Second Assessment of Public Comment

No new comments were received after the prior Assessment of Public Comments (hereinafter "First Assessment"), published on the DOCCS website (www.doccs.ny.gov/rules-regulations), as part of the emergency readoption of the rules published in the July 20, 2022 issue of the State Register.

Regarding those comments on the proposed rulemaking published on February 23, 2022, which were noted by the Board in the First Assessment to be subject to continued consideration, the Board refers to its responses in the First Assessment and where necessary, supplements them as follows:

Section 8002.6(b)

Comments: One comment, addressing paragraph (1) of this subdivision, discussed that allowing for a time assessment to be set in months is inflexible, and does not allow, for example, a 15-day time assessment for non-technical violations, and "month" is not described in Executive Law § 259-i(3)(f)(xii). Another comment discussed that part of paragraph (2) which provides that time assessments "will not be credited with any time in which the releasee is not within the convenience and practical control of the department." It is suggested that this disallows credit for time spent in custody out of state "but still subject to remand due to their detainer/warrant" and that this amendment is in violation of Penal Law § 70.30(3).

Response: As noted in the First Assessment, neither the Executive Law nor the regulatory provision were materially changed as detailed in the comment. The Board additionally notes that paragraph (1) of this subdivision is proposed for further revision to specify that time assessments set in days are limited to sustained technical violation charges. For non-technical violations, the Board has concluded the month increment offers sufficient flexibility while encouraging consistency in time assessments.

Section 8003.2(14)

Comment: Subdivision (14) is an added standard condition including a requirement that releasees appear at, for example, all final revocation hearing appearances for which they are the subject. One commentor writes that this is an "unnecessary and gratuitous" "special condition". The commentor writes that "the purpose of the Less Is More Act is to reduce conditions by which people on supervision are subject to violations and incarceration for violations of technical conditions." It's alleged to be "also unnecessary" because the "forfeiture of such right" is an established precept.

Response: The purposes of the conditions of release include ensuring that releasees are afforded notice of their responsibilities. As noted in the First Assessment, subdivision (14) is a standard condition that provides notification to releasees of their expected cooperation with appearances related to the parole revocation process.

Section 8004.1(f)

Comments: A number of comments suggest that subdivision (f) of section 8004.1 "improperly incorporates the violative policy against multiplicity of counts by allowing 'multiple charges that in aggregate form such conduct as a single course of absconding.'" Commentors also wrote: "the Department holds that evidence that the reasonable efforts requirement of the parole officer to re-engage the releasee to charge absconding does not have to be written into the charges of absconding. However, the Department still has a responsibility under Executive Law §259-i(3)(c)(iii) and in the new Section 8004.4 to provide in the notice of violation 'what conditions of community supervision are alleged to have been violated, and in what manner.' By eliminating the requirement that re-engagement efforts be noted or contained within the charges, the Department is violating the Executive Law's notice requirement and their own new regulation; hence it is a confusing and contrary clause that should be removed." Lastly, there were also comments that suggest "illegal incursion into the hearing process" by this part: "Evidence that the releasee has voluntarily surrendered to custody or that they have at some point re-engaged with the parole officer shall not in itself preclude a finding of absconding."

Response: Following consideration of the comments the Board is now proposing changes to this subdivision. First, the sentence that had provided for absconding to be charged and sustained "as multiple charges that in aggregate form such conduct as a single course of absconding" is proposed for deletion. Second, the last sentence of the provision is proposed for rewording to make clear that evidence of an alleged absconder's re-engagement with the parole officer could be found preclusive of an absconding determination, depending on the

circumstances. As proposed for revision, the subdivision is consistent with Executive Law §§ 259 and 259-i(c)(iii).

Section 8004.2(b)

Comment: One comment raises concerns that the rule allows probable cause to be founded on hearsay, and suggests a prohibition on the use of hearsay.

