


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-012


DC1/E-6 (Retired)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on October 22, 2019, and this decision of the Board was prepared pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 25, 2020, 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 voluntarily retired in 2010 as a Damage Controlman First Class (DC1/E-6) after serving more than 20 years on active duty, asked the Board to correct his record to show that he transferred his unused education benefits under the Post-9/11 Veterans Education Act of 2008 (Post-9/11 GI Bill)¹ to his spouse before he retired. He alleged that he was not counseled about the obligated service requirement that he would incur if he transferred his education benefits under the Post-9/11 GI Bill transfer program and stated that, as a result, he fell two months short of meeting the one-year obligated service requirement to transfer the benefits. He alleged that if he had known that he had to obligate an additional year of service to transfer his education benefits, he would have transferred them to his spouse earlier, when he switched from the Montgomery GI Bill to the Post-9/11 program, or he would have delayed his voluntary retirement date.

The applicant retired from the Coast Guard in 2010 and stated that he discovered the alleged errors in his record on August 12, 2019. He did not explain why he did not notice the error at the time of his retirement.

¹ Pub. L. No. 110-252, §§ 5001 *et seq.*, 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 either four more years or the amount of time prescribed by the regulations).

SUMMARY OF THE RECORD

The applicant retired from the Coast Guard on August 31, 2010, after serving nearly ten years in the U.S. Navy and more than 10 years in the Coast Guard. His Member Information sheet shows an Active Duty Base Date and Pay Base Date of March 1, 1990.

There is nothing in his official military record to show that he was counseled about the Post-9/11 GI Bill program, nor is there anything in his record to show that he completed the Transition Assistance Program (TAP)² class prior to retirement in 2010. There is nothing in the record to show when he enrolled in the Post-9/11 GI Bill program or when he submitted a request to transfer his unused education benefits to his spouse.

APPLICABLE REGULATIONS

Post-9/11 GI Bill

Public Law No. 110-252, § 5001, 122 Stat. 2323, enacted on June 30, 2008, and codified in 38 U.S.C. chapter 33, authorized a new educational assistance program, which members could elect to participate in. Title 38 U.S.C. § 3319 provided that the following would take effect on August 1, 2009:

§ 3319. Authority to transfer unused education benefits to family members

(a) IN GENERAL.—Subject to the provisions of this section, the Secretary of Defense may authorize the Secretary concerned, to promote recruitment and retention of members of the Armed Forces, to 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).

(b) ELIGIBLE INDIVIDUALS.—An individual referred to in subsection (a) is any member of the Armed Forces 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 Armed Forces; or

(2) the years of service as determined in regulations pursuant to section (k).

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(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.

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(j) REGULATIONS (1) The Secretary of Defense, in coordination with the Secretary of Veterans Affairs, shall prescribe regulations for purposes of this section.

² TAP prepares members separating or retiring from the Coast Guard for their transition to civilian life. All eligible members are required to complete the standardized components of the TAP, including pre-separation counseling, the transition seminar, encompassing the transition goals, plans, and Success (GPS) core curriculum, <http://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-Human-Resources-CG-1/Health-Safety-and-Work-Life-CG-11/Office-of-Work-Life-CG-111/Transition-Assistance-Program/> (last visited on September 12, 2020).

- (2) Such regulations shall specify
- (A) the manner of authorizing the transfer of entitlements under this section;
 - (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).

Coast Guard ALCOASTs

Following the passage of this law on June 30, 2008, the Coast Guard issued a series of ALCOASTs regarding the new law:

- ALCOAST 447/08, released on September 18, 2008, includes a brief introduction of the Post-9/11 Veterans Education Act of 2008 (Post-9/11 GI Bill). Paragraph 1. States that the law will go into effect on August 1, 2009. Paragraph 3.G. lists the following as one of the “basic entitlements” under the law: “Transferability: a member may have the opportunity to transfer benefits to their spouse or dependent children. 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 service.” Paragraph 5 advises members “not to make significant unalterable career choices ... until more detailed guidance can be and that detailed guidance will be released ahead of the August 2009 implementation date.
- ALCOAST 044/09, issued on January 16, 2009, likewise notes that the law would go into effect on August 1, 2009, and advises members in paragraph 6 not to make “significant, unalterable career choices” before more detailed guidance is issued. Paragraph 4 states the following: “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, issued on April 28, 2009, states the following in paragraph 5.b.: “The Office of the Secretary of Defense has not yet released the final policy on transferability.” Section B of paragraph 5 states, “The Office of the Secretary of Defense (OSD) has not yet released the final policy on transferability, specifically as it relates to required additional obligated service. There were several features and elements to this policy that, while delaying its release, are needed to address members who are retirement eligible between 2009 and 2012.”
- ALCOAST 377/09, issued on June 26, 2009, acknowledged DTM 09-003 as Coast Guard policy and states in paragraph 6, “Generally, 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].” Paragraph 8 states the following:

8. 1 AUG 2009 RETIREMENTS: PER [DTM 09-003 and the Post-9/11 GI Bill], the effective date of the Post-9/11 GI Bill is 1 AUG 2009. As outlined in chapter 12 of [the Personnel Manual], a members last date in the Armed Forces is the day preceding their effective retirement date. Therefore, a member with a 1 AUG 2009 retirement date is not a member of the Armed Forces on 1 AUG 2009 and will not be eligible to transfer unused benefits to family members. Members with a retirement date of 1 AUG 2009 may submit a request to PSC to extend their retirement date.

