

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-177

██████████
██████████ ██████████

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 Chair docketed the application upon receipt of the applicant's completed application on June 26, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c), with the assistance of staff member ██████████

This final decision, dated March XX, 2013, 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, who retired as a ██████████ after serving more than 20 years on active duty in the Coast Guard, asked the Board to correct his record to show that he transferred his benefits under the Post-9/11 Veterans Education Act of 2008 (Post-9/11 GI Bill)¹ to his dependent son before retiring from active duty. He stated that he was stationed in Louisiana fighting the Deep Water Horizon² oil spill when information about the Post-9/11 GI Bill was first disseminated, but that details about the program "were simply not fed down to us." The applicant alleged that when he asked his Education Services Officer (ESO) about transferring his benefits to his son, he was told that he would not have to extend his enlistment to transfer those benefits. He stated, however, that a few weeks before retiring he was told by someone else that he would have to "do more time in service" if he wanted to transfer his Post-9/11 GI Bill educational benefits to his son. He did not transfer his Post-9/11 GI Bill educational benefits to his son before he retired from active duty.

¹ The Post-9/11 GI Bill provides financial support for education and housing to individuals with at least 90 days of aggregate service after September 10, 2001, or individuals discharged with a service-connected disability after 30 days. An individual must have received an honorable discharge to be eligible for the Post-9/11 GI Bill, http://gibill.va.gov/benefits/post_911_gibill/index.html

² On April 20, 2010, while drilling at the Macondo Prospect, an explosion on the *Deepwater Horizon* caused by a blowout killed 11 crewmen and ignited a fireball visible from 35 miles away. The resulting fire could not be extinguished and, on April 22, 2010, *Deepwater Horizon* sank, leaving the well gushing at the seabed and causing the largest offshore oil spill in U.S. history, http://en.wikipedia.org/wiki/Deepwater_Horizon.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 6, 1991, and although he was retirement eligible on August 6, 2011³, he retired on April 30, 2012, after serving nearly 21 years of active military service. He did not transfer his Post-9/11 GI Bill educational benefits to his dependent son before he retired, and there is nothing in the record to show that the Coast Guard counseled him about his Post-9/11 GI Bill educational benefits or his eligibility to transfer his educational benefits before his retirement.

VIEWS OF THE COAST GUARD

On December 27, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief because the applicant did not receive individual pre-separation counseling related to his Post-9/11 GI Bill benefits. The JAG noted that in BCMR Docket No. 2012-054, the Board held that the absence of individual, documented counseling on the Post-9/11 GI Bill program is sufficient to justify granting relief. The JAG stated that based on the applicant's assignment history, it is likely that he was counseled by the ESO about his Post-9/11 GI Bill benefits sometime during the Spring/Summer of 2010, which was approximately 2 years prior to the applicant's retirement. However, the JAG opined that the information the applicant received from the ESO may have been erroneous. The JAG also noted that if the applicant was indeed told by his ESO that he did not need to obligate additional service to transfer his benefits, then "he would have been less likely to further investigate the matter of his ability to transfer his Post-9/11 GI Bill."

The JAG adopted the facts and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC), and PSC recommended not granting relief. The PSC argued that although the applicant claimed that he did not receive accurate information about the transfer program prior to his separation, the Coast Guard released five official notifications regarding benefit transferability to dependents before the applicant separated from the service. The PSC argued that the "applicant's argument that he was miscounseled or misinformed is therefore without merit."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2013, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. He responded on January 10, 2013, and indicated that he agreed with the Coast Guard's recommendation.

APPLICABLE LAW AND REGULATIONS

Directive Type Memorandum (DTM) 09-003, June 22, 2009

On June 22, 2009, DoD set forth the policies and procedures for carrying out the Post-9/11 GI Bill in DTM 09-003. The DTM states that it is effective immediately and that it is

³ Article 1.C.10.a. of the Coast Guard Separations Manual provides that "at the Commandant's discretion, any enlisted member who has completed 20 years of service may retire from active service (14 U.S.C. §355)."

applicable to the Office of the Secretary of Defense and the Military Departments including the Coast Guard by agreement with the Department. The regulation defined “Military Services” as the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Paragraph 3.a.(3) of Attachment 2 (Procedures) states that members eligible to transfer education benefits includes those members in the Armed Forces who are or become retirement eligible from August 1, 2009, through August 1, 2013, and agree to serve the additional period, if any, specified in paragraphs 3.a.(3)(a) through 3.a.(3)(e) of this attachment. A Service Member is considered to be retirement eligible if he or she has completed 20 years of active Federal service or 20 qualifying years as computed under section 12732 of Reference (b).

