

OFFICE OF THE SECRETARY OF STATE

LAVONNE GRIFFIN-VALADE
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE
AND TRIBAL LIAISON



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 859
PSYCHIATRIC SECURITY REVIEW BOARD

FILED

02/16/2024 5:09 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Permanent Rule

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/22/2024 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Alison Bort
503-229-5596
alison.bort@psrb.oregon.gov

6400 SE Lake Road
Suite 375
Portland, OR 97222

Filed By:
Alison Bort
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 03/15/2024

TIME: 1:00 PM - 1:30 PM

OFFICER: Alison Bort

REMOTE HEARING DETAILS

MEETING URL: [Click here to join the meeting](#)

PHONE NUMBER: 503-446-4951

CONFERENCE ID: 812245404

SPECIAL INSTRUCTIONS:

Password: o7Btmp

NEED FOR THE RULE(S)

AMEND: 859-010-0005(8) : The Court of Appeals issued a decision that relied upon the PSRB's definition of "danger" in making their finding. The court's interpretation of the rule is not aligned with the Board's interpretation and impacts how the Board determines if a person's jurisdiction under the Board should be retained. The agency filed a temporary modify its definition of "danger" to align with the Board's practice of determining whether jurisdiction is proper. In addition, the agency filed a petition to the Oregon Supreme Court for review; however, review was denied. Therefore, the agency is moving forward with making the temporary rule permanent.

Pursuant to OAR 859-030-0010 & 859-530-0010, the Psychiatric Security Review Board (PSRB) historically, calculated credit for time served for persons under the jurisdiction of the Board upon receipt of verified information regarding the time the person spent in a correctional facility or jail or time the person spent in the custody of the Oregon Health Authority at a state mental hospital prior to being found guilty except for insanity (GEI) or its equivalent for youth adjudicated as responsible except for insanity (REI). This calculation was completed regardless of whether the circuit court judge indicated in the guilty except for insanity (GEI) judgment order that credit for time served should be

calculated or applied. Upon review of this practice and the current law, the PSRB has determined that it is not statutorily authorized to calculate credit for time served, unless it is indicated in the circuit court order.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Rinne v. PSRB, 326 Or App 777 (2023); available online

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The agency does not expect these rule changes to affect racial equity in Oregon.

FISCAL AND ECONOMIC IMPACT:

The agency does not expect these rule changes to have a fiscal or economic impact.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The agency did not identify any entity or member of the public likely to be economically affected by these rule changes. Defense counsel representative asserted the possibility of this rule change increasing ineffective counsel claims; (2) The agency does not anticipate that these rule changes would have any effect on small businesses.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were not involved in the development of these rules.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

859-010-0005, 859-030-0010, 859-530-0010

AMEND: 859-010-0005

RULE SUMMARY: Clarifies the agency's definition of "Danger"; "Substantial Danger"; or "Dangerousness."

CHANGES TO RULE:

859-010-0005

Definitions ¶¶

(1) "Administrative Hearing" means a meeting of the Board where a quorum is present and a matter is reviewed (e.g. an outpatient supervisor request for modification to a client's conditional release plan). The Board shall consider information in the written record only and no oral testimony shall be received; If an objection is made to the administrative hearing, the client or the state has the right to request a full hearing. On its own motion, the Board may require further information, testimony or the presence of the client and therefore, set the matter for a full hearing.¶¶

(2) "Administrative Meeting" is any meeting of the Board where a quorum is present for the purpose of considering matters relating to Board policy and administration. Minutes shall be taken during an administrative meeting and distributed to Board members and interested persons. Minutes shall be voted on and approved at subsequent administrative meetings;¶¶

(3) "Case Monitors" are individuals designated in the conditional release order who are responsible for ensuring clients on conditional release receive the services and support they need and reporting to the PSRB a client's

progress, activities and compliance with conditions of release or lack thereof.¶

(4) "Client" refers to any person under the jurisdiction of the Board and may be used interchangeably with "person," "patient," or "outpatient."¶

(5) "Community Evaluation" is a written report ordered by the Board or other court and conducted by a qualified mental health professional from a local mental health program designated by the Board to determine if an individual can be adequately controlled with supervision and treatment if conditionally released and that appropriate supervision and treatment are available.¶

