

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 August 2023

DOCKET NUMBER: AR20230001717

APPLICANT REQUESTS:

- constructive credit for service obligation associated with the Transfer of Education Benefits under the Post 9/11 G.I. Bill
- debt remission from previously disbursed educational benefits

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Legal counsel letter
- Power of Attorney
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 31 August 2019
- Compilation of service records
- Department of Defense, Manpower Data Center letter, 8 November 2016
- DA Form 2339 (Application for Voluntary Retirement), 17 December 2018
- Department of Veterans Affairs (DVA) letter, 28 October 2020
- DVA letter, 23 June 2021
- Military Personnel (MILPER) Message Number 16-283, 29 September 2016
- Self-authored letter, 24 June 2022
- Physician letter, 26 December 2017

FACTS:

1. On behalf of the applicant, counsel states in pertinent part that the applicant served on active duty for over 23 years. The applicant completed a TEB election on 8 November 2016 and agreed to fulfill the required service obligation of 4-years. However, in 2016, a change in policy regarding the maximum years of service allowed per rank precluded the applicant from completing his TEB service obligation prior to retiring.

a. In 2007, the applicant, at the rank of staff sergeant (SSG)/E-6, reenlisted for an indefinite period. The endorsed contract provided that the period of enlistment would last until the applicant reached his Retention Control Point (RCP), which for him, at the

rank of SSG would be 28 February 2018. The applicant retired from military service on 31 August 2019.

b. In 2016, the Army changed the RCP for enlisted Soldiers, reducing the maximum years of service a sergeant first class (SFC)/E-7 could serve. For Soldiers in the rank of SFC, with a Basic Active Service Date (BASD) of 2 April 1994 or later, their RCP would be 24 years. This change in RCP precluded the applicant from promotion consideration.

c. In 2019, MILPER Message Number 16-283 was released re-extending the applicant's RCP, but still prevented him from promotion consideration. This message specifically addressed previous TEB elections. For service members who served more than 10 years as of the transfer date but could not complete the additional time in service obligation due to the policy change, these service members would be required to serve the maximum amount of time permitted. Further, the U.S. Army Human Resources Command (AHRC) would change the respective service obligation end dates no later than 15 October 2016. At the time of this change, the applicant had already submitted his request for retirement based on his previous RCP.

d. During this period, the applicant and his family were struggling with some health concerns, a hardship, that also caused the applicant to retire. His parents and father-in-law requested that he return home to assist them with addressing the challenges associated with their health concerns. The applicant inquired about the need to submit a waiver permitting him to go home to assist his family with this hardship. The applicant also submitted a request to be compassionately reassigned. His request was approved by several levels of command except for the medical command who stated that the medical justification did not have an estimated resolution date. His leadership suggested that he simply retire. During his transition process, the applicant was advised by members of his leadership, the career counselor, and the transition specialist that he "had no further service obligation and could retire at any time without penalty."

e. On 28 October 2020, the applicant received a letter from the VA indicating that he had a debt associated with his dependents use of educational benefits. Counsel contests that the letter inaccurately provides that the applicant failed to complete his service obligation. This letter also provides that the applicant could appeal the decision through this Board if his "discharge or release from active duty was due to a reduction in force or force shaping."

f. In conclusion counsel argues that the applicant reached his service limitations after he transferred his educational benefits to his dependents. He had the full intention to complete his required service time; however, the change in RCP forced him to retire earlier than expected. Once the applicant submitted his request for retirement, he determinately relied on agents of the Army to confirm he had no remaining service obligation time remaining. Counsel contests that the Department of Defense and VA

agencies communicate with each other thus the Army should have been aware of any obligatory time that the applicant had remaining. However, the applicant was advised that he had no further service obligation. If this Board still believes that the applicant failed to complete his service obligation time then the hardship that the applicant was experiencing due to his own health, and the health of both his parents and in-laws must extinguish any obligation time remaining. Counsel's argument is further provided in its entirety within the supporting documents for the Board's review.