Response: As mentioned in the prior response to the comment on this subdivision, prohibiting the use of hearsay would be restrictive and contrary to the current well-established principles of parole revocation matters and administrative proceedings generally. The Board concludes this provision is reasonable and consistent with the Executive Law.

Section 8004.2(d)

Comment: A comment on subdivision (d) of section 8004.2 suggests adding explicit prohibition on issuance of a parole warrant for technical violations, including absconding violations.

Response: In addition to the response in the First Assessment, the Board notes that prohibiting the issuance of warrants in the manner suggested would be inconsistent with Executive Law § 259-i (3)(a).

Section 8004.3

Comments: One comment, based upon a quote of subdivision (a) this section, states the "Board's discretion to designate someone a sex offender absent a conviction of a sex offense should be challenged." With reference to subdivisions (a), (b) and (c), another comment argues

that subdivision (c) "seems to circumvent and dilute the legal requirement set out in EL 259-i(3)(a)(i) that any reporting to the Board of an alleged violation and subsequently be based on probable cause, which necessarily for purposes of Section 8004.3(a) and (b) includes the ability of the state to proceed on the alleged designated criminal conduct upon which the authority to report to the Board emanates. Subdivision (c) as a regulation is contrary to the relevant executive law provision, is confusing and likely to be end up resulting in excessive and unwarranted prosecutions and incarceration…."

Response: As mentioned in the prior response to the comment on this subdivision, subdivision (a) of section 8004.3 does not refer to the Board "designating" someone a sex offender. Following further consideration, the Board is proposing a revision to subdivision (c) which will explicitly specify that the report pursuant to subdivisions (a) or (b) of this section are to be consistent with the standard of probable cause. As proposed for revision, subdivision (c) is consistent with Executive Law § 259-i(3)(a) and section 8004.2.

Section 8004.4(e)

Comment: There is a comment regarding subdivision (e) of section 8004.4, including remarks repeating comments from other sections, and a remark characterizing paragraph (3) as unnecessary.

Response: In addition to the response in the First Assessment, the Board notes that the provisions of paragraph (3) are an implicit extension of a requirement that a releasee appear at hearings as directed.

Section 8004.4(i)

Comment: The comment received on this subdivision is quoted in full: "Section 8004.4(i) is contrary to law. Exec. Law 259-i(3)(c)(iii) requires, in so far as it is practicable, that evidence relating to the charges be delivered to the releasee at the time of service of the notice of violation. Your proposed rule, however, is directly contrary to the law, which only allows for later disclosure in so far it is impracticable at the time of service. The proposed rule is also deeply concerning given your policy, custom, and practice of refusing to follow Exec. Law 259-i(3)(c)(iii), which has always required at least some disclosure of evidence at the time of service."

Response: The Board, disagrees that there is the existence of a "custom, policy or practice", and further notes that the duty to disclose at issue is a duty of the Department as part of the prosecution of the alleged violation, not a duty of the Board and its hearing officers in adjudicating the accusations. Subdivision (i) is consistent with Executive Law § 259-i(3)(c)(iii).

Section 8004.5(e)

Comments: There were comments on subdivision (e) of section 8004.5. One commentor wrote that the rule lacks reference to the Executive Law statement that the releasee be presented for a recognizance hearing within 24 hours of the warrant execution. Another comment addresses parts of paragraph (2) of subdivision (e) in section 8004.5, which paragraph discusses authorized detention following a recognizance hearing in which the court had ordered release. In those remarks, they write that (e)(2)(ii) "defines conduct that would independently provide basis for

the issuance of a parole warrant as 'including, but not limited to conduct such as absconding or the commission of a misdemeanor or felony.'" They continue with respect to (e)(2)(iv), writing that it "attempts to subvert the authority of judges" and the limits of Less is More "by allowing the Department to solely determine that a warrant can be issued if 'the conduct is of such a character or quantity as to be substantially likely, if the recognizance court had been aware of it at the time of the recognizance hearing…'".

