

§2.66

28 CFR Ch. I (7-1-08 Edition)

be held. After the D.C. parole hearing, rehearings shall be conducted pursuant to the rules and policy guidelines of the D.C. Board of Parole, if release on parole is not granted.

(h) *Revocation decisions.* Violations of parole are violations on the aggregate sentence, and a parole violation warrant is therefore issued under the authority of the aggregate sentence. With regard to the reparole decision, the Commission shall follow the guidelines at §2.21 of these rules, but rehearings shall be scheduled according to the guidelines of the D.C. Board of Parole.

(i) *Forfeiture of street time.* All time on parole shall be forfeited if required under §2.52(c) of these regulations. If not, the Commission shall divide the total time on parole (street time) according to the proportional relationship of the D.C. sentence to the U.S. sentence, and shall order the forfeiture of the portion corresponding to the D.C. sentence pursuant to D.C. Code 24-406(a). For example, if the prisoner is serving a two-year D.C. Code sentence and a three-year U.S. Code sentence, the D.C. sentence is two-fifths, or 40 percent, of the total aggregate sentence. If he was on parole 100 days, he therefore forfeits 40 days. “Street time” is measured from the date of release on parole to the execution of the warrant or confinement on other charges.

[54 FR 27842, June 30, 1989, as amended at 57 FR 41395, 41396, Sept. 10, 1992. Redesignated at 63 FR 39176, July 21, 1998, and amended at 68 FR 41530, July 14, 2003]

§2.66 Revocation decision without hearing.

(a) If the releasee agrees to the decision, the Commission may make a revocation decision without a hearing if—

(1) The alleged violation would be graded no higher than Category Two under the guidelines at §2.20;

(2) The alleged violation is in any category under the guidelines at §2.20 and the decision imposes the maximum sanction authorized by law; or

(3) The Commission determines that the releasee has already served sufficient time in custody as a sanction for the violation but that forfeiture of time on parole is necessary to provide an adequate period of supervision.

(b) A releasee who agrees to such a disposition shall indicate such agreement by—

(1) Accepting the decision proposed by the Commission in the Notice of Eligibility for Expedited Revocation Procedure that the Commission sent to the releasee, thereby agreeing that the releasee does not contest the validity of the charge and waives a revocation hearing; or

(2) Offering in writing, before the finding of probable cause or at a probable cause hearing, not to contest the validity of the charge, to waive a revocation hearing, and to accept a decision that is at the bottom of the applicable guideline range as determined by the Commission if the violation would be graded no higher than Category Two under the guidelines at §2.20, or is the maximum sanction authorized by law.

(c) An alleged violator’s agreement under this provision shall not preclude the Commission from taking any action authorized by law or limit the statutory consequences of a revocation decision.

[72 FR 53115, Sept. 18, 2007]

Subpart B—Transfer Treaty Prisoners and Parolees

§2.68 Prisoners transferred pursuant to treaty.

(a) *Applicability, jurisdiction and statutory interpretation.* (1) Prisoners transferred pursuant to treaty (transferees) who committed their offenses on or after November 1, 1987, shall receive a special transferee hearing pursuant to the procedures found in this section and 18 U.S.C. 4106A. Transferees who committed their offenses prior to November 1, 1987, are immediately eligible for parole and shall receive a parole hearing pursuant to procedures found at 28 CFR 2.13. The Parole Commission shall treat the foreign conviction as though it were a lawful conviction in a United States District Court.

(2) The jurisdiction of the Commission to set a release date and periods and conditions of supervised release extends until the transferee is released from prison or the transferee’s case is otherwise transferred to a district

court pursuant to an order of the Commission.

(3) It is the Commission's interpretation of 18 U.S.C. 4106A that every transferee is entitled to a release date determination by the Commission after considering the applicable sentencing guidelines in effect at the time of the hearing. Upon release from imprisonment the transferee may be required to serve a period of supervised release pursuant to section 5D1.2 of the sentencing guidelines. The combination of the period of imprisonment that results from the release date set by the Commission and the period of supervised release shall not exceed the full term of the sentence imposed by the foreign court. The combined periods of imprisonment and supervised release may be less than the full term of the sentence imposed by the foreign court unless the applicable treaty is found to require otherwise.