2. A review of the applicant's available service records reflects the following:

a. On 2 February 1996, the applicant enlisted in the Regular Army to serve as a 92R (Parachute Rigger).

b. Following multiple reenlistments, on 23 February 2007, the applicant reenlisted indefinitely. DD Form 4 (Enlistment/Reenlistment Document – Armed Forces of the U.S.) completed at the time of this reenlistment provides acknowledgment by the applicant that would be permitted to serve up to the RCP for his current rank (SSG) which is 28 February 2018. Further the applicant acknowledged that if he was promoted, reduced, or became ineligible for continued service that he may be further retained or separated.

c. On 25 June 2009, AHRC issued Orders Number 176-306 announcing the applicant's promotion to SFC, effective 1 July 2009.

d. On 10 January 2019, the applicant voluntarily submitted his request for retirement. Submitted with this request is DA Form 2339 (Application for Voluntary Retirement) wherein item 23 provides that the applicant has not incurred a service obligation.

e. On 5 February 2019, AHRC approved the applicant's request for retirement to be effective on 1 September 2019.

f. On 7 February 2019, Installation Management Command – Europe issued Orders Number 038-0001 reassigning the applicant to the transition center pending separation processing.

g. On 31 August 2019, the applicant was retired from military service under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 12 (Retirement for Length of Service), having completed 23 years, 6 months, and 29 days of active federal service.

3. The applicant provides the following:

a. Compilation of service records including previous awards, performance evaluations, duty assignments etc. These documents are provided in their entirety for the Board's review within the supporting documents.

b. Department of Defense, Manpower Data Center letter dated 8 November 2016, reflective of the applicant being advised that his TEB request had been approved. Paragraph 4 provides that it is imperative that the applicant remains in the Armed Forces until he reached his service obligation date (22 September 2020). Should he fail to complete his service obligation, any transferred entitlement used as of the date of such failure shall be treated as an overpayment of educational benefits and shall be subject to collection by the DVA.

c. DVA letter dated 28 October 2020, reflective of the applicant being advised of a \$50,593.43 debt as the result of an overpayment of educational benefits previously paid on his behalf to a university based upon his dependents enrollment on 23 January 2017 and 6 September 2017. The Department of Defense (DoD) determined that the applicant failed to complete his military service agreement and therefore terminated his educational benefits effective 31 August 2019. The applicant was further advised that the DoD determination could only be overturned by the DoD. The applicant was provided with several potential qualifying exceptions, two of which are "discharge or release from active duty or the Selected Reserve, with an honorable discharge due to reduction in force or force shaping initiative resulting from a decision by the Secretary of a Military Department" and "failure to be selected for promotion as an enlisted Service member and being separated under service high-year tenure or retention control point policies (or a change in these policies)."

d. DVA letter dated 23 June 2021, reflective of a summary of the applicant's benefits currently being received from the DVA.

e. MILPER Message Number 16-283 dated 29 September 2016, reflective of a change to the RCP for enlisted Soldiers serving in the Regular Army, effective 1 October 2016. For service members in the rank of SFC with a BASD of 2 April 1994 or later, they would be permitted to serve for 24 years on active duty. The applicant notes that this was previously 26 years. Paragraph 6 provides that in order to maintain TEB, Soldiers who have served at least 10 years as of the TEB request date and cannot complete the required 4 additional years due to the new RCP, they must serve for the maximum amount of time allowed by the RCP. HRC would change the respective service obligation end dates no later than 15 October 2016. Soldiers should verify their adjusted obligation end date within milConnect. Paragraph 7 provides that Soldiers who received an incentive for a specific service obligation and separate prior to completing their service obligation are subject to recoupment of the unearned portion of the incentive.

f. Self-authored letter dated 24 June 2022, reflective of the applicant's contention with the validity of the DVA decision to terminate his TEB and recoupment of previously disbursed benefits. In addition to the opening remarks to this Board, the applicant notes that he intended to remain in service until 29 February 2021. This document is further provided in its entirety within the supporting documents for the Board's review.

g. Physician letter dated 26 December 2017, reflective of the applicant's father-in-law's physician's statement regarding complications experienced by the father-in-law in association with a stem cell transplant procedure conducted requiring the need for additional support with taking care of him. The applicant's wife requested that the applicant being compassionately reassigned to assist her with providing care to her father.

