

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-023


YNCS/E-8 (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 completed application on February 11, 2021, and this decision of the Board was prepared pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 23, 2021, 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 in October 2009 as a Senior Chief Yeoman (YNCS/E-8) after serving more than 20 years on active duty in the Coast Guard, 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 family members before he retired. He alleged that he was not counseled about the benefit transfer program before he went on 90 days of terminal leave just before he retired from active duty. He alleged that if he had known that he had to obligate an additional year of service to transfer his education benefits then he would have transferred them to his spouse when he switched from the Montgomery GI Bill (MGIB) to the Post-9/11 program, or he would have extended his retirement date.

The applicant retired from the Coast Guard on October 31, 2009, 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.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 10, 1989, and was enrolled for

¹ The Post-9/11 GI Bill provides financial support for education and housing to individuals with at least 90 days of aggregate service after September 10, 2001, or individuals discharged with a service-connected disability after 30 days. An individual must have received an honorable discharge to be eligible for the Post-9/11 GI Bill, http://GIbill.va.gov/benefits/post_911_GIbill/index.html (last visited on September 12, 2017).

education benefits under the Montgomery GI Bill. He retired from the Coast Guard on October 31, 2009. There is nothing in the print-outs of his official military records provided by the Coast Guard to show that he was counseled about the Post-9/11 GI Bill program. Nor is there anything to show that he completed the Transition Assistance Program (TAP)² class before he retired in 2009. Likewise, there is nothing in the record to show that he ever transferred his MGIB benefits to Post-9/11 GI Bill benefits or submitted a request to transfer his unused education benefits to his spouse.

APPLICABLE LAW AND REGULATIONS

The Coast Guard has released numerous ALCOASTs about the Post-9/11 GI Bill administered by the VA and the transferability of those education benefits through a DoD website. ALCOAST 377/09, released on June 26, 2009, announced the Department of Defense and Coast Guard policy concerning Post-9/11 GI Bill benefits and the transferability of unused benefits to family members as follows (capitalization adjusted):

1. This ALCOAST supersedes [prior ALCOASTs] and announces DoD/Coast Guard policy concerning Post-9/11-G.I. Bill education benefits as outlined in [Directive-Type Memorandum (DTM) 09-003 and 38 U.S.C. Chap. 33]. Particularly, [DTM-09-003] provides detailed policy on transferability of unused education benefits to family members. Servicemembers are encouraged to review [DTM 09-003] and consult with their unit Education Services Officer (ESO) for guidance on the Post-9/11 G.I. Bill. [DTM 09-003] is currently available on the Coast Guard Personnel Service Center (PSC) website: <http://www.uscg.mil/psc/>.

2. The Post-9/11 G.I. Bill, authorized under [38 U.S.C. Chap. 33] is an automatic entitlement generally available to servicemembers with at least 90 days of active duty service on or after 11 SEP 2001. No action is required by members until they either apply to receive benefits, 2) seek to transfer benefit eligibility to dependents, or 3) are currently eligible for another education benefit (MGIB, MGIB-SR, REAP) and who seek eligibility under the Post-9/11 G.I. Bill.

3. The Department of Veterans Affairs (DVA) is now accepting applications for the Post-9/11 G.I. Bill for members who wish to receive benefits. VA form 22-1990, Application for VA Education Benefits, is available online at: <http://www.gibill.va.gov>. Once DVA processes an application for Post-9/11 G.I. Bill benefits, the member will receive a letter explaining the DVA decision regarding eligibility. Payouts for the Post-9/11 G.I. Bill are not anticipated prior to 15 AUG 2009.

4. Individuals eligible under another education benefit (MGIB, MGIB-SR, REAP), seeking eligibility under the Post-9/11 G.I. Bill are directed to the DVA website. The application form requires that individuals make an irrevocable election to convert from their existing program to the Post-9/11 G.I. Bill. Members should review [DTM 09-003] and consult with their ESO prior to making an election.

• • •

6. Transferability eligibility: 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 paragraph 3.a. of [DTM 09-003]. Family members eligible to receive transferred benefits are outlined in paragraph 3.b. of [the DTM].

