


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-045


MK1/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 April 27, 2022, and this decision of the Board was prepared pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated April 14, 2023, 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 2012, as a Machinery Technician First Class (MK1, E-6) 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 dependents prior to his retirement. He alleged that in November 2009 he applied to have his education benefits transferred to his dependents but was never notified that his request had been rejected. The applicant also alleged that he did not receive individual counseling regarding the benefits transfer program prior to his retirement.

The applicant retired from the Coast Guard in 2012, but stated that he discovered the alleged errors in his record on March 24, 2022.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 6, 1992, and retired on October 31, 2012, after serving 20 years and 26 days on active duty. There is nothing in his official military record to show that he was counseled about the Post-9/11 GI Bill program before his discharge

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 April 12, 2023).

or that he was advised that his application had been rejected due to his lack of four years of obligated service.

APPLICABLE LAW AND 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 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) to the DTM states that it is the responsibility of the Secretary to “[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 of Attachment 2 (Procedures) to the DTM states the following about transferring educational benefits to dependents:

TRANSFERABILITY OF UNUSED EDUCATION BENEFITS TO FAMILY MEMBERS. Subject to the provisions of this attachment, the Secretary of the Military Department concerned, to promote recruitment and retention of members of the Armed Forces, 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.

a. Eligible Individuals. 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 ...

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.

Instead of individually counseling members about this program, the Coast Guard issued a series of ALCOASTs about it:

- ALCOAST 447/08 (September 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 (January 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 service members 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).

Department of Defense Instruction (DoDI) 1341.13

DoDI 1341.13 was issued on May 31, 2013, and establishes policy, assigns responsibilities, and prescribes procedures for implementing DoD authorities and responsibilities for the Post-9/11 GI Bill. Enclosure (2), Paragraph 4.g states that the service must provide and document pre-separation counseling on Post-9/11 GI Bill benefits. It also incorporated and cancelled DTM 09-003 and revised the counseling requirements articulated in the DTM 09-003. Specifically, it removed the requirement to “provide ... individual pre-separation or release from active duty counseling” and replaced it with “direct pre-separation counseling...”

VIEWS OF THE COAST GUARD

On November 15, 2022, 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 stated that the application is timely and recommended that the Board grant relief because there is nothing in the applicant’s record to show that he was properly counseled regarding the obligated service requirement or that his application had been rejected. To support this recommendation, PSC submitted an email from the GI Bill program manager, who wrote the following:

I've checked this veteran's Chapter 33 Post-9/11 GI Bill transfer of education benefits (TEB) record and it shows he applied to transfer his benefits on 11/18/2009. I contacted DMDC to see if they could pull up any record of his TEB request. This is their response.

**I checked in the TEB history table on this request and unfortunately we do not have the ID captured of who rejected this members request. Though it does appear that the Transfer Request was placed into a Rejected status on the same day (20091118) as when the member submitted the request.

Additionally, I've run an audit to see when the [applicant] logged into milConnect and he logged in the following dates/times:

2022-03-23 10:10:05
2022-02-25 10:18:52
2022-02-25 06:46:01
2022-02-25 06:45:50
2022-02-25 06:41:11
2013-08-23 20:41:44

The audit history didn't go back before 2013 for us so I cannot verify the member's original 2009 TEB submission.**

The initial TEB request was denied because the member did not have the minimal 4 year obligated service requirement remaining on his military service contract for approval. This occurred 2 years before I took over as the GI Bill Program Manager for the Coast Guard. I believe that since the member completed 4 years additional service from his date of TEB request, and we are unable to locate any rejection email/information on his TEB rejection, the Board should find in the members favor and grant his approved TEB.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 16, 2022, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. He responded on November 22, 2022, and agreed with the JAG's recommendation.

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.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.² The applicant retired from the Coast Guard on October 31, 2012, and submitted his application to the Board on March 24, 2022, more than ten years after he was discharged. He alleged that he discovered the error in his record in 2022, but to determine whether his application is timely, the Board must decide what the preponderance of the evidence shows about his discovery of the alleged error.³

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

³ *Wielkoszewski v. Harvey*, 398 F.Supp.2d 102, 109 (D.D.C. 2005) (“The Court recognizes that *McFarlane* counsels that the date of discovery should be the actual date, and not the date at which a hypothetical “reasonable person” would have discovered the error or injustice. *McFarlane v. Sec’y of the Air Force*, 867 F.Supp. 405, 412 (E.D.Va.1994). Nevertheless, this does not mean that the actual date of discovery is whenever a plaintiff says it is.