4. On 13 June 2023, AHRC, Chief, Education Incentives Branch, provided an advisory opinion recommending denial of the applicant's request noting that the applicant's TEB election was made on 23 September 2016; approved on 29 September 2016 with an obligation end date of 22 September 2020. The applicant was placed on the retired list on 1 September 2019. While the applicant was on active-duty, numerous Post 9/11 G.I. Bill TEB information sources were available to him after the TEB incentive became available in 2009. On 17 December 2018, the applicant stated on his DA Form 2399, item 23, that he did not have an incurred service obligation. AHRC approved his voluntary retirement on 5 February 2019 based upon the information that he provided on his voluntary retirement application. The applicant further stated that neither his Army Career Counselor nor the Transition Specialist informed him that he had a service obligation. It is not within our purview to speculate as to why they did not refer him to the TEB website. However, Transition Specialists are not provided access to the TEB website to view a Soldier's information as it is not within their scope of duty. Again, it is the Soldier's responsibility to check the status of his service obligation.

a. In counsel's argument to this Board, counsel notes that "the Army made a change to the regulation that prevented the applicant from meeting his service obligation and shortened his RCP." In addition, he was removed from contention for promotion even though he was most qualified for promotion and expected to be selected for promotion because of the reduction in time of service that caused him to fall out of qualification for promotion." The applicant was participating in the Noncommissioned Officer (NCO) Career Status Program since his reenlistment on 23 February 2007 as a SSG. This program allows for a reenlistment period of an "indefinite or unspecified" term. A Soldier in the NCO career status program has no actual Expiration Term of Service (ETS) date but is subject to RCP for the specific rank held. Generally, the Soldier can serve up to the RCP for his/her current rank, unless the Soldier requests earlier separation/ retirement or is separated or removed from active duty under other law or policies. The program also allows for a Soldier's promotion

which would then result in the RCP being automatically adjusted to the new rank; it is not a bar to promotion.

b. The applicant was promoted to SFC on 1 July 2009, while in this NCO Career Status Program. At the time of his TEB approval, he had an RCP of 28 February 2022, which would have been 26 years of service from his BASD of 28 February 1996. The applicant's additional service obligation would not have been affected by the change in MILPER Message Number 16-283 (Reduction of SFC RCP from 26 to 24 years) as per paragraph 4 a.(5), the applicant would have been "grandfathered-in" to the previous higher RCP.

c. On 5 June 2023, AHRC contacted the DVA regarding the applicant's debt. The DVA confirmed an incurred debt in the amount of \$50,593.43. Originally, the debt was assigned to his daughter but has since been transferred to the applicant. The DVA then granted a waiver for a small portion of the debt, which brings the outstanding debt amount down to \$45,407.31.

5. On 20 June 2023, the applicant was provided with a copy of the advisory opinion and afforded 15 days to provide comments. As of 20 July 2023, the applicant or counsel had not responded.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered applicant's contentions, the military record, and regulatory guidance. At the time of his TEB approval, the applicant had an RCP of 28 February 2022, which would have been 26 years of service from his BASD of 28 February 1996. Based on that date, the Board agreed that he was otherwise eligible to retain his original higher retention control point, thus eligible for the transfer of educational benefits to his daughter. Based on the preponderance of the documentation available for review, the Board determined the evidence presented sufficient to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected to show the applicant timely filed and the Army approved his application to transfer his unused education benefits to his eligible dependent(s) in accordance with the Transfer of Education Benefits provisions of the Post-9/11 GI Bill.
2. The Board further determined that as the applicant is eligible for the transfer of education benefits to his child, any remaining debt should be waived and any monies recouped, repaid. The exact amount of which to be determined by DFAS.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Public Law 110-252 limits the eligibility to transfer unused benefits to those members of the Armed Forces who are serving on active duty or a member of the Selected Reserve.

