S T A T E O F N E W Y O R K

2997

2013-2014 Regular Sessions

I N A S S E M B L Y

January 22, 2013

Introduced by M. of A. CLARK, GIBSON -- read once and referred to the Committee on Correction

AN ACT to amend the correction law, the executive law and the penal law, in relation to merit time allowance and release for prisoners accumulating merit time allowance and to repeal certain provisions of the correction law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative intent. It is the purpose of this act to strengthen the ability of the department of corrections and community supervision to better manage its inmate population through the granting or withholding of merit time allowance credits. This new system seeks to prevent the early conditional release of ill-prepared inmates, while offering release only to those inmates who have demonstrated a willingness and ability to work in society through completion of therapeutic and treatment programs prescribed by the department of corrections and community supervision.

S 2. Section 803 of the correction law is REPEALED and a new section 803 is added to read as follows:

S 803. MERIT TIME ALLOWANCE AGAINST INDETERMINATE AND DETERMINATE SENTENCES. 1. (A) EVERY PERSON CONFINED IN AN INSTITUTION OF THE DEPARTMENT OR A FACILITY IN THE DEPARTMENT OF MENTAL HYGIENE SERVING AN INDETERMINATE OR DETERMINATE SENTENCE OF IMPRISONMENT, EXCEPT A PERSON SERVING A SENTENCE WITH A MAXIMUM TERM OF LIFE IMPRISONMENT, MAY RECEIVE TIME ALLOWANCES AGAINST HIS OR HER SENTENCE IMPOSED BY THE COURT. SUCH ALLOWANCES MAY BE GRANTED FOR GOOD BEHAVIOR AND EFFICIENT AND WILLING PERFORMANCE OF DUTIES ASSIGNED OR PROGRESS AND ACHIEVEMENT IN AN ASSIGNED TREATMENT OR EDUCATION PROGRAM, AND MAY BE WITHHELD IN WHOLE OR IN PART FOR BAD BEHAVIOR, VIOLATION OF INSTITUTIONAL RULES OR FAILURE TO PERFORM PROPERLY IN THE DUTIES OR PROGRAM ASSIGNED.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD06304-01-3

(B) A PERSON SERVING AN INDETERMINATE SENTENCE OF IMPRISONMENT MAY RECEIVE TIME ALLOWANCE AGAINST THE MAXIMUM TERM OF HIS OR HER SENTENCE NOT TO EXCEED ONE-THIRD OF THE MAXIMUM TERM IMPOSED BY THE COURT.

(C) A PERSON SERVING A DETERMINATE SENTENCE OF IMPRISONMENT MAY RECEIVE TIME ALLOWANCE AGAINST THE TERM OF HIS OR HER SENTENCE NOT TO EXCEED ONE-SEVENTH OF THE TERM IMPOSED BY THE COURT.

(D) A PERSON SERVING AN INDETERMINATE SENTENCE OF IMPRISONMENT MAY RECEIVE MERIT TIME ALLOWANCES AGAINST THE MAXIMUM AND MINIMUM TERMS OR PERIOD OF HIS OR HER SENTENCE NOT TO EXCEED IN THE AGGREGATE ONE-THIRD OF THE TERM OR PERIOD IMPOSED BY THE COURT.

(E) A PERSON SERVING A DETERMINATE SENTENCE OF IMPRISONMENT MAY RECEIVE A MERIT TIME ALLOWANCE AGAINST THE TERM OF HIS OR HER SENTENCE NOT TO EXCEED ONE-THIRD OF THE TERM IMPOSED BY THE COURT.

(F) (I) EXCEPT AS PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH, EVERY PERSON UNDER THE CUSTODY OF THE DEPARTMENT OR CONFINED IN A FACILITY IN THE DEPARTMENT OF MENTAL HYGIENE SERVING AN INDETERMINATE SENTENCE OF IMPRISONMENT WITH A MINIMUM PERIOD OF ONE YEAR OR MORE OR A DETERMINATE SENTENCE OF IMPRISONMENT OF ONE YEAR OR MORE IMPOSED PURSUANT TO SECTION 70.70 OR 70.71 OF THE PENAL LAW, MAY EARN A MERIT TIME ALLOWANCE.