(4) The applicable offense guideline provision is determined by selecting the offense in the U.S. Code that is most similar to the offense for which the transferee was convicted in the foreign court. In so doing, the Commission considers itself required by law and treaty to respect the offense definitions contained in the foreign criminal code under which the prisoner was convicted, as well as the official documents supplied by the foreign court.

(5) The release date that is determined by the Commission under 18 U.S.C. 4106A(b)(1)(A) is a prison release determination and does not represent the imposition of a new sentence for the transferee. However, the release date shall be treated by the Bureau of Prisons as if it were the full term date of a sentence for the purpose of establishing a release date pursuant to 18 U.S.C. 4105(c)(1). The Bureau of Prisons release date shall supersede the release date established by the Parole Commission under 18 U.S.C. 4106A and shall be the date upon which the transferee's period of supervised release commences. If the Commission has ordered "continue to expiration," the 4106A release date is the same as the full term date of the foreign sentence. It is the Commission's interpretation of 18 U.S.C. 4105(c)(1) that the deduction of service credits in either case does not

operate to reduce the foreign sentence or otherwise limit the Parole Commission's authority to establish a period of supervised release extending from the date of actual release from prison to the full term date of the foreign sentence.

(6) If the Commission sets a release date under 18 U.S.C. 4106A(b)(1)(A) that is earlier than the mandatory release date established by the Bureau of Prisons under 18 U.S.C. 4105(c)(1), then the release date set by the Commission controls. If the release date set by the Commission under 18 U.S.C. 4106A(b)(1)(A) is equal to or later than the mandatory release date established by the Bureau of Prisons under 18 U.S.C. 4105(c)(1), then the mandatory release date established by the Bureau of Prisons controls.

(7) It is the Commission's interpretation of 18 U.S.C. 4106A that U.S. Code provisions for mandatory minimum terms of imprisonment and supervised release, as well as sentencing guideline provisions implementing such U.S. Code requirements (*e.g.*, section 5G1.1(b) of the sentencing guidelines), were not intended by Congress to be applicable in an 18 U.S.C. 4106A(b)(1)(A) determination. Alternatively, it is the Commission's position that there is good cause in every transfer treaty case for a departure from any statutorily required minimum sentence provision in the sentencing guidelines, including section 5G1.1(b) of the sentencing guidelines, because Congress did not enact mandatory sentence laws with transferees in mind. Thus, in every transfer treaty case, the release date will be determined through an exercise of Commission discretion, according to the sentencing guideline range that is derived from a case-specific "similar offense" determination, rather than by reference to any provision concerning mandatory minimum sentences of imprisonment or terms of supervised release.

(b) *Interview upon entry.* Following the transferee's entry into the United States, the transferee shall, without unnecessary delay, be interviewed by a United States Probation Officer who shall inform the transferee of his rights under this regulation. The transferee shall be given the appropriate forms for

appointment of counsel pursuant to 18 U.S.C. 3006(A) at the interview if appointment of counsel is requested.

(c) *Postsentence report.* A postsentence investigation report, which shall include an estimated sentencing classification and sentencing guideline range, shall be prepared by the probation office in the district of entry (or the transferee's home district). Disclosure of the postsentence report shall be made as soon as the report is completed, by delivery of a copy of the report to the transferee and his or her counsel (if any). Confidential material contained in the postsentence investigation report may be withheld pursuant to the procedures of 18 U.S.C. 4208(c). Copies of all documents provided by the transferring country relating to the transferee shall be appended to the postsentence report when disclosed to the transferee and when transmitted to the Commission.

(d) *Opportunity to object.* The transferee (or counsel) shall have thirty calendar days after disclosure of the postsentence report to transmit any objections to the report he or she may have, in writing, to the Commission with a copy to the probation officer. The Commission shall review the objections and may request that additional information be submitted by the probation officer in the form of an addendum to the postsentence report. Any disputes of fact or disputes concerning application of the sentencing guidelines shall be resolved at the special transferee hearing.

(e) *Special transferee hearing.* A special transferee hearing shall be conducted within 180 days from the transferee's entry into the United States, or as soon as is practicable following completion of the postsentence report along with any corrections or addendum to the report and appointment of counsel for an indigent transferee.

(1) *Waivers.* The transferee may waive the special transferee hearing on a form provided for that purpose, and the Commission may either:

(A) Set a release date that falls within 60 days of receipt of the waiver and establish a period and conditions of supervised release; or

(B) Reject the waiver and schedule a hearing.

