



Australian Government

Defence Honours and Awards Appeals Tribunal

Mitterer and the Department of Defence [2017] DHAAT 12 (11 May 2017)

File Number 2016/012

Re **Mr Herbert Mitterer**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Graham Mowbray (Presiding Member)
Rear Admiral James Goldrick AO CSC RAN (Retd)

Hearing Date 2 March 2017

DECISION

On 11 May 2017 the Tribunal affirmed the decision of the Directorate of Honours and Awards of the Department of Defence not to recommend Mr Herbert Mitterer for the award of the Australian Active Service Medal.

CATCHWORDS

DEFENCE AWARDS – *Australian Active Service Medal – Returned from Active Service Badge*

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2)

Defence Force Regulations 1952 – Reg 93C, Sch 3

Defence Regulation 2016 – s 85

Commonwealth of Australia Gazette No. S 335, Schedule, Australian Active Service Medal Regulations, 2 November 1988

REASONS FOR DECISION

Introduction

1. The applicant, Mr Herbert Mitterer, seeks review of decisions by the Directorate of Honours and Awards of the Department of Defence not to recommend him for the Australian Active Service Medal (AASM) and the Returned from Active Service Badge (RASB).
2. On 2 February 2016 Mr Mitterer contacted the Directorate seeking a full medal assessment for his service in the Australian Regular Army (ARA) from 28 April 1971 to 11 July 1991.¹ On 31 March 2016 the Directorate determined that he was entitled to the Australian Service Medal with Clasp 'SE ASIA' (ASM) and the Australian Defence Medal.²
3. Mr Mitterer provided further information to the Directorate on 2 May 2016 and stated that in addition to the ASM he believed that he was entitled to the 'Australian Active Service Medal with SE Asia Clasp' and 'the Operational Service Badge'.³ On 12 May 2016 Mr Michael Cannon, Supervisor Service Assessments and Awards in the Directorate, advised Mr Mitterer that there was no Clasp 'SE ASIA' to the AASM, only to the ASM. Mr Cannon further advised that there was no Operational Service Badge (OSB) with the ASM or the AASM. This can be issued only in conjunction with the new Australian Operational Service Medal, which has replaced the ASM and AASM, but is not retrospective for the periods covered by the latter two awards. There was, however, a RASB which could only be issued if the AASM was awarded.⁴
4. The 12 May 2016 email conveys decisions in effect refusing to recommend Mr Mitterer for the awards he seeks. These are the decisions for which he has sought review from the Tribunal.⁵

Tribunal Jurisdiction

5. Pursuant to s 110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s 110V(1) and includes a decision made by a person within the Department of Defence or the Minister to refuse to recommend a person for an honour or award in response to an application. Regulation 93C of the *Defence Force Regulations 1952* defines a defence award as being those awards set out in Part 2 of Schedule 3.⁶ Included in the defence awards set out in Part 2 is the AASM.

¹ Email H Mitterer to Honours and Awards, 2 February 2016

² Directorate of Honours and Awards Medals Assessment, 31 March 2016

³ Email H Mitterer to Honours and Awards, 2 May 2016

⁴ Email M Cannon to H Mitterer, 12 May 2016

⁵ Application for Review to the Tribunal, 30 June 2016

⁶ Under s 85 of the *Defence Regulation 2016*, the *Defence Force Regulations 1952* continue to apply to an application made under those regulations before their repeal on 1 October 2016

6. Mr Mitterer's email of 2 May 2016 constituted an application and Mr Cannon's email of 12 May 2016 amounted to a refusal to recommend Mr Mitterer for an award as required by s 110V(1) of the Act. Although the AASM is included as a defence award in Part 2 of Schedule 3 of *Defence Force Regulations 1952*, the RASB is not.

7. Thus, the Tribunal has jurisdiction to review the decision on the AASM but not on the RASB. In conducting this review the role of the Tribunal is to determine whether the decision of the Directorate on the AASM is the correct or preferable decision, having regard to the applicable law and the relevant facts.

Conduct of the Review

8. In accordance with its *Procedural Rules 2011*, on 18 July 2016 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Mitterer's application and requesting a report on the material questions of fact and the reasons for the decision made on Mr Mitterer's eligibility for the AASM with Clasp 'SE ASIA' and the RASB.