(II) SUCH MERIT TIME ALLOWANCE SHALL NOT BE AVAILABLE TO ANY PERSON SERVING A SENTENCE IMPOSED FOR A VIOLENT FELONY OFFENSE AS DEFINED IN SECTION 70.02 OF THE PENAL LAW.

(III) SUCH MERIT TIME ALLOWANCE MAY BE GRANTED WHEN AN INMATE SUCCESSFULLY PARTICIPATES IN THE WORK AND TREATMENT PROGRAM ASSIGNED PURSUANT TO SECTION EIGHT HUNDRED FIVE OF THIS ARTICLE AND WHEN SUCH INMATE OBTAINS A GENERAL EQUIVALENCY DIPLOMA, AN ALCOHOL AND SUBSTANCE ABUSE TREATMENT CERTIFICATE, A VOCATIONAL TRADE CERTIFICATE FOLLOWING AT LEAST SIX MONTHS OF VOCATIONAL PROGRAMMING OR PERFORMS AT LEAST FOUR HUNDRED HOURS OF SERVICE AS PART OF A COMMUNITY WORK CREW. SUCH ALLOWANCE SHALL BE WITHHELD FOR ANY SERIOUS DISCIPLINARY INFRACTION.

2. IF A PERSON IS SERVING MORE THAN ONE SENTENCE, THE AUTHORIZED ALLOWANCES MAY BE GRANTED SEPARATELY AGAINST THE MAXIMUM, MINIMUM AND DETERMINATE TERMS OF EACH SENTENCE OR, WHERE CONSECUTIVE SENTENCES ARE INVOLVED, AGAINST THE AGGREGATED MAXIMUM, MINIMUM AND DETERMINATE TERMS. IN NO CASE, HOWEVER, SHALL THE TOTAL OF ALL ALLOWANCES GRANTED TO ANY SUCH PERSON UNDER THIS SECTION EXCEED ONE-THIRD OF THE MAXIMUM TIME HE OR SHE WOULD BE REQUIRED TO SERVE, COMPUTED WITHOUT REGARD TO THIS SECTION. NO MERIT TIME ALLOWANCE SHALL DECREASE THE MINIMUM TERM TO LESS THAN ONE YEAR.

3. THE COMMISSIONER SHALL PROMULGATE RULES AND REGULATIONS FOR THE GRANTING AND WITHHOLDING OF MERIT TIME ALLOWANCES AUTHORIZED BY THIS SECTION IN ACCORDANCE WITH THE CRITERIA SPECIFIED IN THIS SECTION. SUCH RULES AND REGULATIONS SHALL INCLUDE PROVISIONS DESIGNATING A MERIT TIME ALLOWANCE COMMITTEE IN EACH CORRECTIONAL INSTITUTION DELEGATED TO MAKE DISCRETIONARY DETERMINATIONS WITH RESPECT TO THE ALLOWANCES, THE BOOKS AND RECORDS TO BE KEPT, AND A PROCEDURE FOR REVIEW OF THE INSTITUTIONAL DETERMINATIONS BY THE COMMISSIONER. SUCH COMMITTEE SHALL REVIEW THE RECORD OF EACH INDIVIDUAL INMATE EVERY SIX MONTHS BEGINNING FROM THE DATE OF HIS OR HER ENTRANCE AT SUCH INSTITUTION. THE COMMITTEE SHALL THEN DETERMINE, BASED ON THE FACTORS FOR WHICH ALLOWANCE TIME IS GRANTED, WHETHER OR NOT TO GRANT ALLOWANCE TIME TO THE INMATE. FOR EACH SIX MONTH REVIEW PERIOD, AN INMATE MAY BE GRANTED MERIT TIME WHICH MAY REDUCE BY UP TO ONE-THIRD AN INMATE'S MINIMUM OR DETERMINATE SENTENCE FOR THAT SIX MONTH REVIEW PERIOD. IF AN INMATE IS NOT GRANTED MERIT TIME FOR THE SIX MONTH REVIEW PERIOD, HE OR SHE CANNOT EARN ADDITIONAL MERIT

