



## PRISON LAW OFFICE

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### Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information because we know that prisoners often have trouble getting legal information and we cannot give specific advice to all prisoners who ask for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in your institution's law library.

### **ADDENDUM TO INFORMATION ON PROPOSITION 57: UPDATE ON MILESTONE CREDITS FOR EDUCATION PROGRAMS**

(February 6, 2018)

This addendum to the Prison Law Office's letter on Proposition 57 has additional information about recent problems with Milestone and Education Merit Credits. We are aware that some prisoners have been awarded credits and then have had those credits taken away. Here is what we currently know about the situation.

The CDCR is taking the position that some people were improperly awarded Milestone Credits for education programs under the Proposition 57 emergency regulations that went into effect on August 1, 2017. The CDCR has taken several actions in response to these concerns. First, as of November 29, 2017, the CDCR has revised its emergency regulations to clarify its position on the requirements for earning Milestone Credits for education programs (as of January 29, 2018, the revisions are not yet in effect). Second, the CDCR has done additional training for education staff on the Proposition 57 credit rules. Third, the CDCR has been doing audits of credits that were previously awarded and is taking away credits from some people. Fourth, the CDCR imposed a temporary "freeze" on Milestone Credits; however, the CDCR has stated that it will retroactively award Milestone Credits for any time period affected by the freeze.

The CDCR has identified several concerns related to Milestone Credits awarded for education programs. The main issues appear to be:

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- The CDCR is taking the position that, under the regulations that went into effect on August 1, 2017, people should have been required to complete three requirements (coursework, teacher evaluation, and testing) to receive Milestone Credits for education programming. However, prison staff sometimes awarded credit when a person passed a GED sub-test, even if that person did not also complete a course and evaluation. The CDCR is taking Milestone Credits credit away from people in those circumstances; this is expected to affect about 900 people.<sup>1</sup> People whose credits have been removed as well as lawyers who represent people in prison have argued that this is unfair because the regulations were unclear and seemed to indicate that Milestone Credits could be granted to people for just passing the GED sub-tests. Note that as of November 29, 2017, the CDCR has revised the proposed regulations to state its policy that all three requirements must be met. However, the proposed regulations have not yet been finalized and are not yet in effect.
- Prior to August 1, 2017, Milestone Credits could not be awarded to people who were serving time for violent offenses or Two or Three Strikes terms, or who were required to register as sex offenders. Effective August 1, 2017, the Proposition 57 emergency regulations allow these groups of people to earn Milestone Credits. Some prison staff delayed entering classes so that people who fell into these categories ended up getting credit for classes they completed before August 1, 2017. The CDCR is taking away credits that were improperly awarded in this way.
- The CDCR also has found that some people received Milestone Credit for finishing classes when they didn't put the required amount of time into the class. The CDCR is taking away credits where there is a big difference between the amount of time the person put in and the the required amount of time.
- There have been other reports of problems at some prisons, including concerns about staff misconduct related to the award of Milestone Credits at CIW. The CDCR has been investigating these issues and taking credits away from some people.

If you have had problems with your Milestone Credits being taken away or not being properly awarded, you should file a 602 administrative appeal and pursue it to the highest level necessary. The CDCR has informed us that they are looking closely at credit-earning complaints due to the recent issues. If you pursue your 602 to the highest level of review and are not satisfied with the responses, you can file a state court habeas petition arguing that the CDCR is interpreting its regulations in an unreasonable manner and/or raising other legal issues. You can also send your 602 appeals and responses and habeas petitions to the Prison Law Office, as we are interested in making sure the CDCR applies its credit rules fairly.

A free manual on How to File a CDCR Administrative Appeal and a free manual on State Court Petitions for Writ of Habeas Corpus are available on request by writing to the Prison Law Office or on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

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<sup>1</sup> People who pass the GED test for the first time while in prison are still entitled to Education Merit credits for passing the test. This includes people who get their GED anytime during their current term, even prior to August 1, 2017.



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### **INFORMATION ON PROPOSITION 57**

(Updated December 14, 2017)

### **NEW PRISON CREDIT RULES**

**and**

### **NONVIOLENT OFFENDER PAROLE CONSIDERATION**

This letter discusses the new CDCR rules on prison credits (which apply to almost all prisoners), and the new rules about early parole consideration for nonviolent determinately-sentenced offenders. These new rules came about as a result of Proposition 57, passed by the voters in November 2016. Proposition 57 established new Article I, section 32 in the California Constitution, which requires CDCR to issue rules regarding credits and early parole.

