

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-121

XXXXXXXXXXXXXXXXXXXXX.
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on April 16, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c), with the assistance of staff member D. Hale.

This final decision, dated January 18, 2013, is 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 as a Yeoman first class (YN1) after serving 20 years on active duty in the U.S. Army and the Coast Guard, asked the Board to correct his record to show that he transferred his benefits under the Post-9/11 Veterans Education Act of 2008 (Post-911 GI Bill)¹ to his dependents prior to his retirement from the Coast Guard. He stated that he was on terminal leave from April 2009 until his retirement on September 1, 2009, and alleged that he was not told about the Post-9/11 GI Bill program prior to beginning terminal leave.

Regarding the delay in submitting his application, the applicant stated that he discovered the alleged errors in his record on April 10, 2012, and argued that it is in the interest of justice to waive the untimeliness because he was unaware of the Post-9/11 GI Bill benefit and only learned about it when he was planning for his dependent children to attend college.

SUMMARY OF THE RECORD

The applicant retired from 20 years of active military service on September 1, 2009.

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

There is nothing in the record to indicate that he attempted to transfer his unused Post-9/11 GI Bill benefits to his dependents prior to his retirement from the Coast Guard. There is nothing in the record to indicate that he was counseled about the Post-9/11 GI Bill benefits prior to his retirement.

VIEWS OF THE COAST GUARD

On August 15, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG argued that relief should be denied because the applicant failed to substantiate an error or injustice regarding the Coast Guard's notice of pending implementation of the Department of Veterans Affairs (DVA) Post-9/11 GI Bill benefits with respect to his retirement decision. The JAG argued that the Coast Guard delivered constructive notice to all members of the DVA's Post-9/11 GI Bill program when it released ALCOAST² 447/08 on September 18, 2008. The JAG stated that the applicant was still on active duty when this ALCOAST was released and that it "was [the applicant's] responsibility to read and understand information provided within ALCOAST messages." The JAG noted that ALCOAST 447/08 clearly states that the Post-9/11 GI Bill does not go into effect until August 1, 2009, and plainly addresses the transferability of benefits to dependents. The JAG further noted that ALCOAST 447/08 specifically states that "members are reminded not to make significant unalterable career choices or changes to college savings plans."

The JAG also argued that the ALCOAST announcing the implementation of the Post-9/11 GI Bill was released eight months before the applicant began his terminal leave. Moreover, the JAG argued, the CG released another ALCOAST on January 16, 2009, and it specifically addressed the topic of transferability of the benefits to dependents. The JAG asserted that this "is clearly a failure on the applicant's behalf to read posted information released by the CG on several different occasions regarding pending educational benefits prior to the applicant's decision to retire."

The JAG further argued that the applicant has not met his burden of proving that the CG committed an error or injustice in its implementation of the Post-9/11 GI Bill transfer program. The JAG asserted that the applicant had constructive notice of the benefits prior to his September 1, 2009, retirement, and his failure to avail himself of published CG information does not impugn the CG with error or describe an injustice in the way the CG delivered the program information to its members.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC argued that although the applicant claimed that there was no way for him to know about a policy that went into effect on August 1, 2009, the Coast Guard released two ALCOASTs regarding the transfer of GI Bill benefits to dependents before the applicant began his terminal leave in April 2009. The PSC argued that "[i]t is unclear how, beginning in September of 2008, the applicant remained unaware of a

² ALCOAST - A notice containing information of an urgent nature, requiring a wide distribution within the Coast Guard and is transmitted via the Coast Guard Telecommunications System (CGTS). It remains in effect for one year from the date of origin. Coast Guard Telecommunications Manual (TCM), COMDTINST M2000.3C.

program so heavily anticipated. The applicant's argument that he was miscounseled or misinformed is therefore without merit."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2012, 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.

APPLICABLE LAW AND REGULATIONS

38 U.S.C. § 3319

Section 3319 to Title 38 states the following in pertinent part:

"(a) In general (1) Subject to the provisions of this section, the Secretary concerned may permit an individual described in subsection (b) who is entitled to educational assistance under this chapter to elect to transfer to one of 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).

"(2) The purpose of the authority in paragraph (1) is to promote recruitment and retention in the uniformed services. The secretary concerned may exercise the authority for that purpose when authorized by the Secretary of Defense in the National Security interests of the United States.

"(b) Eligible individuals An individual referred to in subsection (1) is any member of the uniformed services 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 uniformed services; or (2) the years of service as determined in regulations pursuant to subsection (j).