Paragraph 3.a.(3)(e) of Attachment 2 states that for those members who have an approved retirement date after August 1, 2011, and before August 1, 2012, three years of additional service is required.

Paragraph 3.b. of Attachment 1 (Responsibilities) to the DTM states that the Secretaries of the Military Departments shall “Ensure that all eligible active duty members . . . are aware that they are automatically eligible for educational assistance under the Post-9/11 GI Bill program upon serving the required active duty time established in Chapter 33 of [title 38 of the United States Code].”

Paragraph 3.g. of Attachment 1 states that the Secretaries of the Military Departments shall “provide active duty participants . . . with qualifying active duty service individual pre-separation or release from active duty counseling on the benefits under the Post-9/11 GI Bill and document accordingly.”

Paragraph 3.g.(1) of Attachment 2 (Time of Transfer) states that an individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement to the individual’s family member only while serving as a member of the armed forces.

Paragraph 3.j.(1) of Attachment 2 (Regulation) states that the Secretary of Defense, in coordination with the Secretary of Veterans Affairs, shall prescribe regulations for purposes of this section. (2) Such regulations shall specify □ (A) the manner of authorizing the transfer of entitlement under this section; (B) the eligibility criteria in accordance with subsection (b); and (C) the manner and effect of an election to modify or revoke a transfer of entitlement under subsection (f)(2).

DTM 09-003 Glossary

“Member of the Armed Forces. For the purpose of this DTM, those individuals serving on active duty or in the Selected Reserve. Does not include other members of the Ready Reserve (such as the Individual Ready Reserve, standby Reserve, or retired members of the Armed Forces).”

Secretary of the Military Department concerned . . . For a member of the Coast Guard, when the Coast Guard is operating as a Service of the DHS, the term means, “the Secretary of Homeland Security has jurisdiction over the service member.”

Coast Guard ALCOAST 377/09, June 26, 2009

The Coast Guard released ALCOAST 377/09 on June 26, 2009 (internet release was authorized) announcing the Department of Defense and Coast Guard policy concerning Post-9/11 GI Bill benefits and the transferability of unused benefits to family members. Paragraph 6 of the ALCOAST states that to be eligible to transfer unused education benefits to a family member, an individual must be a member of the armed services (active duty or selected reserve) on or after August 1, 2009. Paragraph 7.B. states that online applications for the transfer of benefits would be accepted beginning on June 29, 2009. The ALCOAST also states that the DVA is the authority for the Post-9/11 GI Bill, but that transferability policy is directed by the Office of the Secretary of Defense and the Under Secretary of Defense.

Precedent Decision Issued November 7, 2012

In BCMR Docket No. 2012-054, the Deputy General Counsel for the Department of Homeland Security affirmed the Board's decision that the Coast Guard erred when it did not provide individual pre-separation counseling to a retiring member about his Post-9/11 GI Bill benefits. In that case, the applicant was on terminal leave from June 30, 2009, until his retirement on October 31, 2009, and did not receive pre-retirement counseling on the Post-9/11 GI Bill prior to his retirement. The Board found that the Coast Guard committed an error by not providing individual, pre-separation counseling, as required by the DTM, which became effective on June 22, 2009. The instant case is similar, because the applicant alleged that the Coast Guard provided erroneous pre-separation counseling when it told him that he did not need to obligate more service before he could transfer his unused educational benefits.

Previous BCMR Decision Issued January 18, 2013

In BCMR Docket No. 2012-121, the Board cited facts similar to those in BCMR No. 2012-054, in which the Principal Deputy General Counsel approved the Board's findings that the Coast Guard committed an error by not counseling that applicant about his Post-9/11 GI Bill benefits prior to his retirement on October 31, 2009, as required by the DTM that became effective on August 1, 2009.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's retirement.⁴
2. The applicant asked the Board to correct his record to show that he transferred his educational benefits to his dependent son under the Veterans Educational Assistance Act of 2008,

⁴ 10 U.S.C. § 1552(b).

commonly referred to as the Post-9/11 GI Bill, which became effective on August 1, 2009.⁵ He alleged that he was eligible to do so but was erroneously counseled regarding the need to obligate additional service prior to his retirement. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁷

3. The applicant served on continuous active duty in the Coast Guard for more than 20 years until he retired on April 30, 2012. He stated that he spoke with his ESO after details about the Post-9/11 GI Bill transfer policy were released and alleged that he was told he did not need to obligate any additional service to transfer his educational benefits to his son prior to retiring. The applicant alleged that two years later and weeks before his retirement, he was told that he had to obligate more service if he wanted to transfer those benefits. He did not obligate additional service and retired without transferring his educational benefits to his son. After the applicant retired, he was no longer eligible to transfer his benefits.⁸

