



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

MEH

Docket No. 11738-09
15 April 2010

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO
[REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) NAVADMIN 187/09 of 26 June 2009
(3) NAVADMIN 203/09 of 11 July 2009
(4) BUPERS memo 1780 BUPERS-314 of 9 Feb 10
(5) Excerpts from Subject's naval record and papers related to this application

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to establish eligibility to transfer Post-9/11 GI Bill benefits to his dependents.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman and George, reviewed Petitioner's allegations of error and injustice on 12 April 2010 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. The Post-9/11 Veterans Education Assistance Act (Post 9/11 GI Bill, Public Law 110-252) was signed into law on 30 June 2008 and became effective on 1 August 2009. The bill provides financial support for education and housing for service members with at least 90 days of service on or after 11 September 2001. The act also includes a provision for qualifying service members to transfer educational benefits to dependents. General descriptions of the essential components of the new law were widely available beginning in summer 2008 but specific implementing guidance was not published until summer 2009.

c. In approximately December 2008, Petitioner submitted a retirement request seeking to be transferred to the retired list effective 1 August 2009. His request was approved and, in February 2009, he received retirement orders that conformed with his request. Petitioner began terminal leave on 15 June 2009.

d. The Navy's guidance implementing the Post-9/11 GI Bill was published by NAVADMIN 187/09, released on 26 June 2009, and NAVADMIN 203/09, released 11 July 2009. Under the guidance, "active duty sailors that separate, retire, transfer to the Fleet Reserve or who are discharged prior to 1 August 2009 are not eligible to elect transferability." See enclosures (2) and (3).

e. On or about 30 July 2009 Petitioner requested authorization to transfer educational benefits to his dependents electronically via the Department of Defense Transferability of Educational Benefits (TEB) website. Note, because Petitioner was scheduled to be released from active duty on 31 July 2009, he did not meet the eligibility criteria to transfer educational benefits. As stated above, members who are discharged prior to 1 August 2009 are not eligible to elect transferability.

f. On or about 5 August 2009, Petitioner's electronic request to transfer educational benefits to his dependents was, erroneously, approved. The error was made by service representatives of BUPERS 26 and COMNAVRESFORCOM who were struggling to process a backlog of approximately 1700 TEB applications beginning at their first opportunity on 6 July 2009. Subsequent review has revealed that the same error was made in seven other instances.

g. Upon learning that Petitioner's TEB application had been erroneously approved, the Bureau of Naval Personnel (BUPERS-262G now PERS-314) took steps to notify Petitioner of the error. On 4 September 2009 representatives from BUPERS-262G mailed Petitioner a letter advising him that under the law and regulations implementing the Post 9/11 GI Bill, he was not eligible to transfer benefits to his dependents because he was not on active duty on 1 August 2009. Petitioner received the letter on 9 September 2009. Petitioner was also advised by phone on 11 September 2009.

h. On 5 November 2009, the instant application was received by this Board. In it, Petitioner seeks to have the record changed to show that (1) he was released from active duty after 1 August 2009 in order to establish eligibility to transfer Post-9/11 GI Bill benefits, and (2) that his request to transfer the benefits to his dependents be approved. He argues, essentially, as follows. The transfer eligibility criteria were not clear. If he had known that he would not be eligible to transfer benefits based on his approved retirement date, he would have requested to delay his retirement until eligible.

i. In correspondence attached as enclosure (4), the Bureau of Naval Personnel (BUPERS 262-G) has recommended the request be denied. Although a regrettable error was made in originally approving Petitioner's application to transfer Post-9/11 GI Bill benefits to his dependents, Petitioner is, in fact, not eligible under the law. To transfer benefits, a member must have been in the Armed Forces on 1 August 2009, the effective date of the Post-9/11 GI Bill. Petitioner's last day of active duty was 31 July 2009, and as such he was never eligible to transfer his benefits to his dependents. Moreover, upon learning that Petitioner's TEB application had been erroneously approved, the Bureau of Naval Personnel (BUPERS-262G) took prompt steps to notify Petitioner of the error. General descriptions of the eligibility criteria for the Post-9/11 GI Bill were widely available beginning in summer 2008. Petitioner bears some responsibility to know the eligibility criteria for the new law as applied to him. Additionally, although no effort should be spared to avoid providing members of the naval service with erroneous information about their eligibility for benefits, it is well settled that any such erroneous information given does

not serve as a basis for the receipt of benefits in excess of those that are provided for by statute or regulation.

CONCLUSION:

Upon review and consideration of all the evidence of record, on balance, the Board concludes that Petitioner's request warrants favorable action. The Board carefully weighed the observations made in enclosure (4) regarding Petitioner's responsibility to have known that he was not eligible to transfer benefits. However, the Board found that the following factors militated in favor of relief: The Post 9/11 GI Bill program is "new" and, as with many new programs, some implementation difficulties are to be expected. Specific guidance about the program was not available until summer 2009. By that time, Petitioner had already begun his transition to retired status. Most importantly, Petitioner was (initially) erroneously told that his request to transfer benefits was approved. Therefore, even though the record is clear that Petitioner did not meet the criteria to transfer benefits, under these special circumstances a measure of relief is warranted.

RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show that:

a. He was released from active duty and transferred to the retired list effective 31 August/1 September 2009, vice 31 July/1 August 2009. Petitioner will be entitled to all corresponding pay and allowances (to be offset by his retired pay, and if applicable, civilian wages). No waivers of the offset will be granted. Note: this change will make Petitioner eligible to transfer Post 9/11 GI Bill educational benefits under the law.

b. Prior to 31 August 2009, Petitioner made a timely request to transfer Post 9-11 GI Bill benefits to his dependents. The request was received and approved prior to Petitioner's release from active duty.

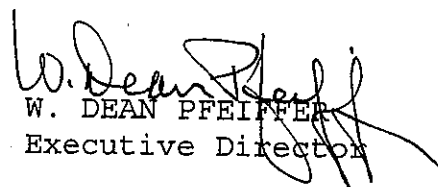
c. Upon completion of the above changes, COMNAVPERSCOM (PERS-314) will execute an approved Transferability of Educational Benefits (TEB) application reflecting the transfer information and options previously elected by Petitioner.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.


ROBERT D. ZSALMAN
Recorder


WILLIAM J. HESS, III
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

Reviewed and Approved

 5/5/10
Assistant General Counsel
(Manpower and Reserve Affairs)