DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-215

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 October 15, 2014, and assigned it to staff member [redacted] to prepare the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 10, 2015, 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 active duty on July 31, 2008, 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 dependents before his retirement from active duty. He stated that the Post-9/11 Veterans Educational Assistance Act became law on June 30, 2008, but alleged that he was never counseled about the transferability of his education benefits prior to his retirement on July 31, 2008. Regarding the delay in submitting his application to the Board, he stated that he discovered the error on March 24, 2012, upon being told by the Department of Veterans' Affairs (DVA) that he was ineligible to transfer his unused education benefits to his dependents because he had been separated from the Coast Guard one year prior to the program's eligibility date. The applicant also stated that he is willing to return to active duty for the requisite period of time necessary to "fully utilize the Post-9/11 GI Bill."

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[1] Public Law 110-252, § 5001, 122 Stat 2323 (June 30, 2008) (authorizing the Secretary of Defense in coordination with the Secretary of Veterans' Affairs to prescribe regulations so that members serving in the Armed Forces may transfer a portion of their entitlement to educational assistance under the Montgomery GI Bill program to their eligible dependents as of August 1, 2009, if the members have at least six years of service and agree to serve four more years or the amount of time prescribed by the regulations).

SUMMARY OF THE RECORD

The applicant served in the U.S. Navy for approximately seven years before enlisting in the Coast Guard on August 24, 1991, and he retired from the Coast Guard on July 31, 2008. His DD 214 shows that he had completed nearly 24 years of active service in both the Navy and the Coast Guard. The applicant did not transfer his Post-9/11 GI Bill educational benefits to his dependents before he retired from the Coast Guard, and his record contains a Page 7 dated August 1, 2008, documenting that he was counseled "regarding retirement rights, benefits, and responsibilities," but nothing which indicates that he was counseled about the Post-9/11 GI Bill.

APPLICABLE LAWS AND REGULATIONS

Post-9/11 Veterans Educational Assistance Act of 2008

On June 8, 2008, Congress passed the Military Construction, Veterans' Affairs, and Related Agencies Appropriations Bill, 2008.[2] Title V of that act, short title Veterans Educational Benefits, laid out the entire new educational benefits program for members of the Armed Forces that had served an aggregate of 36 months on active duty post-9/11. Section 5003(c) of the Act created the framework for the transferability of educational benefits, later codified in 38 U.S.C. § 3319. Section 5003(d) states "EFFECTIVE DATE. – This section [5003] and the amendments made by this section shall take effect on August 1, 2009."

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 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. The regulation defined "Military Services" as the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Paragraph 3 of Attachment 2 (Procedures) states that the transferability program is designed to promote recruitment and retention of members of the Armed Forces. Paragraph 3.a.(3) states that members who are retirement eligible as of August 1, 2009, do not have to obligate additional active service to transfer their benefits.

Paragraph 3.g.(1) of Attachment 2 states that an individual approved to transfer entitlement to educational assistance may transfer such entitlement to the individual's family member only while serving as a member of the Armed Forces. The DTM Glossary defines "member of the Armed Forces" as a member serving on active duty or in the Selected Reserve.

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

[2] Pub.L. 110-252 (2008).

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, and obligate required service in accordance with paragraph 3.a. of DTM 09-003.

VIEWS OF THE COAST GUARD

On March 27, 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). PSC argued that relief should be denied because the applicant retired from the Coast Guard on July 31, 2008, but the policies and entitlements contained in DTM 09-003—including the transferability of unused education benefits to family members—did not become effective until August 1, 2009. PSC also noted that according to the DTM, a member eligible to transfer their unused benefits must be a member of the armed forces on or after August 1, 2009, and that this is consistent with information that was contained in ALCOAST 044/09, which states that the basic requirement to be eligible to transfer benefits to a dependent are that the member must be on active duty on or after August 1, 2009, have a minimum six years active service since September 11, 2001, and agree to serve an additional four years of active service effective on the date they elect to transfer.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 30, 2015, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. He responded on April 30, 2015, and disagreed with the JAG's recommendation. The applicant argued that it was an injustice when the Coast Guard failed to counsel him about the then pending Post-9/11 GI Bill when he retired and that if he had been told about the program before retirement then he would have remained on active duty "to establish eligibility for my children to avail themselves of the educational eligibility provided by the legislation."