4. When the ESO counseled the applicant he should have told him that pursuant to Paragraph 3.a.(3) of Attachment 2 to DTM 09-003⁹, he needed to obligate an additional three years of service if he planned to retire between August 1, 2011, and August 1, 2012, and transfer his unused educational benefits before he retired.¹⁰ Moreover, the ESO should have documented that counseling in accordance with Paragraph 3.G. of Attachment 1 to the DTM instructions. There is no documentation or other evidence of individual, pre-separation counseling in the record, and the JAG admitted that the applicant did not receive proper, individual pre-separation counseling. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that he was not properly counseled about the Post-9/11 GI Bill.

5. The timeliness of the application persuades the Board that if the applicant had been timely counseled about his eligibility under the Post-9/11 GI Bill to transfer to his educa-

⁵ 38 U.S.C. § 3319(a) (authorizing eligible service members to transfer a portion of their entitlement to educational assistance to their eligible dependents); and § 3319(j) (directing the Department of Defense to prescribe implementing regulations on the transferability of educational benefits).

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ DTM 09-003, Attach. 2, para. 3.g.(1) ("An individual approved to transfer entitlement of educational assistance . . . may transfer such entitlement to the individual's family member only while serving as a member of the armed forces."); DTM 09-003, Glossary (defining members of the Armed Forces as those individuals serving on active duty or in the Selected Reserve and not including individuals in a retired status).

⁹ DTM 09-003, Attach. 2, para. 3.a.(3) (a member is eligible to transfer his benefits if he is or becomes retirement eligible during the period from August 1, 2009, through August 1, 2013, and agrees to serve the additional period, if any, specified in paragraphs 3.a.(3)(a) through 3.a.(3)(e) of this attachment. A Service Member is considered to be retirement eligible if he or she has completed 20 years of active Federal service or 20 qualifying years as computed under section 12732 of Reference (b)).

¹⁰ DTM 09-003, Attach. 1, para. 3.g. (requiring the Service to "provide active duty participants . . . with qualifying active duty service individual pre-separation or release from active duty counseling on the benefits under the Post-9/11 GI Bill and document accordingly.").

tional benefits to his son and the necessity of doing so before he retired, the applicant would have transferred his educational benefits to his son before he retired.

6. In a similar case, BCMR No. 2012-054, the Deputy General Counsel of the Department determined that DTM 09-003 requires the Coast Guard to counsel eligible individuals about their Post-9/11 GI Bill educational benefits before they separate and to document that counseling. Because the Coast Guard erred by failing to provide such counseling, the Deputy General Counsel approved the relief granted by the Board in that case, which was to correct the applicant's record to show that he had transferred his benefits to his dependents before he retired. Like the applicant in 2012-054, the applicant in this case was eligible to transfer his educational benefits before he retired, was entitled to counseling about his eligibility, and was not properly counseled nor was the counseling documented. The applicant in 2012-054 was eligible to transfer his benefits based on the date of his retirement and 20 years of service and this applicant is also eligible based on his date of retirement and more than 20 years of service. Therefore, the applicant in this case is entitled to the same relief that the applicant in 2012-054 received.

6. In its advisory opinion for this case, the Coast Guard recommended granting relief based on the reasoning of the Board's decision in BCMR No. 2012-054—that constructive notice through the issuance of ALCOASTs does not satisfy the counseling requirements in DTM 09-003. As the Board noted in its decision in 2012-054, a general announcement, such as an ALCOAST or ALDIST, does not equal individual pre-separation counseling,¹¹ and the Deputy General Counsel did not find that ALCOASTs satisfied the DTM's counseling requirements in 2012-054. Likewise in this case, the Board finds that the Coast Guard's issuance of ALCOASTs in 2008 and 2009 did not satisfy the applicant's entitlement to documented, individual, pre-separation counseling requirement under DTM 09-003.

7. Accordingly, the Board finds that the applicant has proven by a preponderance of the evidence that his record contains an error. He is entitled to relief.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹¹ See, e.g., BCMR Docket Nos. 224-87, 121-93 (decisions of the delegate of the Secretary holding that general messages, such as ALDISTs and ALCOASTs, do not satisfy the Coast Guard's requirement for documented, individual counseling about a member's eligibility for a selective reenlistment bonus).

ORDER

The application of [REDACTED], for correction of his military record is granted. His record shall be corrected to show that before retiring from active duty on April 30, 2012, he transferred his Post-9/11 GI Bill educational benefits to his eligible dependents. The Coast Guard shall assist him with the paperwork necessary to accomplish this transfer of benefits.

