

May 31, 2022

Notice of Proposed Rule

DEPARTMENT OF CORRECTIONS

RULE NO.: RULE TITLE:

33-601.101 Incentive Gain Time

PURPOSE AND EFFECT: The purpose and effect of the proposed rule is to provide clarity by adding definitions; to amend the rule as it relates to gain time eligibility for inmates sentenced for a capital offense committed on or after January 1, 1994, and before October 1, 1995, so that the rule is consistent with section 944.275, F.S.; and to correct typographical errors in the award matrices.

SUMMARY: Rulemaking is necessary to provide clarity by adding definitions; to amend the rule as it relates to gain time eligibility for inmates sentenced for a capital offense committed on or after January 1, 1994, and before October 1, 1995, so that the rule is consistent with section 944.275, F.S.; and to correct typographical errors in the award matrices.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:

The Agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A SERC has not been prepared by the Agency.

The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: The Department used an itemized checklist to conduct an economic analysis and determine if there is an adverse impact or regulatory cost associated with this rule that exceeds the criteria. Upon review of the proposed changes to the rule, the Department has determined that the amendments will not exceed any one of the economic analysis criteria in a SERC as set forth in s. 120.541(2)(a), F.S.

Any person who wishes to provide information regarding a statement of estimated regulatory costs or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 944.09, 944.275, 944.281, F.S.

LAW IMPLEMENTED: 944.09, 944.275, 944.281, 944.801(3)(i)5., F.S.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE SCHEDULED AND ANNOUNCED IN THE FAR.

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 5 days before the workshop/meeting by contacting: Lauren Sanchez, Paralegal Specialist, 501 S. Calhoun Street, Tallahassee, FL 32399 (850)717-3610, lauren.sanchez@fdc.myflorida.com. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Office of the General Counsel, Attn. FDC Rule Correspondence, 501 South Calhoun Street, Tallahassee, Florida 32399, FDCRuleCorrespondence@fdc.myflorida.com.

THE FULL TEXT OF THE PROPOSED RULE IS:

33-601.101 Incentive Gain Time.

(1) Definitions.

(a) Pending Delivery Status - where used herein, refers to the status of a prisoner who has been sentenced to a state penitentiary but is currently housed at a county or municipal facility while waiting for the sheriff or chief correctional officer to relinquish physical custody to the Department. Prisoners who are "Pending Delivery" have not been physically delivered to a reception center and received into the custody of the Department. "Pending Delivery" also applies when the Department has received a prisoner's paperwork but has not yet received physical custody of the prisoner. Prisoners with a "Pending Delivery" status are ineligible to receive incentive gain time (excluding prisoners in the physical custody of another agency while actively serving a Florida sentence in accordance with the Interstate Corrections Compact or designated pursuant to section 921.16(2), F.S.)

(b) Out-To-Court Status - where used herein, refers to the status of a state prisoner whose presence is required in court for any reason. To be categorized as "Out-To-Court," a prisoner's physical presence and custody must have first been transported by the sheriff or chief correctional officer to the Department for post-sentence intake processing at a reception center. If a prisoner is needed in court after the prisoner is in physical custody of the Department, the court shall issue an order for the sheriff or chief correctional officer to assume temporary custody and transport the prisoner to the county jail pending the court appearance. Gain time awards for inmates in an "Out-To-Court" status shall be in accordance with this rule. The receipt of the prisoner's paperwork without the prisoner having been received into the Department's physical custody does not qualify as "Out-To-Court."

~~(2)(1)~~ Ineligibility.

(a) No inmate shall receive or accumulate incentive gain time:

1. For the minimum portion of a sentence imposed pursuant to section 775.087(2), F.S., for an offense committed on or after October 1, 1976, involving use or possession of a firearm, machine gun, or destructive device as defined in section 775.087, F.S.;

2. For the minimum portion of a sentence imposed pursuant to section 893.13(1)(e), F.S., (1989), for a specified drug-related offense committed on or after June 27, 1989, but before January 1, 1994, in, on, or within 1,000 feet of a school;

3. If sentenced under section 893.13(1)(i)1., F.S. (Supp. 1990), for a specified drug-related offense committed prior to January 1, 1994, in, on, or within 200 feet of real properties described in section 893.13(1)(i), F.S. (Supp. 1990);

4. No change.

5. If convicted of offenses committed on or after October 1, 1995, and has 85% or less of the sentence remaining to be served.

