



Australian Government

Defence Honours and Awards Appeals Tribunal

██████████ and the Department of Defence [2017] DHAAT 03 (18 January 2017)

File number (s) 2015/033

Re Mr ██████████
Applicant

And Department of Defence
Respondent

Tribunal Ms Jane Schwager AO (Presiding Member)
Mr Richard Rowe PSM

Hearing Date 14 October 2016

DECISION

On 18 January 2017 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr ██████████ is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – refusal to recommend the award of the Australian Defence Medal.

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1) 110VB(2)
Defence Force Regulations 1952 - reg 93C and Schd 3
Commonwealth of Australia Gazette No S48 dated 30 March 2006 – Australian Defence Medal Regulations 2006
Australian Defence Medal Regulations 2006 – Instrument of Delegation – dated 9 August 2014
Australian Defence Medal Regulations 2006 - CDF Determination on Qualifying Service as Efficient Service – dated 8 November 2009

REASONS FOR DECISION

Introduction

1. The applicant, Mr [REDACTED] (Mr [REDACTED]) seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Australian Defence Medal (ADM). On 16 April, 2013 Mr [REDACTED] made an application to the Directorate for the award of the ADM. On 7 August, 2013, the Directorate advised Mr [REDACTED] that he did not qualify for the award as he had not completed his initial engagement period of four years of service. On 7 September 2015, Mr [REDACTED] applied to the Tribunal for a review of the Directorate's decision.

Tribunal Jurisdiction

2. Pursuant to s110VB (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 s110V (1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for an award in response to an application. Regulation 93C of the *Defence Force Regulations 1952*¹ defines a defence award as being those awards set out in Part 2 of Schedule 3. The ADM is included in the defence awards set out in Part 2. Therefore the Tribunal has jurisdiction to review decisions in relation to this award. The role of the Tribunal is to determine whether the decision of the Directorate is the correct or preferred decision having regard to the applicable law and the relevant facts.

Conduct of the Review

3. In accordance with the *Defence Honours and Awards Appeal Tribunal Procedural Rules 2011 (as amended)*, on 16 September 2015, the Tribunal wrote to the Secretary of the Department of Defence advising them of Mr [REDACTED] application for review and seeking a report on the reasons for the original decision and the provision of relevant material that was relied upon in reaching the decision. On 6 October 2015, the Directorate of Honours and Awards wrote to the Tribunal Secretariat requesting an extension of time for receipt of the Defence Submission as Mr [REDACTED] had submitted an application for retrospective change of his mode of separation. On 7 October 2015, the Tribunal Secretariat wrote to Mr [REDACTED] advising him of the extension of time provided to Defence. On 29 March 2016, Mr [REDACTED] wrote to the Chair of the Tribunal requesting that details not be published due to the sensitive medical nature of his case. On 18 April 2016, the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence submission in the form of a written report. The Tribunal forwarded a copy of the Directorate's written report to Mr [REDACTED] for comment on 26 April 2016. On

¹ Under Section 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.

24 May 2016 Mr [REDACTED] provided the Tribunal with his comments on the Defence submission.

4. The Tribunal considered the material provided by Mr [REDACTED] and the Directorate. Mr [REDACTED] was invited to give oral evidence (by telephone) to the Tribunal. On 14 October 2016, the Tribunal held a hearing with Mr [REDACTED]. The following three representatives from Defence were in attendance; Mr Michael Stevens (Service Assessments and Awards –Supervisor), Mrs Allison Augustine (Tribunal Manager) and Colonel Glen Wells MBBS, MPH (Medical Consultant, Joint Health Command).

5. The Tribunal considered the material provided by Mr [REDACTED] and by the Directorate. Relevant extracts of Mr [REDACTED] service records were provided to the Tribunal with the Defence submission.

