DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2016-008

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 November 3, 2015, 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 August 26, 2016, 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 retired from active duty on August 1, 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 daughter before he retired. He alleged that he was not told about the option of transferring his unused education benefits at his retirement seminar in the spring of 2008.

The applicant stated that he discovered the alleged error in his record in 2009 and that it is in the interest of justice for the Board to consider his application because he does not plan on going to college and wants his daughter to use his Post-9/11 GI Bill college benefits.

SUMMARY OF THE RECORD

The applicant served in the U.S. Army and the Coast Guard for nearly twenty-five years, from November 21, 1983, until his retirement from the Coast Guard on August 1, 2008. He did not transfer his Post-9/11 GI Bill educational benefits to his daughter before he retired, and his

[1] Pub. L. No. 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).

record does not contain anything to document that he was counseled about the Post-9/11 GI Bill prior to his retirement.

APPLICABLE REGULATIONS

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

On June 22, 2009, the Department of Defense (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 of Homeland Security. It states that the effective date of the Post-9/11 GI Bill is August 1, 2009. The regulation defines "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) of Attachment 2 (Procedures) states that members who are retirement eligible as of August 1, 2009, do not have to obligate additional active service to transfer their benefits. A member is considered to be retirement eligible if he or she has completed 20 years of active federal service or 20 qualifying years toward a Reserve retirement.

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

VIEWS OF THE COAST GUARD

On March 18, 2016, 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 the application is untimely and should not be considered by the Board beyond a cursory review because the applicant was discharged in 2008 but did not submit his application until 2015. Notwithstanding the untimeliness, PSC argued that relief should be denied because the applicant retired from the Coast Guard on August 1, 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 noted that according to the DTM, members are eligible to transfer their unused education benefits to their family members if they became retirement eligible between August 1, 2009, and August 1, 2013, and agree to serve an additional four years on active duty.

PSC also argued that the transferability of the Post-9/11 GI Bill Education Assistance Benefit Program is not retroactive, and only qualifying members of the Armed Forces starting August 1, 2009, were able to transfer their unused benefits to their dependents. Moreover, PSC argued that one of the purposes of the transferability program it to promote recruitment and retention of members of the Armed Forces, and 38 U.S.C. § 3319 specifically prohibits former service members from transferring their unused education benefits.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 25, 2016, 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 over this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record.[2] The record shows that the applicant retired from the Coast Guard in 2008 and he stated that he discovered the alleged error in his record in 2009. Therefore, the applicant knew in 2009 that that he had not transferred his benefits to his daughter and the Board finds that his application is untimely

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[3] In *Allen v. Card*, the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[4] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the

[2] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

[3] 10 U.S.C. § 1552(b).

[4] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[5]

4. The applicant stated that he discovered the alleged error in his record in 2009 and argued that it is in the interest of justice for the Board to consider his application because he does not plan on going to college and wants his daughter to use his Post-9/11 GI Bill college benefits. The Board finds that his explanation for the delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

5. The Board's cursory review of the merits of this case shows that the timing of the law defeats the applicant's claim. Although the statute was enacted on June 30, 2008, Congress did not authorize the transfer of MGIB benefits until August 1, 2009, approximately twelve months after the applicant retired. The statute shows that it was created "to promote recruitment and retention in the uniformed services" and made the benefit-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. As the Board has noted in prior, similar cases, the benefit-transfer program cannot be applied retroactively because the United States Supreme Court has ruled that a law should be given retroactive effect only if Congress clearly intends that the law be applied retroactively.[6] 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."[7] 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 apply the law to prior members or retired members in DTM 09-003.

7. Accordingly, the Board will not excuse the untimeliness of the application or waive the statute of limitations. The applicant's request should be denied.

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[5] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

[6] *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.").

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

ORDER

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

August 26, 2016

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