

ORDER OF THE WISCONSIN DEPARTMENT OF CORRECTIONS

CR 09-120

INTRODUCTORY CLAUSE

The Wisconsin Department of Corrections proposes an order to create DOC 302.03 (1d), (1h), (1p), (1t), (7m), (9g), (9r), (11m), (12m), (15g), (15r), (17m), and (18m); DOC 302.33, DOC 302.34, DOC 302.35, DOC 302.36, DOC 302.37, DOC 302.38, DOC 302.39, DOC 302.40, and DOC 302.41 and to repeal and recreate DOC 302.18, relating to sentence computation and modification.

ANALYSIS PREPARED BY THE DEPARTMENT OF CORRECTIONS

RULE SUMMARY:

- A. Statutes interpreted:** ss. 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, s. 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, s. 2739, s. 973.031, as created by 2009 Wis. Act 28, s. 3387t, s. 302.042, as created by 2009 Wis. Act 28, s. 2699m, s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751, and s. 301.03 (2), Stats., and 973.01 (3d) (b), as created by 2009 Wis. Act 28, s. 3377.
- B. Statutory authority to promulgate the rule:** ss. 227.11 (2), 301.02, 301.03 (2), and 302.07, Stats.
- C. Explanation of agency authority:**

The Department of Corrections is responsible for supervision of inmates sentenced to Wisconsin prisons, including sentence calculations. Under 2009 Wisconsin Act 28, specifically, ss. 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, s. 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, s. 2739, s. 973.031, as created by 2009 Wis. Act 28, s. 3387t, s. 302.042, as created by 2009 Wis. Act 28, s. 2699m, and s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751, the legislature created several statutory provisions which affect the calculation of sentences. The Department is promulgating rules to address these changes. In addition, under s. 301.03, Stats., the Department is responsible for the supervision of inmates. As part of that supervision, the Department reviews inmates for appropriate custody level, facility placement, program needs, and education needs.

D. Related statute or rule:

Sections 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, s. 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, § 2739, s. 973.031, as created by 2009 Wis. Act 28, s. 3387t, s. 302.042, as created by 2009 Wis. Act 28, s. 2699m, and s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751

Chapter PAC 1, Wisconsin Administrative Code, addresses release procedures for inmates, including those under 2009 Wisconsin Act 28.

E. Plain language analysis:

The rule amends ch. DOC 302 to bring it into compliance with significant changes made in sentence calculations and releases from prison under 2009 Wis. Act 28, including:

1. Creating definitions for the following terms: administrator, agent, assaultive activity, certain earned release, detainer, enrolled victim, extended supervision, office of victim services and programs, positive adjustment time, projected extended supervision date, risk eligibility date, social worker, and victim.
2. Creating s. DOC 302.33, relating to positive adjustment time (PAT) under s. 302.113 (2) (b), Stats., as created by 2009 Wis. Act 28, s. 2722. Under this section, an inmate may become eligible for PAT at the rate of one for every two days served if the inmate is eligible, is not excluded, and meets certain criteria for release. Eligibility criteria and exclusions are statutorily established. With regard to eligibility criteria, the department has clarified through rule two of the criteria. First, with respect to violations of prison regulation, the department determined that it will only consider violations of institution regulations which result in a major penalty as being an impediment to earning PAT at the one day for every two days served rate. Since a liberty interest is involved, the department determined that the due process afforded when a major penalty was imposed was necessary before eligibility under this criterion was denied. Second, with regard to an inmate refusing to perform required or assigned duties, the department clarified the criterion to include participation in programming and treatment identified by the department as appropriate for the inmate.

The department has added to the list of exclusions two additional groups of inmates who will not be considered for PAT at the rate of one day for every two days served. First, the department will not consider inmates who are serving, will begin to serve, or has served during the current period of confinement a sentence for a Class A or B felony. Second, the department will not consider inmates who are serving, will begin to serve or who have served during the current period of confinement a sentence for a felony defined in ch. 940, Stats. Given the serious nature of the offenses under either category, the department concluded that the inmates should be excluded from the one for two track.

The inmates who are not eligible for release under this provision may be considered for release under other Act 28 release mechanisms.

The department added the criteria it has been using for evaluating suitability for release under this provision. The criteria are the same as those used by the earned release review commission.