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"(f) Time for transfer; revocation and modification. Time for transfer. Subject to the time limitation for use and 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) Such regulations shall specify (A) the manner of authorizing the transfer of entitlement 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)."

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, which became effective on August 1, 2009. The DTM states that it is effective immediately and that it is applicable to the Office of the Secretary of Defense and the Military Departments including the Coast Guard by agreement with the Department. The regulation defined “Military Services” as the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Paragraph 3.b. of Attachment 1 (Responsibilities) to the DTM states that the Secretaries of the Military Departments shall “Ensure that all eligible active duty members . . . are aware that they are automatically eligible for educational assistance under the Post-9/11 GI Bill program upon serving the required active duty time established in Chapter 33 of [title 38 of the United States Code].”

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.”

Paragraph 3.a. of Attachment 2 (Procedures) states that members eligible to transfer education benefits are those members in the Armed Forces on or after August 1, 2009, who have served a specific period of active duty and who agree to a further period of active duty. However, paragraph 3.a.(3)(b) states that for those members who have an approved retirement date after August 1, 2009, and before July 1, 2010, no 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.

Paragraph 3.j.(1) of Attachment 2 (Regulation) states that the Secretary of Defense, in coordination with the Secretary of Veterans Affairs, shall prescribe regulations for purposes of this section. (2) Such regulations shall specify □ (A) the manner of authorizing the transfer of entitlement 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).

DTM 09-003 Glossary

“Member of the Armed Forces. For the purpose of this DTM, those individuals serving on active duty or in the Selected Reserve. Does not include other members of the Ready Reserve (such as the Individual Ready Reserve, standby Reserve, or retired members of the Armed Forces).”

Secretary of the Military Department concerned . . . For a member of the Coast Guard, when the Coast Guard is operating as a Service of the DHS, the term means, “the Secretary of Homeland Security has jurisdiction over the service member.”

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 Department of Defense 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. 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 DVA 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.

Earlier Coast Guard ALCOASTs

ALCOAST 447/08 was released on September 18, 2008, and provides a brief introduction of the Post-9/11 Veterans Education Act of 2008 (Post-9/11 GI Bill). Paragraph 3.g. states that a “member may have the opportunity to transfer benefits to their spouse or dependent children”, and that detailed guidance will be released ahead of the August 2009 implementation date.

ALCOAST 444/09 was released on January 16, 2009, and provides the second update to the Post-9/11 GI Bill and its applicability to Coast Guard members. Paragraph 4 provides details about the transfer of benefits to spouses and children, and notes that the member must be on active duty on August 1, 2009, and must agree to serve an additional four years of active service.

ALCOAST 250/09 was released on April 28, 2009, and is the third update to the Post-9/11 GI Bill which was scheduled to go into effect on August 1, 2009. Paragraph 5 of the ALCOAST states that the DVA is scheduled to begin accepting applications for transfer of benefits on or about June 15, 2009. Section B of paragraph 5 states that the Office of the Secretary of Defense has not released the final policy on transferability, specifically as it relates to members who are retirement eligible between 2009 and 2012.

Precedent Decision Issued November 7, 2012

In BCMR Docket No. 2012-054, the Deputy General Counsel for the Department of Homeland Security affirmed the Board’s decision that the Coast Guard erred when it did not provide individual pre-separation counseling to a retiring member about his Post-9/11 GI Bill benefits. In that case, the applicant was on terminal leave from June 30, 2009, until his retirement on October 31, 2009, and did not receive pre-retirement counseling on the Post-9/11 GI Bill prior to his retirement. The Board found that the Coast Guard committed an error by not providing individual, pre-separation counseling, as required by the DTM, which became effective on June 22, 2009. The instant case is remarkably similar, because this applicant was also on terminal leave when the DTM was issued and when the program went into effect. And like the applicant in Docket No. 2012-054, he was not counseled about the Post-9/11GI Bill

program and the chance to transfer unused benefits before he started his terminal leave and retired from active duty.

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. The application was timely.

2. This application involves a request for benefits under the Veterans Educational Assistance Act of 2008, commonly referred to as the Post-9/11 GI Bill. It was signed into law in June 2008 and became effective on August 1, 2009. Section 3319(a) of Title 38 of the United States Code authorized eligible service members to transfer a portion of their entitlement to educational assistance to their eligible dependents. Subsection (j) directed the Department of Defense to prescribe implementing regulations on the transferability of educational benefits.

