DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-200

[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 September 9, 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 June 5, 2015, 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, a former [redacted] who was involuntarily discharged on June 30, 2014, for unsuitability (alcohol abuse), asked the Board to correct his record to show that he transferred his unused education benefits under the Post-9/11 Veterans' Educational Assistance Act of 2008, "Post-9/11 GI Bill,"[1] to his eligible dependent in 2009. He stated that he submitted a request to transfer his unused education benefits to his dependent and that it was approved on June 7, 2011, but his dependent's claim for education benefits was denied by the Department of Veterans Affairs (DVA) because he was involuntarily discharged in 2014 before completing the obligated service that was necessary to transfer the unused benefits. The applicant alleged that it was unjust for the Coast Guard to not personally counsel him about the transferability program when it was announced in 2009, because if they had, then he could have requested the benefit transfer in 2009 and would have been able to complete the obligated service requirement before his involuntary discharge in 2014. He also alleged that it was unjust when the Coast Guard failed to provide him with individual counseling regarding the Post-9/11 GI Bill program prior to being discharged.

[1] 38 U.S.C. § 3319 (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).

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 3, 1996, for a term of four years, through September 2, 2000. On December 7, 1997, he signed a five-month extension contract to obligate additional service for "A" School, through February 2, 2001. He signed a four-year reenlistment contract on January 23, 2001, through January 22, 2005; signed another reenlistment contract on January 4, 2005; and another on May 13, 2009, through May 12, 2015.

The record before the Board does not contain any evidence showing that the applicant was authorized to reenlist in 2011; that he obligated additional service beyond May 12, 2015, in 2011; or that he applied for and was approved to transfer his unused educational benefits in 2011. Nor is there any documentation of counseling about Post-9/11 GI Bill educational benefits in the record.

On April 24, 2014, a Page 7 was placed in the applicant's record to document counseling for two alcohol incidents. The Page 7 states that he was twice arrested and convicted for DUI, on August 31, 2005, and January 24, 2009, but had failed to notify anyone in his chain of command about the arrests or subsequent convictions as required. The Page 7 states that the command eventually received notification of his arrests and initiated an investigation on March 4, 2014. The investigation confirmed that the applicant had been arrested and convicted twice for DUI, and the Page 7 states that these two incidents would be recorded as two separate alcohol incidents and that he would be processed for separation in accordance with the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (Series).

The applicant was honorably discharged on June 30, 2014, after serving approximately 18 years in the Coast Guard. His separation authorization shows that he was discharged for "Unsuitability (alcohol abuse)" under Article 1.B.15. of the Personnel Manual, with separation code JND (separation for miscellaneous/general reasons) and reenlistment code RE-4 (ineligible to reenlist).

VIEWS OF THE COAST GUARD

On March 10, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

The PSC argued that relief should be denied because the applicant's involuntary discharge for alcohol abuse prevented him from completing the obligated service necessary to effectuate the transfer of his unused education benefits. PSC argued that DTM 09-003[2] states that if a member transferring unused benefits fails to complete the service agreed to by the member, then transfer eligibility is lost. PSC noted that the DTM provides several exceptions to this rule but that the applicant's reason for discharge does not meet any of these exceptions.

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[2] U.S. Department of Defense, DTM 09-003, Post-9/11 GI Bill (June 22, 2009) (hereinafter "DTM 09-003"); ALCOAST 377/09 (June 26, 2009) (acknowledging DTM 09-003 as Coast Guard policy and stating in paragraph 6 that "[g]enerally, 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 Aug 2009 and obligate required service as outlined in [DTM 09-003]").