The department added a provision addressing enrolled victim notification to clarify the notification that will be given when the department is considering making a recommendation to the court to release an inmate under this provision. In addition, the department will give notification to an enrolled victim prior to the inmate being released.

The department changed the wording of the rule as it relates to the information provided to the court when it makes its recommendation for release. The department will provide the court with justification for its recommendation, rather than specifying and limiting the information or documents that are given.

The department clarified in the section titled "court action" that if the court orders a date other than the date recommended by the department, the department will comply with the court's order.

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under this provision results in a lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

3. Creating ss. DOC 302.34 and DOC 302.35, relating to positive adjustment time (PAT) under 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, s. 2751. Under these sections, an inmate may earn PAT at two rates (1 for 3, or 1 for 5.7) depending on the offense of which the inmate was convicted. The inmate may be eligible for PAT, which may result in modification of the term of confinement of the inmate's bifurcated sentence if the department determines that the inmate has not received a major penalty under s. DOC 303.68 (1), and the inmate has not neglected or refused to perform required or assigned duties.

The department has clarified through rule the two eligibility criteria. First, with respect to violations of prison regulation, the department determined that only violations of institution regulations which result in a major penalty will be considered as being an impediment to earning PAT at the one for three or one for 5.7 rate. Since a liberty interest is involved, the department also determined that the due process afforded when a major penalty was imposed was necessary before eligibility under this criterion was denied. Second, with regard to an inmate refusing to perform required or assigned duties, the department clarified the criterion to include participation in programming and treatment identified by the department as appropriate for the inmate.

The department clarified that an inmate who is ineligible for PAT at the one for two rate may be considered for eligibility under the provision for PAT at the one for three rate.

The department rule provides that the earned release review commission considers inmates for release under these provisions. The procedures for release consideration under these provisions, including victim notification, are found in the commission's rules (ch. PAC 1).

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under these provisions results in a lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

4. Creating ss. DOC 302.36 and DOC 302.37, relating to sentence calculations under s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751, for an inmate who has been convicted under s. 973.01, Stats., following the inmate's having served at least 75% or 85% of the confinement time of a bifurcated sentence, depending on the classification of the crime.

The department rule provides that the earned release review commission considers inmates for release under these provisions. The procedures for release consideration under these provisions, including victim notification, are found in the commission's rules (ch. PAC 1).

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under these provisions results in a lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

5. Creating ss. DOC 302.38 and DOC 302.39, relating to the challenge incarceration program and the earned release program under ss. 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712. The department had not previously had a rule provision addressing either of these two programs. The rule creates provisions which codify the department's implementation of the programs and also updates the provisions to reflect the legislative change which permits inmates who do not have AODA needs to participate.
6. Creating s. DOC 302.40, relating to the risk assessment program under s. 302.042, as created by 2009 Wis. Act 28, s. 2699m. A court may order an offender to serve a risk reduction sentence if the offender agrees to participate in the risk reduction plan established by the department. The department is required to complete a validated and objective assessment of an offender's criminogenic factors and risk to reoffend. Based on that assessment, the department is required to establish the plan, monitor the inmate's progress and participation in the plan, and evaluate the inmate's institutional conduct. The plan may be modified if programming and treatment is unavailable or a new program need is identified.

The department will look at four factors in determining whether the plan has been successfully completed. The factors are: the inmate's demonstrated satisfactory institution adjustment, his or her participation and demonstrated sufficient efforts in meeting the requirements of the plan, the inmate's development of an adequate release plan, and evaluation of the risk to the public if release is granted.

If the department determines that the plan has been completed, the department will notify the sentencing court and an enrolled victim. The department will release the inmate to extended supervision on or after the inmate's risk eligibility date when the inmate has completed the plan.

The department inserted a provision which clarifies that if an inmate is released prior to his or her release eligibility date, the inmate's overall sentence is reduced by the period of confinement time not served. The period of extended supervision is not increased.

7. Creating s. DOC 302.41, relating to the earned release of certain inmates (CER) within 12 months of their release under s. 302.113 (9h), as created by 2009 Wis. Act 28, s. 2739. The rule lists the statutory conditions which establish eligibility and exclusions.