(2) *Short-term cases.* In the case of a transferee who has less than six months from the date of his entry into the United States to his release date as calculated by the Bureau of Prisons under 18 U.S.C. 4105, the Commission may, without conducting a hearing or awaiting a waiver, set a release date and a period and conditions of supervised release. In such cases, the period of supervised release shall not exceed the minimum necessary to satisfy the applicable sentencing guideline (but may extend to the full-term of the foreign sentence if such period is shorter than the minimum of applicable sentencing guideline). The transferee may petition the Commission for a more favorable decision within 60 days of the Commission's determination, and the Commission may act upon the petition regardless of whether or not the transferee has been released from prison.

(f) *Representation.* The transferee shall have the opportunity to be represented by counsel (retained by the transferee or, if financially unable to retain counsel, counsel shall be provided pursuant to 18 U.S.C. 3006(A)), at all stages of the proceeding set forth in this section. The transferee may select a non-lawyer representative as provided in 28 CFR 2.61.

(g) *The decisionmaking criteria.* The Commission will consider the United States Sentencing Guidelines as advisory guidelines in making its decisions, as though the transferee were convicted in a United States District Court of a statutory offense most nearly similar to the offense of which the transferee was convicted in the foreign court. The Commission shall take into account the offense definition under foreign law, the length of the sentence permitted by that law, and the underlying circumstances of the offense behavior, to establish a guideline range that fairly reflects the seriousness of the offense behavior committed in the foreign country.

(h) *Hearing procedures.* Special transferee hearings shall be conducted by a hearing examiner. Each special transferee hearing shall be recorded by the hearing examiner. The following procedures shall apply at a special transferee proceeding, unless waived by the transferee:

Department of Justice

§ 2.68

(1) The examiner shall inquire whether the transferee and his counsel have had an opportunity to read and discuss the postsentence investigation report and whether the transferee is prepared to go forward with the hearing. If not, the transferee shall be given the opportunity to continue the hearing.

(2) The transferee shall have an opportunity to present documentary evidence and to testify on his own behalf.

(3) Oral testimony of interested parties may be taken with prior advance permission of the Regional Commissioner.

(4) The transferee and his counsel shall be afforded the opportunity to comment upon the guideline estimate contained in the postsentence investigation report (and the addendum, if any), and to present arguments and information relating to the Commission's final guideline determination and decision.

(5) Disputes of material fact shall be resolved by a preponderance of the evidence, with written recommended findings by the examiner unless the examiner determines, on the record, not to take the controverted matter into account.

(6) The transferee shall be notified of the examiner's recommended findings of fact, and the examiner's recommended determination and reasons therefore, at the conclusion of the hearing. The case shall thereafter be reviewed by the Executive Hearing Examiner pursuant to § 2.23, and the Commission shall make its determination upon a panel recommendation.

(i) *Final decision.* (1) The Commission shall render a decision as soon as practicable and without unnecessary delay. Decisions shall be made upon a concurrence of two votes of the National Commissioners. The decision shall set a release date and a period and conditions of supervised release. If the Commission determines that the appropriate release date under 18 U.S.C. 4106A is the full term date of the foreign sentence, the Commission will order the transferee to "continue to expiration".

(2) Whenever the Bureau of Prisons applies service credits under 18 U.S.C. 4105 to a release date established by the Commission, the release date used by

the Bureau of Prisons shall be the date established by the Parole Commission pursuant to the sentencing guidelines and not a date that resulted from any adjustment made to achieve comparable punishment with a similarly-situated U.S. Code offender. The application of service credits under 18 U.S.C. 4105 shall supersede any previous release date set by the Commission. The Commission may, for the purpose of facilitating the application of service credits by the Bureau of Prisons, reopen any case on the record to clarify the correct release date to be used, and the period of supervised release to be served.

(3) The Commission may, in its discretion, defer a decision and order a rehearing, provided that a statement of the reason for ordering a rehearing is issued to the transferee and the transferee's counsel (if any).

(4) The Commission's final decision shall be supported by a statement of reasons explaining:

(i) The similar offense selected as the basis for the Commission's decision;

(ii) The basis for the guideline range applied; and

(iii) The reason for making a release determination above or below the guideline range. If the release date is within a guideline range that exceeds twenty-four months, the Commission shall identify the reason for the release date selected.