Response: The Board refers to its prior response to the comments on this subdivision and additionally notes that subdivision (e) is proposed for further revision not inconsistent with the Executive Law.

Section 8004.7(a)

Comments: One comment was received as to paragraph (1) of subdivision (a), contending it is illegal to include clarification that a failure to notify the parole officer of the releasee's criminal arrest is not a violation that is exempt from reincarceration. A comment on paragraph (4) of subdivision (a) was that it "creates a new type of technical violation not approved or sanctioned by the legislative scheme of Less Is More".

Response: The Board refers to its prior response to the comment on this subdivision and additionally notes that the language of the proposed paragraph (4) was potentially unclear. The rule has been revised to make clear that an 'arrest', which relates to a formal criminal proceeding, is distinct from a 'contact', which includes a broad variety of interactions with law enforcement agencies.

Section 8004.7(b)

Comment: Citing Executive Law § 259-i(3)(f)(xii), there was a comment complaining of subdivision (b) as "audaciously and illegally creat[ing] a sentencing enhancement scheme to increase penalties for technical violations based on prior violation history".

Response: This provision is consistent with the Executive Law, including § 259-i(3)(f)(x) through (xiii) , which authorize sanctions based on the total number of violations committed.

Section 8004.8(a)

Comments: There were comments on (a)(2) of section 8004.8. Subdivision (a) of this section begins: "'Non-technical violation' means:", and (2) of this subdivision states (emphasis added): "for a releasee who is serving a sentence for an offense defined in article 130 of the Penal Law or section 255.26 or 255.27 of such law, conduct violating a specific condition reasonably related to such offense and efforts to protect the public from the commission of a repeat of such offense, *provided that for purposes of this Part all conditions imposed upon such a releasee are presumed to be reasonably related to such offense and efforts to protect the public from the commission of a repeat of such offense*." Comments were to the effect that the inclusion of the emphasized language exceeded the scope of the Board's authority and Executive Law § 259(7) requires as conditions for this prong of non-technical violations, that the subject condition for an offender serving a sentence for a Penal Law Article 130 or section 255.26 or 255.27 offense be reasonably related to such offense and efforts to protect the public from the

commission of a repeat of such offense. One comment further notes that "[i]t may not be possible to promulgate precise criteria for when the reasonable relationship requirement is satisfied" but there must nevertheless be a "nexus between the condition imposed and the underlying sex offense conviction that goes beyond the nexus between that condition and other underlying convictions".

Response: The Board, after careful consideration of the concerns, has concluded that it is appropriate to retain the presumption, which ensures consistency and thoroughness in the designation of cases under this section and section 8004.2. This is consistent with the Board's ultimate authority over conditions of release and the underlying purpose of conditions of release generally, which are intended to directly or indirectly avert recidivism. Regarding the comment arguing that the relation between the specific condition and the sex offense must go "beyond the nexus between that condition and other underlying convictions", the Board notes that, when addressing potential recidivism by individuals who are serving sentences for multiple offenses, the purpose underlying particular conditions will not necessarily be exclusive to specific offenses. To the extent objections reflect concerns that the releasee will be unable to effectively contest this presumption, the Board notes that the administrative law judge at the final hearing, acting pursuant to the Board's authority, will make the final determination as to whether a specified condition is reasonably related to the offense at issue and efforts to protect the public from the commission of a repeat of such offense based on the record. .