The department has added to the list of exclusions two additional groups of inmates who will not be considered for release under CER. First, the department will not consider inmates who are serving, will begin to serve, or has served during the current period of confinement a sentence for a Class A or B felony. Second, the department will not consider inmates who are serving, will begin to serve or who have served during the current period of confinement a sentence for a felony defined in ch. 940, Stats. Given the serious nature of the offenses under either category, the department concluded that the inmates should be excluded from this provision.

The department added the criteria it has been using for evaluating suitability for release under this provision. The criteria are the same as those used by the earned release review commission.

The department added a provision on enrolled victim notification to clarify the notification that will be given when the department is considering making a recommendation for release of an inmate under this provision for the purposes of giving an enrolled victim an opportunity to have input. In addition, the department will give notification to an enrolled victim prior to the inmate being released.

The department added a separate subsection to clarify that it will provide notice to the court and the district attorney of the release of an inmate under this section.

The department clarified in the rule that release under this section would be consistent with public safety and reentry goals.

The department inserted a provision in the rule for clarification purposes that modification of the term of confinement under this provision results in a lengthening of the term of extended supervision so that the overall length of sentence does not change.

Finally, the department clarified that release under this provision may result in release to extended supervision or release to another sentence depending on the inmate's particular situation.

8. Repealing and recreating s. DOC 302.18, relating the inmate requests for review of department decisions concerning custody classification, institution placement, program needs, or treatment needs. The revised section shortens the time in which an inmate can appeal a decision regarding custody, institution placement, program need, or treatment need from 30 days to 10 days. The revision clarifies that a classification review under s. DOC 302.17 (11) is not subject to review under this process. The clarifies that the person conducting the administrative review will be either the director of the bureau of offender classification and movement or the administrator of the division of adult institutions, depending on who made the initial decision. Finally, the rule clarifies that the review decision is final.

F. Summary of and Comparison with Existing or Proposed Federal Regulations that are intended to address the activities to be regulated by the proposed rule:

There are no federal regulations that regulate the activities addressed by the proposed rule.

G. Comparison of similar rules in adjacent states (Illinois, Iowa, Michigan, and Minnesota):

1. Illinois:

Under 730 ILCS 5/3-6-3, the state of Illinois has provided for the early release of inmates on account of good conduct. Inmates are able to earn good conduct credit at the rate of 4.5 days of credit or 7.5 days of credit for each month of a sentence of imprisonment for certain very serious crimes. (For example, 1 for 4.5 crimes include: home invasion, armed robbery, and aggravated vehicular hijacking. 1 for 7.5 crimes include: gunrunning, narcotics racketeering, and drug-induced homicide.) For all other offenses, inmates are able to earn one day of good conduct credit for each day of the inmate's sentence of imprisonment. Good conduct credit may be revoked or lost following a due process determination by the Prisoner Review Board which is a citizen member board and which is independent of the IL DOC. Under 730 ILCS 5/5-8-1.1, Illinois has an Impact Incarceration Program which is similar to the Challenge Incarceration Program. It is not limited to individuals who have AODA needs but involves rigorous physical elements.

2. Iowa:

Under ICA s. 903A.2, each inmate is eligible to earn a reduction of sentence by the accumulation of "earned time." Inmates who receive category A sentences are able to earn credit at the rate of 1.2 days of credit for each day the inmate demonstrates good conduct and satisfactory participation in programs or placement. An inmate may be eligible for an additional reduction of sentence of up to 365 days of the full term of the sentence for exemplary acts. Inmates who receive category B sentences may receive 15/85 of a day for each day of good conduct. Under IA ADC s. 201.-20.18(904), Iowa has established a rigorous program called "violation/shock probation programs" which are aimed at individuals who are on community supervision and who have violated the conditions of supervision. The goal is avoid lengthy periods of incarceration.

3. Michigan:

Under MCLA 800.33, each inmate shall receive a reduction from his or her sentence. The rate of reduction depends on when the crime was committed (there is a statutory change in the rate for crimes which occurred prior 4/1/87) and what the crime was. An inmate may be eligible for good time credit, disciplinary credit, or special disciplinary credit. Special disciplinary credit is additional credit which an inmate may earn if the inmate has not had a major conduct violation and upon the recommendation of the institution disciplinary credit committee. If the credit is lost, it cannot be restored. An inmate cannot earn any of the three types of credit during a month during which the inmate incurred a major conduct report.