(6) "Conditional Release" is a grant by the court or the Board for a client, patient or defendant to reside outside a state hospital in the community under conditions mandated by the court or Board for monitoring and treatment of mental and physical health.¶

(7) "Consultation" is a screening completed on a PSRB template, ordered by a court and conducted by a qualified mental health professional from a local mental health program designated by the Board, to determine whether the necessary supervision and treatment for the individual are available in the community and appropriate for the individual and informs the court as to whether a community evaluation is necessary to determine whether the person can be adequately controlled with supervision and treatment if conditionally released.¶

(8) "Danger"; "Substantial Danger"; or "Dangerousness" means a ~~demonstration or previous demonstration of intentional, knowing, reckless or criminally negligent behavior which places others at risk of physical injury because of the person's qualifying mental disorder~~ risk that the person will inflict injury or harm to others. Evidence may include information about historical patterns of behavior, recent behavior, or verbal or physical threats, which have caused injury or harm or would place a reasonable person in fear of sustaining injury or harm. This determination does not require an imminent risk of injury or harm to others.¶

(9) "Escape" means:¶

(a) A client committed to a state hospital:¶

(A) Leaves the supervision of hospital staff without permission;¶

(B) Leaves the hospital without permission; or¶

(C) Fails to return at the appointed time to the hospital.¶

(b) Any client who leaves the State of Oregon without authorization of the Board;¶

(c) Any client who fails to return to the State of Oregon as directed by the Board.¶

(10) "Full Hearing" is a meeting of the Board where parties are present, testimony is taken and written findings on the issue(s) before the Board are made.¶

(11) "Incident Report" means a report completed by the case monitor that describes any significant behavioral or mental health changes, serious violations of conditional release requirements, psychotropic medication refusals, or any other information that is relevant to an individual's ability to be safely managed in a community setting. The incident report shall contain the following information:¶

(a) A description of incident;¶

(b) A summary of the interventions that were used by community mental health provider staff;¶

(c) A summary of the debrief with the individual or a summary of why a debrief did not occur; and¶

(d) Any recommendations on how to mitigate future incidents, including but not limited to modifications to the individual's conditional release plan.¶

(12) "Insanity Defense", also known as "GEI", refers to a plea or finding of "Guilty Except for Insanity".

Nomenclature. For offenses committed on or after January 1, 1984, a person is guilty except for insanity if, as a result of a qualifying mental disorder (formerly "mental disease or defect") at the time of engaging in criminal conduct, the person lacked substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law. The name of the insanity defense from January 1, 1978, through December 31, 1983, was "not responsible due to mental disease or defect." From January 1, 1971, through December 31, 1977, the insanity defense was known as "not guilty by reason of mental disease or defect." The name of the insanity defense prior to 1971 was "not guilty by reason of insanity."¶

(13) "Jurisdictional Report" means a report completed by a psychiatrist, psychiatric mental health nurse practitioner, or licensed psychologist that assists the Board in making the determinations described in ORS 161.341(1), ORS 161.346(1), or ORS 161.336(5)(a) and includes an analysis of the following information:¶

(a) An opinion as to the mental condition of the person;¶

(b) Whether the person presents a substantial danger to others; and¶

(c) Whether the person could be adequately controlled with treatment as a condition of release.¶

(14) "Monthly Progress Report" means a template report available on the PSRB's website that is required to be completed for all individuals who are on conditional release by the individual's case monitor each month that includes the following information attached, if applicable:¶

(a) Prescriber and specialty progress notes that occurred within the reporting month of the monthly progress report; and¶

(b) Any incident reports that that occurred within the reporting month of the monthly progress report.¶