7. Transferability of Education Benefits (TEB) web application:

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, 2017).

a. The TEB web application provides an eligible servicemember the ability to elect to transfer educational benefits to an eligible dependent. Via the TEB web application, all CG applications will be reviewed by the Coast Guard Personnel Service Center (PSC). Accepted applications are automatically sent to the VA for processing once the transfer is approved by PSC. Once approved, the dependent must apply to the DVA for a certificate of eligibility by submitting VA form 22-1990, Application for VA Education Benefits as indicated in paragraph 3. Servicemembers do not need to apply for education benefits through the VA prior to applying for transferability via the TEB web application.

b. The TEB web application is scheduled to open on 29 JUN 2009. The link is: <https://www.dmdc.osd.mil/teb/>. This link will not be operational until 29 JUN 2009. Service members are directed to apply to their appropriate service component, active or reserve.

• • •

10. Members with questions regarding VA education benefits are encouraged to contact their Education Services Officer (ESO) for clarification and guidance. ESOs are encouraged to familiarize themselves with general DVA guidelines concerning Post-9/11 G.I. Bill and direct members to the DVA website for detailed clarification. The DVA is the authority for the Post-9/11 G.I. Bill. Transferability policy, however, is directed by the Office of the Secretary of Defense (OSD) and detailed in [DTM-09-003]. ESO questions regarding transferability policy only may be directed to [name redacted], COMDT (CG-1221), at [phone number redacted].

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 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.” (This requirement for *individual*, pre-separation counseling was amended to just pre-separation counseling on May 31, 2013, pursuant to DoDI 1341.13.)

Paragraph 1.a. of Attachment 2 to DTM 09-003 states that the “DVA is responsible for determining eligibility for education benefits under the Post-9/11 GI Bill. Generally, to be eligible for the Post-9/11 GI Bill, individuals must serve on active duty on or after September 11, 2001,” for a specified period of time.

Paragraph 1.b.(8) of Attachment 2 states that members who are eligible for educational benefits under the MGIB or another program could elect to receive benefits under the Post-9/11 GI Bill instead and receive refunds of their contributions.

Paragraph 1.e.(1)(f) of Attachment 2 provides that even members who are not entitled to educational assistance under the MGIB, by reason of an election to disenroll, also “may elect to receive education assistance under [38 U.S.C. Chap. 33]” if, as of the date of the election, they meet the requirements for entitlement to educational assistance with [38 U.S.C. Chap. 33].”

Paragraph 1.e.(2) of Attachment 2 states that the method and process of making an election to receive educational assistance under the Post-9/11 GI Bill will be determined by DVA. Paragraph 1.e.(3) states that such an election is irrevocable.

Paragraph 3 of Attachment 2 governs the transferability of unused education benefits to family members. Paragraph 3.a. states the following about eligibility:

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

(2) Has at least 10 years of service in the Armed Forces (active duty and/or Selected Reserve) on the date of election, is precluded by either standard policy (Service or DoD) or statute from committing to 4 additional years, and agrees to serve for the maximum amount of time allowed by such policy or statute, or

(3) Is or becomes retirement eligible during the period from August 1, 2009, through August 1, 2013, and agrees to serve the additional period, if any, specified in paragraphs 3.a.(3)(a) through 3.a.(3)(e) of this attachment. A Service Member is considered to be retirement eligible if he or she has completed 20 years of active Federal service or 20 qualifying years as computed under section 12732 of Reference (b).

(a) For those individuals eligible for retirement on August 1, 2009, no additional service is required.

(b) For those individuals who have an approved retirement date after August 1, 2009, and before July 1, 2010, no additional service is required.

(c) For those individuals eligible for retirement after August 1, 2009, and before August 1, 2010, 1 year of additional service is required.

(d) For those individuals eligible for retirement on or after August 1, 2010, and before August 1, 2011, 2 years of additional service is required.

(e) For those individuals eligible for retirement on or after August 1, 2011, and before August 1, 2012, 3 years of additional service is required.

Paragraph 3.g.(1) states that the transfer must be made while the member is still serving on active duty or in the Selected Reserve.