Australian Defence Medal

6. The ADM was instituted by Her Majesty, Queen Elizabeth the Second by Letters Patent on 8 September 2005, *for the purpose of according recognition to Australian Defence Force personnel who have served for a minimum of six years since the end of World War II.*

7. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.² As a result of that amendment the minimum period of service became four years. Regulation 4 of the amended Regulations states:

(1) The Medal may be awarded to a member, or former member, of the Defence Force who after 3 September 1945 has given qualifying service that is efficient service:

(a) by completing an initial enlistment period; or

(b) for a period of not less than 4 years service; or

(c) for periods that total not less than 4 years; or

(d) for a period or periods that total less than 4 years, being service that the member was unable to continue for one or more of the following reasons:

(i) the death of the member during service;

(ii) the discharge of the member as medically unfit due to a compensable impairment;

(iii) the discharge of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force or his or her delegate;

² *Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette No. S48, 30 March 2006.*

- (2) *For sub regulation (1), the Chief of the Defence Force or his or her delegate may determine that a period of the member's qualifying service is efficient service.*

³

8. Relevant to Mr [REDACTED] application, on 8 November 2009 the Chief of the Defence Force made a determination under Regulation (4)(2), that states '*... where a member or former member was discharged as medically unfit to serve due to a non-compensable injury or disease, and that period of service of that member or former member is less than that prescribed under regulations 4(1)(a) to (c), that lesser period may, subject to the individual circumstances, be considered as being efficient service for the award of a medal to members or former members of the Defence force who qualify for the award of the medal under section 4 of the regulations.*'⁴

Mr [REDACTED] service record

9. Mr [REDACTED] service record states that he enlisted in the Australian Regular Army on 23 March 1962, with an enlistment period of 6 years and that he discharged on 5 March 1965 at own request. His service records therefore, confirm that he served 2 years, 11 months and 13 days of his enlistment period.

10. Mr [REDACTED] service record also includes his Attendance and Treatment Card and Medical Board report which notes, on the 25 January 1965, that Mr [REDACTED] was described as '*not suitable for army employment return to unit to await discharge from army*'. This is reiterated at Paragraph 2 of the Defence submission.

Mr [REDACTED] Submission

11. In his application for review, Mr [REDACTED] stated:

'I enlisted in the Australian Regular Army in [REDACTED] and served almost three years, the bulk of which was with [REDACTED]. In early January 1965 I was suffering from anxiety and depression and subsequently admitted to One Camp Hospital for assessment. The Doctor's findings of the assessment were that I was suffering from a 'Sociopathic personality with paranoid tendencies and delusions of persecution and psychopathic features and a personality unsuitable for army service, recommend an administrative discharge.' Mr [REDACTED] stated that '*I did not resign or retire but may have been deemed redundant due to a psychiatric condition. However, it can also be interpreted that I was discharged for a medical (psychiatric) condition that rendered me unfit for service where I had no control over the date of my departure.*'⁵

³ Ibid

⁴ *Australian Defence Medal Regulations 2006 Determination by the Chief of the Defence Force*, dated 8 November 2009, received under cover of the Defence Submission DH&A/OUT/2016/0056 dated 18 April 2016.

⁵ Application for Review of Decision Re Australian Defence Medal – [REDACTED] 9 September 2015

12. In his application for review Mr [REDACTED] refers to – and relies on - dot points (4.) and (5.) of Form AD497 – *Application for Australian Defence Medal*.⁶ Mr [REDACTED] also states he is aware of the ADM Regulations as set out in the *Commonwealth of Australia Gazette No. S 48* of 30 March 2006. Regarding dot points 4 and 5 of Form AD497, Mr [REDACTED] states:

“Dot point four deems eligibility as, ‘...were medically discharged (based upon individual circumstances)’...this dot point implies a soldier classed as medically fit on service entry and diagnosed at a later date in his service as being unfit to serve due to a medical (psychiatric) impairment and is discharged for a non-compensatory impairment, that soldier would be given consideration for the ADM...

...dot point five [deems eligibility] as ‘left the service due to a defence workplace policy of the time’. [which] would make me eligible for the award, as at the time of my discharge, obviously army policy was such that personnel identified with a Sociopathic Personality Disorder could not serve in the army, hence my discharge on those grounds.”⁷ (Emphasis added by applicant)

13. Mr [REDACTED] also relies on the conditions as outlined in the Department of Defence PACMAN ADF Pay and Conditions Manual volume 1 Chapter 2.2 which he states as ‘...you can leave either through an administrative process or a medical process. You leave under the administrative process when you resign, retire or are made redundant. You leave under the medical discharge process when you are **declared unfit for service**. When you leave under the medical process, you cannot control the date you go’⁸. Mr [REDACTED] requests that the Tribunal consider the fact that he could fall into either of these two conditions and in either case should be entitled to the award of the ADM.⁹ (Emphasis added by applicant)

14. On 24 May 2016, Mr [REDACTED] provided his comments in response to the Directorate’s submission. In his letter to the Tribunal Mr [REDACTED] states:

“I am of the opinion that the findings of the Defence Department on “Material Questions of Fact” are grossly inadequate in terms of identifying all the facts as they evolved in the last three months of my service career...