The new rules on credits and early parole consideration were issued by CDCR on an "emergency" basis on March 24, 2017. A copy of the new rules should be available in your prison law library; the rules are also on the CDCR website: [www.cdcr.ca.gov](http://www.cdcr.ca.gov). As "emergency" rules, they are in effect on a temporary basis while the full rule-making process is underway. The CDCR started applying the new credit rules on May 1 (good conduct credit) and August 1 (various programming credits), and started the new early parole consideration processes on July 1. The CDCR has heard public comments on the rules, and as of November 29, 2017, has issued an amended version of the rules. The amendments make changes in wording and procedures; the substance of the regulations are unchanged except for a few small adjustments or clarifications as to which prisoners are eligible for some types of credits and which prisoners are eligible for early parole consideration. The CDCR will have a 15-day period to take public comments on these amendments. See the Section III of this letter for information on the rule-making process.

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Part I of this letter summarizes the new rules on credits. Part II summarizes the new rules on early parole consideration for nonviolent offenders. Part III describes how prisoners and others can comment on the new rules.

There may be legal disputes about whether or not the new CDCR rules are in accord with new Article I, section 32 to the California Constitution. There may also be disputes about exactly what the new rules mean and how they apply.

## **I. PRISON TIME CREDITS FOR GOOD BEHAVIOR AND PROGRAMMING**

The new CDCR rules regarding credits completely replace all previous California laws and CDCR rules regarding credits for good behavior and programming in prison, and appear to include all credits required by the February 2014 federal court order about reducing crowding in the prisons. Under the new rules described below, all CDCR prisoners are eligible to receive at least as much credit to reduce their prison terms as under the old laws and rules, and some prisoners are eligible to receive more credits than before. Note that although these conduct and programming credits apply toward the Earliest Possible Release Date for determinate sentences and the Minimum Eligible Parole Date (MEPD) for indeterminate (life with the possibility of parole) sentences, they do *not* apply toward a Youth Offender Parole Eligibility Date (YPED) or Elderly Parole Eligibility Date (EPED).

**1. Effective May 1, 2017, many prisoners earn more Good Conduct Credits so long as they comply with prison rules and programming duties.** Good Conduct Credits are now available to all prisoners serving determinate (set-length) sentences and sentences of life with the possibility of parole, including those who are housed in Department of Juvenile Justice (DJJ) facilities or in alternative custody programs. The Good Conduct Credit rules apply also to prisoners serving California sentences in out-of-state prisons, federal prisons, or state hospitals. There are different levels of credit eligibility depending on the prisoner's offenses and sentence. (See chart on next page.)

Description of Current Offense and/or Sentence	Current CDCR Credit Rate	New CDCR Credit Rate <sup>1</sup>
Life without parole (LWOP) and condemned	0%	0%
Indeterminate term (lifers) not previously eligible for credits (murder, etc.)	0%	20%
Violent offense -- third striker lifers	0%	20%
Violent offense – determinate term -- 0 credits (a few other recidivists)	0%	20%
Violent offense -- determinate or indeterminate sentence	15%	20%
Non-violent offense – third striker lifers	0%	33.3%
Non-violent offense – second strikers with PC 290	20%	33.3%
Non-violent offense – second strikers	33.3%	33.3%
Lifers eligible for 1/3 credits (some crimes in 1980s & 1990s)	33.3%	33.3%
Non-violent offense – determinate sentence	50%	50%
Lifers – eligible for day-for-day (a few crimes)	50%	50%
Violent offense – determinate sentence -- firefighters or in fire camp	15%	50%
Non-violent offense -- second strikers --- firefighters or in fire camp	33.3%	66.6%
Non-violent offense – determinate sentence – firefighters or in fire camp	66.6%	66.6%
Non-violent offense –Minimum A or Minimum B custody	66.6%	66.6%

<sup>1</sup> The CDCR's titles for the various credit categories are NOT internally consistent.