Section 8004.9(b)

Comments: One comment addressed paragraph (3) of subdivision (b) of this section, which is taken from Executive Law § 259-i(3)(a)(viii). The comment suggests additions to paragraph (3) of subdivision (b), including reference to release under CPL §§ 30.30, 180.80, 190.80, or writs of habeas corpus. Another commenter discussed section 8004.9, contending it creates loopholes and shortcuts that curtail the new right, degrading and undermining the intent of the Legislature. With respect to subdivision (b) that commenter took issue with paragraphs (5), (6) and (7) and urged their deletion. The comment complains of (b)(5) as invading the province of the Legislature. The comments are also critical of (b)(6), which currently provides in part that "Where the releasee's custody is pursuant to the parole warrant and they are not detained in the county within which the violations are alleged to have occurred, execution of the warrant shall not be deemed completed within the meaning of this section until their known reception in the appropriate county…." The comment says that this creates a situation where a recognizance hearing could be delayed indefinitely. Further, (b)(7) provides: "The failure of the authorized officer to present the releasee within the periods set forth in this paragraph shall have no effect on the validity of the parole warrant or the parole violation charges and shall not in itself require release, but may provide basis for an application to a court of law, on notice to the department and Board of Parole, for an order compelling the appropriate production." The comment remarks that this part of the rule "renders the statutory time limits… irrelevant and abrogates the authority of the judiciary."

Response: The Board refers to its prior response to the comments on this subdivision. Regarding comment on paragraph (7) of paragraph (b), such paragraph is not inconsistent with

the Executive Law provisions concerning recognizance hearings within § 259-i(3)(a). Furthermore, we note that a revision to paragraph (6) of subdivision (b) is currently being proposed. As proposed for revision, that paragraph further clarifies the agency's flexibility to account for varied circumstances of an alleged violator's custody while remaining consistent with the intent of the Legislature.

Section 8004.9(e)

Comment: Subdivision (e) reflects that where the recognizance court makes the findings required to underlie the issuance of any detention order, the releasee is to be ordered detained until the conclusion of the revocation case. One commenter writes that this contradicts Executive Law § 259-i(3)(a)(viii). The comment also states: "Thus the legislation makes clear that when there is a pending criminal case connected to the parole violation, release on that case will lead to release on the parole warrant."

Response: This rule is consistent with Executive Law § 259-i(3)(a)(vi), and the Board further notes that subparagraph (viii) of § 259-i(3)(a) is expressly repeated with subdivision (b) of section 8004.9.

Section 8004.9(i)

Comment: Subdivision (i) of section 8004.9 in parts states that the Department is to "[a]t the time of the hearing… serve the releasee with the notice of violation if they were not previously served with such notice". The comment takes issue with a claimed omission of "mandatory" language that "as far as practical or feasible, any additional documents having been collected or prepared that are relevant to the charge shall be delivered to the alleged violator."

Response: Subdivision (i) is consistent with Executive Law § 259-i(3)(c)(iii), which requires that documents be delivered rather than prescribing specific language required by the notice.

Section 8004.9(l)

Comment: One commenter urges the deletion of subdivision (l), writing it contradicts significant parts of the legislation and abrogates the authority of the courts "to review central due process issues related to the issuance and service of parole warrants". The first sentence of the subdivision is suggested to contradict Executive Law § 259-i(3)(a)(v). The second sentence is suggested to be "extremely concerning" and allowing a DOCCS employee to "make a baseless claim at a recognizance hearing".

Response: This subdivision is not inconsistent with the recognizance hearing provisions in Executive Law § 259-i(3)(a), which delineates the scope of the court's determination as whether the releasee should be detained or released pending further revocation proceedings. Moreover, the language in this rule does not encourage misrepresentations to a court of law or otherwise permit unethical behavior by the Department.

Section 8004.11(b)

Comments: Section 8004.11 concerns discretionary cancellation of the revocation process. Subdivision (b) explains that the cancellation of a revocation case prior to a preliminary hearing or the waiver of such, may be without prejudice to the recommencement of the case or

commencement of a new case based upon the same charges. A couple of comments were received objecting to this subdivision as improper and creating the potential for arbitrary and capricious decisions.

Response: This rule is not inconsistent with the Executive Law and accords with longstanding practice previously codified in the Board's rules.

Section 8005.4(b)

Comment: One comment refers to this rule, which indicates that the preliminary hearing officer must have no prior supervisory involvement with the alleged violator whose case they are presiding over, as having vague wording, and offers a specific revised version as a replacement.

