* Prior to the commencement of each docket of probable cause hearings in the District of Columbia, a list of the parolees who are scheduled for probable cause hearings, together with a copy of the warrant application for each parolee, shall be sent to the D.C. Public Defender Service. At or before the probable cause hearing, the parolee (or the parolee's attorney) may submit a written request that the hearing be postponed for any period up to thirty days, and the Commission shall ordinarily grant such requests. Prior to the commencement of the probable cause hearing, the examiner shall advise the parolee that the parolee may accept representation by the attorney from the D.C. Public Defender Service who is assigned to that docket, waive the assistance of an attorney at the probable cause hearing, or have the probable cause hearing postponed in order to obtain another attorney and/or witnesses on his behalf. In addition, the parolee may request the Commission to require the attendance of adverse witnesses (*i.e.*, witnesses who have given information upon which revocation may be based) at a postponed probable cause hearing. Such adverse witnesses may be required to attend either a postponed probable cause hearing, or a combined postponed probable cause and local revocation hearing, provided the parolee meets the requirements of § 2.102(a) for a local revocation hearing. The parolee shall also be given notice of the time and place of any postponed probable cause hearing.

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3. Section 2.211 is amended as follows:

a. Amend paragraph (a) (1) by removing ''preliminary interview'' and adding in its place ''probable cause hearing'.

b. Revise paragraph (f) to read as follows:

§ 2.211 Summons to appear or warrant for retaking releasee.

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(f) A summons or warrant issued pursuant to this section shall be accompanied by a warrant application (or other notice) stating:

(1) The charges against the releasee;

(2) The specific reports and other documents upon which the Commission intends to rely in determining whether a violation of supervised release has occurred and whether to revoke supervised release;

(3) Notice of the Commission's intent, if the releasee is arrested within the District of Columbia, to hold a probable cause hearing within five days of the releasee's arrest;

(4) A statement of the purpose of the probable cause hearing;

(5) The days of the week on which the Commission regularly holds its dockets of probable cause hearings at the Central Detention Facility;

(6) The releasee's procedural rights in the revocation process; and

(7) The possible actions that the Commission may take.

4. Section 2.212 is amended to read as follows:

a. Revise paragraph (b) to read as set forth below.

b. Amend paragraph (e) by removing ''preliminary interview'' and adding in its place ''probable cause hearing'.

§ 2.212 Execution of warrant and service of summons.

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(b) Upon the arrest of the releasee, the officer executing the warrant shall deliver to the releasee a copy of the warrant application (or other notice provided by the Commission) containing the information described in § 2.211(f).

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5. Section 2.214 is revised to read as follows:

§ 2.214 Probable cause hearing and determination.

(a) *Hearing.* A supervised releasee who is retaken and held in custody in the District of Columbia on a warrant

issued by the Commission, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission no later than five days from the date of such retaking. A releasee who is retaken and held in custody outside the District of Columbia, but within the Washington D.C. metropolitan area, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission within five days of the releasee's arrival at a facility where probable cause hearings are conducted. The purpose of a probable cause hearing is to determine whether there is probable cause to believe that the releasee has violated the conditions of supervised release as charged, and if so, whether a local or institutional revocation hearing should be conducted. If the examiner finds probable cause, the examiner shall schedule a final revocation hearing to be held within 65 days of the releasee's arrest.

(b) *Notice and opportunity to postpone hearing.* Prior to the commencement of each docket of probable cause hearings in the District of Columbia, a list of the releasees who are scheduled for probable cause hearings, together with a copy of the warrant application for each releasee, shall be sent to the D.C. Public Defender Service. At or before the probable cause hearing, the releasee (or the releasee's attorney) may submit a written request that the hearing be postponed for any period up to thirty days, and the Commission shall ordinarily grant such requests. Prior to the commencement of the probable cause hearing, the examiner shall advise the releasee that the releasee may accept representation by the attorney from the D.C. Public Defender Service who is assigned to that docket, waive the assistance of an attorney at the probable cause hearing, or have the probable cause hearing postponed in order to obtain another attorney and/or witnesses on his behalf. In addition, the releasee may request the Commission to require the attendance of adverse witnesses (*i.e.*, witnesses who have given information upon which revocation may be based) at a postponed probable cause hearing. Such adverse witnesses may be required to attend either a postponed probable cause hearing, or a combined postponed probable cause and local revocation hearing, provided the releasee meets the requirements of § 2.215(a) for a local revocation hearing. The releasee shall also be given notice of the time and place of any postponed probable cause hearing.

(c) *Review of the charges.* At the beginning of the probable cause hearing, the examiner shall ascertain that the notice required by § 2.212(b) has been given to the releasee. The examiner shall then review the violation charges with the releasee and shall apprise the releasee of the evidence that has been submitted in support of the charges. The examiner shall ascertain whether the releasee admits or denies each charge listed on the warrant application (or other notice of charges), and shall offer the releasee an opportunity to rebut or explain the allegations contained in the evidence giving rise to each charge. The examiner shall also receive the statements of any witnesses and documentary evidence that may be presented by the releasee. At a postponed probable cause hearing, the examiner shall also permit the releasee to confront and cross-examine any adverse witnesses in attendance, unless good cause is found for not allowing confrontation. Whenever a probable cause hearing is postponed to secure the appearance of adverse witnesses (or counsel in the case of a probable cause hearing conducted outside the District of Columbia), the Commission will ordinarily order a combined probable cause and local revocation hearing as provided in paragraph (i) of this section.

(d) *Probable cause determination.* At the conclusion of the probable cause hearing, the examiner shall determine whether probable cause exists to believe that the releasee has violated the conditions of release as charged, and shall so inform the releasee. The examiner shall then take either of the following actions:

(1) If the examiner determines that no probable cause exists for any violation charge, the examiner shall order that the releasee be released from the custody of the warrant and either reinstated to supervision, or discharged from supervision if the term of supervised release has expired.

(2) If the hearing examiner determines that probable cause exists on any violation charge, and the releasee has requested (and is eligible for) a local revocation hearing in the District of Columbia as provided by § 2.215 (a), the examiner shall schedule a local revocation hearing for a date that is within 65 days of the releasee's arrest. After the probable cause hearing, the releasee (or the releasee's attorney) may submit a written request for a postponement. Such postponements will normally be granted if the request is received no later than fifteen days before the date of the revocation hearing. A request for a postponement that is received by the Commission less than fifteen days before the scheduled date of the revocation hearing will be granted only for a compelling reason. The releasee (or the releasee's attorney) may also request, in writing, a hearing date that is earlier than the date scheduled by the examiner, and the Commission will accommodate such request if practicable.

(e) *Institutional revocation hearing.* If the releasee is not eligible for a local revocation hearing as provided by § 2.215 (a), or has requested to be transferred to an institution for his revocation hearing, the Commission will request the Bureau of Prisons to designate the releasee to an appropriate institution, and an institutional revocation hearing shall be scheduled for a date that is within ninety days of the releasee's retaking.

(f) *Digest of the probable cause hearing.* At the conclusion of the probable cause hearing, the examiner shall prepare a digest summarizing the evidence presented at the hearing, the responses of the releasee, and the examiner's findings as to probable cause.

(g) *Release notwithstanding probable cause.* Notwithstanding a finding of probable cause, the Commission may order the releasee's reinstatement to supervision or release pending further proceedings, if it determines that:

(1) Continuation of revocation proceedings is not warranted despite the finding of probable cause; or

(2) Incarceration pending further revocation proceedings is not warranted by the frequency or seriousness of the alleged violation(s), and the releasee is neither likely to fail to appear for further proceedings, nor is a danger to himself or others.

(h) *Conviction as probable cause.* Conviction of any crime committed subsequent to the commencement of a term of supervised release shall constitute probable cause for the purposes of this section, and no probable cause hearing shall be conducted unless a hearing is needed to consider additional violation charges that may be determinative of the Commission's decision whether to revoke supervised release.

(i) *Combined probable cause and local revocation hearing.* A postponed probable cause hearing may be conducted as a combined probable cause and local revocation hearing, provided such hearing is conducted within 65 days of the releasee's arrest and the releasee has been notified that the postponed probable cause hearing will constitute his final revocation hearing. The Commission's policy is to conduct a combined probable cause and

local revocation hearing whenever adverse witnesses are required to appear and give testimony with respect to contested charges.

(j) *Late received charges.* If the Commission is notified of an additional charge after probable cause has been found to proceed with a revocation hearing, the Commission may:

(1) Remand the case for a supplemental probable cause hearing if the new charge may be contested by the releasee and possibly result in the appearance of witness(es) at the revocation hearing;

(2) Notify the releasee that the additional charge will be considered at the revocation hearing without conducting a supplemental probable cause hearing; or

(3) Determine that the new charge shall not be considered at the revocation hearing.

6. Section 2.215 (f) is revised to read as follows:

§ 2.215 Place of revocation hearing.