3. On June 22, 2009, DoD issued Directive-Type Memorandum (DTM) 09-003 implementing the Post-9/11 GI Bill, which included regulations for transferring educational benefits to dependents. The DTM states that it is applicable to OSD (Office of the Secretary of Defense) and the Military Departments including the Coast Guard by agreement with the Department of Homeland Security. Paragraph 3 of Attachment 1 (Responsibilities) states that Service Secretaries have the responsibility for providing regulations, policy, implementation guidance, and instructions governing the administration of the Post-9/11 GI Bill consistent with the DTM.

Section 3.b. of Attachment 1 to the DTM states that Service Secretaries shall “[e]nsure that all eligible active duty members and members of the Reserve Components are aware that they are automatically eligible for educational assistance under the Post-9/11 GI Bill program upon serving the required active duty time as established [under the applicable law].”

Section 3.g. of Attachment 1 to the DTM states that Service Secretaries shall “[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. of Attachment 2 (Procedures) to the DTM states that 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 August 1, 2009, and obligate an additional amount of service, except that for individuals who have an approved retirement date on or after August 1, 2009, and before July 1, 2010, no additional service is required.

Paragraph 3.g. of Attachment 2 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.

5. The applicant commenced authorized terminal leave in conjunction with retirement mid April 2009 and retired from the Coast Guard on September 1, 2009, without returning to his unit.³ The applicant met all of the requirements to transfer his educational benefits to his dependents, except that he did not execute the transfer prior to his retirement, as required by the regulation. According to paragraph 3.g.(1) of Attachment 2 of the DTM, “[a]n individual approved to transfer entitlement of educational assistance . . . may transfer such entitlement to the individual’s family member only while serving as a member of the armed forces.” The DTM Glossary defines members of the armed forces as those individuals serving on active duty or in the SELRES. The definition does not include individuals in a retired status. Attachment 1 to the DTM states that Service Secretaries 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*.” [Emphasis added.] In paragraph 1 of ALCOAST 377/09, issued June 26, 2009, the Coast Guard announced the DTM regulation as the Coast Guard’s policy and it is therefore bound by that regulation.

6. The applicant argued that the Coast Guard failed to counsel him that he could transfer his unused Post-9/11 GI Bill education benefits to his dependents prior to his retirement. There is no evidence before the Board that proves that the applicant received any pre-retirement counseling about Post 9-11 GI Bill benefits prior to his retirement. The Coast Guard committed an error by failing to provide the applicant with individual pre-separation counseling on Post-9/11 GI Bill benefits prior to his retirement, as required by the DTM.

7. The Coast Guard argued that it provided constructive notice to the applicant about the Post-9/11 GI Bill via two ALCOASTs that were published before he began terminal leave, and that it was “clearly a failure on the applicant’s behalf to read posted information . . .” prior to his departure on terminal leave. The Coast Guard would place all of the responsibility on the member to learn about the program and limits its responsibility to announcements through ALCOASTs. However, the DTM requires that the Services do more than just announce the program; it places the responsibility on each Service to ensure that all eligible active duty members are aware of their automatic eligibility for education assistance under the Post-9/11 GI Bill and to provide individual counseling on the program’s benefits prior to separation. Webster’s Ninth New Collegiate Dictionary, p. 808, defines notice as a “written or printed announcement.” It defines counseling as “professional guidance of the individual . . .” Id. p. 296. The Board finds that posting ALCOASTs do not meet the individual counseling requirement of the DTM.

8. The facts in this case are similar to those in BCMR No. 2012-054 in which the Principal Deputy General Counsel approved the Board’s findings that the Coast Guard committed an error by not counseling that applicant about his Post-9/11 GI Bill benefits prior to his retirement on October 31, 2009 as required by the DTM that was published and became effective on June 22, 2009.

9. Accordingly, the applicant has demonstrated an error in his record and his request

³ According to Article 12.C.1.d. of the Personnel Manual (2005), members who have been granted leave in accordance with their retirement do not return to their duty stations to receive final discharge documents. The documents are mailed to the members at their then-location.

should be granted. No basis exists on which to treat this applicant differently than the applicant in 2012-054.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXX Retired, for correction of his military record is granted. His record shall be corrected to show that before retiring from active duty on September 1, 2009, he transferred his Post-9/11 GI Bill educational benefits to his eligible dependents. The Coast Guard shall assist him with the paperwork necessary to accomplish this transfer of benefits.

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