

 <p style="text-align: center;">STATE OF NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION</p> <p style="text-align: center;"><b>DIRECTIVE</b></p>	TITLE		NO. 4790
	<b>Merit Time</b>		DATE 10/12/2011
SUPERSEDES DIR# 4790 Dtd. 12/20/05	DISTRIBUTION A B	PAGES PAGE 1 OF 4	DATE LAST REVISED
REFERENCES (Include but are not limited to) Corr. Law. § 803 L. 2004, c. 738, § 30	APPROVING AUTHORITY 		

- I. PURPOSE:** Inmates serving sentences for certain non-violent crimes may receive merit time allowances against their sentences provided they have achieved certain significant programmatic objectives, have not committed any serious disciplinary infractions, and have not filed any frivolous lawsuits. In the case of an indeterminate sentence, the merit eligibility date is the parole eligibility date minus the merit time allowance as outlined in section III, below. In the case of a determinate sentence, the merit eligibility date is five-sevenths of the imposed term, as outlined in section III. When granted, merit time allowances enable inmates to appear before the Board of Parole for possible release on parole on their merit eligibility dates. A merit time allowance is a privilege to be earned by the inmate and no inmate has the right to demand or require that any such allowance be granted. This Directive sets forth the policy and procedures for granting and withholding merit time allowances.
- II. ELIGIBILITY:** An inmate must satisfy all criteria set forth in subdivisions A through D below to be eligible for merit time consideration.
- A. Crime, Sentence and Commitment Criteria:**
1. An inmate cannot be presently serving a sentence for an A-1 felony other than an A-1 felony defined in Article 220 of the Penal Law or a violent felony offense (this will include any sentence for a violent felony offense which has been imposed by another state).
  2. An inmate cannot be presently serving a sentence for any of the following or any attempt thereof:
    - a. Manslaughter in the second degree;
    - b. Vehicular manslaughter in the first or second degree;
    - c. Criminally negligent homicide;
    - d. Incest;
    - e. Any offense defined in Article 130 of the Penal Law (sex offenses);
    - f. Any offense defined in Article 263 of the Penal Law (use of a child in a sex performance); or
    - g. Aggravated harassment of an employee by an inmate.
  3. An inmate cannot be presently serving an indeterminate sentence of imprisonment authorized for an A-1 felony other than an A-1 felony defined in Article 220 of the Penal Law.
  4. An inmate must be serving a sentence of one year or more.
- B. Disciplinary record criteria:** An inmate must not commit any serious disciplinary infraction. A “serious disciplinary infraction” shall be identified as behavior which results in criminal or disciplinary sanctions as follows:
1. Any conviction for a State or Federal crime that was committed after the inmate was committed to the Department of Corrections and Community Supervision;

2. A finding at a Tier II or Tier III hearing of violation of any of the following rules as described in 7 NYCRR Section 270.2 and the Standards of Inmate Behavior All Institutions (inmate rulebook):
    - a. 1.00 - Penal Law Offenses
    - b. 100.10 - Assault on inmate
    - c. 100.11 - Assault on staff
    - d. 100.12 - Assault on other
    - e. 101.10 - Sex offense
    - f. 101.20 - Lewd conduct
    - g. 104.10 - Rioting
    - h. 105.12 - Unauthorized organization (if the violation occurred before May 28, 2008)
    - i. 105.13 - Gangs (Tier III only)
    - j. 105.14 - Unauthorized organizations (Tier III only)
    - k. 108.10 - Escape
    - l. 108.15 - Abscondance
    - m. 113.10 - Weapon
    - n. 113.13 - Alcohol
    - o. 113.24 - Drug use
    - p. 113.25 - Drug possession
    - q. 117.10 - Explosives
    - r. 118.10 - Arson
    - s. 118.22 - Unhygienic act (Tier III only)
    - t. 180.14 - Urinalysis violation;
  3. Receipt of a disciplinary sanction at a Tier III hearing which includes 60 or more days of SHU and/or keeplock time, if the time actually served was 60 days or more on the particular penalty; or
  4. Receipt of any recommended loss of good time as a disciplinary sanction at a Tier III hearing.
- C. Frivolous Lawsuit: An inmate must not have filed an action, proceeding, or claim against a State Agency Officer or employee that was found to be frivolous pursuant to:
1. Section 8303-a of the Civil Practice Law and Rules, or
  2. Rule 11 of the Federal Rules of Civil Procedure.
- D. Program criteria:
1. An inmate must:
    - a. Successfully perform and pursue his or her most recently assigned Earned Eligibility Plan or program plan; and
    - b. Subsequent to the date of that most recently assigned Earned Eligibility Plan or Program Plan, undertake and complete one of the following:
      - (1) Earn a general equivalency diploma (GED);
      - (2) Receive an alcohol and substance abuse treatment certificate;
      - (3) Receive a vocational trade certificate following at least six months of programming in that program; or

- (4) Perform 400 hours or more of service as part of a community work crew/outside assignment.