6. For sentences imposed for offenses committed on or after October 1, 2014, the ~~D~~Department may not grant incentive gain time if the offense is a violation of section 782.04(1)(a)2.c., 787.01(3)(a)2. or 3., 787.02(3)(a)2. or 3., 794.011, F.S., excluding section 794.011(10), 800.04, 825.1025, or 847.0135(5), F.S.

7. If serving a sentence for a capital offense committed on or after January 1, 1994, and before October 1, 1995.

(b) An inmate shall not be eligible for incentive gain time in an amount which would cause a sentence to expire prior to such inmate having served the minimum or mandatory minimum portion of a sentence imposed pursuant to:

1. Section 775.0823, F.S., for specified crimes committed against a law enforcement officer, state attorney, or assistant state attorney on or after January 1, 1990, but prior to January 1, 1994, or against a judge or justice of a court described in Article V of the State Constitution on or after October 1, 1990, but prior to January 1, 1994;

2. through 3. No change.

(c) No change.

~~(3)(2)~~ Eligibility. All other inmates not excluded in subsection ~~(2) (1)~~ or ~~(6) (5)~~ of this rule section, including those in the custody of another agency while actively serving a Florida sentence in accordance with the Interstate Corrections Compact or designated pursuant to section 921.16(2), F.S., may be awarded incentive gain time pursuant to subsection ~~(4) of this rule.~~ 33-601.101(3), F.A.C.

~~(4)(3)~~ How credited. For inmates eligible to receive consideration under this section, the following procedures shall be used.

(a) Each inmate eligible for consideration for the award of incentive gain time shall receive gain time evaluations based upon their ~~his~~ institutional adjustment as reflected in evaluations from security, work, and program components, if assigned. If it becomes necessary to make corrections to the inmate's monthly security, work, or program evaluations after the evaluations have ~~already~~ been submitted, the request for correction along with the reasons for the correction shall be submitted in writing to the ~~D~~Department head for approval. The approved corrections shall be submitted to the classification officer or their ~~his~~ designee, who shall make the necessary changes.

1. The security evaluation is the rating of an inmate's institutional adjustment that includes evaluation of all areas of daily institutional routine, with the exception of the inmate's work and program assignments. The security rating for the month shall be determined by reviewing through the review of the four security behavioral objectives, while considering the inmate's capabilities. The security rating is to be determined by observations of the evaluator, ~~notations on the inmate's Housing Officer Contact Card, and~~ information from other staff sources, and any written

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notations regarding the inmate's behavior, including notations on the inmate's Form DC6-256, Housing Officer Contact Card. Form DC6-256 is incorporated by reference in Rule 33-601.313, F.A.C. Observable behavior by the evaluator, information from other staff sources, and any security behavioral objectives not met due to negative or unsatisfactory reasons must be documented in writing and made available upon request. The employee completing the security evaluation shall not complete the inmate's performance evaluation for the same month. The following security behavioral objectives shall be considered when completing the monthly security rating:

a. The employee completing the security evaluation shall not complete the inmate's performance evaluation for the same month.

b. The following security behavioral objectives shall be considered when completing the monthly security rating:

(I)~~a.~~ Hygiene: grooming and personal cleanliness.

(II)~~b.~~ Appearance: care of issued clothing and compliance with uniform regulations.

(III)~~c.~~ Conduct: adherence to rules, regulations, procedures, and orders and respect for others.

(IV)~~d.~~ Maintenance of living quarters: appearance and cleanliness of assigned living area.

