(b)(2) through (b)(3) [Reserved]. For further guidance, *see* § 1.6038B–1(b)(2) through (b)(3).

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 24.** The authority citation for part 301 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 25.** Section 301.7701–3 is amended by revising paragraph (c)(1)(ii) to read as follows:

§ 301.7701–3 Classification of certain business entities.

* * * * *

(c) * * * (1) * * *

(ii) [Reserved]. For further guidance, *see* § 301.7701–3T(c)(1)(ii).

* * * * *

■ **Par. 26.** Section 301.7701–3T is added to read as follows:

§ 301.7701–3T Classification of certain business entities (temporary).

(a) through (c)(1)(i) [Reserved]. For further guidance, *see* § 301.7701–3(a) through (c)(1)(i).

(ii) *Further notification of elections.* An eligible entity required to file a federal tax or information return for the taxable year for which an election is made under § 301.7701–3(c)(1)(i) must attach a copy of its Form 8832 to its federal tax or information return for that year. If the entity is not required to file a return for that year, a copy of its Form 8832 (''Entity Classification Election'') must be attached to the federal income tax or information return of any direct or indirect owner of the entity for the taxable year of the owner that includes the date on which the election was effective. An indirect owner of the entity does not have to attach a copy of the Form 8832 to its return if an entity in which it has an interest is already filing a copy of the Form 8832 with its return. If an entity, or one of its direct or indirect owners, fails to attach a copy of a Form 8832 to its return as directed in this section, an otherwise valid election under § 301.7701–3(c)(1)(i) will not be invalidated, but the non-filing party may be subject to penalties, including any applicable penalties if the federal tax or information returns are inconsistent with the entity's election under § 301.7701–3(c)(1)(i). In the case of returns for taxable years beginning after December 31, 2002, the copy of Form 8832 attached to a return pursuant to this paragraph (c)(1)(ii) is not required to be a signed copy.

(c)(1)(iii) through (h) [Reserved]. For further guidance, *see* § 301.7701–3(c)(1)(iii) through (h).

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 27.** The authority citation for part 602 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 28.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.170A–11T	1545–1868
* * * * *	

Robert E. Wenzel,

Deputy Commission for Services and Enforcement.

Approved: December 2, 2003.

Gregory Jenner,

Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 03–31238 Filed 12–18–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

AGENCY: United States Parole Commission, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is designed to provide a fair and expeditious means of handling the case of an accused parole violator who is found to be mentally incompetent to proceed with a scheduled parole revocation hearing. Under the Commission's present rule, such a parolee is sent to the Bureau of Prisons for a mental health examination, with a report every six months, until the parolee regains sufficient competence to participate in a revocation hearing. This rule can result in the indefinite detention of the mentally incompetent parolee, without any provision for bringing the revocation matter to resolution. The interim rule authorizes the Commission to conduct a revocation hearing notwithstanding the parolee's lack of mental competency, so long as the Commission obtains a current mental health report, ensures that the parolee has counsel to present a defense, and takes the parolee's mental condition into account in its determination.

DATES: *Effective date:* January 20, 2004. Comments must be received by February 17, 2004.

ADDRESSES: Send comments to Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815.

FOR FURTHER INFORMATION CONTACT: Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815, telephone (301) 492–5959. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION: A recent case in the District of Columbia has illustrated the problems that can arise when the Commission finds that a parolee who is charged with parole violations is not mentally competent to participate a revocation hearing, and successive efforts to hold a revocation hearing are frustrated by the parolee's inability to regain competency. Other pending revocation cases potentially raise similar difficulties. Under the Commission's present regulation, 28 CFR 2.8, such a parolee must be kept in prison with a report as to his mental competency submitted every six months. A revocation hearing is attempted only when the mental health report indicates that the parolee may be competent to proceed. The regulation can result in indefinite delays in holding the revocation hearing, because the rule lacks any provision for resolving the parolee's situation.

The rule at § 2.8 is grounded, in part, on the policy judgment that the Commission cannot responsibly return accused parole violators to parole supervision solely by reason of their mental incompetency. This result would be incompatible with a primary purpose of parole, *i.e.*, to promote the reintegration of criminal offenders into society as law-abiding citizens through closely supervising their activities in the community and facilitating their rehabilitation. Effective supervision can only be carried out when parolees

maintain sufficient mental capacity to report as directed to their supervision officers, to follow instructions, to comply with the conditions of parole, and to avoid committing new crimes. Given the overriding public interest in preventing new crimes by released offenders, the Commission may justifiably require any parolee who lacks the mental capacity to function successfully on parole to complete his sentence in prison.