TIME IN ANY SUBSEQUENT SIX MONTH REVIEW PERIOD TO MAKE UP FOR MERIT TIME WHICH HAS NOT BEEN GRANTED. ADDITIONALLY, AN INMATE WHO HAS BEEN GRANTED MERIT TIME DURING A SIX MONTH REVIEW PERIOD SHALL NOT LOSE SUCH MERIT TIME DURING A SUBSEQUENT SIX MONTH REVIEW PERIOD FOR BAD BEHAVIOR, VIOLATION OF INSTITUTIONAL RULES OR FAILURE TO PERFORM PROPERLY IN THE DUTIES OR PROGRAM ASSIGNED.

4. ALL MERIT TIME ALLOWANCES EARNED PURSUANT TO THIS SECTION SHALL BE VESTED, ON A ONE DAY FOR EVERY THREE DAYS BASIS, EXCEPT AS MODIFIED BY OTHER PROVISIONS OF THIS CHAPTER.

5. MERIT TIME ALLOWANCES GRANTED PRIOR TO ANY RELEASE ON PAROLE OR TO POST-RELEASE SUPERVISION SHALL BE FORFEITED AND SHALL NOT BE RESTORED IF THE FORMERLY INCARCERATED INDIVIDUAL IS RETURNED TO AN INSTITUTION UNDER THE JURISDICTION OF THE DEPARTMENT FOR VIOLATION OF PAROLE OR POST-RELEASE SUPERVISION BY REASON OF A CONVICTION FOR A CRIME COMMITTED WHILE ON PAROLE OR POST-RELEASE SUPERVISION. A PERSON WHO IS SO RETURNED MAY, HOWEVER, SUBSEQUENTLY RECEIVE MERIT TIME ALLOWANCES AGAINST THE REMAINING PORTION OF HIS OR HER MAXIMUM OR AGGREGATE MAXIMUM TERM OR PERIOD NOT TO EXCEED IN THE AGGREGATE ONE-THIRD OF SUCH PORTION PROVIDED SUCH REMAINING PORTION OF HIS OR HER MAXIMUM OR AGGREGATE MAXIMUM TERM OR PERIOD IS MORE THAN ONE YEAR.

6. UPON COMMENCEMENT OF AN INDETERMINATE OR DETERMINATE SENTENCE THE PROVISIONS OF THIS SECTION SHALL BE FURNISHED TO THE PERSON SERVING THE SENTENCE AND THE MEANING OF SAME SHALL BE FULLY EXPLAINED TO HIM OR HER BY A PERSON DESIGNATED BY THE COMMISSIONER TO PERFORM SUCH DUTY.

7. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, WHENEVER MERIT TIME ALLOWANCE IS CLAIMED AGAINST THE MINIMUM TERM OR PERIOD OF IMPRISONMENT, IT SHALL SERVE ONLY TO ALLOW SUCH PERSON, IN THE SOLE DISCRETION OF THE STATE PAROLE BOARD, TO BE RELEASED ON PAROLE. WHENEVER MERIT TIME ALLOWANCE IS CLAIMED AGAINST THE MAXIMUM TERM OR PERIOD OF IMPRISONMENT, AND THE MAXIMUM TERM LESS ACCUMULATED MERIT TIME ALLOWANCE CREDITS EQUALS THE PERSON'S TIME SERVED, SUCH PERSON SHALL BE RELEASED TO PAROLE SUPERVISION. WHENEVER MERIT TIME ALLOWANCE IS CLAIMED AGAINST THE TERM OF A DETERMINATE SENTENCE, AND THE DETERMINATE TERM LESS ACCUMULATED MERIT TIME ALLOWANCE CREDITS EQUALS THE INDIVIDUAL'S TIME SERVED, SUCH INDIVIDUAL SHALL BE RELEASED TO POST-RELEASE SUPERVISION.

