

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-009**



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**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 7, 2013, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 9, 2014, 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 from the Coast Guard on March 3, 2005, after serving 20 years on active duty in the Navy and the Coast Guard, asked the Board to correct his record to show that he transferred his Post-9/11 GI Bill<sup>1</sup> benefits to his dependent son prior to his retirement. He alleged that he had sufficient time in service to qualify for the benefit but that the program did not exist when he retired in 2005 and he would like to have the BCMR "correct this error." In support of his application, he stated:

So, I retired from the USCG in March of '05, after completing 8 years US Navy and 12 years USCG. The Chapter 33, Post-9/11 benefits I seek were drafted in August of 2009, and were unknown to me as how to transfer these benefits. My son is now in school and told me that we qualified. We applied and were denied, with a letter stating the USCG had not released or forwarded whatever is required to allow me to transfer these benefits to my son, who is going into his third year of school.

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<sup>1</sup> 38 U.S.C. § 3319 (2010) (authorizing members on active duty with at least six years of active service to transfer part of their educational benefits to their dependents if they agree to obligate four more years of service or "the years of service as determined in regulations pursuant to subsection (j), which authorizes the Secretary of Defense to prescribe regulations for purposes of this section).

Regarding the delay in submitting his application, the applicant stated that he discovered the alleged error on September 13, 2013, after spending more than a year trying to apply for the benefit through the DVA. He stated that he only recently discovered why the DVA was denying his request for the benefit.

### **VIEWS OF THE COAST GUARD**

On February 11, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request, based on the analysis of the case provided in a memorandum from the Commander, Coast Guard Personnel Service Center (PSC). PSC argued that the applicant is not eligible to transfer his unused education benefits to his dependents because he retired from the Coast Guard in 2005 and the Post-9/11 GI Bill was not published until 2009. PSC noted that the implementing regulations for the Post-9/11 GI Bill clearly state that it became effective on June 22, 2009, and is not retroactive.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On February 26, 2014, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. No response was received.

### **APPLICABLE LAW**

The Post-9/11 GI Bill, Public Law 110-252, 122 Stat. 2369, under which members may transfer their MGIB benefits to their dependents, is codified at 38 U.S.C. § 3319. It was enacted on June 30, 2008, "to promote recruitment and retention in the uniformed services," and paragraph (f)(1) of 38 U.S.C. § 3319 states that an individual approved to transfer entitlement to educational assistance may transfer such entitlement only while serving as a member of the armed forces when the transfer is executed. Paragraph (j)(2) authorized the Secretary of Defense to issue regulations prescribing the eligibility criteria and the manner of authorizing the transfer of entitlements.

On June 22, 2009, the Department of Defense issued Directive-Type Memorandum (DTM) 09-003, with the policies and procedures for transferring MGIB benefits required by the Post-9/11 GI Bill. DTM 09-003 states that it is applicable to the military departments including the Coast Guard by agreement with the Department of Homeland Security.

Paragraph 3.a. of Attachment 2 (Procedures) to DTM 09-003 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, except that for members who retired after August 1, 2009, and before July 1, 2010, no additional service was required.

Paragraph 3.g.(1) of Attachment 2 (Time of Transfer) to DTM 09-003 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.

The glossary to DTM 09-003 states that members of the Armed Forces are those individuals serving on active duty or in the Selected Reserve, and does not include other members of the Ready Reserve or retired members of the Armed Forces.

Paragraph 6 of ALCOAST 377/09, released on June 26, 2009, states that in accordance with DTM 09-003, 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. This ALCOAST was published on the internet.

### 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 in his record. The applicant retired from the Coast Guard on March 31, 2005, but stated that he did not discover the error in his record until September 3, 2013, after spending more than a year trying to find out why the DVA was denying his request to transfer his unused education benefits. Therefore, the Board finds that his application is timely because he filed his application within three years of discovering the alleged error.
3. The applicant argued that his record should be corrected to show that he transferred his unused education benefits to his son because when he retired from the Coast Guard in 2005, the Post-9/11 GI Bill benefit-transfer program did not exist so he was unable to transfer his unused education benefits. 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.<sup>2</sup> 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."<sup>3</sup>
4. The timing of the law defeats the applicant's claim. Congress did not authorize the transfer of Post-9/11 MGIB benefits until June 30, 2008. The statute shows that it did so "to promote recruitment and retention in the uniformed services," and so the benefit was made available only to those serving as a member of the Armed Forces when the transfer is executed.<sup>4</sup> Congress authorized the Secretary of Defense to issue regulations prescribing the eligibility criteria, which the Secretary did in DTM 09-003. Under DTM 09-003, which the Coast Guard adopted, a member must have served on active duty or in the Selected Reserve on or after August 1, 2009, to be eligible to transfer his benefits. In fact, the glossary of DTM 09-003 specifically states that retired members are not eligible members for the purpose of transferring benefits.

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<sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>3</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>4</sup> 38 U.S.C. § 3319(f)(1).

Because the applicant retired in 2005 and has not served on active duty or in the Selected Reserve since August 1, 2009, he is not entitled to transfer his benefits to his dependents.

5. The benefit-transfer program cannot be applied retroactively because the Supreme Court has ruled that a law should be given retroactive effect only if Congress clearly intends that the law be applied retroactively.<sup>5</sup> Thus, statutes are assumed to have only prospective effect unless Congress expressly states otherwise. In a unanimous opinion, the Supreme Court has stated, “Retroactivity is not favored in the law. ... [C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”<sup>6</sup> (Citation omitted.) There is nothing in 38 U.S.C. § 3319 to indicate that Congress intended the program to apply retroactively to members who had already been discharged or retired, and the Secretary of Defense did not attempt to apply the law to prior members or retired members in DTM 09-003. The Board is bound by these laws.

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

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>5</sup> See *Landaraf v. USI Film Products*, 511 U.S. 244, 280 (1994); see *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) (“The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.”).

<sup>6</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

**ORDER**

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

May 9, 2014