PSC also argued that relief should be denied because although the applicant claims that he should have been told about the transfer program in 2009 so that he could meet the obligated service requirement, the Coast Guard is only required to provide documented, individual counseling upon a member's separation from the service, and this requirement has only been in effect since June 22, 2009, when DTM 09-003 went into effect and established the rules. Because the applicant was not undergoing separation after he reenlisted in May 2009, he was not then entitled to documented, individual pre-separation counseling. The Coast Guard also noted that it had issued numerous ALCOASTs in 2008 and early 2009 about the new statute[3] and that it was the applicant's responsibility to be "diligent and maintain awareness regarding his personal entitlements and Coast Guard Policy."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 12, 2015, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The Board did not receive a response.

APPLICABLE 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 applicable to the Office of the Secretary of Defense and the Military Departments including the Coast Guard by agreement with the Department. It states that the effective date of the Post-9/11 GI Bill is August 1, 2009.

Paragraph 3.g. of Attachment 1 to DTM 09-003 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."

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[3] U.S. Coast Guard, ALCOAST 447/08 (Sept. 18, 2008), para. G ("Transferability: A member may have the opportunity to transfer benefits to their spouse or dependent child. Members must be on active duty at the time of this election, must have served six years since 9/11, and must agree to serve an additional four years of active service. Detailed guidance is being developed in conjunction with DOD and will be released ahead of the August 2009 implementation date."); ALCOAST 044/09 (Jan. 16, 2009), para. 4 ("Transferability: The basic requirements to be eligible to transfer this entitlement to a dependent (spouse or child) are that a member must be on active duty on 1 August 2009; must have a minimum of six years active service since 11 September 2001 and must agree to serve an additional four years of active service effective on the date they elect to transfer."); ALCOAST 250/09 (April 28, 2009), para. 3 ("Eligibility: The Post-9/11 GI Bill … is an automatic entitlement generally available to servicemembers with at least 90 days of active duty service following 11 September 2001. No action is required by members until they either 1) apply to receive benefits, 2) seek to transfer benefit eligibility to dependents, or 3) are currently eligible for another education benefit … and who seek eligibility under the Post-9/11 GI Bill."); para. 5.b. ("The Office of the Secretary of Defense has not yet released the final policy on transferability."); ALCOAST 377/09 (June 26, 2009) (acknowledging DTM 09-003 as Coast Guard policy and stating in paragraph 6 that "[g]enerally, 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 Aug 2009 and obligate required service as outlined in [DTM 09-003]"); ALCOAST 443/09 (July 31, 2009) (encouraging members to review DTM 09-003 and to seek guidance).

Paragraph 3 of Attachment 2 to DTM 09-003 states that "to promote recruitment and retention of members of the Armed Forced," the Secretary "may permit an individual described in paragraph 3.a. of this attachment, who is entitled to educational assistance under the Post-9/11 GI Bill, to elect to transfer to one or more of the family members specified, all or a portion of such individual's entitlement to such assistance."

Paragraph 3.a.(2). of Attachment 2 defines an "eligible individual" as "Any member of the Armed Forces on or after August 1, 2009, who, at the time of the approval of the individual's request to transfer entitlement to educational assistance under this section, is eligible for the Post-9/11 GI Bill, and (1) 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, or …" The DTM's Glossary defines "member of the Armed Forces" as a member serving on active duty or in the Selected Reserve.

Paragraph 3.b. of Attachment 1 (Responsibilities) to the DTM states that the Secretaries of the Military Departments shall "[e]nsure 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.(1) of Attachment 2 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.h.(5).a. of Attachment 2 states that if a member fails to complete the service required obligated service under paragraph 3.a., then the amount of any transferred entitlement that is used by a dependent shall be treated as an overpayment of educational assistance and will be subject to collection by the DVA.

Paragraph 3.h.5.(b). of Attachment 2 further states that paragraph 3.h.(5)(a) shall not apply in the case of an individual who fails to complete service due to—

1. The death of the individual,
2. Discharge or release from active duty for a medical condition which pre-existed the service and was not service connected,
3. Discharge or release from active duty for hardship as determined by the Secretary of the Military Department concerned, or
4. Discharge or release from active duty for a physical or mental condition, not a disability, that did not result from the individual's own willful misconduct, but did interfere with the performance of duty.