Note: An Earned Eligibility Plan is a work and treatment program applicable to an inmate serving a minimum term of not more than eight years developed under the Earned Eligibility Program. A Program Plan refers to a work and treatment program applicable to an inmate serving a minimum term exceeding eight years. In either case, the individualized program plan is created by the Department's guidance staff in consultation with the inmate during classification, assessment, or intake interviews. It may be modified during later reviews as necessary. Inmates are assigned to programming based upon their established program/earned eligibility plan. Therefore, inmates will only be granted merit time consideration where a program need has been established.

2. An inmate shall not be eligible for merit time if the inmate:
  - a. Entered the shock incarceration program, but failed to successfully complete the program for any reason other than an intervening circumstance beyond the control of the inmate; inmates who refuse the shock incarceration program at reception will be ineligible for merit time for six months from the refusal date or after the graduation date of the platoon in which the inmate would have participated;
  - b. Was a participant in the temporary release program but was removed for any reason other than an intervening circumstance beyond the control of the inmate; or
  - c. Was temporarily placed in a relapse program.

### III. EFFECT ON THE SENTENCE

#### A. Indeterminate sentences

1. The merit time allowance is one-third of the minimum term or period imposed by the court for an inmate convicted of an A-1 felony under Article 220 of the Penal Law and one-sixth of the minimum term or period imposed by the court for an inmate convicted of any other eligible offense.
2. An inmate serving a sentence for any Class A-II through Class E drug offense may earn supplemental merit time in the amount of an additional one-sixth of the minimum period of the sentence imposed for the drug felony if he or she has either:
  - a. Completed two or more of the four possible merit program objectives listed in section II-D-1-b, above; or
  - b. Completed one of the four and also successfully maintained employment in a work release program or other continuous temporary release program for a period of not less than three months.

- B. Determinate sentences: The merit time allowance is an additional one-seventh of the determinate term imposed by the court for an eligible offense.

### IV. PROCEDURE

#### A. Merit Time Reviews

1. The records of an inmate eligible for a merit time allowance under the criteria set forth in section II, above, shall be reviewed by facility guidance staff prior to his or her merit eligibility date.
2. The inmate's program history and record will be reviewed by a Supervising Correction Counselor, Deputy Superintendent for Programs, and Superintendent, or their respective designees to identify any inmate whose behavior, subsequent to commitment to the Department, may be regarded as inconsistent with the intent of Correction Law Section 803(1)(d) and public safety. Factors which will be viewed negatively include failure to participate in an assigned program or removal from any assigned program for reasons other than that which is beyond the inmate's control. These would include:

- a. Poor program participation/efforts;
- b. Disciplinary removals;
- c. Refusal to participate in any recommended program.

**B. Merit Time Determination**

1. Merit time determinations shall be made by the Commissioner or designee after Central Office review.
2. The decision of the Commissioner or designee to grant or withhold a merit time allowance is final, except as provided in paragraph (4) below.
3. The Merit Time Determination Notice shall be delivered to the inmate approximately one week following the Central Office decision. Copies shall also be provided to facility community supervision staff and the inmate's guidance folder.
4. A merit time allowance may be revoked at any time prior to an inmate's release on parole if the inmate commits a serious disciplinary infraction or fails to continue to perform and pursue his or her assigned Program Plan or Earned Eligibility Plan.

**V. EFFECT OF MERIT TIME**

- A. Any inmate who is granted a merit time allowance will appear before the Board of Parole for possible release on parole at a date computed by subtracting the merit time allowance from his or her parole eligibility date.
- B. If the Board of Parole grants the inmate parole, he or she will be released to community supervision.
- C. If parole is withheld by the Board, the inmate will again be considered by the Board for possible release when he or she reaches the original parole eligibility date.