4. Minnesota:

Under Minnesota law, inmates convicted on or after August 1, 1993 are not eligible to earn good time sentence reduction credit. Under s. 244.171, MN Stats., the commissioner of corrections shall establish a challenge incarceration program.

H. Summary of the factual data and analytical methodologies that DOC used in support of its determination of the rule's fiscal effect on small businesses under s. 227.114, Stats.:

The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in § 227.114, Stats.

I. Any analysis and supporting documents that DOC used in support of the department's determination of the proposed rule's effect on small businesses or that was used when the DOC prepared an economic impact report:

Not applicable.

J. Effect on small businesses:

Not applicable.

TEXT OF RULE

SECTION 1. DOC 302.03 (1d), (1h), (1p), (1t), (7m), (9g), (9r), (11m), (12m), (15g), (15r), (17m), and (18m) are created to read:

DOC 302.03 (1d) “Administrator” means the administrator of the division of adult institutions.

DOC 302.03 (1h) “Agent” has the meaning given in s. DOC 328.03 (4).

DOC 302.03 (1p) “Assaultive activity” means an action that results in or is intended to result in physical harm to another.

DOC 302.03 (1t) “Certain earned release” means the process by which an inmate may be considered for release under s. 302.113 (9h), Stats., to extended supervision or another sentence.

DOC 302.03 (7m) “Detainer” means a writ or other legal instrument issued by a competent officer, directing the warden or superintendent of a correctional facility to notify the issuing authority when the named person is about to be released so that the issuing authority may obtain custody of the named person if appropriate.

DOC 302.03 (9g) “Enrolled victim” means a victim who has submitted a request to the office of victim services and programs for notification of inmate or offender status changes.

DOC 302.03 (9r) “Extended supervision” means the portion of a bifurcated sentence imposed under s. 973.01, Stats., to be served in the community under the supervision of the department.

DOC 302.03 (11m) “Office of victim services and programs” means the office in the department, which is responsible for victim information and advocacy.

DOC 302.03 (12m) “Positive adjustment time” means a period of time measured in days that can be earned to reduce an inmate’s period of confinement.

DOC 302.03 (15g) “Projected extended supervision date” or “PESD” means the date that an inmate who is serving a bifurcated sentence is eligible for early release under s. 302.113 (2) (b) or 304.06 (1) (bg) 1. and 2., Stats.

DOC 302.03 (15r) “Release eligibility date” means the date that an inmate who is serving a risk reduction sentence under s. 973.031, Stats., has served 75% of the confinement portion of his or her sentence or the date that an inmate who is serving a bifurcated sentence under s. 973.01, Stats., has served 75% or 85% of the confinement portion of his or her sentence.

DOC 302.03 (17m) “Social worker” means the institution social worker to whom an inmate is assigned.

DOC 302.03 (18m) “Victim” has the meaning given in s. 950.02(4), Stats.

SECTION 2. DOC 302.18 is repealed and recreated to read:

DOC 302.18 Administrative review of a classification decision. (1) Within 10 calendar days of an inmate's receipt of a written decision concerning custody classification, institution placement, program need, or treatment need, the inmate may request a review of the decision made under s. DOC 302.13 (2) or 302.17 (8) if the inmate believes that the decision was based on erroneous information.

(2) Denial of a request for a classification review under s. DOC 302.17 (11) (d) is not subject to review under this section.

(3) The inmate shall submit a request for review under this section on a form approved by the department.

(4) The review shall be completed by one of the following:

(a) The director if the director is not the decision maker under s. DOC 302.13 (2) or 302.17 (8).

(b) The administrator if the director was the decision maker under s. DOC 302.13 (2) or 302.17 (8).

(5) The director or administrator shall respond within a reasonable period of time, following receipt of the administrative review request.

(6) The decision under sub. (5) is final.

SECTION 3. DOC 302.33, 302.34, 302.35, 302.36, 302.37, 302.38, 302.39, 302.40, and 302.41 are created to read:

DOC 302.33 Positive adjustment time--one for two. (1) ELIGIBILITY. Inmates who are sentenced under s. 973.01, Stats., for a misdemeanor or for a Class F to Class I felony that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., may earn one day of positive adjustment time for every two days served if all of the following apply:

(a) The department has determined the inmate is not at a high risk of reoffending. If an inmate is determined to be at a high risk to reoffend, the inmate may be reviewed for eligibility under 302.34.