- “15%” credit means a prisoner gets credit for 15 percent of the days actually served, and ends up serving about 85% of the actual time imposed.
- “20%” credit means a prisoner gets credit for 20% of the days actually served (one day credit for four days served) and ends up serving about 80% of the actual time imposed).
- CDCR's "33.3%" credit means a prisoner gets credit for 33.3% of the days actually served (one day credit for two days actually served) and ends up serving about 66.7% of the actual time imposed.
- BUT CDCR's "50%" credit does NOT mean a prisoner gets credit for 50% of days actually served. Rather, a prisoner gets credit for 100% of days served (day-for-day) and the prisoner ends up serving 50% of the actual time imposed (sometimes referred to as "half-time")
- Similarly, CDCR's "66.6%" credit does NOT mean a prisoner gets credit for 66.6% of days actually served. Rather, a prisoner gets credit for 200% of days served (two-for-one) and the prisoner ends up serving about 33.3% of the actual time imposed.

Prisoners can still be placed on Zero Credit earning status for twice refusing to accept assigned housing, refusing to perform an assignment, or being a program failure (Work Group C) or due to placement in a segregation unit for a serious disciplinary offense or validation as an STG-I member or associate (D-2 status).

Prisoners can still lose Good Conduct Credits if they violate prison rules.

**2. Effective August 1, 2017, all CDCR prisoners serving determinate sentences or sentences of life with the possibility of parole are eligible to earn additional credits for successful participation in approved rehabilitative programs.**

The new and revised programming credits are:

- **Milestone Completion Credits:** These credits are awarded for achieving objectives in approved rehabilitative programs, including academic, vocational, and therapeutic programs. The programs eligible for credit now include full-time rehabilitative programming, alternative custody programs, Enhanced Outpatient (EOP) mental health participation and Developmentally Disabled Program (DDP) participation. The new regulations expand Milestone Credits to 12 weeks in a 12-month period; excess credits will be rolled over to the following year. The new regulations get rid of restrictions that barred some types of prisoners from earning Milestone Credits. Milestone Completion Credits can be lost due to rules violations.
- **Rehabilitative Achievement Credits:** These credits are for participation in self-help and volunteer public service activities. Currently, there is no credit-earning attached to self-help activities. The new regulations will give prisoners one week of credit for every 52 hours of participation, with a maximum of four weeks credit per year, for participating in eligible self-help programs. Rehabilitative Achievement Credits can be lost due to rules violations.
- **Education Merit Credits:** These credits recognize the achievements of prisoners who earn high school diplomas, high school equivalency, or higher education degrees, or complete the offender mentor certification program available at several CDCR prisons. Prisoners must earn at least 50 percent or more of the degree or diploma during their current term to receive Education Merit Credits. Prisoners who earn high school diplomas or equivalency get 90 days of credit and prisoners who earn other degrees or an offender mentor certification get 180 days credit. These credits will take effect in August 2017, but will be applied retroactively for degrees earned prior to that date. Education Merit Credits apply to prisoners serving California sentences who are housed out-of-state, in federal prison, or in state hospitals. Educational Merit Credits cannot be taken away due to rule violations.

## II. EARLY PAROLE CONSIDERATION FOR SOME DETERMINATELY SENTENCED NONVIOLENT OFFENDERS

Proposition 57 authorizes earlier parole consideration for prisoners convicted of nonviolent felony offenses.<sup>2</sup>

The new CDCR rules provide for early parole consideration for “determinately sentenced nonviolent offenders” who meet certain other criteria.<sup>3</sup> **An eligible prisoner will be considered for parole suitability prior to his or her “Nonviolent Parole Eligible Date,” which is the date on which the prisoner has served the “full term” of his or her “primary offense,” minus pre-sentence credits awarded by the court and credits for time in custody between sentencing and arrival in the CDCR.** “Primary offense” means the crime for which the court imposed the longest prison term, without taking into account enhancements, alternative sentences, or consecutive sentences. “Full term” means the time imposed by the court for the primary offense without considering credits earned in prison.<sup>4</sup> The CDCR started determining which prisoners are eligible for parole consideration as of June 1, 2017 and started referring prisoners for parole reviews on July 1, 2017.

A prisoner must meet four criteria to get released early on nonviolent offender parole.

**1. The prisoner must be a “Nonviolent Offender,” which is defined as a prisoner who is serving a sentence for a nonviolent felony offense.** A nonviolent felony offense is any crime that is **not** listed in Penal Code § 667.5(c).

