

process (part 541 of this subchapter) to have committed a level 100 or 200 series drug-or alcohol-related prohibited act will automatically have their performance pay reduced to maintenance pay level and will be removed from any assigned work detail outside the secure perimeter of the institution.

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 550

[Docket No. BOP-1139-P]

RIN 1120-AB41

Drug Abuse Treatment Program: Eligibility of D.C. Code Offenders for Early Release Consideration

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) proposes to extend early release consideration to D.C. Code offenders pursuant to D.C. Code § 24-403.01.

DATES: Comments due by January 2, 2007.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On July 1, 2004 (69 FR 39887), we published a proposed rule revising all the regulations on the Drug Abuse Treatment Program in 28 CFR part 550, subpart F (2004 proposed rule). We now propose to revise 28 CFR 550.55(a) of the 2004 proposed rule to extend early release consideration to D.C. Code offenders pursuant to D.C. Code § 24-403.01.

The 2004 proposed rule, § 550.55(a), stated that inmates may be eligible for early release by a period not to exceed 12 months if they were sentenced to a term of imprisonment under 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense and successfully complete a residential drug abuse treatment program, as described in § 550.53, during their current commitment.

We now propose to modify § 550.55(a) from the 2004 proposed rule to state that inmates may be eligible for early release by a period not to exceed 12 months if they were sentenced to a term of

imprisonment under *either* 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense; or D.C. Code § 24-403.01 for a nonviolent offense, meaning an offense other than those in D.C. Code § 23-1331(4). There has been no change to the provision in the 2004 rule stating that in addition to the above criteria, inmates must successfully complete a residential drug abuse treatment program, as described in § 550.53, during their current commitment.

Statutory Authority

The Residential Drug Abuse Program (RDAP) is available to all eligible inmates pursuant to Title 18 U.S.C. 3621(b) and (e). Section 3621(b) generally obligates the Bureau to provide “substance abuse treatment for each prisoner the Bureau determines has a treatable condition of addiction or abuse.” Section 3621(e)(1) states that the Bureau “shall, subject to the availability of appropriations, provide residential substance abuse treatment * * * for all eligible prisoners.”

Further, under § 3621(e)(2)(B), the period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

Early Release Regulation

In 1995, the Bureau published a regulation to implement the early release incentive which defined the term “crime of violence” and provided a framework for Bureau employees to make early release determinations. *See* 60 FR 27692 (May 25, 1995) (previously codified at 28 CFR 550.58). Instructive policy was issued in Program Statement 5162.02, Definition of Term, “Crimes of Violence.” In the regulation and policy, the Bureau defined the term “crime of violence” pursuant to 18 U.S.C. 924(c)(3). Subsequently, there was a split among Circuit Courts regarding the validity of this approach. The split prompted the Bureau to revise the regulation in 1997 to explicitly rely upon the discretion allotted to the Director of the Bureau to grant a sentence reduction. *See* 62 FR 53690 (Oct. 15, 1997) (codified at 28 CFR 550.58(a), currently in 550.55). The revised regulation was designed to achieve consistent administration of the early release incentive and to clearly demonstrate that the Bureau now relied upon the discretion of the Director to determine eligibility for certain program benefits.

The revised regulation and policy resulted in another split among the Circuit Courts which was resolved by the Supreme Court’s decision in *Lopez v. Davis*, 531 U.S. 230 (2001). In *Lopez*, the Supreme Court held that the revised regulation found at 28 CFR 550.58 (currently in § 550.55) is a permissible exercise of the Bureau’s discretion under § 3621(e)(2)(B) for assessing program benefit eligibility.

D.C. Code Offenders—Eligibility for Early Release

The Bureau initially codified its rules regarding its Drug Abuse Treatment Programs on January 7, 1994. Subsequently, on May 25, 1995, the Bureau amended its rules on Drug Abuse Treatment Programs to allow for the consideration of early release of eligible inmates who successfully completed the RDAP. Excluded from this category of eligible inmates were inmates in Bureau custody not serving a sentence for a federal offense (e.g., D.C. Code offenders, contractual borders, INS detainees, and pretrial inmates).