Each case will be reviewed on a case-by-case basis in accordance with Chapter 12 of [the Personnel Manual]. Requests must clearly articulate a service need.

- ALCOAST 443/09, issued on July 31, 2009, encouraged members to review DTM 09-003 and to seek guidance.

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.g. of Attachment 1 (Responsibilities) states that the Service must “[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.a.(3) of Attachment 2 (Procedures) states that members eligible to transfer education benefits include those members of the Armed Forces who, at the time their transfer request is approved, are or become retirement eligible from August 1, 2009, through August 1, 2013, and agree to serve the additional period, if any, specified in paragraphs 3.a.(3)(a) through 3.a.(3)(e). Paragraph 3.a.(3)(c) states that for individuals who are “eligible for retirement after August 1, 2009, and before August 1, 2010, 1 year of additional service is required.”

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 and expressly excludes retired members.

VIEWS OF THE COAST GUARD

On February 28, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis in a memorandum submitted by the Commander, Personnel Service Center (PSC). PSC argued that the application is untimely, but recommended granting relief because there is nothing in the applicant’s record to show that he was provided individual counseling regarding the transfer of his education benefits. Moreover, PSC stated that the applicant “clearly did not understand the associated limitations” when he used the Defense Manpower Data Center (DMDC) website to transfer his education benefits, nor did the website provide any record of individual counseling. PSC added that although the applicant had direct access to information about the transfer program through the DMDC site and the published ALCOASTs, his record still lacks the documentation of individual counseling.

In addition to agreeing with the recommendations provided by PSC, the JAG provided a copy of BCMR Docket No. 2012-054, which is comparable to the instant case. In the decision

for Docket No. 2012-054, the Board determined that the DTM 09-003 required the Coast Guard to provide individualized pre-separation counseling and to document that counseling.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 5, 2020, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The Board did not receive a response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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 after the applicant discovers the alleged error or injustice.³ The applicant retired from the Coast Guard on August 31, 2010, and submitted his application to the Board on October 10, 2019, more than nine years after he was discharged. He claimed to have discovered the error on August 12, 2019—presumably when his benefit transfer request was disapproved. Because there is no evidence that the applicant was counseled about the transferability of his education benefits before or after his retirement, the Board finds that the preponderance of the evidence shows that the application was timely filed.
3. The applicant asked the Board to correct his record to show that he transferred his education benefits under the Post-9/11 GI Bill to his spouse before he retired. When considering allegations of error and injustice, the Board begins its analysis 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 other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁵
4. The applicant stated that he did not receive documented, individual counseling when he transferred his education benefits to his spouse and, as a result, he retired from active duty before completing the obligated service required to effectuate the transfer. There is nothing in his record to show that he received counseling about the Post-9/11 GI Bill program as required by Paragraph 3.g. of Attachment 1 to DTM 09-003, and so the Board finds that he has proven by a preponderance of the evidence that the Coast Guard erred by failing to timely counsel him about transferring his education benefits.
5. The record shows that the applicant completed 20 years of service and became eligible to retire in March 2010. Therefore, pursuant to paragraph 3.a.(3)(c) of Attachment 3 to

³ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

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).

DTM 09-003, if had he been properly counseled about the transferability of his benefits after the program went into effect in August 2009, he could have transferred them to his spouse and still retired on August 31, 2010. Or if counseled later, he could have delayed submitting his retirement request or asked to delay his retirement by a few months to be eligible to transfer his benefits. Once he had retired, he was ineligible to transfer his education benefits to his dependents. Therefore, the applicant has shown that the Coast Guard's error in failing to timely counsel him has caused a significant injustice.

6. The Coast Guard recommended granting relief in the absence of any documented counseling. Moreover, the Coast Guard noted that this case is similar to BCMR Docket No. 2012-054, wherein the Board granted relief after determining that DTM 09-003 required the Coast Guard to provide individual pre-separation counseling and to document of that counseling. The Board agrees and finds that the applicant is entitled to relief because he was not timely counseled about his Post-9/11 GI Bill education benefits before he retired in 2010 and could have satisfied the obligated service requirement if he had been timely counseled. Accordingly, his record should be corrected to show that he transferred his education benefits before he retired from the Coast Guard. The Coast Guard should assist him with the paperwork necessary to accomplish this transfer of benefits. (There are no back pay and allowances due as a result of this correction.)

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of DC1 [REDACTED], USCG (Retired), for correction of his military record is granted. The Coast Guard shall correct his record to show that he transferred his Post-9/11 GI Bill education benefits to his eligible dependents in August 2009, a year before he retired from active duty on August 31, 2010. The Coast Guard shall assist him with the paperwork necessary to accomplish this transfer of benefits.

September 25, 2020