(b) The inmate has not received a major penalty under s. DOC 303.68 (1) (a) on any day counted toward positive adjustment time.

(c) The inmate does not neglect or refuse to perform required or assigned duties, including programming and treatment identified by the department.

(2) EXCLUSIONS. Notwithstanding sub. (1), this section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) A violent offender, as defined in s. 16.964 (12) (a), Stats.

(g) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class F to Class I felony that is a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats.

(h) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(i) An inmate who is ineligible for positive adjustment time under this paragraph pursuant to s. 973.01 (3d) (b), Stats.

(j) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22 (20d), Stats.

(k) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(l) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(m) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(n) An inmate who is serving a sentence for a violation of s. 940.11 (1), Stats.

(o) An inmate who is serving a sentence for a violation of s. 940.235, Stats.

(p) An inmate who is serving a sentence for a violation of s. 940.32 (3), Stats.

(q) An inmate who is serving a sentence for a violation of s. 941.21, Stats.

(r) An inmate who is serving a sentence for a violation of s. 946.465, Stats.

(s) An inmate who is serving, begins to serve, or has served, during his or her current period of confinement, a sentence for a Class A or B felony.

(t) An inmate who is serving, begins to serve, or has served during his or her current period of confinement a sentence for a felony defined in ch. 940, Stats.

(3) CRITERIA CONSIDERED FOR RELEASE. The department shall consider all of the following when making a decision to release an inmate under this section:

(a) The inmate meets the eligibility criteria under sub. (1) and is not excluded from consideration under sub. (2).

(b) The inmate has served sufficient time so that release would not depreciate the seriousness of the offense.

(c) The inmate has demonstrated satisfactory adjustment in the institution.

(d) The inmate has not refused or neglected to perform required or assigned duties, including programming and treatment identified by the department.

(e) The inmate has participated in and has demonstrated sufficient efforts in required or recommended programs which have been made available by demonstrating one of the following:

1. The inmate has gained maximum benefit from programs.
2. The inmate can complete programming and treatment in the community without presenting an undue risk.
3. The inmate has not been able to gain entry into programming and treatment and release would not present an undue risk.

(f) The inmate has developed an adequate release plan.

(g) The inmate is subject to a sentence of confinement in another state or is in the United States illegally and may be deported.

(h) The inmate has reached a point at which the department concludes that release would not pose an unreasonable risk to the public and would be in the interests of justice.

(4) VICTIM NOTIFICATION. (a) Prior to its decision to recommend release of an inmate under this section, the department shall notify an enrolled victim for the purpose of giving the victim the opportunity of providing input.

(b) Prior to release of an inmate under this section, the department shall notify an enrolled victim that the inmate is to be released.

(5) COURT NOTIFICATION. When an inmate is within 90 days of release to extended supervision under sub. (7), the department shall notify the sentencing court that it intends to modify the inmate's sentence and release the inmate to extended supervision or to another sentence. The department shall provide the sentencing court with rationale for its recommendation.

(6) COURT ACTION. If the court does not schedule a review hearing within 30 days after notification, or the court accepts the department's recommendation, the department may proceed under sub. (7). If the court issues an order rejecting the department's recommendation, the inmate may not be released under this section. If the court orders the inmate to remain in prison for a period not to exceed the time remaining on the inmate's term of confinement, the department will proceed in accordance with the court order.

(7) RELEASE. An inmate under sub. (1) shall be released to extended supervision or to another sentence when he or she has served the term of confinement in the prison portion of his or her bifurcated sentence, less positive adjustment time earned unless denied by the court.

(8) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under sub. (7), the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.34 Positive adjustment time--one for three. (1) ELIGIBILITY. Inmates who are sentenced under s. 973.01, Stats., for a Class F to Class I felony or a misdemeanor that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., and who are ineligible for positive adjustment time under s. 302.113 (2) (b), Stats., pursuant to s. 973.01(3d) (b), Stats., or for a Class F to Class I felony that is a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., may earn one (1) day of positive adjustment time for every three (3) days served if all of the following apply:

(a) The inmate has not received a major penalty under s. DOC 303.68 (1) on any day counted toward positive adjustment time.