The applicant also argued that he should have been told about the Post-9/11 GI Bill prior to his retirement on July 31, 2008, and told that his release from active duty would make him ineligible to transfer his unused education benefits because Public Law 110-252 (the Post-9/11 GI Bill) was enacted on June 30, 2008. He argued that since the Coast Guard knew about the transferability features of that bill at that time, then it should have told him about it. The applicant also stated that at the time of his retirement he was serving on a set of orders that permitted him to remain on active duty through June 2010, and alleged that he would have remained on active duty until August 1, 2009, if he had been advised of the pending legislation.

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 over this case 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.[3] The applicant asked the Board to correct his ineligibility to transfer his education benefits to his dependents, claimed that he would not have retired in 2008 if he had been properly counseled, and offered to return to active duty. He alleged that he discovered this injustice when consulting the DVA on March 12, 2012.

3. The statute authorizing the transfer of education benefits as of August 1, 2009, Public Law 110-252, was enacted on June 30, 2008, and the applicant retired on July 31, 2008, before the Coast Guard issued the first of many ALCOASTs about the future program.[4] Therefore, although the applicant could have learned about the new benefit-transfer program before March 2012 through numerous Coast Guard and veterans' publications, the Board will accept his claim that he did not discover the alleged injustice in his record until March 2012. Therefore, his application is timely.

4. The applicant reasoned that his record should be corrected to show that he transferred his unused education benefits to his dependents because when he retired from the Coast Guard on July 31, 2008, the Coast Guard knew about the recently enacted Post-9/11 GI Bill legislation but failed to tell him about it. 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.[5] 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."[6]

5. The timing of the law defeats the applicant's claim. Although the statute was enacted on June 30, 2008, the statute only authorized the transfer of MGIB benefits on or after August 1, 2009, more than a year after the applicant retired. In addition, the statute shows that it did so "to promote recruitment and retention in the uniformed services" and made the benefit-

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[3] 10 U.S.C. § 1552(b).

[4] 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).

[5] 33 C.F.R. § 52.24(b).

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

transfer available only to those serving as members of the Armed Forces. Congress authorized the Secretary of Defense to issue regulations prescribing the eligibility criteria, which the Secretary did in DTM 09-003 on June 26, 2009. Until DTM 09-003 was issued, the Coast Guard could not know exactly what eligibility criteria would appear in the regulations. Under DTM 09-003, 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. Because the applicant retired in 2008 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.

6. 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.[7] 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."[8] (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. Additionally, 38 U.S.C. § 3319(f)(1), which lists when a transfer may take place, explicitly states a member can transfer benefits "only while serving as a member of the Armed Forces when the transfer is executed." The Board is bound by these laws.

7. The applicant argues in essence that in July 2008, the Coast Guard should have immediately understood, based on the statutory language, that military personnel retiring before August 1, 2009, would not be eligible to transfer their benefits; counseled all retiring personnel about the statute; and allowed them to withdraw their retirement requests so they could remain on active duty because they might become eligible to transfer their benefits under regulations that had not yet been prescribed by the Secretary of Defense. The Board rejects this argument because in July 2008 the Coast Guard had no obligation to advise members about a future benefit program for which the eligibility criteria were as yet unknown or to cancel or postpone already approved retirement dates.

8. The applicant offered to return to active duty to be able to transfer his education benefits. He has not shown that his (and hundreds of thousands of other veterans') inability to transfer their education benefits constitutes either an error or injustice that would warrant returning him to the Service for the sole purpose of enabling him to transfer his benefits. If he wants to return, he must persuade the Coast Guard or another military service to accept his offer.

9. Accordingly, the applicant's request should be denied.

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[7] *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.").

[8] *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988).

ORDER

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

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July 10, 2015