



Australian Government

Defence Honours and Awards Appeals Tribunal

McGlinchey and the Department of Defence [2015] DHAAT 20 (10 April 2015)

File Number(s) 2014/037

Re **Mr K.W.J. McGlinchey**
Applicant

And **Department of Defence**
Respondent

Tribunal Mr M. Sullivan AO (Presiding Member)
Brigadier M. Bornholt AM (Retd)

Hearing Date 24 March 2015

DECISION

On 10 April 2015 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Keith McGlinchey is not eligible for the award of the Australia Service Medal 1939-45.

CATCHWORDS

DEFENCE AWARD – Australia Service Medal 1939-45

LEGISLATION

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

Defence Force Regulations 1952 - Reg 93C

Commonwealth of Australia Gazette No. 91, Royal Warrant, The Australia Service Medal 1939-45 – 30 November 1949

Commonwealth of Australia Gazette No. S309, Amendment of Royal Warrant for Award of the Australia Service Medal 1939-45 – 21 August 1996

REASONS FOR DECISION

Introduction

1. The applicant, Mr Keith McGlinchey (Mr McGlinchey) seeks review of a 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 Australia Service Medal (ASM) 1939-45 because of the nature of his discharge which was deemed by Army to constitute a dishonourable discharge. On 29 August 1995 Mr McGlinchey applied for the restoration of his entitlements following their forfeiture at the end of the Second World War. Forfeiture had been ordered as he had received a dishonourable discharge. On 1 July 1996 Army approved restoration of Mr McGlinchey's 1939-45 Star, Pacific Star and War Medal 1939-45. On 26 September 1996 Army further advised him that 'only those who received an Honourable Discharge are issued with the ASM 1939-45 and the Returned from Active Service Badge (RASB). Unlike other awards these two cannot be replaced'.

2. On 21 August 2013 Mr McGlinchey made application to the Directorate concerning his entitlement to the ASM 1939-45 and the RASB. On 3 September 2013 he was advised by the Directorate that due to the nature of his discharge from the Australian Army, his entitlement to these awards had been forfeited and could not be restored. In his application dated 14 April 2014, Mr McGlinchey sought a review of this decision and requested that the Tribunal 'restore my awards'.

Tribunal Jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) 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 a defence 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. Included in the defence awards set out in Part 2 is the ASM 1939-45. Therefore the Tribunal has jurisdiction to review this decision.

4. The RASB is not included in the *Defence Force Regulations*. The Tribunal therefore does not have jurisdiction to review individual entitlements to this badge.

Steps taken in the conduct of the review

5. In accordance with its *Procedural Rules 2011*, on 8 May 2014, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr McGlinchey's application for review and requesting that he provide a report. On 12 November 2014 the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report, the Directorate confirmed its position that Mr McGlinchey did not meet the eligibility criteria for the award he sought. On 20 November 2014 the Tribunal forwarded a copy of the report of the Directorate to Mr McGlinchey for comment. On 1 December 2014 he provided the Tribunal with a written submission.

6. The Tribunal met on 2 March 2015 to scope the review. During its meeting the Tribunal considered the material provided by Mr McGlinchey and the Directorate. The Tribunal heard oral evidence from Mr McGlinchey during a telephone hearing on 24 March 2015. The Tribunal also considered a further written submission dated 26 March 2015 which was provided by Mr McGlinchey following the hearing.

Australia Service Medal 1939-45

7. Following the conclusion of the Second World War in 1945, the Australian Defence Committee recommended that Australia institute a medal of its own in connection with the war, and that such a medal be awarded, not only to members of the Australian Forces, but also to selected civilian organisations. An 18 month qualifying period for full time personnel was recommended for those who served between 3 September 1939 and 15 August 1945.

8. On 17 January 1946 Cabinet approved that a 'medal be instituted for all members of the Defence Forces of the Commonwealth of Australia who participated in the 1939-1945 war; these to include members of the Mercantile Marine, Civil Air pilots, members of the Comforts Funds and Red Cross Funds, and to include both men and women'.¹ Subsequently His Majesty King George VI instituted the Australia Service Medal 1939-45 by Royal Warrant on 30 August 1949. The Royal Warrant was published in the *Commonwealth of Australia Gazette* in November that year.² There is provision in the Warrant for the Governor-General to make Regulations to carry out the purposes of the Warrant, but no Regulations have ever been made. Pertinent to this review, the Warrant in part states:

- 1) *The persons eligible for the Medal shall be those of Our faithful subjects and others, male and female, who between the 3rd September 1939 and the 2nd September 1945, rendered the required service in the Australian Armed Forces, in the Australian Mercantile Marine or as civil members of the Royal Australian Air Force Reserve who served as aircrew in civil aircraft in operational areas.*
- 2) *Representatives of philanthropic bodies, official press correspondents, official photographers and other civil personnel attached to the Armed Forces in an official capacity for full-time duty in uniform shall also be eligible.*
- 3) *Eligibility shall not be affected by the grant of any other general award for service in the war of 1939-45...*
- 4) *Only those who have received, or would be entitled to receive, **an honourable discharge** shall be eligible. (Highlight added for clarity)*
- 5) *The period of qualifying service for full-time duty shall be eighteen months at home or overseas.*

...

¹ Cabinet Agendum No 1002A: Proposal for an Australian Decoration, National Archives of Australia (NAA): A816, 66/301/251.

