DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-021

[redacted]

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 November 16, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated July 25, 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 retired from active duty as [redacted] effective January 1, 2009. He asked the Board to correct his record to show that he transferred his educational benefits under the Post-9/11 GI Bill[1] to his dependents prior to his retirement from the Coast Guard. He alleged that he did not receive any counseling about the Post-9/11 GI Bill benefits program prior to his retirement. The applicant stated that prior to retirement he was assigned to a small unit that did not have an education officer.

The applicant stated that he did not discover the alleged error until October 22, 2012. He stated that he originally contacted the Department of Veterans' Affairs (DVA) about the Post-9/11 GI Bill benefits in January 2012 and was told that he could not transfer any educational benefits to his dependents because he failed to do so while on active duty. He argued that even though he personally has fifteen years to use his Post-9/11 benefits, it is unjust to expect him to know at what point he will need to transfer his educational benefits to a dependent prior to retirement. He argued the policy is asinine. He stated that his son is currently enrolled in

[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. You 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

college and his wife is considering enrolling in a two-year degree program. He again argued that since he was never counseled on the Post/911 GI Bill benefits program, he should have relief.

As stated, the applicant asserted that he discovered the alleged error on October 22, 2012. He retired from active duty effective January 1, 2009 and submitted his application to the Board on November 5, 2012. Regarding the delay in submitting his application, the applicant stated that it is in the interest of justice to waive the untimeliness because he was told by certain college personnel that the DVA was not forthcoming about the policy on transferring educational benefits under the Post-9/11 GI Bill program. He stated that he could use the educational benefits to help his son and wife.

VIEWS OF THE COAST GUARD

On May 3, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG stated that he concurred with the analysis, conclusion, and recommendation in a memorandum from the Commander, Personnel Service Center (PSC), which was attached as an enclosure to the advisory opinion. PSC recommended that the application be denied and stated that the application was timely based on the date the applicant stated that he discovered the alleged error.

PSC stated that the Coast Guard informed personnel of the new Post-9/11 GI Bill program in ALCOAST[2] 447/08 that was issued on September 18, 2008. PSC noted that paragraph 3.G. of the ALCOAST specifically addressed the topic of transferability of benefits. PSC stated that the Coast Guard subsequently issued several more ALCOASTS on the new Post 9/11 GI Bill program, but admitted that since the applicant retired effective January 1, 2009, he likely did not view any of the subsequent messages on the Post-9/11 GI Bill program. PSC stated that on June 26, 2009, the Coast Guard issued ALCOAST 377/09 about the Post-9/11 GI Bill program and noted the Department of Defense implementing regulation on the transferability of educational benefits (Directive-Type Memorandum (DTM) 09-003 that was published and became effective on June 22, 2009). PSC further stated the following:

> In this particular instance, the applicant voluntarily retired from active duty on December 31, 2008. Under the implementing regulation for the Post-9/11 GI Bill, DTM 09-003 that applies to the Coast Guard, the applicant was not eligible to transfer his educational benefits to his dependents because he was not on active duty on or after August 1, 2009. (See BCMR [No.] 2012-120)[3]. As the

[2] ALCOAST - A notice containing information of an urgent nature, requiring a wide distribution within the Coast Guard and is transmitted via the Coast Guard Telecommunications System (CGTS). Coast Guard Telecommunications Manual (TCM), COMDTINST M2000.3C.

[3] In denying relief to the applicant in BCMR No. 2012-120, the Board made the following pertinent findings and conclusions (footnotes and paragraph numbering omitted):

> [T]he applicant asks for a correction of his record to show that he transferred his educational benefits to eligible dependents under the . . . Post-9/11 GI Bill. It was signed into law in June 2008 with an effective

applicant voluntarily retired from the service on 31DEC2008, the requirement(s) to be on active duty at the time of transfer as well as the obligated service requirement associated with the transfer of benefits to dependents was still mandatory. . . . Since the applicant was not on active duty at any point on or after June 22, 2009, the Coast Guard had no duty to counsel him about Post 9/11 GI Bill benefits prior to his 31DEC2008 retirement. (BCMR FD 2012-120).

Therefore the applicant is not entitled to relief. The applicant claims he was not counseled by his [education officer] that once retired he could not transfer any of his education benefits. However, the [Coast Guard] had no duty to counsel the applicant about the Post-9/11 GI Bill prior to his effective retirement date. The duty to counsel members about their Post 9/11 GI Bill benefits became effective on June 22, 2009, with implementation of the DTM. (BCMR FD 2012-120).

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of August 1, 2009 . . . On June 22, 2009, DoD issued Directive-Type Memorandum (DTM) 09-003 implementing regulations for transferring educational benefits to dependents.

Under the implementing regulation for the Post 9/11 GI Bill, DTM 09-003 that also applied to the Coast Guard, the applicant was not eligible to transfer of his educational benefits to his dependents because he was not on active duty on or after August 1, 2009. *See* paragraph 3.a of attachment 2 of the DTM. The applicant had retired effective December 1, 2008. The Glossary to DTM 09-003 states that for the purpose of the DTM regulation, members of the Armed Forces are "those individuals serving on active duty or in the Selected Reserve. [The term] does not include other members of the Ready Reserve (such as the Individual Ready Reserve, standby Reserve, or retired members of the armed forces.)" . . . The applicant was not on active duty on or after August 1, 2009 and is ineligible to transfer his educational benefits to his dependents.