9. The Director Honours and Awards provided a report and Defence's submissions on the AASM on 28 August 2016, noting that the Tribunal had no jurisdiction to consider the RASB. Defence also pointed out that an AASM with Clasp 'SE ASIA' did not exist and recommended that its decision should be affirmed.⁷

10. On 1 September 2016 the Tribunal forwarded the Defence report to Mr Mitterer for his comments.⁸ Mr Mitterer provided these by email on 18 September 2016.⁹

11. The Tribunal met on 9 December 2016 to consider the material provided by Mr Mitterer and Defence and set a hearing date.

12. On 27 February 2017 Mr Mitterer sent the Tribunal a copy of emails from Warrant Officer Class One (Retired) Mick Polak containing his observations of service with Rifle Company Butterworth (RCB) in early 1975.¹⁰

13. On 2 March 2017 the Tribunal held a hearing by telephone with Mr Mitterer. He had provided the Tribunal with written opening submissions the previous day.¹¹ Defence was represented by Mr David Bell and Mrs Petrina Cole, with Mr Steven O'Brien and Ms Nicola Byrne as observers.

⁷ Letter DH&A/OUT/2016/0138 Director Honours and Awards to the Tribunal, 28 August 2016

⁸ Letter DHAAT/OUT/2016/361 Tribunal to H Mitterer, 1 September 2016

⁹ Email H Mitterer to Tribunal, 18 September 2016

¹⁰ Emails between M Polak and H Mitterer, 25, 26 & 27 February 2017, provided to Tribunal by H Mitterer, 27 February 2017

¹¹ Opening Submissions for Tribunal Hearing of 2 March 2017, from H Mitterer, 1 March 2017

Mr Mitterer's Service Record

14. Herbert Mitterer was born on 3 December 1953 and enlisted in the ARA on 28 April 1971, being discharged on 11 July 1991 having attained the rank of Sergeant. He also served in the Australian Army Reserve from 12 July 1991 to 30 September 1992.¹²

15. During his time with the ARA Mr Mitterer had two periods of overseas service:

- Butterworth Air Force Base – 10 March 1975 to 3 June 1975 with 4 Field Regiment; and
- Honolulu – 12 June 1984 to 25 June 1984.

16. For his service in the ARA, Mr Mitterer has received the following awards:

- the Australian Service Medal with Clasp 'SE ASIA';
- the Defence Force Service Medal with First Clasp; and
- the Australian Defence Medal.

Eligibility Criteria for the Australian Active Service Medal

17. The Australian Active Service Medal (AASM) was established by Letters Patent on 13 September 1988 'for the purpose of according recognition to members of the Defence Force and certain other persons who render service in certain warlike operations'.¹³

18. The award of the medal is governed by regulations set out in the Schedule to the Letters Patent.¹⁴ Of particular relevance to the current application are the following regulations:

2. *In these regulations –*

...

“prescribed operation” means an operation in respect of which a declaration has been made under regulation 3.

3. *The Governor-General, on the recommendation of the Minister, may declare a warlike operation in which members of the Defence Force are, or have been on or after 14 February 1975, engaged, to be a prescribed operation for the purposes of these Regulations.*

¹² Details are from the Defence Report: Letter DH&A/OUT/2016/0138 Director Honours and Awards to the Tribunal, 28 August 2016

¹³ *Commonwealth of Australia Gazette No. S 335*, 2 November 1988

¹⁴ *Commonwealth of Australia Gazette No. S 335*, Schedule, Australian Active Service Medal Regulations (AASM Regulations), 2 November 1988

4. (1) *The Medal may be awarded for service in or in connection with a prescribed operation.*

...

(4) *The persons to whom the Medal may be awarded are –*

(a) *persons who served in a prescribed operation as members of the Defence Force: and*

...

(5) *The Medal may not be awarded except to a person who fulfils the conditions for the award of the Medal.*

19. The Governor-General has made declarations under regulation 3 in respect of warlike operations in which members of the Australian Defence Force have been engaged on a number of occasions, for example with the United Nations and North Atlantic Treaty Organisation in the Balkans between 1992 and 1997.¹⁵

20. However, it is not in dispute that no declaration has been made under the Regulations for operations in South East Asia.