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 DoD 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 Department of Veterans Affairs 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.

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 discovery of the alleged error and injustice in his record.

2. The applicant alleged that it was an injustice for the Coast Guard not to provide him with personal counseling about the Post-9/11 GI Bill transfer program when it became effective on August 1, 2009, and upon his discharge in 2014. In considering allegations of error and injustice, 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.[4] Absent evidence to the contrary, the Board presumes that Coast Guard officials and Government employees have carried out their duties "correctly, lawfully, and in good faith."[5]

3. The applicant alleged that if the Coast Guard had counseled him about the transferability of his education benefits under the Post-9/11 GI Bill when it went into effect in August 2009, then he could have requested to transfer his unused educational benefits at that time, and he would have been able to complete the obligated service necessary to complete the transfer before he was involuntarily discharged in 2014. Paragraph 3.g. of Attachment 1 to DTM 09-003, which was issued on June 22, 2009, states that the "Secretaries of the Military Departments shall provide individual pre-separation or release from active duty counseling on the benefits under the Post-9/11 GI Bill and document accordingly." Neither this counseling requirement nor eligibility rules for the transferability of benefits was in effect prior to June 22, 2009. Therefore, when the applicant signed his reenlistment contract on May 13, 2009, there was no requirement for the Coast Guard to counsel him about the rules for transferring benefits, and those rules did not yet exist.

4. Because the applicant reenlisted for six years on May 13, 2009, he would not normally have been subject to separation until May 2015. Therefore, he has not proven that the Coast Guard committed any error or injustice by failing to document individual, pre-separation counseling about his educational benefits prior to June 30, 2010, which is the last date that the

[4] 33 C.F.R. § 52.24(b).

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

applicant would have been able to transfer his benefits and still complete four full years of service before his discharge for alcohol abuse on June 30, 2010.

5. The Coast Guard has issued several ALCOASTs to alert its membership about Post-9/11 educational benefits and the transfer program. According to the applicant, he learned about the transferability of his benefits and was approved to transfer them on June 7, 2011, but his discharge less than four years later has caused his dependent's request to use his benefits to be denied by the DVA, which administers veterans' educational benefits. Although the DVA, not the Coast Guard, administers the program, the alleged denial appears to be correct under paragraph 3.h.(5).a. of Attachment 1 to DTM 09-003, which states that if a member fails to complete the service required under paragraph 3.a. (four years), then the amount of any transferred entitlement that is used by a dependent shall be treated as an overpayment of educational assistance and will be subject to collection by the DVA. The Board notes that a discharge due to alcohol abuse does not fall within any of the exceptions to this rule listed in paragraph 3.h.(5).b.

6. The applicant also alleged that is was unjust for the Coast Guard not to counsel him about the Post-9/11 GI Bill when he was discharged in 2014. However, in 2014, the applicant was being involuntarily discharged for alcohol abuse and so could not obligate additional service to ensure the transferability of his educational benefits. Moreover, the applicant has admitted that he learned about his benefits in 2011. Assuming that the applicant was not counseled in 2014, however, the Board finds that this error was harmless[6] because even if the Coast Guard had counseled the applicant about the program prior to his discharge in 2014, the result would be the same: He would be discharged as a result of his alcohol incidents before he had an opportunity to complete the required obligated service to fully effectuate the transfer. Counseling the applicant about the transfer program upon his discharge would not have altered the outcome because he was being involuntarily discharged and had no way to complete the required obligated service.

7. Accordingly, the Board finds that the applicant has failed to prove by a preponderance of the evidence that his record contains an error or an injustice. His request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[6] *See* FED. R. CIV. P. 61 ("Harmless Error: … At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief"); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be "no substantial nexus or connection" between the proven error and the prejudicial record that the applicant wants the Board to remove or correct).

ORDER

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

June 5, 2015

[redacted]