The record indicates that the applicant applied to transfer his educational benefits in November 2009, but his application was rejected because he had not obligated four years of service through November 2013. There is no evidence that he was individually counseled about the need to obligate four years of service to transfer his benefits or advised that his application had been rejected. Therefore, it is possible that he remained unaware of the obligated service requirement and unaware of the rejection of his application to transfer his educational benefits. He might have seen the obligated service requirement in the published ALCOASTs, but under DTM 09-003, he was supposed to receive documented individual counseling about the program. He also might have had access to his educational benefits information through the milconnect portal,⁴ but the Coast Guard did not make that claim, and according to the program manager, the Coast Guard's milconnect records do not go back that far. The available time stamps show that the applicant logged into milconnect to see his records just once, in 2013, before 2022. Although he certainly could have discovered the alleged error within three years of his retirement, the Board finds that the preponderance of the evidence shows that the applicant discovered the alleged error in 2022, and so his application was timely filed.

3. The applicant alleged that the rejection of his application to transfer his educational benefits to his dependents and the lack of the documented, individual counseling required by DTM 09-003 constitutes an error and injustice in his record. 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.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

4. Since the applicant applied to transfer his education benefits to his dependents in November 2009, he clearly knew about the program even though he had not been individually counseled. The program allows members with six years of service to transfer their education benefits to their dependents if they have four years of obligated service remaining to run. Whether the applicant was somehow aware of the program but unaware of the obligated service requirement or unaware of how much obligated service he had remaining on his enlistment is unclear. However, because he was not individually counseled and may not have been informed when his application was rejected, the JAG recommended that the Board grant relief by correcting the applicant's record to show that his benefits transfer application was accepted. To correct his record to show that his application was accepted, the Board must enter a four-year reenlistment in his record as of November 2009 to provide the required four years of obligated service. In light of the lack of individual counseling, the Board is persuaded that relief should be granted by correcting his record to show that he reenlisted for four years in November 2009 to have sufficient obligated service to transfer his benefits.

⁴ According to the milconnect FAQ webpage, milconnect was released in December 2008. https://milconnect.dmdc.osd.mil/milconnect/public/faq/Contacts_and_Help-About_milConnect (last viewed April 13, 2023).

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).

5. The Board notes, however, that the GI benefits transfer program is run by the VA, not by the military, and this Board has no authority over the VA. And although the Coast Guard's program manager claimed that the applicant served for four years after he attempted to transfer his benefits in November 2009, he actually did not. Instead, the record shows that the applicant retired just three years later, on October 31, 2012. To the Board's knowledge, the VA will not transfer the education benefits of a member who, like the applicant, did not fulfill all four years of the obligated service requirement. And his date of application cannot be backdated to four years before his retirement date because the program did not begin until August 2009. Therefore, although the Board will correct his record to show that he obligated four years of service in November 2009 and so his application to transfer his education benefits was accepted, the applicant should be aware that because he retired three years later, the VA may find that he did not fulfill the requirements for transferring his benefits.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of MK1 [REDACTED] [REDACTED] [REDACTED] USCG (Retired), for correction of his military record is granted. The Coast Guard shall correct his record to show that in November 2009, he obligated four years of service by signing a reenlistment or extension contract and that his application to transfer his Post-9/11 GI Bill education benefits to his eligible dependents was accepted by the Coast Guard. The Coast Guard shall assist him with the paperwork necessary to accomplish these corrections. There are no back pay and allowances due as a result of this correction.

April 14, 2023

[REDACTED] [REDACTED] [REDACTED] Digitally signed by [REDACTED]
Date: 2023.05.04 14:09:59 -04'00'

[REDACTED] [REDACTED] [REDACTED] Digitally signed by [REDACTED]
Date: 2023.05.04 12:29:59 -04'00'

[REDACTED] [REDACTED] [REDACTED] Digitally signed by [REDACTED]
Date: 2023.05.04 13:18:14 -04'00'