Tribunal report on Rifle Company Butterworth

21. The matter of awarding the AASM for service with RCB was explored by the Tribunal in its *Inquiry into recognition for members of Rifle Company Butterworth for service in Malaysia between 1970 and 1989*.¹⁶ At the conclusion of this Inquiry, the Tribunal recommended that no change should be made to the medallic entitlements which attach to service with RCB or any other unit at Butterworth.¹⁷ These recommendations were subsequently accepted by Government.

Mr Mitterer's Evidence and Submissions

22. Mr Mitterer provided evidence and submissions to the Tribunal in a number of written documents, notably in two attachments to his application to the Tribunal of 30 June 2016, his comments of 18 September 2016 on the Defence report, and a document of 1 March 2017 entitled 'Opening submissions' for the Tribunal hearing the next day. He also presented oral evidence and submissions by telephone at the hearing on 2 March 2017.

23. It is not in dispute that Mr Mitterer was a member of the ARA from 28 April 1971 to 11 July 1991. He served at Butterworth Air Force Base from 10 March 1975 to 3 June 1975 with 4 Field Regiment, as part of RCB. This service includes the period for which he seeks the AASM.

¹⁵ *Commonwealth of Australia Gazette No. S 102*, Declaration and Determination under the Australian Active Service Medal Regulations, 27 March 2001

¹⁶ Report, *Inquiry into recognition for members of Rifle Company Butterworth for service in Malaysia between 1970 and 1989*, Defence Honours and Awards Appeals Tribunal, 2011.

¹⁷ *Ibid*, p6.

24. Mr Mitterer's principal contention is that while at Butterworth he was involved in a 'warlike operation' for the purposes of the regulations.¹⁸ He relies on a range of documents to assert that:¹⁹

- there was no question as to the existence of an insurgency at the time he was at Butterworth;
- there was a defence emergency in April 1975 during this time;
- following the collapse of the South Vietnamese forces in March 1975 there was an escalation of military activity in the region including Malaysia, resulting in a declaration of a 'ground defence emergency at RAAF Butterworth'; and
- 'the armed ready reaction force was immediately increased from section to platoon strength' with everyone on duty 'armed and left in no doubt that they were armed to be ready to defend the airfield from an anticipated incursion by communist insurgents'.

25. Mr Mitterer presented further detail on some of his experiences during this time in a second attachment to his application.²⁰

26. In his written 'Opening submissions' to the Tribunal²¹ Mr Mitterer referred extensively to correspondence of 29 May 2014 between the Hon Stuart Robert MP, Assistant Minister for Defence and the Standing Committee on Petitions of the House of Representatives²² and an accompanying Background Paper of 28 April 2014 prepared by the Department of Defence²³ to support his argument that during 'The Plan Asbestos Phase' the RAAF base faced a threat which rendered his service within the definition of 'warlike'. He also commented on the Tribunal's Report on its inquiry into recognition for Members of Rifle Company Butterworth.²⁴

27. The conclusion in Mr Mitterer's written documents was that:

*... about midway through my service with the company the threshold into warlike was crossed, and as such, I am entitled to retain the Australian Service Medal I have received in recognition of the service rendered up to the time the threshold into warlike service was crossed, and for the service with the Company thereafter, award of the Australian Active Service Medal.*²⁵

¹⁸ Mr Polak broadly supports this proposition in his emails referred to at footnote 10

¹⁹ First Attachment to H Mitterer's Application for Review of Decision, 30 June 2016

²⁰ Second Attachment to H Mitterer's Application for Review of Decision, 30 June 2016

²¹ Written Opening Submissions of H Mitterer, 1 March 2017

²² Letter the Hon Stuart Robert MP, Assistant Minister for Defence, to Dr Dennis Jensen MP, Chair Standing Committee on Petitions, 29 May 2014

²³ Background Paper Nature of Service Branch, Department of Defence, *Parliamentary Petition Dated 3 March 2014, Rifle Company Butterworth 1970-1989*, 28 April 2014

²⁴ Defence Honours and Awards Appeals Tribunal *Inquiry into Recognition for Members of Rifle Company Butterworth for Service in Malaysia between 1970 and 1989*, 18 February 2011

²⁵ Letter H Mitterer to the Tribunal in response to the Defence Report, 18 September 2016

28. Mr Mitterer's oral submissions added little to the written material before the Tribunal. He was unable to direct the Tribunal to a relevant declaration under regulation 3, nor could he point to a provision which would allow the Tribunal to review any refusal of the Minister to recommend that the Governor-General make such a declaration. He asserted that as the word 'warlike' was in an Act it overrode the regulations, but was unable to refer the Tribunal to the Act where 'warlike' was mentioned or defined. In the end, he in effect accepted that he did not meet the criteria for the AASM, but contended that he had a moral entitlement. He asked to whom could he go to give effect to this entitlement.