a. A Soldier must be on active duty or a member of the Selected Reserve at the time of transfer of educational benefits to his or her dependent on or after 1 August 2009.

b. A Soldier must have at least 6 years of eligible service in order to transfer educational benefits to a spouse and at least 10 years of eligible service to transfer to eligible children.

c. A Soldier may only transfer to eligible family members. To be considered an eligible family member the spouse or child must be enrolled in the DEERS.

d. A Soldier must also agree to serve the prescribed additional service obligation based on the time in service the Soldier had on 1 August 2009.

e. A Soldier should not be granted relief based on unawareness of the law, program rules, or procedures unless he or she left the service during the implementation phase which is the first 90 days of the program.

f. A Soldier must have initially requested to transfer benefits on the DOD TEB online database. The TEB online database was operational 29 June 2009. Once approved in the TEB online database by the Soldier's service, the approval information is automatically relayed electronically to the VA for their access.

2. Army Regulation 621-202 (Army Educational Incentives and Entitlements) paragraph 4-15 (Transferability of Unused Benefits to Dependents) provides that Soldiers may elect to transfer their Post 9/11 G.I. Bill education benefits to their spouse, one or more of their children, or a combination of spouse and children through the TEB website. TEB is neither an entitlement nor a transition benefit but was specifically identified by statute as a tool for recruitment and retention of the career force. Soldiers must have at least 6 years of eligible service (qualifying active duty or SELRES) in the Armed Forces on the date of election and agree to serve 4 additional years from the date of request, regardless of the number of months transferred. Soldiers who are not eligible to commit to 4 additional years of service from the TEB request date are not eligible to transfer benefits.

a. Soldiers who fail to fulfill the TEB service obligation will have the previously approved TEB rejected and the Soldier and dependent may incur an overpayment debt

from the DVA. In the event of an overpayment of educational assistance with respect to a dependent to which entitlement is transferred, the dependent and the Soldier making the transfer may be jointly liable for the amount of the overpayment. The DVA is responsible for recouping overpayment of benefits.

b. Authorized exceptions for failure to complete TEB service agreement - If a Soldier fails to complete the service agreement for reasons other than those listed below, the amount of any transferred entitlement used by the dependent shall be treated as an overpayment of educational assistance and will be subject to the recoupment by the DVA. Exceptions are as follows:

- death of the Soldier
- discharge or release from the Army for a medical condition, which pre-existed the service of the Soldier and was not service connected
- discharge or release from the Army for hardship
- discharge or release from the Army for a physical or a mental condition not characterized as a disability, and which did not result from the Soldier's own willful misconduct
- discharge or release from the Army for a disability
- involuntary discharge or release through a service force-shaping or reduction in force initiative when the TEB request resulting in an approved TEB request is before the effective date of this regulation and before the convening date of the following boards:
 - i. service force-shaping or reduction in force (Qualitative Service Program, Qualitative Retention Board, Selective Early Retirement Board, Selective Retention Board or Release from Active Duty)
 - ii. these exceptions do not apply to Soldiers who voluntarily retire or separate in lieu of consideration by any separation/ retirement board and will result in TEB rejection if their established separation/retirement date is before the TEB Obligation End Date

3. AR 600-4 (Remission or Cancellation of Indebtedness) in accordance with the authority of Title 10 USC, section 4837, the Secretary of the Army may remit or cancel a Soldier's debt to the U.S. Army if such action is in the best interests of the United States. Indebtedness to the U.S. Army that may not be canceled under Title 10 USC, section 4837 when the debt is incurred while not on active duty or in an active status.

4. The ABCMR cannot cancel or remit a debt established by the VA. The debt must be addressed by the VA.

//NOTHING FOLLOWS//