The applicant argued that he was not aware of the Post-9/11 GI Bill and its benefits and should have been counseled about them prior to his retirement . . . The duty to counsel members about their Post-9/11 GI benefits became effective on June 22, 2009 with the implementation of the DTM . . . Since the applicant was not on active duty at any point on or after June 22, 2009, the Coast Guard had no duty to counsel him about Post-9/11 GI Bill benefits prior to his December 1, 2008 retirement.

In BMCR No 2011-227, the Board denied an applicant's request to correct her record to show that she was in the Selected Reserve instead of the Retired Reserve on June 1, 2008 so that she could transfer her educational benefits to her dependents under the Post 9-11 GI Bill. She also asserted that she was not counseled on the Post-911 GI Bill as required by regulation. The Board found the following in pertinent part:

The applicant was not a member of the SELRES on August 1, 2009, having been transferred to the IRR on January 24, 2004, about which there is no disagreement . . . Since she was not on active duty or in the SELRES at any point on or after August 1, 2009, there was no duty to counsel her because she was not eligible to transfer her education benefits.

Contrast BCMR 2012-054 where the Board granted relief because the Coast Guard committed an error in not counseling the applicant about his Post 9-11 GI Bill as required by the DTM which became effective on June 22, 2009. The applicant in this case was on active duty on August 1, 2009 and retired effective November 1, 2009. He was not counseled about his Post 9-11 GI Bill benefits as required by the DTM. [The Principal Deputy General Counsel for the Department approved the Board's grant of relief].

These policies and procedures became effective immediately and did not provide for retroactivity.

In agreeing with PSC, the JAG argued that the Board should apply the same reasoning in the present case as it did in BCMR No. 2012-120. The JAG stated that in that case the Board found that the applicant was not eligible to transfer his educational benefits to his dependents because he was not on active duty on or after August 1, 2009. *See also* Army BCMR No. AR 20120012138 (electing to deny relief to an Army applicant who retired on February 28, 2008, because that applicant was not a member of the Armed Forces on or after August 1, 2009).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 8, 2012, the Board sent a copy of the views of the Coast Guard to the applicant and invited him to submit a reply. The Board did not receive a response from the applicant.

APPLICABLE REGULATIONS

38 U.S.C. § 3319

Section 3319 to Title 38 states the following in pertinent part:

Subsection (a) states that subject to the provisions of this section, the Secretary concerned may permit an individual described in subsection (b) who is entitled to educational assistance under this chapter to elect to transfer to one or more of the dependents a portion of such individual's entitlement to educational assistance, subject to certain limitations.

Subsection (b) defines eligible individual as any member of the uniformed services who, at the time of the approval of the individual's request to transfer entitlement to educational assistance under this section, has completed at least—(1) six years of service in the armed forces and enters into an agreement to serve at least four more years as a member of the uniformed services; or (2) the years of service as determined in regulations pursuant to subsection (j).

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Subsection (f) states that an individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement only while serving as a member of the armed forces when the transfer is executed.

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Subjection (j) states that the Secretary of Defense, in coordination with the Secretary of Veterans Affairs, shall prescribe regulations for purposes of this section, which shall specify the manner of authorizing the transfer of entitlement under this section, the eligibility criteria, and the manner and effect of an election to modify or revoke a transfer of entitlement.

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

DoD set forth the policies and procedures implementing the Post-9/11 GI Bill in DTM 09-003. The regulation emphasized that the law became effective August 1, 2009 and the regulation became effective on June 22, 2009 and was 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, the Navy, Air Force, the Marine Corps, and the Coast Guard.

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 of 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.a. of Attachment 2 (Procedures) states that members eligible to transfer education benefits are those members in the Armed Forces on or after August 1, 2009 who have served a specific period of active duty and who agree to a further period of active duty. However, paragraph 3.a.(3)(b) states that for those members who have an approved retirement date after August 1, 2009, and before July 1, 2010, no additional service is required.

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 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)."

Pertinent Coast Guard ALCOASTS

ALCOAST 447/08

ALCOAST 447/08 was released on September 18, 2008, and provides a brief introduction of the Post-9/11 Veterans Education Act of 2008 (Post-9/11 GI Bill). Paragraph 3.g. states that a "member may have the opportunity to transfer benefits to their spouse or dependent children", and that detailed guidance will be released ahead of the August 2009 implementation date. [4]

ALCOAST 377/09

ALCOAST 377/09 was issued on June 26, 2009. Section 6 of the ALCOAST states that to be eligible to transfer unused education benefits, an individual must be a member of the armed forces (active duty or SELRES) on or after August 1, 2009 and obligate required service as outlined in DTM 09-003.

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.