The Defence Submission

29. The Defence Submission²⁶ set out the history of its consideration of Mr Mitterer's requests for defence awards following his online application of 2 February 2016 for a full medal assessment.

30. After referring to the eligibility criteria for the Australian Active Service Medal referred to at paragraph 18 above, Defence submits:

As the Minister has not recommended, nor the Governor-General declared service with Rifle Company Butterworth to be a prescribed operation for the purposes of the Australian Active Service Medal Regulations, the AASM cannot be awarded to Mr Mitterer in recognition of his service with Rifle Company Butterworth.

31. Defence notes that Mr Mitterer has been appropriately awarded the ASM with Clasp 'SE ASIA' for his service at the RAAF Base at Butterworth.

32. It also points out that the Tribunal has no jurisdiction on decisions about the RASB.

33. Oral submissions by representatives of Defence on 2 March 2017 reiterated its written submissions.

Tribunal Consideration

34. The Tribunal carefully considered Mr Mitterer's eligibility against the criteria in the Australian Active Service Medal Regulations.

35. A proper reading of these Regulations makes it abundantly clear that an essential precondition for the award of the AASM is *a declaration* of a warlike operation by the Governor-General under regulation 3 to be *a prescribed operation*. If a person's service does not include a prescribed operation subject to a declaration by the Governor-General, it is not possible for that person to be awarded the AASM.²⁷

²⁶ Letter DH&A/OUT/2016/0138 Director Honours and Awards to the Tribunal, 28 August 2016

²⁷ AASM Regulations, paragraph 4(4)(a) and regulation 4(5)

36. The Governor-General has not made a declaration under these Regulations for any operation in which Mr Mitterer has been involved, as Mr Mitterer ultimately accepted. There is therefore no prescribed operation under these Regulations applicable to Mr Mitterer's service. In these circumstances Mr Mitterer is not entitled to the AASM and the Regulations expressly prohibit an award of the AASM to him.²⁸

37. Mr Mitterer's evidence and submissions focus on his assertion that his service at RAAF Butterworth at least from April 1975 amounted to warlike service. With due respect, for the purposes of the AASM whether such service was warlike or not is irrelevant to the Tribunal's decision. Even if this service were warlike, without a declaration from the Governor-General under regulation 3, reliance could not be placed on it for award of an AASM.

38. The question of whether a declaration should be made is one for the Governor-General on the recommendation of the Minister. The Tribunal has the power to make recommendations which it considers appropriate arising out of the review of a reviewable decision. Given this, it has carefully considered the evidence before it in this matter, particularly the submissions and primary source documents provided by Mr Mitterer both before and after the hearing. After considering this material, and having regard to its 2011 inquiry amongst other inquiries, the Tribunal is not inclined to make a recommendation for a new declaration.

39. Mr Mitterer refers in his application to the Tribunal decision in *Chief Petty Officer John David Anderson and the Department of Defence*²⁹ as a precedent in support of his application. However, this decision concerned an award for the Australian Active Service Medal with Clasp 'KUWAIT' for which the Governor-General had made a declaration as required under the Regulations.³⁰

40. As noted earlier, the Tribunal has no jurisdiction to review the RASB.

41. The Tribunal notes that Mr Mitterer has been awarded the ASM with Clasp 'SE ASIA' for his service at the RAAF Base at Butterworth, and the Australian Defence Medal and the Defence Force Service Medal with First Clasp for his service in the ARA.

Tribunal Finding

42. For the reasons given above, the Tribunal finds that Mr Mitterer is not eligible for the AASM. His service at RAAF Butterworth has not been subject of a declaration by the Governor-General under the relevant regulations. Consequently he did not render service in a prescribed operation entitling him to this award.

²⁸ AASM Regulations, regulation 4(5)

²⁹ *Chief Petty Officer John David Anderson and the Department of Defence* [2012] DHAAT (4 October 2014)

³⁰ *ibid* p19

TRIBUNAL DECISION

43. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence not to recommend Mr Herbert Mitterer for the award of the Australian Active Service Medal.