Response: This rule is consistent with the language on the same subject in Executive Law § 259-i(3)(c)(i), which includes in the statute a requirement that has been a long-standing requirement of the Board's regulations.

Section 8005.6(a)

Comments: Section 8005.6 concerns scheduling of the preliminary revocation hearing. One comment urges removal of "as may be relevant to reasonably ensure substantial compliance" with the law from subdivision (a), characterizing it as a lackadaisical standard. 8005.6(a)(2)(iii) provides: "Nothing within this paragraph shall be construed as prohibiting the conduct of a preliminary hearing in absentia." One comment states that this must be struck because the statute does not provide for preliminary hearings to be held in absentia.

Response: In addition to its response in the First Assessment, the Board notes that the language of subdivision (a) identified in the comment reflects the provisions of Executive Law § 259-i(3) pertinent to the scheduling of the preliminary revocation hearing, and guides the scheduling in a manner consistent with due process.

Section 8005.6(b)

Comment: One comment argued that paragraph (2) of subdivision (b), by stating that subsequent changes in custodial or residential status permit a "reasonable extension of time for scheduling or rescheduling at another appropriate location", is violative of the Executive Law.

Response: The cited language permits the revocation process to continue in compliance with due process and the Executive Law where circumstances beyond the agency's control disrupt scheduling. The Board further notes that, as provided in the regulations, any rescheduling must satisfy a reasonableness requirement.

Section 8005.6(c)

Comment: A comment stated that subdivision (c) of section 8005.6 encourages violations of due process and the Executive Law by allowing for the waiver of the right to a preliminary revocation hearing without the presence of counsel.

Response: As provided for by the Executive Law and in accord with due process, this provision reflects that a releasee may waive their right to a preliminary revocation hearing, and it

appropriately comports the procedure for such with longstanding agency practice and rule. Well-settled case law establishing the requirements for a valid waiver will appropriately protect the releasee and need not be restated in the rulemaking.

Section 8005.7

Comment: One comment contends that as currently written, subdivision (d) "improperly and illegally holds that proof of a conviction of a crime while on supervision shall constitute preponderance of evidence", in contrast with Executive Law § 259-i(3)(c)(iv).

Response: The Board agrees that the language of subdivision (d) (formerly paragraph (3) of subdivision (a)) had not been fully revised to reflect the change in the law as noted in the comment. Further modification of the language is currently proposed to clarify that conviction of a crime would constitute prima facie evidence of a violation.

Section 8005.17(a)

Comments: Several comments were received on section 8005.17, which is entitled "Scheduling of the final revocation hearing." Similar to a comment with respect to subdivision (a) of section 8005.6, a comment takes a partial quote from subdivision (a) of section 8005.17 and complains that "substantial compliance" is an unacceptable "standard". Another comment, citing certain language in (a)(1) ("notice of violation", "issuance of the notice"), also contends that as to scheduling of the final hearing the rule is unreasonably vague. There were also comments contending that this section allows for the arbitrary extension of statutorily defined speedy trial limits. It is claimed that (a)(2) is contrary to the Executive Law and permits the

agency to arbitrarily restart the 45-day period. The language in (a)(4) was discussed in two comments, basically for allegedly authorizing the holding of a final hearing beyond the statutory period.

Response: Subdivision (a) appropriately reflects the provisions of Executive Law § 259-i(3) pertinent to the scheduling of the final revocation hearing, and guides the scheduling to account for changed circumstances in a manner consistent with due process.

Regarding concerns that the language of paragraph (1) is vague, the Board submits that the use of the terms "notice" and "notice of violation" are sufficiently clear, particularly when read in conjunction with subparagraphs (i) and (ii).