2. The performance evaluation is the rating of the inmate's performance in work and program assignments. The monthly performance rating for the month shall be determined by reviewing through the review of the five performance behavioral objectives, while considering the inmate's capabilities. The performance rating is to be determined by observations of the evaluator, information from other staff sources, and any written notations regarding the inmate's performance behavior objectives, including notations on the inmate's Form DC6-256, Housing Officer Contact Card. Behavior observable by the evaluator, information from other staff sources, and any performance behavior objectives not met due to negative or unsatisfactory reasons must be documented in writing and made available upon request.

a. The employee completing the performance evaluation shall not complete the inmate's security evaluation for the same month.

b. The following performance behavioral objectives shall be considered when completing the monthly performance rating:

(I) Conduct in program and work assignment: adherence to rules, regulations, procedures, and orders, and demonstration of respect for others;

(II) Interaction with others: the degree to which the inmate works and participates with others to accomplish required tasks;

(III) Motivation for personal development and improvement: the degree of interest displayed in improving skills and increasing capabilities;

(IV) Work and study habits: willingness to accomplish tasks without being prompted; and

(V) Constructive use of time: promptness in reporting to assigned area and effective use of time.

~~c.~~ In a month in which an inmate has:

(I) more than one full time assignment, the assignment of the longest duration shall be used to determine utilized for determining the inmate's monthly performance evaluation.

(II)~~b.~~ In a month in which the full or half time assignments are of equal duration, the assignment closest to the end of the month shall be used utilized to determine the inmate's monthly performance evaluation.

(III)~~c.~~ In a month in which an inmate has any half time assignments, both half time evaluations shall be completed. The half time assignment of the longest duration in both a.m. time period and the p.m. time period shall be used to determine utilized for determining the inmate's performance evaluation. In determining the work and program performance evaluation for the half time assignments, the work and program rating reflects the same rating as the two half time assignments if the ratings are the same. If the two half time ratings are different, the overall work and program evaluation shall reflect the lesser of the two ratings.

d. In a month in which the inmate's status is inmate:

(I) Is designated a medical health classification work grade (W-5)₁; or

(II) Is in medical staging at a reception center;₁ or

(III) Is housed in the Corrections Mental Health Institution, Crisis Stabilization Unit, Transitional Care Unit, Hospital or Infirmary;₁ and

(IV) The status as described in (I) ~~1~~, (II), ~~2~~, or (III) ~~3~~ is of a longer duration than any work or program

assignment during the month, ~~then~~ the inmate's performance evaluation shall be derived from a rating submitted by the health care provider who has the primary health care responsibility for the inmate. The health care provider shall evaluate the inmate on the following behavioral objectives:

(A) through (C) No change.

~~e. The employee completing the work or program performance evaluation shall not be the same employee completing the security evaluation.~~

~~f. The following behavioral objectives shall be considered when evaluating the monthly work and program rating:~~

~~(I) Conduct in program and work assignment: adherence to rules, regulations, procedures, and orders and demonstration of respect for others.~~

~~(II) Interaction with others: degree to which inmate works and participates with others to accomplish required tasks.~~

~~(III) Motivation for personal development and improvement: degree of interest displayed in improving skills and increasing capabilities.~~

~~(IV) Work and study habits: willingness to accomplish tasks without being prompted.~~

~~(V) Constructive use of time: promptness in reporting to assigned area and effective use of time.~~

3. The security and performance evaluation provides the preliminary base gain time recommendation for the inmate in the following amounts. These amounts are contingent on the performance evaluations derived from work and programs and the security evaluation unless modified in accordance with paragraph (4)(b) of this rule. ~~33-601.101(3)(b), F.A.C.~~

a. through d. No change.

**Preliminary Incentive Gain Time Base Recommendations With Performance and Security Evaluations;
for inmate convicted of an Qoffense committed prior to 10-1-95**

PERFORMANCE				
S E C U R I T Y		Above Satisfactory	Satisfactory	Unsatisfactory
	Above Satisfactory	16/22	12	0
	Satisfactory	12	8	0
	Unsatisfactory	0	0	0

~~**Preliminary Incentive Gain Time Base Recommendations With Performance and Security Evaluations
for inmate convicted of an Qoffense committed on or after 10-1-95**~~

PERFORMANCE				
S E C U R I T Y		Above Satisfactory	Satisfactory	Unsatisfactory
	Above Satisfactory	8	<u>6</u> 8	0
	Satisfactory	6	4	0
	Unsatisfactory	0	0	0

4. If an inmate has no work or program evaluation for the₂ month the inmate shall be evaluated for the preliminary base gain time recommendation based upon the security evaluation in the following amounts unless

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modified in accordance with paragraph (4)(b) (3)(b) of this rule:

a. through c. No change.