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<sup>2</sup> This part of California Constitution, Article I, section 32 states:

(a)(1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

(A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.

....

(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

<sup>3</sup> The new regulations are 15 CCR §§ 2449.1-2449.7 and 15 CCR §§ 3490-3493.

<sup>4</sup> For example, this appears to mean that a person serving a doubled term under the two-strikes law (which is an alternative sentencing law) for a nonviolent offense is eligible for parole consideration after serving just the ordinary base term (without the doubling or any enhancements).

The new parole consideration process does **not** apply to any prisoner who:

- is serving a death sentence or a term of life without the possibility of parole (LWOP), OR
- is serving a term of life with the possibility of parole (such as three-strikers and other lifers),<sup>5</sup> OR
- is serving a term for a violent felony crime or enhancement that is listed in Penal Code § 667.5(c), OR
- has a past or current conviction for an offense that requires sex offender registration under Penal Code § 290,<sup>6</sup> OR
- is serving a determinate term prior to beginning a term of life with the possibility of parole for a violent felony or prior to beginning a term for an in-prison offense that is a violent felony, OR
- is currently serving a term for a non-violent offense after completing a concurrent determinate term for a violent felony. (Note that the regulations do not specifically say whether a prisoner is ineligible for parole consideration if the prisoner has *consecutive sentences for a mix of violent and nonviolent crimes* (with the nonviolent terms calculated at 1/3 of the normal base term) and has finished serving the portion of the term that is for the violent offense; there may be legal disputes about whether such prisoners are or should be eligible for parole consideration.)

**2. The prisoner must not be otherwise eligible for parole or parole consideration in the near future.** The prisoner's Nonviolent Parole Eligibility Date must be at least 180 days before the prisoner's regular Earliest Possible Release Date (EPRD) and the prisoner's EPRD must be at least 210 days in the future. The prisoner must not be eligible for a Youth Offender Parole or Elder Parole consideration hearing within a year of the nonviolent parole eligibility review or have an initial Youth Offender Parole or Elder Parole hearing already scheduled.

**3. The prisoner must have good behavior in prison.** The CDCR will screen a prisoner no later than 35 days before the Nonviolent Parole Eligible Date to decide whether the prisoner is eligible for referral to the Board of Parole Hearings (BPH) for parole consideration. The CDCR should tell the prisoner the result of the screening.

Some circumstances will make a prisoner **ineligible** for nonviolent offender parole:

- current Security Housing Unit (SHU) term or assessment or service of a SHU term in the past 5 years (unless for the prisoner's own safety);
- a Level A-1 or A-2 serious rule violation in the past 5 years;

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<sup>5</sup> The exclusion of nonviolent third strikers is being challenged as being contrary to Proposition 57. *In re Davis*, Santa Clara Superior Court No. CC800408.

<sup>6</sup> The exclusion of nonviolent sex offenders is being challenged as being contrary to Proposition 57, *Alliance for Constitutional Sex Offense Laws v. CDCR*, Sacramento Superior Court No. 80002581,

- assignment to Work Group C in the past year;
- 2 or more serious rule violations of any level within the past year;
- a drug-related rule violation or refusal to provide a urine sample in the past year; or
- a rule violation found to have a nexus to an STG group.

A prisoner who is deemed ineligible based on any of these circumstances will be screened again for eligibility after serving 1 more year, and will be reviewed every year thereafter.

A prisoner who is screened out by the CDCR can challenge the screening decision by filing a CDCR Form 602 administrative appeal.

**4. The Board of Parole Hearings (BPH) must decide that that prisoner does not pose an “unreasonable risk of violence to the community.”**

When a prisoner is referred to BPH for nonviolent offender parole consideration, the prisoner should be notified that he or she can submit a written statement to BPH. WE ADVISE PRISONERS TO SUBMIT A STATEMENT ABOUT WHY THEY SHOULD BE PAROLED EARLY, FOCUSING ON WHY THEY WILL NOT POSE A RISK OF VIOLENCE TO THE COMMUNITY IF RELEASED. IF POSSIBLE, PRISONERS SHOULD HAVE FAMILY, FRIENDS, POTENTIAL EMPLOYERS OR OTHERS WITH HELPFUL INFORMATION SUBMIT STATEMENTS TO BPH.