Paragraph 3.i. of Attachment 2 states that “[a]ll requests and transactions for individuals who remain in the Armed Forces will be completed through the Transferability of Educational Benefits (TEB) Web application at <https://www.dmdc.osd.mil/TEB/>. The TEB Users’ Manual will provide instruction for enrollment; verification; and additions, changes, and revocations.” Paragraph 3.g.(2) states that a member on active duty or in the Selected Reserve may also modify or revoke a transfer at any time through the TEB website.

VIEWS OF THE COAST GUARD

On May 28, 2021, 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 it is more likely than not that the applicant was on terminal leave at the time the transfer program was released on June 22, 2009, and there is no evidence to suggest that he was properly counselled as required by the Department of Defense Instruction.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 22, 2021, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. He responded on July 6, 2021, and stated he agreed with the JAG's recommendation.

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 October 31, 2009, and submitted his application to the Board on December 11, 2020, more than nine years after he was discharged. Although he claimed to have discovered the error only recently, the record shows that the education benefit transfer program was publicized in several ALCOASTs in 2008 and 2009 before he retired. The Board finds that the preponderance of the evidence shows that the applicant must have known about the possibility of transferring his education benefits before he retired but did not research the matter for many years. Therefore, the application was not timely filed.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁴ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), 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"⁵ 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 weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."⁶
4. The applicant did not state why it took him so long to notice the alleged error in his record. Nor did he justify his long delay. However, a cursory review of the record shows that his request has merit because there is nothing in his Coast Guard record to show that he received documented individual counseling on the benefits of the Post-9/11 GI Bill program before he

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

⁴ 10 U.S.C. § 1552(b).

⁵ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁶ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

retired, as required by policy. Accordingly, the Board will waive the statute of limitations and consider the case on the merits.

5. 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 family members before he retired on October 31, 2009. 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.⁷ 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."⁸

6. The applicant stated that he did not receive documented, individual counseling about his eligibility to transfer his education benefits to his family members prior to his retirement, and as a result he retired from active duty before transferring his unused education benefits to his dependents. There is nothing in his record to show that he received counseling about the transferring his MGIB benefits to the Post-9/11 GI Bill program or about transferring his Post-9/11 GI benefits to his dependents, as required by DTM 09-003. And the Coast Guard has recommended granting relief given the lack of any documented counseling.

7. The Board agrees with the JAG's recommendation and finds that the applicant has proven by a preponderance of the evidence that he was not properly counseled about the Post-9/11 GI Bill benefit transfer program and the benefits available to his dependents before he retired. The Board finds that the lack of the required documentation of individual counseling in 2009 is sufficient to prove that the applicant was not properly counseled about his ability to transfer his MGIB benefits to Post-9/11 GI benefits and to transfer those benefits to his dependents before he retired. He was ineligible to transfer them once he had retired. Moreover, pursuant to Paragraph 3.a.(3)(b) of Attachment 2 to DTM 09-003, the applicant was authorized to transfer his benefits to his dependents without obligating any additional military service.

8. The Board finds that the applicant is entitled to relief because he has proven by a preponderance of the evidence that he was not properly counseled about his ability to transfer his education benefits to his dependents in 2009 before he retired from active duty. Accordingly, his record should be corrected to show that he transferred his education benefits under the Post 9/11 GI Bill prior to his retirement 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)

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

ORDER

The application of YNCS [REDACTED] [REDACTED] USCG (Retired), for correction of his military record is granted. The Coast Guard shall correct his record to show that he elected to receive his education assistance under the Post-9/11 GI Bill program, instead of the MGIB, and that he then transferred those education benefits to his eligible dependents before he retired from active duty on October 31, 2009. The Coast Guard shall 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.

July 23, 2021

[REDACTED] Digitally signed by [REDACTED]
[REDACTED] Date: 2022.04.12 06:46:06
-04'00'

[REDACTED]

[REDACTED] Digitally signed by [REDACTED]
[REDACTED] Date: 2022.04.12 10:00:04
06'00'

[REDACTED]

[REDACTED] Digitally signed by [REDACTED]
[REDACTED] Date: 2022.04.12 12:30:38
-04'00'

[REDACTED]