


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-131

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION


This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The case was docketed on August 18, 2003, upon the BCMR's receipt of the applicant's completed application and military records.

This final decision, dated April 29, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his records to make him eligible for educational benefits under the Veterans' Educational Assistance Program (VEAP).¹ He alleged that he was "never notified about reinstatement period for VEAP education benefits." The applicant alleged that he discovered the error on May 15, 2003.

SUMMARY OF THE RECORD

On April 27, 1978, the applicant enlisted in the Coast Guard Reserve under the Delayed Entry Program for a term of six years. On May 15, 1978, he enlisted for four years duty as a member of the regular Coast Guard. He was released into the Reserve on May 14, 1982. His DD 214 indicates that he did not contribute to VEAP during the

¹ 38 U.S.C. § 3201. Money deposited by a servicemember in a VEAP account is matched 2 to 1 by the government. On July 1, 1985, VEAP was replaced by the Montgomery G.I. Bill, under which funds deposited in an MGIB account are matched approximately 12 to 1. 38 U.S.C. § 3001.

enlistment.

The applicant has remained a member of the Reserve. From September 14, 2001, to June 16, 2002, he served on extended active duty, providing food service to people working at the World Trade Center disaster site. The DD 214 issued to document this 9-month and 3-day period of active duty indicates that he had previously completed a total of 4 years, 11 months, and 3 days² of active duty and 18 years, 5 months, and 16 days of inactive duty.

VIEWS OF THE COAST GUARD

On December 31, 2003, the Judge Advocate General (TJAG) of the Coast Guard recommended that the applicant's request for relief be denied.

TJAG stated that the applicant failed to contribute to VEAP during his period of active duty. He further stated that there was no requirement at the time for members' notification of VEAP to be documented in their records.³

TJAG argued that the Board should deny relief in this case because the applicant failed to submit a timely application. He stated that although the applicant alleged that he did not discover the error in his record until 2003, he provided "no explanation for this implausible assertion." TJAG pointed out that 33 C.F.R. § 52.22 states that an application "must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error or injustice." He argued that in this case, the applicant reasonably should have discovered the alleged error in his records no later than his release from active duty on May 14, 1982, when he received his DD 214. Therefore, he argued, the application was untimely.

TJAG also argued that the applicant has "failed to show why it is in the interest of justice to excuse the delay" because he failed to explain his delay in seeking the record correction and failed to submit any evidence "that he ever chose to participate in the VEAP program or that the Coast Guard violated any sort of duty to inform him of changes to a program he did not participate in while on active duty subsequent to his discharge in 1982." TJAG argued that the Coast Guard is entitled to the presumption of regularity and that the applicant has not met his burden of production or persuasion to overcome that presumption.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

² In addition to his original 4-year enlistment, this total includes 11 months and 3 days of accumulated short-term active duty periods (ADSW) that the applicant has performed while in the Reserve.

³ Today, members are automatically enrolled in the MGIB upon their enlistment unless they opt out in writing. MGIB counseling must be documented at the time of enlistment.

On January 20, 2004, the Chairman sent the applicant a copy of the Judge Advocate General's advisory opinion and invited him to respond within 30 days. The applicant did not respond.

APPLICABLE LAW

Under 38 U.S.C. § 3201, one of the purposes of VEAP was "to provide educational assistance to those men and women who enter the Armed Forces after December 31, 1976, and before July 1, 1985." The statute also states that "[e]ach person entering military service on or after January 1, 1977, and before July 1, 1985, shall have the right to enroll in the educational benefits program provided by this chapter ... at any time during such person's service on active duty before July 1, 1985." 38 U.S.C. § 3221.

On November 14, 1986, the Commandant issued ALCOAST 056/86, concerning VEAP. The ALCOAST announced a new enrollment period for members who first enlisted between January 1, 1977, and June 30, 1985, but who failed to enroll in VEAP during that time. The new enrollment period lasted until March 31, 1987. The ALCOAST included the following instructions:

3. Personnel Reporting Units will be provided with a list of eligible personnel. This listing will be forwarded to the units. Eligible members shall sign the roster indicating their intention to participate or not. Personnel absent from the unit shall be so noted with their current status. New personnel and personnel present on [temporary active duty] shall be added to the list by the unit. The completed list shall be forwarded by the unit to Commandant {G-PE-3}.
4. Commanding officers and officers in charge shall assure that this information is brought to the attention of all personnel.

The Paperwork Management Manual, COMDTINST M5212.12, dictates that such unit records may be destroyed after three years.

The Coast Guard does not administer VEAP accounts. VEAP accounts are administered by the DVA. *See* 38 U.S.C. § 501(a) and 38 C.F.R. § 21.5001. Since the enactment of the Montgomery G.I. Bill in 1985, Congress has allowed members who participated in VEAP to convert their accounts to MGIB accounts.⁴

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and appli-

⁴ *See* Veterans' Benefits Improvements Act of 1996, Pub. L. 104-275 (October 9, 1996).

cable law:

1. The Board has jurisdiction over this matter pursuant to the provisions of 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. Although the applicant alleged that he did not discover the alleged error until 2003, the record indicates that he knew or should have known of his non-enrollment in VEAP at the latest upon receipt of his DD 214 in 1982. Even if the applicant is alleging that he was never notified of the enrollment period under ALCOAST 056/86, the Board finds that he reasonably should have discovered the alleged error much earlier. The applicant's failure to investigate the rules of VEAP eligibility for more than fifteen years does not toll the Board's statute of limitations. Therefore, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case and consider the reasons for the delay. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant failed to explain his unnecessary delay in seeking enrollment in VEAP.

5. The applicant has failed to submit any evidence to prove that his non-enrollment in VEAP is an error or injustice in his record. The record indicates that he did not participate in VEAP by contributing a portion of his basic pay during his enlistment on active duty from May 15, 1978, to May 14, 1982. Regarding the enrollment period from November 14, 1986, to March 31, 1987, under ALCOAST 056/86, any notification the applicant received would have been destroyed long ago along with other unit records in accordance with the rules in the Paperwork Management Manual, COMDTINST M5212.12. Absent evidence to the contrary, the Board presumes that Coast Guard officials performed their duties with respect to VEAP "correctly, lawfully, and in good faith."⁵ The applicant has submitted no evidence to overcome this presumption of regularity. Therefore, the Board finds that the applicant's allegation of error lacks merit and that it is not in the interest of justice to waive the statute of limitations in this case.

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

⁵ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992), and *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