(b) The inmate does not neglect or refuse to perform required or assigned duties, including programming and treatment identified by the department.

(2) SPECIAL CONSIDERATION. Inmates ineligible for positive adjustment time under s. DOC 302.33 (1) (a) may be considered for eligibility under this section.

(3) EXCLUSIONS. This section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(g) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22(20d), Stats.

(h) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(i) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(j) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(k) An inmate who is serving a sentence for a violation of s. 940.11 (1), Stats.

(l) An inmate who is serving a sentence for a violation of s. 940.235, Stats.

(m) An inmate who is serving a sentence for a violation of s. 940.32 (3), Stats.

(n) An inmate who is serving a sentence for a violation of s. 941.21, Stats.

(o) An inmate who is serving a sentence for a violation of s. 946.465, Stats.

(4) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision or another sentence under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(5) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC.302.35 Positive adjustment time--one for 5.7. (1) ELIGIBILITY. Inmates who are sentenced under s. 973.01, Stats., for a Class C to Class E felony may earn one (1) day of positive adjustment time for every 5.7 days served if all of the following apply:

(a) The inmate has not received a major penalty under s. DOC 303.68 (1) on any day counted toward positive adjustment time.

(b) The inmate does not neglect or refuse to perform required or assigned duties, including programming and treatment identified by the department.

(2) EXCLUSIONS. This section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22 (20d), Stats.

(g) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(h) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(i) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(j) An inmate who is serving a sentence for a violation of s. 940.06, Stats.

(k) An inmate who is serving a sentence for a violation of s. 940.302, Stats.

(l) An inmate who is serving a sentence for a violation of s. 940.31 (1), Stats.

(m) An inmate who is serving a sentence for a violation of s. 948.03 (2) (a), Stats.

(n) An inmate who is serving a sentence for a violation of s. 948.40 (4) (a), Stats.

(3) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision or another sentence under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(4) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.36 Modification of bifurcated sentence after serving 75 percent of confinement time. (1) ELIGIBILITY. An inmate sentenced under s. 973.01, Stats., for a misdemeanor or for a Class F to Class I felony committed prior to October 1, 2009, and who has not petitioned a sentencing court for a sentence adjustment under s. 973.195 (1r), Stats., for any offense for which he or she is incarcerated may apply for release to extended supervision when he or she has served at least 75% of the term of confinement portion of his or her bifurcated sentence as modified by the sentencing court under s. 302.045 (3m) (b) 1. or 302.05 (3) (c) 2. a., Stats., less any positive adjustment time he or she has earned.

(2) EXCLUSION. This section does not apply to an inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(3) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(4) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.37 Modification of bifurcated sentence after serving 85 percent of confinement time. (1) ELIGIBILITY. An inmate sentenced under s. 973.01, Stats., for a Class C to Class E felony committed prior to October 1, 2009, and who has not petitioned a sentencing court for a sentence adjustment under s. 973.195 (1r), Stats., for any offense for which he or she is incarcerated may apply for release to extended supervision when he or she has served at least 85% of the term of confinement portion of his or her bifurcated sentence as modified by the sentencing court under s. 302.045 (3m) (b) 1. or 302.05 (3) (c) 2. a., Stats., less any positive adjustment time he or she has earned.

(2) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under this section as provided in ch. PAC 1. Procedures for release consideration under this section, including victim notification, are found in ch. PAC 1.

(3) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

DOC 302.38 Challenge incarceration program. (1) The department shall provide a challenge incarceration program which incorporates manual labor, education, military drill and ceremony, age appropriate strenuous physical activity and rehabilitative programming that is directly related to the inmate's criminal behavior in preparation for release on parole or extended supervision.

(2) Inmates convicted of a crime specified in ch. 940, Stats., or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, Stats., are excluded from eligibility.

(3) The department or sentencing court shall determine eligibility under one of the following:

(a) For inmates sentenced for crimes committed on or before December 30, 1999 the department determines eligibility.

(b) For inmates sentenced for crimes committed on or after December 31, 1999 the sentencing court determines eligibility.

(4) The department may place an inmate into the challenge incarceration program if the inmate meets all of the following criteria:

(a) The inmate is determined to be eligible for participation under sub. (3).