8. EVERY PERSON EXCEPT THOSE EXCLUDED PURSUANT TO SUBDIVISION ONE OF THIS SECTION WHO IS INCARCERATED ON THE EFFECTIVE DATE OF THIS SUBDIVISION SHALL BE ENTITLED TO NO MORE THAN ONE MONTH OF MERIT TIME ALLOWANCE FOR EVERY THREE MONTHS SERVED TO BE CREDITED AGAINST THE MINIMUM, MAXIMUM AND DETERMINATE TERMS OR PERIODS OF IMPRISONMENT. THE AMOUNT OF CREDITS ACTUALLY AWARDED SHALL BE DETERMINED BY THE MERIT TIME ALLOWANCE COMMITTEE AND APPLIED RETROACTIVELY STARTING FROM THE FIRST DAY OF THE CURRENT INCARCERATION. EVERY PERSON WHO IS INCARCERATED ON THE EFFECTIVE DATE OF THIS SUBDIVISION, AND WHO HAS ALREADY SERVED HIS OR HER MINIMUM TERM, SHALL BE EVALUATED RETROACTIVELY FOR EARNED ELIGIBILITY CERTIFICATION. IN THAT CASE AN IMMEDIATE PAROLE BOARD HEARING SHALL GIVE FULL CONSIDERATION TO THE MERIT TIME ACCUMULATED.

S 3. Paragraph (a) of subdivision 2 of section 259-i of the executive law, as amended by section 38-f-1 of subpart A of part C of chapter 62 of the laws of 2011, is amended to read as follows:

(a) (i) Except as provided in subparagraph (ii) of this paragraph, at least one month prior to the date on which an inmate may be paroled pursuant to subdivision one of section 70.40 of the penal law LESS ANY ACCUMULATED MERIT TIME ALLOWANCE CREDITS, a member or members as determined by the rules of the board shall personally interview such inmate and determine whether he OR SHE should be paroled in accordance with the

guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article. If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms. The board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same. If the inmate is released, he OR SHE shall be given a copy of the conditions of parole OR POST-RELEASE SUPERVISION. Such conditions shall where appropriate, include a requirement that the [parolee] FORMERLY INCARCERATED INDIVIDUAL comply with any restitution order, mandatory surcharge, sex offender registration fee and DNA databank fee previously imposed by a court of competent jurisdiction that applies to [the parolee] SUCH INDIVIDUAL. The conditions shall indicate which restitution collection agency established under subdivision eight of section 420.10 of the criminal procedure law, shall be responsible for collection of restitution, mandatory surcharge, sex offender registration fees and DNA databank fees as provided for in section 60.35 of the penal law and section eighteen hundred nine of the vehicle and traffic law.

(ii) Any inmate who is scheduled for presumptive release pursuant to section eight hundred six of the correction law shall not appear before the board as provided in subparagraph (i) of this paragraph unless such inmate's scheduled presumptive release is forfeited, canceled, or rescinded subsequently as provided in such law. In such event, the inmate shall appear before the board for release consideration as provided in subparagraph (i) of this paragraph as soon thereafter as is practicable.

S 4. Paragraph (a) of subdivision 2 of section 259-i of the executive law, as amended by section 38-f-2 of subpart A of part C of chapter 62 of the laws of 2011, is amended to read as follows:

(a) At least one month prior to the expiration of the minimum period or periods of imprisonment fixed by the court or board, LESS ANY ACCUMULATED MERIT TIME ALLOWANCE CREDITS, a member or members as determined by the rules of the board shall personally interview an inmate serving an indeterminate sentence and determine whether he OR SHE should be paroled at the expiration of the minimum period or periods in accordance with the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c OF THIS ARTICLE. If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms. The board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same. If the inmate is released, he OR SHE shall be given a copy of the conditions of parole OR POST-RELEASE SUPERVISION. Such conditions shall where appropriate, include a requirement that the [parolee] FORMERLY INCARCERATED INDIVIDUAL comply with any restitution order and mandatory surcharge previously imposed by a court of competent jurisdiction that applies to [the parolee] SUCH INDIVIDUAL. The conditions shall indicate which restitution collection agency established under subdivision eight of section 420.10 of the criminal procedure law, shall be responsible for collection of restitution and mandatory surcharge as provided for in section 60.35 of the penal law and section eighteen hundred nine of the vehicle and traffic law.