**Preliminary Incentive Gain Time Base Recommendations Security Evaluation Only:
Offenses committed prior to 10/1/95**

S E C U R I T Y	Above Satisfactory	8/11
	Satisfactory	4
	Unsatisfactory	0

Offenses committed on or after 10/1/95:

Above Satisfactory	4
Satisfactory	24
Unsatisfactory	0

(b) The classification officer or designee shall evaluate the security and performance ratings which reflect the inmate's institutional adjustment for the month. The final determination of an award of incentive gain time shall be determined by the classification officer or designee and shall be based on the inmate's overall monthly activities. When the classification officer or designee concurs with the preliminary base gain time recommendation being applied, no modification is required. The preliminary base gain time recommendation may be modified by the classification officer or designee as reflected by the inmate's overall institutional adjustment and level of work and program participation for the month. The classification officer or designee may modify the preliminary base gain time recommendation upward or downward from 1 to 4 days not to exceed the maximum eligible award. Any time the classification officer or designee modifies the preliminary base gain time recommendation, the reason for the modification shall be noted. These modifications will be applied to the preliminary base gain time recommendation reflective of the overall rating derived from the security and performance evaluation or security evaluation alone. Reasons for modification of the preliminary base gain time recommendation include:

1. Modification upward of 1-4 days, excluding those inmates identified in sub-subparagraph (4)(a)2.d. of this rule (3)(a)2.d., F.A.C.:

- a. through b. No change.
- c. Work or program stability;
- d. No change.

2. Modification downward of 1-4 days excluding those inmates identified in sub-subparagraph (4)(a)2.d. of this rule 33-601.101(3)(a)2.d., F.A.C.:

- a. No change.
- b. Work, program, or treatment instability;
- c. Not adhering to classification management plans recommendations;
- d. Assigned to work or program 14 days or less during the month, excluding those inmates identified in sub-subparagraph (4)(a)2.d. of this rule 33-601.101(3)(a)2.d., F.A.C.

3. For those inmates identified in sub-subparagraph (4)(a)2.d. of this rule 33-601.101(3)(a)2.d., F.A.C.

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a. through c. No change.

~~(5)(4)~~ When processed. Incentive gain time is to be processed at the end of each month or upon receipt of progress reports on inmates housed by other agencies. All incentive gain time awards should be posted in the Offender Based Information System by the close of business no later than the 12th day of each month following the month of the award.

(a) No change.

(b) Inmate grievances related to the gain time award or the failure to have received notice of the gain time award shall be filed pursuant to the formal grievance process no later than the end of the month the award is posted, in accordance with rule 33-103.006, F.A.C., for inmates in the Department's custody at the end of the month. Inmates who are out to court or in an outside hospital at the end of the month shall file grievances related to the gain time award or the failure to have received notice of the gain time award pursuant to the formal grievance process no later than fifteen days from the date of return to a Department facility.

(c) A grievance concerning gain time filed by an inmate whose complaint is that the work or program evaluation failed to consider the inmate's capabilities requires that the respondent consult with the Chief Health Officer or designee for information on the inmate's capabilities.

(d) through (e) No change.

~~(6)(5)~~ Disqualifications. The following conditions will disqualify an inmate for an award of incentive gain time for the period stated:

(a) Inmates in disciplinary confinement status are not eligible for a work/program evaluation or rating award ~~even if assigned to work or programs while in disciplinary confinement~~. Inmates in disciplinary confinement are eligible for a security rating award, which can be modified by the classification officer in accordance with paragraph (4)(b) of this rule 33-601.101(3)(b), F.A.C.