2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant retired from the Coast Guard effective January 1, 2009, but stated that he did not discover the alleged error in his record until October 22, 2012, while speaking with a DVA representative about the Post-9/11 GI Bill. Although the Coast Guard had posted one ALCOAST about the post 9-11 GI Bill prior to the applicant's retirement, there is nothing in the record which shows that the applicant actually knew about the Post-9/11 GI Bill prior to his retirement. Insufficient evidence exists to rebut the applicant's contention that he was not aware of the Post-9/11 GI Bill until October 22, 2012. Therefore, his application to the BCMR is timely.

3. In his application, the applicant asks for a correction of his record to show that he transferred his educational benefits to eligible dependents under the Post-9/11 GI Bill that was signed into law in June 2008 with an effective of August 1, 2009. Section 3319(b) of title 38 of the United States code authorized eligible service members of the Uniformed Services to transfer a portion of their entitlement to educational assistance to their eligible dependents.[5] Subsection (j) directed the Department of Defense to prescribe implementing regulations on the transferability of educational benefits. On June 22, 2009, DoD issued Directive-Type

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[4] The Coast Guard also issued ALCOAST 444/09 on January 16, 2009 and ALCOAST 250/09 on April 28, 2009.

[5] Prior to subsequent statutory amendments, the term "Armed Forces" was used instead of the term "Uniformed Services."

Memorandum (DTM) 09-003 implementing regulations for transferring educational benefits to dependents. The DTM applied to the Coast Guard.

4. Under the implementing regulation for the Post-9/11 GI Bill, DTM 09-003, the applicant was not eligible to transfer of his educational benefits to his dependents because he was not on active duty on or after August 1, 2009. *See* paragraph 3.a of attachment 2 of the DTM. The applicant had retired effective January 1, 2009. The Glossary to DTM 09-003 states that for the purpose of the DTM regulation, members of the Armed Forces are "those individuals serving on active duty or in the Selected Reserve. [The term] does not include other members of the Ready Reserve (such as the Individual Ready Reserve, Standby Reserve, or retired members of the armed forces.)" Coast Guard ALCOAST 377/09 also states that "to be eligible to transfer unused education benefits, an individual must be a member of the armed forces (active duty or SELRES) on or after 1 August 2009 . . ." The applicant was not on active duty on or after August 1, 2009 and therefore is ineligible to transfer his educational benefits to his dependents.

5. The applicant argued that he was not aware of the Post-9/11 GI Bill and its benefits because he was not counseled about them prior to his retirement. The applicant has presented no evidence that the Coast Guard had a duty to counsel him about the Post-9/11 GI Bill prior to or on January 1, 2009, his effective retirement date. The duty to counsel members about their Post-9/11 GI benefits became effective on June 22, 2009 with the implementation of the DTM. The DTM states on page 3 that the "policies and procedures under this DTM are effective immediately" and it does not provide for retroactivity. DOD and the DVA had responsibility for developing and implementing the regulation for the transferability of education benefits and mandated individual pre-separation counseling as of June 22, 2009. Since the applicant was not on active duty at any point on or after June 22, 2009, the Coast Guard had no duty to counsel him about Post-9/11 GI Bill benefits prior to his January 1, 2009 retirement.

6. In BMCR No. 2011-227, the Board denied an applicant's request to correct her record to show that she was in the Selected Reserve instead of the Retired Reserve on June 1, 2008 so that she could transfer her educational benefits to her dependents under the Post 9-11 GI Bill. The Board determined that she was not eligible to transfer her educational benefits because she was not on active duty or in the Selective Reserve on August 1, 2009. She asserted that she was not counseled on the Post-9/11 GI Bill as required by regulation. The Board found that there was no duty to counsel her since she was not on active duty on August 1, 2009. *See also* BCMR No. 2012-120, where the Board denied an applicant's request to transfer his educational benefits because he was not on active duty on August 1, 2009; nor was he on active duty on June 22, 2009, when the DTM was issued requiring pre-separation counseling on Post-9/11 GI Bill benefits for eligible members.

7. Contrast BCMR No. 2012-054 in which the Board granted relief because the Coast Guard committed an error in not counseling the applicant about his Post-9/11 GI Bill as required by the DTM which became effective on June 22, 2009. The applicant in this case was on active duty on August 1, 2009 and retired effective November 1, 2009. He was not counseled about his Post-9/11 GI Bill benefits as required by the DTM. In granting relief, as approved by the Principal Deputy General Counsel for the Department, the Board found that under the DTM the Coast Guard had the responsibility to provide the applicant with individual pre-

separation/retirement counseling about the Post-9/11 GI Bill. Attachment 1 to the DTM states that Service Secretaries must "[p]rovide active duty participants and members of the Reserve Components 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*." [Emphasis added.]

8. Like the applicants in BCMR No. 2011-227 and BCMR No. 2012-120, the applicant in the current case was not eligible to transfer his educational benefits under the Post-911 GI Bill because he was not on active duty on or after August 1, 2009. He voluntarily retired from the Coast Guard effective January 1, 2009. Nor did the Coast Guard have a duty to provide him with individual pre-separation counseling about benefits under the Post-9/11 GI Bill prior to his retirement because he had retired when the regulation was issued.

9. Accordingly, the applicant has failed to prove an error or injustice in his record and his request should be denied.

ORDER

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

[redacted]