(b) The inmate volunteers to participate in the program and agrees to the rules and regulations of the program.

(c) The inmate has not attained the age of 40 as of the date the inmate will begin the program.

(d) The inmate meets physical, medical and psychological criteria required for program participation.

(e) The department determines, using evidence-based assessments that one of the following applies:

1. The inmate has a substance abuse treatment need that requires an intensive level of treatment.

2. The inmate has a substance abuse treatment need that does not require an intensive level of treatment but does require education or outpatient services, and the inmate's substance use is not a key factor in his or her criminal behavior.

3. The inmate has one or more treatment needs not related to substance abuse that is directly related to his or her criminal behavior.

(5) The department may restrict participant privileges as necessary to maintain discipline.

(6) The department shall determine if placement is appropriate and when placement will occur.

(7) For inmates sentenced for crimes committed on or after December 31, 1999, the department shall determine successful completion of the challenge incarceration program and notify the sentencing court of the successful completion to initiate a modification of the inmate's sentence.

(8) The department shall release the inmate within 6 working days upon receipt of a court order modifying the inmate's bifurcated sentence.

(9) For inmates sentenced for crimes committed before December 31, 1999, the department shall determine successful completion of the rehabilitation program and notify the earned release review commission.

(10) The department shall provide notice to an enrolled victim prior to an inmate's release under this section.

DOC 302.39 Wisconsin earned release program. (1) The department shall provide a rehabilitation program for the purposes of release.

(2) Inmates convicted of a crime specified in ch. 940, Stats., or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, Stats., are excluded from eligibility.

(3) The department or sentencing court shall determine eligibility under one of the following:

(a) For inmates sentenced for crimes committed before December 31, 1999 the department determines eligibility.

(b) For inmates sentenced for crimes committed on or after December 31, 1999 the sentencing court determines eligibility.

(c) For inmates who are serving a bifurcated sentence and whose sentence was imposed on or after December 31, 1999 but before July 26, 2003, the inmate may petition the sentencing court with the department's approval to determine eligibility. The inmate shall serve a copy of the petition on the district attorney who prosecuted him or her.

(4) The department may place an inmate into the Wisconsin earned release program if the inmate meets all the following criteria:

(a) The inmate is determined to be eligible for participation under sub. (3).

(b) The inmate volunteers to participate in the program and agrees to the rules and regulations of the program.

(c) The department determines, using evidence-based assessments that one of the following applies:

1. The inmate has a substance abuse treatment need that requires an intensive level of treatment.

2. The inmate has a substance abuse treatment need that does not require an intensive level of treatment but does require education or outpatient services, and the inmate's substance use is not a key factor in his or her criminal behavior.

3. The inmate has one or more treatment needs not related to substance abuse that is directly related to his or her criminal behavior.

(5) The department may restrict participant privileges as necessary to maintain discipline.

(6) The department shall determine if placement is appropriate and when placement will occur.

(7) For inmates sentenced under s. 973.01, Stats., the department shall determine successful program completion and notify the sentencing court to initiate a modification of the inmate's sentence.

(8) The department shall release the inmate within 6 working days upon receipt of a court order modifying the inmate's bifurcated sentence.

(9) For inmates sentenced for crimes committed before December 31, 1999, the department shall determine successful completion of the rehabilitation program and notify the earned release review commission.

(10) The department shall provide notice to an enrolled victim prior to an inmate's release under this section.

DOC 302.40 Risk reduction program. (1) For inmates ordered to serve a risk reduction sentence, the department shall do all of the following:

(a) Complete a validated and objective assessment to identify the inmate's criminogenic factors and risk to reoffend.

(b) Create a risk reduction plan that is designed to address the identified criminogenic factors and reduce the inmate's risk of reoffending.

(c) Monitor and review the progress made towards completion of the risk reduction plan. The plan may be modified if programming is unavailable or a new program need is identified.

(2) The department shall determine if an inmate has completed the risk reduction program by review of the following:

(a) The inmate has demonstrated satisfactory institution adjustment.

(b) The inmate has participated and demonstrated sufficient efforts in meeting all the requirements of the risk reduction plan.

(c) The inmate has developed an adequate release plan.

(d) Release would not pose an unreasonable risk to the public.

(3) The department may rescind or withhold a determination regarding the completion of the risk reduction plan based misconduct or failure to complete any component of the risk reduction plan.

(4) If the department determines that the risk reduction plan has been completed and institution adjustment is satisfactory, the department will notify the sentencing court at least 30 days prior to release. The department will notify an enrolled victim that the inmate will be released under this section.

(5) The department shall release an inmate to extended supervision on or after the inmate's release eligibility date when inmate has completed the risk reduction program pursuant to sub. (2).

(6) If an inmate is released after successfully completing the risk reduction program and demonstrating satisfactory institution adjustment but prior to his or her release eligibility date, the inmate's overall sentence shall be reduced by the confinement time not served. The term of extended supervision shall not be increased.

DOC 302.41 Certain earned releases under s. 302.113 (9h), Stats. (1) ELIGIBILITY. Under s. 302.113 (9h), Stats., the department may release to extended supervision or to another sentence certain persons who are serving the confinement portion of a bifurcated sentence and who meet all of the following conditions:

(a) The inmate is serving a confinement portion of a bifurcated sentence for misdemeanor or a Class F to Class I felony that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats.

(b) The social worker or agent has reason to believe that the inmate will be able to maintain himself or herself while on extended supervision without engaging in assaultive activity.

(c) The release to extended supervision date is not more than 12 months before the inmate's extended supervision eligibility date.

(2) EXCLUSIONS. An inmate is not eligible for certain earned release if any of the following apply:

(a) The inmate is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) The inmate has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) The inmate has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) The inmate is required to register under s. 301.45, Stats.

(e) The inmate has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving, begins to serve, or has served, during his or her current period of confinement, a sentence for a Class A or B felony.

(g) An inmate who is serving, begins to serve, or has served during his or her current period of confinement a sentence for a felony defined in ch. 940, Stats.

(3) CRITERIA CONSIDERED FOR RELEASE. The department shall consider all of the following when making a decision to release an inmate under this section:

(a) The inmate meets the eligibility criteria under par. (1) and is not excluded from consideration under par. (2).

(b) The inmate has served sufficient time so that release would not depreciate the seriousness of the offense.

(c) The inmate has demonstrated satisfactory adjustment in the institution.

(d) The inmate has not refused or neglected to perform required or assigned duties, including programming and treatment identified by the department.

(e) The inmate has participated in and has demonstrated sufficient efforts in required or recommended programs which have been made available by demonstrating one of the following:

1. The inmate has gained maximum benefit from programs.

2. The inmate can complete programming and treatment in the community without presenting an undue risk.

3. The inmate has not been able to gain entry into programming and treatment and release would not present an undue risk.

(f) The inmate has developed an adequate release plan.

(g) The inmate is subject to a sentence of confinement in another state or is in the United States illegally and may be deported.

(h) The inmate has reached a point at which the department concludes that release would not pose an unreasonable risk to the public and would be in the interests of justice.

(4) RELEASE TO DETAINER. An inmate who has an active detainer is eligible for certain earned release consideration without meeting the criteria under par. (1) (a) if the detainer concerns a sentence imposed in another jurisdiction and the remainder of the confinement portion of that sentence is equal to or longer than the remainder of the confinement portion of the Wisconsin sentence. In this paragraph, "active" means that the jurisdiction issuing the detainer intends to obtain custody of the inmate immediately upon release.

(5) VICTIM NOTIFICATION. (a) Prior to its decision to recommend release of an inmate under this section, the department shall notify an enrolled victim for the purpose of giving the victim the opportunity of providing input.

(b) Prior to release of an inmate under this section, the department shall notify an enrolled victim that the inmate is to be released.

(6) COURT AND DISTRICT ATTORNEY NOTIFICATION. The department shall notify the court and district attorney upon the inmate's release.

(7) RELEASE AUTHORITY. The secretary may release eligible inmates under this section consistent with public safety and reentry goals.

(8) MODIFICATION OF EXTENDED SUPERVISION. When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision or to another sentence under this section, the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

SECTION 4. EFFECTIVE DATE. This rule will take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2), Stats.

This rule will take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2), Stats.

Dated: October 6, 2010

Agency: _____
Rick Raemisch
Secretary