(b) No change.

(c) Inmates who are out of the Department's custody during the month on escape, in out-to-court ~~out to court~~ status, or on furlough shall not be eligible to receive incentive gain time for that period of the month, except inmates in out-to-court ~~out to court~~ status for a full month shall be eligible to receive incentive gain time as noted below unless otherwise ineligible:

1. Inmates sentenced for offenses committed on or between April 17, 1994, and September 30, 1995, and which fall within levels 1 through 7 of the sentencing guidelines offense severity ranking chart located in section 921.0012, F.S. (Supp. 1994), shall receive 11 days incentive gain time for each month in out-to-court ~~out to court~~ status.

2. Inmates sentenced for offenses committed on or between April 17, 1994, and September 30, 1995, and which fall within levels 8 through 10 of the sentencing guidelines offense severity ranking chart located in section 921.0012, F.S. (Supp. 1994), shall receive 8 days incentive gain time for each month in out-to-court ~~out to court~~ status.

3. Inmates sentenced for offenses committed on or after October 1, 1995, shall receive 4 days incentive gain time for each month in out-to-court ~~out to court~~ status.

(d) Pending delivery status. An inmate is not eligible to receive incentive gain time for the period the inmate is pending delivery to the Department's custody pursuant to subsection (1)(a) of this rule.

~~(e)(4)~~ Death or Life sentences. Death or Life sentences cannot be reduced by gain time. However, any inmate serving a Death or Life sentence will be considered for incentive gain time, and the gain time will be posted so that in the event the Death or Life sentence is commuted to a number of years, the accumulated incentive gain time will be applied to the inmate's sentence.

~~(7)(6)~~ Educational achievement incentive gain time. Upon notification by the lead educator ~~education supervisor~~ or regional education program administrator of a recommendation by the Bureau of Re-Entry Programs and Education, the Department shall apply a one-time ~~one-time~~ award of 60 additional days of incentive gain time to an inmate who is otherwise eligible and who has successfully completed requirements for and is awarded a general education development certificate or vocational certificate. ~~In order to be eligible for the gain time award, the general education development certificate or vocational certificate must be issued by the Florida Department of Education, or the program issuing the certificate must be approved by the Bureau of Re-Entry Programs and Education in advance of the inmate's enrollment. Inmates assigned to community facilities who earn a general education development certificate or vocational certificate in an~~ on-site ~~on-site~~ educational program operated by an

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outside vendor or provider (state community college, vocational technical center, or private institution) who is approved in advance by the Bureau of ~~Re-Entry Programs and~~ Education shall be recommended by the regional educational program administrator for incentive gain time for educational achievement. Under no circumstances may an inmate receive more than 60 days gain time for educational attainment pursuant to this ~~subsection~~ section.

~~(8)~~(7) Educational gain time. Upon notification by the education supervisor or regional education program administrator, the ~~D~~e~~p~~a~~r~~t~~m~~e~~n~~t shall grant a one-time ~~one-time~~ award of up to 6 days of additional incentive gain time to all inmates who are otherwise eligible and who have attended and satisfactorily participated in 150 hours of functional literacy instruction in accordance with section 944.801(3)(i), F.S. The functional literacy instruction must be provided by the Bureau of ~~Re-Entry Programs and~~ Education teachers, approved staff, or volunteers.

Rulemaking Authority 944.09, 944.275, 944.281 FS. Law Implemented 944.09, 944.275, 944.281, 944.801(3)(i)5. FS. History—New 2-26-80, Amended 1-12-83, 1-31-85, 10-7-85, Formerly 33-11.065, Amended 4-28-87, 7-12-89, 7-17-90, 10-16-90, 10-14-91, 2-17-93, 4-17-94, 7-17-94, 4-21-96, 6-1-97, 10-7-97, 3-11-98, 5-12-98, 7-9-98, 9-17-98, Formerly 33-11.0065, Amended 7-15-09, 4-19-10, 2-6-12, 5-27-12, 2-16-17, _____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Hope Gartman

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Ricky D. Dixon

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: May 10, 2022

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: April 7, 2022