However, D.C. Code § 24-403.01(d-1), amended on May 24, 2005, states that D.C. Code offenders sentenced under D.C. Code § 24-403.01 for a nonviolent offense are eligible for early release consideration in accordance with 18 U.S.C. 3621(e)(2). Accordingly, the Director now extends early release eligibility pursuant to 18 U.S.C. 3621(e)(2) to D.C. Code offenders for successful completion of the RDAP.

Eligibility for early release for D.C. Code offenders participating in the Residential Drug Abuse Program (RDAP) requires a determination that the inmate has not committed a crime of violence as defined by D.C. Code § 23-1331(4).

The National Capital Revitalization and Self-Government Improvement Act of 1997, approved August 5, 1997, (Pub. L. 105-33; 111 Stat. 740) (“Revitalization Act”) dictates that D.C. Code felony offenders “shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.” D.C. Code § 24-101(b). Therefore, as with federal offenders, it is also within the Director’s discretion, as provided by 18 U.S.C. 3621(e), to determine D.C. Code offenders’ eligibility for early release according to the same criteria used for federal offenders. This criteria, which appears in current § 550.58, gives the following

list of inmates not eligible for early release:

- (1) Immigration and Customs Enforcement detainees;
- (2) Pretrial inmates;
- (3) Contractual boarders (for example, State, or military inmates);
- (4) Inmates who have a prior felony or misdemeanor conviction for:
 - (i) homicide (including deaths caused by recklessness, but not including deaths caused by negligence or justifiable homicide),
 - (ii) forcible rape,
 - (iii) robbery,
 - (iv) aggravated assault,
 - (v) arson,
 - (vi) kidnaping; or
 - (vii) an offense that by its nature or conduct involves sexual abuse offenses committed upon minors;
- (5) Inmates who have a current felony conviction for:
 - (i) an offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another,
 - (ii) an offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device),
 - (iii) an offense that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or
 - (iv) an offense that by its nature or conduct involves sexual abuse offenses committed upon minors;
- (6) Inmates who have been convicted of an attempt, conspiracy, or other offense which involved an underlying offense to commit any offense listed in paragraph (4) and/or (5); or
- (7) Inmates who previously received an early release under 18 U.S.C. 3621(e).

Title 18 U.S.C. 3621(e)(2)(B) establishes two prerequisites for early release consideration:

- (1) Conviction of a nonviolent offense and
- (2) successful completion of drug treatment. If those prerequisites are met, the Bureau may grant early release.

Thus, because of the Revitalization Act, the explicit intention of the D.C. Government stated in D.C. Code § 24–403.01, the statutory language of § 3621, the Bureau's regulations, and the Bureau's clearly established use of discretion as held in *Lopez*, the Bureau can consider D.C. Code offenders for RDAP early release as it does for Federal offenders.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", section 1(b), Principles of Regulation. The Director, Bureau of Prisons has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

In particular, the Bureau has assessed the costs and benefits of this rule as required by Executive Order 12866 Section 1(b)(6) and has made a reasoned determination that the benefits of this rule justify its costs. Clarifying and streamlining this rule and eliminating unnecessary text and obsolete language will have the benefit of easier readability and improved understanding of our drug treatment programs. We strengthen the program by calculated revisions designed to allow inmates to succeed in drug treatment while avoiding expending resources unnecessarily.

Executive Order 13132

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

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation. By approving it, the Director certifies that it will not have a significant economic impact upon a substantial number of small entities because: This rule is about the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local and tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. We do not need to take

action under the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

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

List of Subjects in 28 CFR Part 550

Prisoners.

Harley G. Lappin,

Director, Bureau of Prisons.

Under the rulemaking authority vested in the Attorney General in 5 U.S.C 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we propose to amend 28 CFR part 550 as follows.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 550—DRUG PROGRAMS

1. The authority citation for part 550 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3521–3528, 3621, 3622, 3624, 4001, 4042, 4046, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 21 U.S.C. 848; 28 U.S.C. 509, 510; Title V, Pub. L. 91–452, 84 Stat. 933 (18 U.S.C. Chapter 223).

Subpart F—Drug Abuse Treatment Program

2. Revise § 550.55 (a)(1) as follows:

§ 550.55 Eligibility for early release.

(a) *Eligibility.* Inmates may be eligible for early release by a period not to exceed 12 months if they:

- (1) were sentenced to a term of imprisonment under either:
 - (i) 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense; or
 - (ii) D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those in D.C. Code § 23–1331(4); and

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