DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 2000-156

FINAL DECISION

[redacted] Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on July 5, 2000, upon the BCMR's receipt of the applicant's complete application for correction of his military record.

This final decision, dated May 31, 2001, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, an [redacted]; pay grade E-6), asked the Board to correct his record to show that he "enrolled in the V.E.A.P. [Veteran's Education Assistance Program] program, because [he] would have enrolled in the . . . program, had he been properly counseled." The applicant stated that he had never been counseled or given an opportunity to participate in any educational program.

The applicant stated that he discovered the alleged error on June 2, 2000. He stated that in the interest of justice the Board should waive the three-year statute of limitations and consider his application because "I have served over 18 1/2 years of honorable service, and have no educational benefits available."

On January 30, 1979, the applicant enlisted in the Coast Guard. He was discharged on June 29, 1983, after having served four years and five months on active duty. The DD Form 214 (active duty discharge document) for this period contains the applicant's signature and states that the applicant did not contribute to VEAP. After a break of approximately three-years, the applicant reenlisted in the active duty Coast Guard for three years on June 18, 1986. He has served continually since that time.

Views of the Coast Guard

On December 21, 2000, the Chief Counsel of the Coast Guard recommended that the applicant's request for relief be denied. He stated that no error or injustice occurred in this case.

The Chief Counsel stated that the applicant alleged that the Coast Guard failed to counsel him of his right to participate in the Veteran's Educational Assistance Program (VEAP) during the initial period the program was in effect or during the subsequent open enrollment period of October 28, 1986 through March 31, 1987. The Chief Counsel stated that the applicant failed to prove that the Coast Guard had a duty to provide him with VEAP eligibility counseling. He stated that the Coast Guard had no duty to individually counsel members regarding their VEAP educational eligibility or to document such counseling. He stated that 'the only informational requirement . . . was promulgated in ALCOAST 056/98 which instructed units to have members initial a roster indicating whether they intended to participate in VEAP as part of the temporary reopening." The Chief Counsel stated that to the best of his knowledge these roster lists are no longer maintained by the Coast Guard. Therefore, he stated that under the presumption of regularity, the Coast Guard is presumed to have properly executed its duties under ALCOAST 056/98.

The Chief Counsel stated that the applicant had two opportunities to enroll in the VEAP education program.

> These two opportunities were: 1) from 01 January 1977 through [30 June 1985] (when VEAP expired) the applicant could have signed up for VEAP, and; 2) from 28 October 1986 through March 1987 when, per ALCOAST 056/86, the VEAP program was "reopened" for those members entering active duty between 01 January 1977 and [30 June1985]. In the instant case, there is no evidence that the Applicant ever exercised his option to enroll during either of those two periods. The applicant was personally responsible for determining his eligibility as to this program and his failure to exercise due diligence or to properly exercise his options in the 1985 through 1987 time period cannot now serve as a basis for the relief he requests.

The Chief Counsel also argued that this claim is more than 13 years old and should be barred by the doctrine of laches. The Chief Counsel further stated:

> The Board's enabling statute, 10 U.S.C. §1552, provides that the Secretary, acting through boards of civilians, may correct a military record "when he considers it necessary to correct an error or remove an injustice." Thus, the Secretary is not compelled to correct a record, but may exercise considerable discretion in determining whether such a correction is "necessary" to make the applicant whole. In this present case, the Board

should decline to grant relief based on the doctrine of laches. . . .

This alleged "error" occurred over thirteen years ago and is now nearly impossible to confirm independently from the Applicant's allegations. Applicant took no action to correct the alleged "error" then, and instead waited over twelve years to challenge it before the BCMR. Where an applicant's unexcused delay has caused substantial prejudice to the government, the claim for relief is generally barred under the doctrine of laches. See, e.g. Sargisson v. United States, 12 Cl. Ct. 539, 542 (1987). . . .

In the present case, the Coast Guard's ability to reconstruct the relevant evidence on this case has been severely hampered by the presumed destruction of key unit documents that have been destroyed or disposed of per paperwork disposition regulations. See, e.g. Paperwork Management Manual, COMDTINST M5212.12. (Most documents may be destroyed after 3 years.) Therefore, considering the substantial delay between the "error" and date of application in this case and that the Applicant has the burden of production and proof, the Board should dismiss Applicant's claim with prejudice.

Applicant's Response to the Views of the Coast Guard

On December 21, 2000, a copy of the views of the Coast Guard was sent to the applicant for a reply. He did not submit a response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the applicant, and applicable law

1. The Board has jurisdiction to determine the issues in this proceeding under section 1552 of title 10, United States Code. The application is timely pursuant to Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994).

2. The applicant had two opportunities to sign up for VEAP: 1) from January 1, 1977 through June 30, 1985 and 2) from October 28, 1986 to March 31, 1987 (an open enrollment period). The applicant has not presented any evidence showing that he signed up or attempted to sign up for this program. However, the DD Form 214 the applicant received upon his discharge from his first active duty enlistment period stated that the applicant had not participated in VEAP. This should have put the applicant on notice that he did not have any education benefits available to him.

3. To the Board's knowledge, neither the law nor the regulation pertaining to VEAP required that counseling as to educational benefits be recorded in service records.

There was nothing in the initial law that required service members to be individually counseled about it. See Chapter 32 of title 38 of the United States Code.

4. However, in legislation creating an open enrollment period for eligible VEAP members, from approximately November 14, 1986 until April 1, 1987, Congress imposed a duty on the services to notify eligible members. This open enrollment period applied to those members who entered the Service prior to July 1, 1985. Section 309(d) of Pub. L. 99-576 provided: "[T]he Secretary of Transportation . . . shall carry out activities for the purpose of notifying, to the maximum extent feasible, individuals [who were eligible to enroll in the program on June 30, 1985] of the opportunity [to enroll in the program by April 1, 1987]." According to the Chief Counsel, the Coast Guard chose to ensure that members were informed of the VEAP open enrollment period by having each member initial next to their names on a unit roster as directed by ALCOAST 056/98. The Chief Counsel has indicated that these rosters are no longer available. However, under the presumption of regularity, Coast Guard officials are presumed, in the absence of substantial evidence to the contrary, to have properly executed their duty under ALCOAST 056/98.

5. The only evidence offered by the applicant to rebut the presumption that the Coast Guard properly carried out its responsibilities under the law and regulation is his declaration under penalty of perjury that he was not counseled about VEAP. The Board finds the applicant's declaration, without other corroborating evidence of the Coast Guard's failure to inform him of VEAP or to comply with requirement of ALCOAST 056/98, insufficient to rebut the presumption of regularity in this case. Therefore, the applicant has failed to prove error or injustice in this case.

6. In light of the above findings, the Board does not find it necessary to reach a decision with respect to the Chief Counsel's assertion that the case should be denied because of laches.

7. Accordingly, the applicant's request should be denied.

ORDER

The application of [redacted] USCG, for the correction of his military record is denied.

[redacted]