The mental incompetency of a defendant facing a criminal prosecution has a far different consequence. A defendant who is found unable to regain competence to stand trial in the foreseeable future cannot be incarcerated indefinitely and must be released, as mandated by *Jackson* v. *Indiana,* 406 U.S. 715 (1972). But this requirement does not apply to an accused parole violator, who is a convicted felon whose imprisonment will terminate with the expiration date of his sentence. Moreover, a parolee's mental condition is not a defense to revocation, though the parolee's condition is a factor for the decision-maker to consider in the disposition of the case. *E.g., United States* v. *Brown,* 899 F.2d 189 (2d Cir. 1990); *Steinberg* v. *Police Court of Albany, New York,* 610 F. 2d 449 (6th Cir. 1979). A parolee cannot, therefore, gain immunity from revocation of parole, and force the government to resort to civil commitment procedures, merely by reason of mental incompetency.

On the other hand, maintaining an accused parole violator on a potentially indefinite six-month reporting cycle without a revocation hearing, as permitted by the present rule, fails to serve the interest of both society and the parolee in seeing that parole violation charges are resolved in a reasonable time. Conducting a revocation hearing notwithstanding the parolee's mental incompetency is the appropriate solution because, in the final analysis, revocation of parole is remedial in nature. *E.g., United States* v. *Pinjuv,* 218 F.3d 1125, 1131 (9th Cir. 2000), *citing, Standlee* v. *Rhay,* 557 F.2d 1303, 1306 (9th Cir. 1977). Although it is obviously important for an accused parole violator to be able to participate meaningfully in the revocation process, the overriding consideration is that the Commission should avoid excessive delay in determining whether revocation is appropriate. A prolonged delay in holding the revocation hearing may result in the loss of witnesses, or the ability of witnesses to recall the events underlying a charged violation, which would impede the Commission's ability to make an accurate evaluation of the parolee's conduct and needs, and make an informed predictive judgment of the parolee's ability to live a law-abiding life. *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972). It can also keep the parolee in custody unjustly where the violation charges would otherwise be dismissed.

If revocation is ordered, depending on the seriousness of the violations committed and the risk of new criminal behavior, the Commission can take such measures as are best suited to protect the public, which may include a reparole under conditions of supervision adequate to support the parolee's mental health needs. If the charges are dismissed, or revocation is otherwise not found appropriate, the Commission can return the parolee to the community with a better understanding of the needs that must be addressed to improve the parolee's chances for success.

Consequently, the Commission's revised regulation requires that, whenever a parolee appears to be incompetent to go forward with a revocation hearing, the hearing examiner must temporarily postpone the hearing to obtain a report concerning the parolee's competency from mental health professionals. If the incompetency appears at the probable cause hearing stage, the examiner (or Commission) will make a finding as to probable cause and, if probable cause is found, will schedule a revocation hearing to be held with such a report.

At the postponed revocation hearing, the hearing examiner will make a preliminary determination as to the parolee's competency before proceeding with the revocation hearing. But the hearing examiner will proceed with the revocation hearing even if the examiner determines that the parolee is mentally incompetent to participate in the hearing. Under the interim rule, a finding of incompetency is not a reason for ordering further postponements or for canceling the hearing. In such a case, the purpose of the mental competency determination is to inform the examiner of the parolee's condition, so that the examiner can ensure that both a fair revocation hearing and a reasonable decision results.

In drafting this revised regulation, the Commission has taken account of the possibility that holding a revocation hearing in the case of an incompetent parolee could result in an increased risk of erroneous fact-finding. This risk will be controlled by the provision that any mentally incompetent parolee must be afforded representation by counsel at the revocation hearing. Counsel will be expected to investigate the charges by speaking to witnesses, family members, and others with relevant information. Counsel will be permitted to present any substantial defense to the charges which the circumstances suggest, even if the parolee is not able to testify or give counsel meaningful assistance. This is not an unfair expectation because counsel is not tasked with preparing a defense in a criminal trial under the standard of ''beyond a reasonable doubt.'' Counsel is only tasked with preparing a defense in an informal administrative hearing, under the lesser standard of the ''preponderance of the evidence,'' whereby counsel need only provide the Commission with the explanation of the facts which ''best accords with reason and probability.'' *See* 28 CFR 2.19(c). As the Supreme Court stated in *Morrissey* v. *Brewer, supra,* 408 U.S. at 489, a parole revocation hearing is not a criminal trial ''in any sense.''

Therefore, the absence of any readily evident defenses to the alleged parole violations will, in most cases, result in counsel emphasizing factors in mitigation. Even though a case may occur in which a parolee cannot communicate to counsel some defense that is known only to the parolee, it is still preferable for the Commission to hold a hearing and make the best decision it can, as opposed to postponing the hearing until such time as the parolee is able to regain his competence.

In sum, the only requirement of due process in such a case is that the Commission must take the parolee's mental condition fully into account in conducting the revocation hearing and making its decision. *Pierce* v. *State Department of Social and Health Services,* 646 P. 2d 1382 (S. Ct. Wash. 1982) (*en banc*). Before making a finding as to whether the parolee violated parole as charged, the Commission will consider the parolee's difficulty in communicating his version of the facts, and weigh that factor in the balance in assessing the probabilities under 28 CFR 2.19(c). If the Commission finds that violations have occurred, the Commission will consider the parolee's inability to provide a coherent explanation of the reasons for his misconduct in determining whether revocation is the appropriate remedy.

Because this is a rule of procedure only, and implementation of the rule at the earliest opportunity is necessary for the Commission to be able to resolve any potential delays in its revocation caseload, this rule will go into effect as an interim rule with request for comments, in contrast to proposals for rulemaking on substantive matters such as paroling policy.

Implementation

The amended rule will take effect January 20, 2004, and will apply to all cases, federal and District of Columbia, including District of Columbia offenders on supervised release.

Executive Order 12866

The U.S. Parole Commission has determined that this interim rule does not constitute a significant rule within the meaning of Executive Order 12866.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications requiring a Federalism Assessment.

Regulatory Flexibility Act

The interim rule 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 is deemed by the Commission to be a rule of agency practice that does not substantially affect the rights or obligations of non-agency parties pursuant to section 804 (3) (c) of the Congressional Review Act.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local, or tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and parole.

The Interim Rule

■ Accordingly, the U.S. Parole Commission is adopting the following amendment to 28 CFR Part 2.

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. Amend § 2.8 by revising paragraph (c) and adding paragraph (e). The revised and added texts read as follows:

§ 2.8 Mental competency proceedings.

* * * * *

(c) Whenever the hearing examiner(s) or designated official determine that a prisoner is mentally incompetent and postpone the previously scheduled hearing, they shall forward the record of the preliminary hearing with their findings to the Regional Commissioner for review.

(1) In the case of a prisoner, if the Regional Commissioner concurs with their findings, the Commissioner shall order the temporarily postponed hearing to be postponed indefinitely until such time as it is determined that the prisoner has recovered sufficiently to understand the proceedings. The Regional Commissioner shall require a progress report on the mental health of the prisoner at least every six months. When the Regional Commissioner determines that the prisoner has recovered sufficiently, the Commissioner shall reschedule the hearing for the earliest feasible date.

(2) In the case of a parolee in a revocation proceeding, the Regional Commissioner shall postpone the revocation hearing and order that the parolee be given a mental health examination in a suitable facility of the Bureau of Prisons or the District of Columbia. The postponed revocation hearing shall be held within 60 days, or as soon as a satisfactory mental health report is submitted. The Regional Commissioner shall order that appointment of counsel be sought in any case where the parolee does not have counsel for the revocation hearing. If the parolee's mental incompetency is raised at a preliminary interview or probable cause hearing, the Commission (or hearing official) will make a determination of probable cause and, if probable cause is found, schedule a revocation hearing as provided in this paragraph.

* * * * *

(e) At a postponed revocation hearing under this section, the hearing examiner shall make a preliminary determination as to the parolee's mental competency, taking into account all available mental health reports, any evidence submitted on the parolee's behalf, any report from counsel as to counsel's ability to communicate with the parolee, and the parolee's own responses to the examiner's questioning.

(1) If the hearing examiner determines the parolee to be mentally competent, the examiner shall conduct the revocation hearing. If counsel has previously asserted the parolee's incompetence, the examiner shall offer counsel a brief recess to consult with the parolee before proceeding.

(2) If the hearing examiner determines the parolee to be mentally incompetent, the examiner shall conduct the revocation hearing, and shall take into full account the parolee's mental condition in determining the facts and recommending a decision as to revocation and reparole.

(3) If the Commission revokes parole, the Commission may grant reparole conditioned on the parolee's acceptance into a particular type of mental health program prior to release from prison, or may grant reparole with a special condition of supervision that requires appropriate mental health treatment, including medication. In cases where no other option appears appropriate, the Commission may grant reparole conditioned upon the parolee's voluntary self-commitment to a mental health institution until such time as the parolee has sufficiently recovered for the Commission to permit the parolee's return to supervision.

(4) If the Commission finds that the parolee did not commit the charged violations of parole, but also finds that the parolee is unable to fulfill the normal obligations of a parolee by reason of his mental condition, the Commission may reinstate the parolee to parole with any appropriate special condition, including the special condition, if necessary, that the parolee voluntarily commit himself to a mental institution until such time as the parolee has sufficiently recovered for the Commission to permit a return to supervision.

Dated: December 12, 2003.

Edward F. Reilly, Jr.,

Chairman, U.S. Parole Commission.

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