5. In contradiction to Defence claim, the psychiatrist did not indicate on my record “administrative discharge”...

7. A medical classification review on 3rd Feb 65 indicated “medically unfit”...

9. Defence wrongly claimed in the “Joint Health Command Minute Reference 2015/1011384 R25002906 dated 22nd Feb 16” that there was “no specific evidence of a mental health disorder or disability at the time of his discharge” then that would pose the question as to what classification “Sociopathic personality with paranoid tendencies and delusions of persecution and psychopathic features” comes under...

⁶ Ibid, Appendix 7 - Form AD 497 *Application for Australian Defence Medal*.

⁷ Application for Review of Decision Re Australian Defence Medal – [REDACTED] 9 September 2015

⁸ Ibid

⁹ Ibid

I would appeal to the Tribunal to consider the case in its entirety and apply the principles of procedural fairness which would afford me natural justice."¹⁰

15. On the 29 March 2016, Mr [REDACTED] sent an email to the Chair of the Tribunal, Mr Mark Sullivan AO, requesting that *"due to the very sensitive medical nature of the contents of my case, I would respectfully request the details of same not be published in the Government Gazette."*¹¹

16. The Chair of the Tribunal has directed that the public version of this decision report be suitably redacted to protect Mr [REDACTED] identity.

Defence's Submission

17. Defence's submission, dated 18 April 2016, concluded that after reassessment of all material questions of fact, including relevant documentation, Mr [REDACTED] was not eligible for the ADM because he did not meet the eligibility criteria for the award, in that he:

- did not complete his initial enlistment period;
- did not give 'qualifying service that is efficient service' for four years in that he only completed 'two years, 11 months and 13 days of 'efficient service';
- was not discharged as medically unfit; and
- was not discharged due to a prevailing discriminatory Defence policy.

18. After receiving the Tribunal's request, Mrs Augustine from the Directorate suggested to Mr [REDACTED] that he could request to have his service and medical records reviewed for a possible change to his mode of discharge. On 18 September 2015 Mr [REDACTED] in an email to Mrs Augustine confirmed that he had lodged his application for a mode of discharge review. On 21 September 2015, Retrospective Change to Mode of Separation, Administration Officer, Ms Meg Ryan confirmed receipt of Mr [REDACTED] application and advised him *"the process is quite lengthy and a timeframe for an outcome could not be predicted."*¹²

19. On 8 March 2016, Brigadier Stothart, Director General Career Management – Army, wrote to Mr [REDACTED] advising him that the review into his mode of discharge had been completed and with the information that was available, he could not support the claim and that, unless additional evidence was provided, there would not be a change in his mode of discharge.¹³ Attached to this letter was a Minute from Colonel Glen Wells MBBS, MPH, Medical Consultant, Joint Health Command, to DNP/Defence SAM dated 22 February 2016, who undertook the review of Mr [REDACTED]'s mode of discharge.

20. In the Minute, Colonel Wells stated that: *"In conclusion, there is insufficient evidence to conclude that Mr [REDACTED] could or should have been discharged*

¹⁰ Response to Defence Submission – Mr [REDACTED] 24 May 2016

¹¹ Email from Mr [REDACTED] to Chair of Tribunal dated 29 March 2016

¹² Defence Submission DH&A/OUT/2016/0056 dated 18 April 2016 paras 4,5.

¹³ Letter from DGCMA/OUT/2016/AB26726242 to Mr [REDACTED] dated 8 March 2016, received under cover of the Defence Submission DH&A/OUT/2016/0056 dated 18 April 2016

medically unfit in Mar 65. There is no specific evidence of a mental health disorder or disability at the time of his discharge or in the period immediately after discharge.”¹⁴

21. The Minute from Colonel Wells also concedes that there was no written request for discharge by Mr [REDACTED] on his personnel file. In the Minute, by way of explanation, Colonel Wells states that “Mr [REDACTED] was medically classified as P2S7 Class II (essentially considered fit with restrictions) at the time of his separation from Army in Mar 65.”¹⁵ The Minute confirms that Mr [REDACTED] “was admitted to 1 Camp Hospital ... where he remained for two days and was assessed (by a Psychiatrist) as having a personality disorder and at that time this was not considered to be a reason for a medical discharge, as it was considered to be a developmental or constitutional issue – inherent in the ‘make up’ of the person. The non-medical classification of personality ‘disorders’ was formalised in policy when the PULHEEMS¹⁶ System of Medical Classification – Medical Pamphlet was first published in 1978”¹⁷