- (15) "Qualifying Mental Disorder" (formerly "Mental disease or defect") means:¶
- (a) a developmental or intellectual disability, traumatic brain injury, brain damage or other biological dysfunction that is associated with distress or disability causing symptoms or impairment in at least one important area of an individual's functioning and is defined in the current Diagnostic and Statistical Manual of Mental Disorders (DSM 5-TR) of the American Psychiatric Association; or¶
 - (b) any diagnosis of a psychiatric condition which is a significant behavioral or psychological syndrome or pattern that is associated with distress or disability causing symptoms or impairment in at least one important area of an individual's functioning and is defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM 5-TR) of the American Psychiatric Association.¶
 - (c) "Qualifying Mental Disorder," described in subsections (a) and (b), excluding those conditions described in subsection (d) includes:¶
 - (A) A disorder in a state of remission which could with reasonable medical probability occasionally become active; or¶
 - (B) A disorder that could become active as a result of a non-qualifying mental disorder.¶
 - (d) "Non-Qualifying Mental Disorder" is defined as a mental disorder in which the condition is:¶
 - (A) A diagnosis solely constituting the ingestion of substances (e.g., chemicals or alcohol), including but not limited to alcohol-induced psychosis;¶
 - (B) An abnormality manifested solely by repeated criminal or otherwise antisocial conduct; or¶
 - (C) An abnormality constituting a personality disorder.¶
- (16) "Party" means the State, which includes the Oregon Department of Justice or, if representing the State's interest, the District Attorney from the county where the GEI was adjudicated, client and client's counsel.¶
- (17) "PSRB" or "Board" means the Oregon Psychiatric Security Review Board.¶
- (18) "Quorum" means the presence of at least three members, in person or on the telephone, of the Adult Panel of the Board.¶
- (19) "State Hospital" means any state institution or facility operated by the Oregon Health Authority.¶
- (20) "Unauthorized Departure" means a person who is under the jurisdiction of the Board who is conditionally released to the community that:¶
 - (a) Leaves the supervision of the community mental health program staff without permission;¶
 - (b) Leaves the authorized placement listed on the conditional release order without permission;¶
 - (c) Fails to return to the authorized placement listed on the conditional release order at the appointed time;¶
 - (d) Leaves the State of Oregon without authorization of the Board; or¶
 - (e) Fails to return to the State of Oregon as directed by the Board.¶
- (21) "Victim" means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime that brought the client under the Board's jurisdiction. In the case of a homicide or abuse of a corpse, a member of the immediate family of the decedent and, in the case of a minor victim, the legal guardian of the minor. In no event shall the PSRB client be considered a victim of his/her own GEI case.
- Statutory/Other Authority: ORS 161.387
 Statutes/Other Implemented: ORS 161.387, ORS 161.295 - 161.400

AMEND: 859-030-0010

RULE SUMMARY: The rule change clarifies that the Board will only apply credit for time served if ordered by the committing circuit court and stated in the GEI judgment. The rule further clarifies the procedure by which the Board will apply credit for time served if ordered, but the specific amount is not indicated. The rule further eliminates language that the Board will apply credit for time served for circumstances whereby an individual is held at a secure residential treatment facility for determination of the defendant's fitness to proceed or for treatment until fit to proceed under a detainer for the criminal charges for which the person ultimately was found guilty except for insanity.

The changes also reflect making the spelling consistent of the term "judgment."

CHANGES TO RULE:

859-030-0010

Jurisdiction of Persons under the PSRB/Length of Jurisdiction ¶

- (1) In accordance with ORS 161.325, the Board will take jurisdiction over persons adjudged by the court to be guilty except for insanity and who present a substantial danger to others.¶
 - (2) The period of jurisdiction of under the Board will be that sentence ordered by the court that places the person under PSRB jurisdiction.¶
 - (3) The Board will maintain jurisdiction over persons who are legally placed under its jurisdiction by any court of the State of Oregon or transferred from the jurisdiction of the Oregon Health Authority.¶
 - (4) Judgment orders placing individuals under Board jurisdiction must:¶
 - (a) Indicate whether the court finds the individual is a proper subject for conditional release, and if so, that the procedures outlined in OAR 859-070-0005 and ORS 161.327 have been completed.¶
 - (b) Identify the length of Board jurisdiction over the individual;¶
 - (c) Any supervisory or other special orders the court delivered with its judgment.¶
 - (5) If the court's order is unclear or is missing information required by ORS 161.325 or ORS 161.327, the Board may seek clarification on the matter from the court.¶
 - (6) The Board will not retain jurisdiction over persons if the court order places the person under the Board only because of a judgment of guilty except for insanity for a probation violation. In order for the Board to retain jurisdiction, the person must be placed under the Board's jurisdiction for the initial offense.¶
 - (7) The Board's Adult Panel will accept jurisdiction of remanded youth who are found Guilty Except for Insanity (GEI) in adult court and placed under the Board's Adult Panel Jurisdiction. For rules regarding adjudicated youth who are found Responsible Except for Insanity (REI) in juvenile court and placed under the Board's Juvenile Panel, see OAR 859, Divisions 501 through 600.¶
 - (8) Upon receipt of verified information regarding time spent in custody, persons placed the judgment order placing individuals under the Board's jurisdiction will receive credit for:¶
 - (a) Time spent in any correctional facility or jail for the offense or conduct for which the person was placed under the Board's jurisdiction; and¶
 - (b) Time spent in custody of the Oregon Health Authority at a state mental hospital for determination of the defendant's fitness to proceed or for treatment until fit to proceed under a detainer for the criminal charges for which the person ultimately was found guilty except for insanity as well as a result of being committed by a court after being found guilty except for insanity of a charge.¶
 - (9) Escape from the state hospital or unauthorized departure while on conditional release: the individual shall have their end of jurisdiction date calculated by Board staff within 30 days of receipt of the judgment order.¶
 - (a) Board staff shall apply any credit for time served that is indicated in the judgment order. ¶
 - (b) If the judgment order states that credit for time served shall be applied but does not indicate the amount, Board staff shall apply credit for time served for: ¶
 - (aA) The Board does not consider time that a client under the Board's jurisdiction spent while on escape from time spent in any correctional facility or jail for the offense or conduct for which the Oregon State Hospital as part of the person's jurisdictional time and will add that time to the end of jurisdiction date: person was placed under the Board's jurisdiction, verified by a law enforcement agency; and¶
 - (bB) Time spent in unauthorized departure while on conditional release will be tolled and added to the custody of the Oregon Health Authority at a state ment end of the person's end of jurisdiction date.¶
 - (c) Persons may contest having time tolled and added to their end of jurisdiction date at any full hearing before the Boardtal hospital or on a mental health hold at a secure facility.
- Statutory/Other Authority: ORS 161.387

Statutes/Other Implemented: ORS 161.387, ORS 161.325 - ORS 161.351

AMEND: 859-530-0010

RULE SUMMARY: The rule clarifies that the agency may only apply credit for time served if ordered by the committing circuit court and included in the judgment order. The rule also clarifies the method by which the agency will apply credit for time served that is ordered, but not specified in the judgment.

CHANGES TO RULE:

859-530-0010

Functions and Purpose of JPSRB ¶

The Board shall assume jurisdiction over youths adjudged by the court to be "responsible except for insanity" for a period not to exceed the maximum sentence the court finds the youth could have received had the youth been adjudicated except in murder cases where the maximum is life.¶

(1) The Board shall maintain jurisdiction over youths who are legally placed under its jurisdiction by any court of the State of Oregon.¶

~~(2) The Board shall not consider time spent on unauthorized leave from the custody of a Department of Human Services or Oregon Health Authority contracted facility as part of the youth's jurisdictional period.~~
Upon receipt of the judgement order placing the youth under Board jurisdiction the youth shall have their end of jurisdiction date calculated by Board staff within 30 days of receipt of the judgement order.¶

(a) Board staff shall apply any credit for time served that is indicated in the judgement order.¶

~~(3b) Upon receipt of verified information of time spent in custody, youths placed under the Board's jurisdiction shall receive credit.~~
If the judgment order states that credit for time served shall be applied but does not indicate the amount, Board staff shall apply credit for time served for:¶

(aA) Time spent in any youth correctional facility for the offense for which the youth was placed under the Board's jurisdiction, verified by a law enforcement agency; and¶

(bB) Time spent in custody of the Department of Human Services or Oregon Health Authority at a state designated facility, or on a mental health hold at a secure facility for determination of the defendant youth's fitness to proceed or under a detainer for the criminal charges for which the youth ultimately was placed under the Board's jurisdiction.

Statutory/Other Authority: ORS 161.385; ORS 161.387, Oregon Laws 2007, Chapter 889 ¶ 6 (SB 328)

Statutes/Other Implemented: ORS 161.327, 161.336, 161.341, 161.346, 161.351, 161.385, 161.387, 419C.529, 419C.532, 419C.538, 419C.540, 419C.544; OL 2007, Ch. 889 ¶ 2 (SB 328)