S 5. Paragraph (c) of subdivision 2 of section 259-i of the executive law, as separately amended by chapters 40 and 126 of the laws of 1999 and subparagraph (A) as amended by section 38-f-1 of subpart A of part C of chapter 62 of the laws of 2011, is amended to read as follows:

(c) [(A)] (I) Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he OR SHE will live and remain at liberty without violating the law, and that [his] SUCH release is not incompatible with the welfare of society and will not so deprecate the seriousness of his OR HER crime as to undermine respect for law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates AND THE RECOMMENDATIONS OF THE APPROPRIATE MERIT TIME ALLOWANCE COMMITTEE ESTABLISHED UNDER SUBDIVISION THREE OF SECTION EIGHT HUNDRED THREE OF THE CORRECTION LAW; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. The board shall provide toll free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of section 440.50 of the criminal procedure law, the parole board member shall present a written report of the statement to the parole board. A crime victim's representative shall mean the crime victim's closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim's representative may include information concerning threatening or intimidating conduct toward the victim, the victim's representative, or the victim's family, made by the person sentenced and occurring after the sentencing. Such information may include, but need not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced.

S 6. Subparagraphs (ii), (iii) and (iv) of paragraph (a) of subdivision 1 of section 70.40 of the penal law, as amended by section 127-c of

subpart B of part C of chapter 62 of the laws of 2011, are amended to read as follows:

(ii) A person who is serving one or more than one determinate sentence of imprisonment IN ACCORDANCE WITH SECTION 70.02 OF THIS ARTICLE shall be ineligible for discretionary release on parole.

(iii) A person who is serving one or more than one indeterminate sentence of imprisonment and one or more than one determinate sentence of imprisonment, which run concurrently may be paroled at any time after the expiration of the minimum period of imprisonment of the indeterminate sentence or sentences, or upon the expiration of [six-sevenths] TWO-THIRDS of the term of imprisonment of the determinate sentence or sentences, whichever is later.

(iv) A person who is serving one or more than one indeterminate sentence of imprisonment and one or more than one determinate sentence of imprisonment which run consecutively may be paroled at any time after the expiration of the sum of the minimum or aggregate minimum period of the indeterminate sentence or sentences and [six-sevenths] TWO-THIRDS of the term or aggregate term of imprisonment of the determinate sentence or sentences.

S 7. Paragraph (b) of subdivision 1 of section 70.40 of the penal law, as amended by section 127-d-1 of subpart B of part C of chapter 62 of the laws of 2011, is amended to read as follows:

(b) A person who is serving one or more than one indeterminate or determinate sentence of imprisonment shall, if he or she so requests, be conditionally released from the institution in which he or she is confined when the total good behavior time allowed to him or her, pursuant to the provisions of the correction law, is equal to the unserved portion of his or her term, maximum term or aggregate maximum term; provided, however, that (i) in no event shall a person serving one or more indeterminate sentence of imprisonment and one or more determinate sentence of imprisonment which run concurrently be conditionally released until serving at least [six-sevenths] TWO-THIRDS of the determinate term of imprisonment which has the longest unexpired time to run and (ii) in no event shall a person be conditionally released prior to the date on which such person is first eligible for discretionary parole release. The conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law.

Every person so released shall be under the supervision of the state department of corrections and community supervision for a period equal to the unserved portion of the term, maximum term, aggregate maximum term, or period of post-release supervision.

S 8. This act shall take effect on the ninetieth day after it shall have become a law, provided that:

1. the amendments to paragraph (a) of subdivision 2 of section 259-i of the executive law made by section three of this act shall be subject to the expiration and reversion of such paragraph pursuant to subdivision d of section 74 of chapter 3 of the laws of 1995, as amended, when upon such date the provisions of section four of this act shall take effect; and

2. the amendments to paragraphs (a) and (b) of subdivision 1 of section 70.40 of the penal law made by sections six and seven of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith.