DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-109

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on April 10, 2014, 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 November 21, 2014, is approved and 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 was discharged from active duty on December 1, 2010, asked the Board to correct his record to show that he transferred his benefits under the Post-9/11 Veterans' Educational Assistance Act of 2008, "Post-9/11 GI Bill,"[1] to his wife before being discharged from active duty. He stated that he was never counseled about the transferability of his education benefits because he began terminal leave after returning from an overseas assignment and did not attend any type of pre-separation counseling. The applicant also alleged that he did not undergo a separation physical.[2] Regarding the delay in submitting his application to the Board, he stated that he discovered the error on October 13, 2014,[3] after contacting the Department of Veterans' Affairs (DVA) in an attempt to transfer his unused education benefits to his wife.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 5, 2001, and reenlisted for six-years on November 15, 2005, with an end of enlistment (EOE) date of November 14, 2011. On

[1] 38 U.S.C. § 3319 (authorizing the Secretary, as a recruitment and retention tool, to prescribe regulations allowing eligible service members to transfer a portion of their entitlement to educational assistance to their eligible dependents).

[2] The applicant did not ask the Board to address this issue.

[3] The applicant submitted his application to the Board on March 31, 2014, so the Board presumes that the October 13, 2014, date is incorrect and that he discovered the error before March 31, 2014.

June 29, 2010, the applicant submitted a request for an early release from active duty on December 1, 2010, in accordance with ALCGENL 046/10,[4] to "pursue a new career, move back home, and spend time with my family." On the same day, the Executive Officer of the applicant's unit conducted a reenlistment interview with the applicant in accordance with Article 12.B.4. of the Personnel Manual,[5] and the applicant signed a Page 7 acknowledging the counseling and indicating that he intended to separate.

The Coast Guard granted the applicant's request, honorably separated him on December 1, 2010, and transferred him to the Reserve for three years on December 2, 2010. The applicant did not transfer his Post-9/11 GI Bill educational benefits to his wife before he was discharged from active duty, and there is no documentation of counseling about his Post-9/11 GI Bill educational benefits in his record. In the Reserve, the applicant did not affiliate with the Selected Reserve. Therefore, he was initially placed in the Individual Ready Reserve (IRR), and on May 1, 2011, he was transferred to the inactive status list (ISL). He was discharged from the Reserve on December 1, 2013.

APPLICABLE LAW

Title 38 U.S.C. § 3319 (2008) provides the following:

(a) In general.--(1) 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 specified in subsection (c) a portion of such individual's entitlement to such assistance, subject to the limitation under subsection (d).

(2) The purpose of the authority in paragraph (1) is to promote recruitment and retention in the uniformed services. The Secretary concerned may exercise the authority for that purpose when authorized by the Secretary of Defense in the national security interests of the United States.

(b) Eligible individuals.--An individual referred to in subsection (a) is 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).

• • •

(f) Time for transfer; revocation and modification.--

(1) Time for transfer.--Subject to the time limitation for use of entitlement under section 3321 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.

• • •

(j) Regulations.--(1) 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 entitlements under this section;

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[4] ALCGENL 046/10, issued on June 11, 2010, announced a voluntary separation program under which members were invited to submit requests to be released from active duty into the Reserve prior to the end of their regular enlistments.

[5] Article 12.B.4. of the Personnel Manual states that when an eligible member indicates an intention not to reenlist, the commanding officer or executive officer will interview the member and "[f]ully inform him or her of matters of interest to potential reenlistees," such as reenlistment bonuses and other military benefits.

(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). [Emphasis added.]

Directive Type Memorandum (DTM) 09-003

On June 22, 2009, the Secretary of Defense issued 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 is applicable to the Office of the Secretary of Defense and the Military Departments including the Coast Guard by agreement with the Department of Homeland Security.

Paragraph 3.g. of Attachment 1 to DTM 09-003 states that the Secretary shall "[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."

Paragraph 3 of Attachment 2 provides the rules governing the transferability of educational benefits and states that the transferability program is designed to promote recruitment and retention of members of the Armed Forces. Paragraph 3.a. defines the "eligible individuals" who may transfer their educational benefits, and subparagraph 3.a.(1) provides that a member of the Armed Forces is eligible if he "has at least 6 years of service in the Armed Forces (active duty and/or Selected Reserve) on the date of election and agrees to serve 4 additional years in the Armed Forces from the date of election." Subparagraphs 3.a.(2) and (3), inapplicable to the applicant's case, make eligible those members with 10 years of service who are precluded from reenlisting by policy or statute and those members who become retirement eligible between August 1, 2009, and August 1, 2013, under certain circumstances. Under subparagraph 3.a.(3), only members with an approved retirement date on or after August 1, 2009, and before July 1, 2010, could transfer their benefits to their dependents without signing a contract to obligate additional active service.

Paragraph 3.g.(1) of Attachment 2 (Time of Transfer) states that "[a]n individual transferring an 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 DTM's Glossary defines "member of the Armed Forces" for the purposes of DTM 09-003 as a member "serving on active duty or in the Selected Reserve."

Paragraph 3.h.(5) of Attachment 2 states that if the member transferring his or her entitlement to educational assistance fails to complete the amount of service agreed to under paragraph 3.a., any amount that has been transferred and used by a dependent "shall be treated as an overpayment of educational assistance … and will be subject to collection by DVA," unless the member dies or is separated due to a medical condition or hardship.

ALCOAST 377/09

Following the passage of the Post-9/11 GI Bill, the Coast Guard issued several ALCOASTs in 2008 and 2009 addressing the benefits that would go into effect on August 1, 2009. On June 26, 2009, the Coast Guard released ALCOAST 377/09, 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 Forces (active duty or Selected Reserve) on or after August 1, 2009, and obligate required service in accordance with paragraph 3.a. of DTM 09-003.

VIEWS OF THE COAST GUARD

On August 28, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

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. PSC argued that although the Board has previously granted relief when the Coast Guard failed to provide individual pre-separation counseling on Post-9/11 GI Bill benefits to eligible members who could have transferred their benefits before retiring if properly counseled, this case is different. PSC stated that this case is distinguishable because the applicant requested a voluntary early separation from the Coast Guard and was not retiring or reenlisting. PSC stated that Paragraph 3.a. of Attachment 2 of DTM 09-003 clearly states that a member seeking to transfer their unused benefits must be a member of the Armed Forces (active duty or SELRES) on or after August 1, 2009, and obligate four years of additional service, except for those members with an approved retirement date on or after August 1, 2009, and before July 1, 2010.

PSC argued that the transfer program is designed to foster retention and that allowing the applicant to benefit from the program in light of his decision to leave the service early would be counter to the policy's goals. Therefore, PSC argued, this case is clearly distinguishable from cases in which the Board has granted relief. Moreover, PSC argued, it is safe to assume that the applicant "did not seek additional counseling on the GI Bill benefits based on his intentions to not only discontinue his Service, but his request to depart the Service before the end of his obligation." Finally, PSC noted that the applicant still has the option of using his Post-9/11 GI Bill educational benefits for himself.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 8, 2014, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The BCMR did not receive a response.

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. An application to the Board must be filed within three years of the day the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant alleged that he

discovered his ineligibility to transfer his educational benefits to his dependent when he consulted the DVA on October 13, 2014, but he submitted his application before that date, in March 2014, and he presumably knew that he had not already transferred his benefits when he was discharged on December 1, 2010. Because there is no evidence of the documented, individual pre-separation counseling about Post-9/11 educational benefits required by DTM 09-003 in the record, the Board finds that the preponderance of the evidence shows that the applicant discovered the alleged error in his record during the year before he applied to the Board in March 2014. Therefore, his application is timely.

3. The applicant was not eligible to transfer his unused Post-9/11 GI Bill educational benefits to his wife before he left active duty in 2010 because he decided to voluntarily separate from active duty before the end of his enlistment. If he had remained on active duty until his EOE in 2011 and reenlisted for four more years, he would have been eligible to transfer his educational benefits to his wife, but he did not. Under paragraph 3.a. of Attachment 2 to the DTM 09-003, members on active duty who are not eligible to retire and who are eligible to reenlist must reenlist to obligate four additional years of service to be entitled to transfer their educational benefits to their dependents. Because the applicant was not eligible for retirement and he was eligible to reenlist, he would have had to remain on active duty until his EOE and reenlist for four years to transfer his educational benefits to his wife. In this regard, DTM 09-003 is consistent with Congress's statute, which states that the purpose of this new benefit is "to promote recruitment and retention in the uniformed services." 38 U.S.C. § 3319(a)(2) (2008).

4. The applicant complained that no one told him that he could only transfer his educational benefits while on active duty. Paragraph 3.g. of Attachment 1 to DTM 09-003 states that the Secretary shall "[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." There is no documentation of such counseling in the record, but a Page 7 shows that, when the applicant decided to separate on June 29, 2010, his Executive Officer did conduct a reenlistment interview pursuant to Article 12.B.4. of the Personnel Manual, which requires counseling about the benefits of reenlisting. By that date, the DTM and a few ALCOASTs mentioning the transferability of benefits had been issued, so it is possible that the Executive Officer provided this information to the applicant. Whether the Executive Officer provided the applicant with this information during their Article 12.B.4. interview is moot, however, because the applicant did not remain on active duty or obligate and perform four additional years of service to become eligible to transfer his benefits to his wife, as required by the regulations.

5. The Board finds that the applicant has not proven by a preponderance of the evidence that his inability to transfer his educational benefits to his dependent is an error or injustice. Congress authorized the new benefits, including their transferability, to encourage the retention of trained personnel, and the applicant not only did not obligate additional service, but he voluntarily ended his enlistment early. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

November 21, 2014

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