A BPH staff member (who is called a “hearing officer”, even though there is no actual hearing at which the prisoner or anyone else can appear) will double-check to make sure the prisoner is eligible for nonviolent offender parole consideration. If the hearing officer confirms the prisoner is eligible, the BPH will notify the prosecutor and victim(s) that they have 30 days to submit written statements. The hearing officer will then review documents including the prisoner’s central file and criminal history records and written statements by the prisoner, the prisoner’s supporters, the crime victims, and/or the prosecutor. Unlike lifer parole suitability hearings, there is no in-person hearing.

The hearing officer decides whether or not the prisoner “poses an unreasonable risk of violence to the community.” The hearing officer shall consider all the circumstances, including the nature of the prisoner’s current conviction, prior criminal record, in-prison behavior and programming, and any input from the prisoner, victims and prosecutor. The regulations list numerous specific aggravating and mitigating factors to be considered. The hearing officer must issue a written decision with statement of reasons for the decision, and a copy must be provided to the prisoner within 15 business days after the decision is issued.

**If release is granted:**

Release will be granted if the hearing officer finds the prisoner does not pose an unreasonable risk of violence to the community. If a parole grant will result in the prisoner being released two or more years prior to the regular Earliest Possible Release Date (EPRD), a high level

BPH hearing officer must review the parole grant, and can issue a new decision approving or denying the release. The prisoner should be notified in writing of the decision.

A prisoner who is granted nonviolent offender parole should be released 60 days after the date of the BPH decision, following any required notifications to crime victims and law enforcement agencies. If the prisoner has an additional term to serve for an in-prison offense, the additional term shall start 60 days after the BPH decision. Also, nonviolent offender parole can be vacated for subsequent crimes or prison rule violations or if the prisoner otherwise becomes ineligible for nonviolent offender parole during the time prior to release. The prisoner will presumably serve the normal parole or PRCS period that would apply to their crimes.

**If release is denied:**

Release will be denied if the hearing officer finds the prisoner poses an unreasonable risk of violence to the community. If release is denied or vacated, the prisoner will be re-screened every year and, if eligible, will be re-referred to the BPH for nonviolent offender parole consideration.

A prisoner who is denied nonviolent offender parole can request a review of the decision. This is done through a special review procedure (NOT the CDCR 602 process). The prisoner must request review by submitting a written request to the BPH within 30 calendar days after the denial. A BPH hearing officer who was not involved in the original decision will conduct a review within 30 calendar days after the prisoner's request is received. The hearing officer will either uphold the parole denial or vacate the parole denial and issue a new decision. The prisoner should be notified in writing of the review decision within 15 business days after the decision..

**III. HOW DO THE NEW REGULATIONS GET ADOPTED?**

California's Administrative Procedures Act (APA) requires the CDCR to adopt its regulations in a formal manner that includes notice to the public, opportunity for public comments, and approval by the Office of Administrative Law (OAL), the agency that oversees compliance with the APA.

The CDCR issued the new Proposition 57 regulations pursuant to its power to adopt emergency regulations when necessary to operate the prison or parole system. The Proposition 57 emergency regulations were filed with the Secretary of State and went into effect on April 13, 2017. The CDCR "Notice of Change to Regulations" (#17-05) was issued on July 14, 2017

The CDCR then received and considered public comments. Because of the many public comments and the need to make revisions to the proposed regulations, the CDCR has received an extension of time to complete the rule-making process and is seeking permission to re-issue the emergency regulations. On November 29, 2017, the CDCR issued a "Notice of Change to Text as Originally Proposed" and its responses to the top comments it had received, and announced a 15-

day period for public comments on the revisions. The address for sending public comments is CDCR Regulation and Policy Management Branch, P.O. Box 942883, Sacramento, CA 94283-0001.

The Notice of the Change to Regulations, the Notice of Change to Text as Originally Proposed, and other documents about the proposed regulations should be available in prison law libraries and made available to prisoners housed in SHUs. The notices and other documents are also on the CDCR website at [www.cdcr.ca.gov](http://www.cdcr.ca.gov).

Once the CDCR decides on the final wording of the regulations, the proposed regulations must be reviewed by the OAL. The OAL will determine whether the APA requirements have been met, and whether the regulation is necessary, based on proper authority, clear, consistent, properly referenced, and not duplicative. If the OAL approves the regulations, they will be filed with the Secretary of State.