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(f) A local revocation hearing shall be held not later than sixty-five days from the retaking of the releasee on a supervised release violation warrant. An institutional revocation hearing shall be held within ninety days of the retaking of the releasee on a supervised release violation warrant. If the releasee requests and receives any postponement, or consents to any postponement, or by his actions otherwise precludes the prompt completion of revocation proceedings in his case, the above-stated time limits shall be correspondingly extended.

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7. Section 2.216 is amended by revising paragraph (e) and adding paragraphs (g) and (h) to read as follows:

§ 2.216 Revocation hearing procedure.

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(e) All evidence upon which a finding of violation may be based shall be disclosed to the alleged violator before the revocation hearing. Such evidence shall include the Community Supervision Officer's letter summarizing the releasee's adjustment to supervision and requesting the warrant, all other documents describing the charged violation or violations, and any additional evidence upon which the Commission intends to rely in determining whether the charged violation or violations, if sustained, would warrant revocation of supervised release. If the releasee is represented by an attorney, the attorney shall be provided, prior to the revocation hearing, with a copy of the releasee's presentence investigation report, if such report is available to the Commission. If disclosure of any information would reveal the identity of a confidential informant or result in harm to any person, that information may be withheld from disclosure, in which case a summary of the withheld information shall be disclosed to the releasee prior to the revocation hearing.

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(g) At a local revocation hearing, the Commission shall secure the presence of the releasee's Community Supervision Officer, or a substitute Community Supervision Officer who shall bring the releasee's supervision file if the releasee's Community Supervision Officer is not available. At the request of the hearing examiner, such officer shall provide testimony at the hearing concerning the releasee's adjustment to supervision.

(h) After the revocation hearing, the hearing examiner shall prepare a summary of the hearing that includes a description of the evidence against the releasee and the evidence submitted by the releasee in defense or mitigation of the charges, a summary of the arguments against revocation presented by the releasee, and the examiner's recommended decision. The hearing examiner's summary, together with the releasee's file (including any documentary evidence and letters submitted on behalf of the releasee), shall be given to another examiner for review. When two hearing examiners concur in a recommended disposition, that recommendation, together with the releasee's file and the hearing examiner's summary of the hearing, shall be submitted to the Commission for decision.

8. Section 2.217 (a) (1) is amended by removing ''preliminary interview'' and adding in its place ''probable cause hearing''.

9. Section 2.218 (g) is revised to read as follows:

§ 2.218 Revocation decisions.

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(g) Decisions under this section shall be made upon the concurrence of two Commissioner votes, except that a decision to override an examiner panel recommendation shall require the concurrence of three Commissioner votes. The final decision following a local revocation hearing shall be issued within 86 days of the retaking of the releasee on a supervised release violation warrant. The final decision following an institutional revocation hearing shall be issued within 21 days of the hearing, excluding weekends and holidays.

Dated: January 16, 2003.

Edward F. Reilly, Jr.

Chairman, U.S. Parole Commission.

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DEPARTMENT OF JUSTICE

28 CFR Part 16

[AAG/A Order No. 002–2003]

Privacy Act of 1974; Implementation

AGENCY: Department of Justice.

ACTION: Interim Rule with Request for Comments.

SUMMARY: This interim rule with request for comments implements the Privacy Act of 1974, as amended (5 U.S.C. 552a, Pub. L. 93–579). This regulation exempts five Privacy Act systems of records of the Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), from the subsections of the Privacy Act listed below. The five systems of records listed below are described in today's notice section of the **Federal Register**. As described in the rule, the exemptions are necessary to protect law enforcement and investigatory information and functions of ATF, and will be applied only to the extent that information in a record is subject to exemption pursuant to 5 U.S.C. 552a(j) and (k).

DATES: This rule is effective on January 24, 2003. Written comments must be submitted on or before March 25, 2003.

ADDRESSES: All comments concerning this interim rule should be mailed to: Mary Cahill, Management and Planning Staff, Justice Management Division, Department of Justice, Washington, DC 20530 (1400 National Place Building).

FOR FURTHER INFORMATION CONTACT: Mary Cahill (202) 307–1823.

SUPPLEMENTARY INFORMATION: On November 25, 2002, the President signed into law the Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135 (2002). Under Title XI, Subtitle B of the Act, the ''authorities, functions, personnel, and assets'' of the Bureau of Alcohol, Tobacco, and Firearms are transferred to the Department of Justice, with the exception of certain enumerated authorities that were retained by the Department of the Treasury. The functions retained by the Department of the Treasury are the responsibility of a new Alcohol and Tobacco Tax and Trade Bureau. Section 1111 of the Homeland Security Act