(j) *Appeal.* The transferee shall be advised of his right to appeal the decision of the Commission to the United States Court of Appeals that has jurisdiction over the district in which the transferee is confined.

(k) *Reopening or modification of a determination prior to transfer of jurisdiction.* (1) A hearing and assistance of counsel will be provided to the transferee whenever a case is reopened under subparagraphs (2), (3), (4), and (5) below unless:

(i) Waived by the transferee; or

(ii) The action to be taken is favorable and no factual issue must be resolved.

(2) The Commission may reopen and modify a determination based upon information which was not previously considered. Such information must,

§2.69

however, be contained in the record of the foreign sentencing court.

(3) The Commission may reopen and modify a determination of the terms and conditions of supervised release. Modifications may include approval or disapproval of the transferee's release plan.

(4) The Commission shall reopen and modify a determination that has been found on appeal to have been imposed in violation of the law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to have been unreasonable.

(5) The Commission may reopen and modify a determination upon consideration of the factors listed in section 5K1.1 of the sentencing guidelines if the transferee provides substantial assistance to law enforcement authorities, and that assistance was not previously considered by the Commission. The Commission will treat a request from a foreign or a domestic law enforcement authority as the equivalent of a "motion of the government."

(6) The Commission may modify a determination based upon a clerical mistake or other error in accordance with Federal Rules of Criminal Procedure Rule 36.

(7) The Commission may reopen and modify the release date if it determines that a circumstance set forth in 18 U.S.C. 3582(c) is satisfied.

(1) *Supervised release.* (1) If a period of supervised release is imposed, the Commission presumes that the recommended conditions of supervised release in section 5D1.3(a) and (c) of the sentencing guidelines, a condition requiring the transferee to report to the probation office within 72 hours of release from the custody of the Bureau of Prisons, a condition that the transferee not commit another Federal, state or local crime, and a condition that the transferee not possess a firearm or other dangerous weapon are reasonably necessary in every case. These conditions, therefore, shall be imposed unless the Commission finds otherwise. The Commission may also impose special conditions of supervised release whenever deemed reasonably necessary in an individual case.

(2) If the transferee is released pursuant to a date established by the Bureau

28 CFR Ch. I (7-1-08 Edition)

of Prisons under 18 U.S.C. 4105(c)(1), then the period of supervised release commences upon the transferee's release from imprisonment.

[54 FR 27840, June 30, 1989, as amended at 55 FR 39269, Sep. 26, 1990; 58 FR 30705, May 27, 1993; 59 FR 26425, May 20, 1994; 60 FR 18354, Apr. 11, 1995; 61 FR 38570, July 25, 1996; 61 FR 54096, 54097, Oct. 17, 1996; 62 FR 40270, July 28, 1997. Redesignated at 63 FR 39176, July 21, 1998, and amended at 67 FR 70694, Nov. 26, 2002; 73 FR 12637, Mar. 10, 2008]

§2.69 [Reserved]

Subpart C—District of Columbia Code: Prisoners and Parolees

SOURCE: 65 FR 45888, July 26, 2000, unless otherwise noted.

§2.70 Authority and functions of the U.S. Parole Commission with respect to District of Columbia Code offenders.

(a) The U.S. Parole Commission shall exercise authority over District of Columbia Code offenders pursuant to section 11231 of the National Capital Revitalization and Self-Government Improvement Act of 1997, Public Law 105-33, 111 Stat. 712, and D.C. Code 24-409. The rules in this subpart shall govern the operation of the U.S. Parole Commission with respect to D.C. Code offenders and shall constitute the parole rules of the District of Columbia, as amended and supplemented pursuant to section 11231(a)(1) of the Act.

(b) The Commission shall have sole authority to grant parole, and to establish the conditions of release, for all District of Columbia Code prisoners who are serving sentences for felony offenses, and who are eligible for parole by statute, including offenders who have been returned to prison upon the revocation of parole or mandatory release. (D.C. Code 24-404 and 408). The above authority shall include youth offenders who are committed to prison for treatment and rehabilitation based on felony convictions under the D.C. Code. (D.C. Code 24-904(a).)

(c) The Commission shall have authority to recommend to the Superior Court of the District of Columbia a reduction in the minimum sentence of a District of Columbia Code prisoner, if