As to the claim regarding (a)(2), the law does not prohibit such a rule, which provides for reasonable application of the Executive Law in the circumstance of a second or subsequent recognizance hearing. To the extent commenters are concerned about arbitrary actions, the rules of the Board cannot authorize arbitrary and capricious action and, therefore, should be read and construed as requiring rational action.

Regarding language in paragraph (4) establishing good cause the extension of time to conduct the hearing under subdivision (b), the statute provides the appropriate locations for hearings depending on the circumstances of the releasee. It is consistent with the intent of the statute to allow sufficient time to effectuate the statute's provisions. Thus, any extension of time must be limited to that "reasonably necessary to allow for its conduct at the appropriate location and facility".

Section 8005.17(c)

Comment: There is a comment discussing 8005.17(c) and alleging it will allow for "unfair practices".

Response: Subdivision (c) is currently proposed for revision to direct that notice of the date, place and time of the final hearing be in accordance with section 8005.18, which is entitled "Notice of final revocation hearings".

Section 8005.17(d)

Comments: Comments were received concerning subdivision (d) ("Adjournments") of section 8005.17. One remark suggests that (d) fails to "address the statutory obligation to provide discovery", and another suggests it should be included specifically in (d)(2)(ii). One of the comments, remarks extensively on the "absence of a K Calendar". The commenter writes that the specific reason the K calendar had previously existed was to mitigate the "loss of time credit" against the potential new felony sentence. They write that its absence now prejudices releasees with pending felonies, that such releasees should be "entitled to adjournments at their request", and that indefinite adjournments would allow releasees to benefit from Executive Law § 259-i(3)(f)(viii).

Response: The Board refers to its prior response to the comments on this subdivision. Regarding a commenter's suggestion that subdivision (d) address "discovery", the Board notes that this subdivision solely addresses "Adjournments". The document disclosure requirements of Executive Law § 259-i(3)(c)(iii) and (ix) are reflected in sections 8004.4 and 8005.18.

Section 8005.18(a)

Comment: There is a comment that subdivision (a) of section 8005.18 is insufficient in its direction to provide proper and timely notice, possesses a "meaningless" standard, and the section fails to state the proper scope of discovery mandated by Executive Law § 259-i(3)(c)(iii).

Response: The prior response to this comment indicated that subdivision (a) of section 8005.18 contains language similar to that in 8005.17(c) in their current forms. Subdivision (a) is proposed for further revision to provide clarity, and as proposed for revision it is consistent with due process and the Executive Law on the subject of proper notice concerning final revocation hearings. The requirements of Executive Law § 259-i(3)(c)(iii) and (ix) in regard to the provision of additional documents are appropriately reflected in sections 8004.4 and 8005.18.

Section 8005.20

Comments: Comments were received with respect to parts of section 8005.20. One comment is that (e)(2) is "plainly contrary to the law" by including all sustained technical violations in the current revocation case in the determination of the potentially applicable time assessment consistent with Executive Law § 259-i(3)(f)(xii). The comment states that the law only "sets up graduated sanctions for *successive* technical violations" (emphasis in original). A remark alleges that (e)(2)(iv) removes discretion from the presiding officer in stating that there is a presumption the applicable maximum time assessment for technical violation cases will be applied in the event a time assessment is imposed. Potential time assessments regarding non-technical violations are also addressed in section 8005.20, and a comment takes issue with an

"increase[s] in maximum sanctions", by comparison with the prior version of this section, and with reference to non-violent felonies and examples given.

Response: The Board refers to its response in the First Assessment and additionally notes that the presiding officer retains discretion under subdivision (e) of this section comporting with the Executive Law, and paragraph (3) of this subdivision, which addresses time assessments concerning non-technical violations, is consistent with Executive Law § 259-i(3)(f). Further, the Board is proposing further modification to subdivision (d) of this section that will afford greater discretion to presiding officers by lowering the potential time assessment floor to 3 months in cases where such subdivision is applicable.

Regarding the remaining comments, the Board has completed its consideration and determined its response in the First Assessment does not require supplementation.