22. On 16 March 2016, Mrs Augustine advised Mr [REDACTED] by telephone that she would arrange for the re-assessment of his eligibility towards the ADM with the mode of discharge that is reflected on his service records, that being ‘at his own request’.¹⁸

Tribunal’s Consideration – The Merits Review

23. The Tribunal carefully considered all the material placed before it. At the hearing on 14 October 2016 Mr [REDACTED] confirmed the accuracy of his service records in relation to his enlistment period with the ARA. He confirmed that he enlisted in the ARA on 23 March, 1962 with an enlistment period of 6 years and that he discharged on 5 March 1965 and that his service record states ‘discharged at own request’ having served 2 years, 11 months and 13 days of his enlistment period.

24. Mr [REDACTED] also confirmed that he understood that the ADM is awarded for specific enlistment periods and that his service records - as recorded – state that he does not qualify for these specific periods either on a continuous or aggregate basis.

25. The Tribunal sought clarification from Defence at the hearing as to why the Eligibility Section of Defence Form AD 497 (revised October 2010) *Application for Australian Defence Medal* relied on by Mr [REDACTED] does not strictly, in terms of wording, correspond with the relevant ADM Regulation (1)(d)(ii) and (iii). That is,

...1(d) for a period or periods that total less than 4 years, being service that the member was unable to continue for one or more of the following reasons:

¹⁴ Letter from DGCMA/OUT/2016/AB26726242 to Mr [REDACTED] dated 8 March 2016, Enclosure 1, Joint Health Command Minute to DNP/Defence SAM dated 22 February 2016, para 11

¹⁵ Ibid para 2.

¹⁶ The acronym ‘PULHEEMS’ is derived from the first letters of the qualities assessed when a medical examination is carried out.

¹⁷ Letter from DGCMA/OUT/2016/AB26726242 to Mr [REDACTED] dated 8 March 2016, Enclosure 1, Joint Health Command Minute to DNP/Defence SAM dated 22 February 2016, para 5.

¹⁸ Defence Submission DH&A/OUT/2016/0056 dated 18 April 2016, para 11

- (i).....
- (ii) *the discharge of the member as medically unfit due to a compensable impairment;*
- (iii) *the discharge of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force or his or her delegate;*¹⁹

Defence clarified that the forms had been updated to reflect the gazetted eligibility criteria.

26. At the hearing, the Tribunal also sought clarification from Colonel Wells regarding his advice in relation to the distinction between a 'personality disorder' and 'a mental health condition' requiring a medical discharge. Colonel Wells confirmed that, at the time of his discharge, he was satisfied that Mr ██████ was not diagnosed with a mental health condition but with a sociopathic personality disorder. He provided further clarification and again referred the Tribunal to the non-medical classification of personality 'disorders' which was later formalised in policy when the PULHEEMS System of Medical Classification – Medical Pamphlet was first published in 1978. He advised the Tribunal that Mr ██████ did not qualify at the time for a medical discharge. He also confirmed that Mr ██████ had not provided any further post-discharge medical information (contemporaneous or otherwise) to change his 'mode of discharge.'

Tribunal's Finding

27. The Tribunal carefully considered Mr ██████ service records, his in patient records and the Minute from Colonel Wells. It also carefully considered Mr ██████ application, Defence's submission and Mr ██████ response to its submission. Whilst the Tribunal was sympathetic to Mr ██████ experience in the ARA, unfortunately it has no bearing on his eligibility for the ADM.

28. The Tribunal finds, based on the evidence, that Mr ██████ is not eligible for the ADM as he does not meet the eligibility criteria for the award in that he:

- did not complete his initial enlistment period;
- did not give 'qualifying service that is efficient service' for four years in that he only completed 'two years of 'efficient service';
- was not discharged as medically unfit; and
- was not discharged due to a prevailing discriminatory Defence policy.

The Tribunal finds that the decision of the Directorate is the correct decision.

DECISION

29. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mr ██████ is not eligible for the award of the Australian Defence Medal.

¹⁹ *Commonwealth of Australia Gazette* No. S48, 30 March 2006.