² Royal Warrant, Australia Service Medal 1939-45, *Commonwealth of Australia Gazette* No. 91, 30 November 1949.

9. The power to vary the conditions of the 1949 Royal Warrant was delegated to the Governor-General in 1995 by way of an exchange of letters between Prime Minister Paul Keating and Her Majesty the Queen. This delegated power was used in 1996 to reduce the qualifying period for the ASM 1939-45 from eighteen months to 30 days for full time service; and from three years to 90 days for part-time service.³

Mr McGlinchey's Service Record

10. Mr McGlinchey's Service Record shows that he enlisted in the Citizen Military Force on a part time basis on 12 January 1942 in Sydney at the age of 18. He transferred to the Australian Imperial Force (AIF) on 8 July 1942. He served in Australia until 12 September 1943 and commenced his overseas war service in New Guinea on 16 September 1943.

11. Mr McGlinchey's conduct record shows that he was convicted of the offence of Absence Without Leave on five separate occasions in a twelve month period prior to his embarkation for overseas service. His penalties included fines, reduction in rank, forfeiture of pay and detention.

12. On 19 and 20 December 1943, Mr McGlinchey appeared before a District Court Martial at Headquarters 7th Australian Division in New Guinea. He was found guilty of three charges of stealing public property and one charge of conduct to the prejudice of good order and military discipline. He was sentenced to 14 months and 10 days detention and was committed to 16 Australian Detention Barracks in New Guinea on 27 December 1943. He remained detained in New Guinea until 19 March 1944 when he was transferred to the 2/1st Australian Detention Barracks in Townsville.

13. Mr McGlinchey's sentence was remitted and he was discharged from the AIF on 13 April 1944 under the authority of Australian Military Regulations and Orders (AMR&O) 253A(1)(k):

...that, by reason of numerous convictions, he is deemed to be incorrigible

14. Mr McGlinchey's Medal Card indicates that his entitlement to medals was assessed and his card was annotated with 'Awards Withheld'. A Statement of Service Proforma was issued to Mr McGlinchey on 14 August 1968 which indicated that his entitlements had been 'Forfeited'. Mr McGlinchey's entitlement to campaign awards was reassessed in 1996 and for his Army service he had the following awards restored and issued:

- 1939-45 Star,
- Pacific Star, and
- War Medal 1939-45.

Mr McGlinchey's Submission

15. Mr McGlinchey's application for review indicated that he had served in combat operations during 1943 and 1944 in the Ramu Valley in New Guinea. He stated that as a

³ Commonwealth of Australia Gazette No. S 309, 21 August 1996.

result of this service he was entitled to the RASB and the ASM 1939-45. In support of his application he attached a Repatriation Commission decision document which determined that for the purposes of the *Veterans' Entitlements Act 1986* he had operational service in the Second World War during the period 18 May 1942 to 13 April 1944.

16. Mr McGlinchey contacted Army regarding the restoration of his 'service badges and medals' on 3 March 1980. In a letter to Central Army Records Office, he stated that 'after a short period in Australia I served in action in New Guinea'. He stated that he 'served a period of detention for which I was innocent and upon discharge was advised of forfeiture of medals and service badge'. He stated that he had evidence available to clear him of the conviction. His motivation for restoration at that time was to enable him 'to join the Returned Servicemen's League (sic) and take part in ANZAC marches with his old unit'.

17. Mr McGlinchey's campaign medals were restored in 1996 under provisions that allowed for restoration where an applicant had not been convicted of a serious offence in the ten years prior to the application being made. At the time of restoration, Mr McGlinchey was advised that 'only those who received an Honourable Discharge are issued with the ASM 1939-45 and the RASB ... and that unlike other awards these two cannot be replaced'.⁴

18. In his submission to the Tribunal dated 1 December 2014, Mr McGlinchey focussed on the outcome and sentence of the District Court Martial in 1943 where he was convicted of stealing public property (a quantity of service pistols). He stated that at the time of the offence he 'elected to accept the responsibility of having them in my possession rather than identify the actual owner'. He stated that his Commanding Officer had provided a favourable conduct report and character assessment during the trial. He indicated that in his opinion there had been no previous misconduct other than Absence Without Leave which had been dealt with summarily. He contended that his fourth conviction for absence in April 1943 was deliberate as he had been promoted to Corporal Instructor at Canungra and was therefore ineligible for overseas deployment⁵. He suggested that the subsequent punishment of reduction in rank meant that he could deploy.

19. Mr McGlinchey contends that his Court Martial conviction was unreasonable and the penalty inappropriate. He further contended that in 1971, the Judge Advocate General (JAG) regarding his Court Martial had stated:⁶

...it will be observed that it was not part of the sentence of the court that Mr McGlinchey be discharged and it would appear that his discharge was effected administratively...

20. During his oral evidence, Mr McGlinchey asserted that he had not been provided with due process in that the discharge decision was not made by a properly constituted authority and he was not given the opportunity to be heard. He stated that at no time

⁴ Letter, Soldiers Career Management Agency, ex NX131565 dated 26 September 1996, NAA: B883, NX131565

⁵ Mr McGlinchey was promoted to Acting Corporal on 19 March 1943 and was reduced to Private after being recorded as AWOL from 5 – 7 April 1943.

⁶ Letter, Judge Advocate General, 3 August 1971.

was he judged by his superiors to be ‘incorrigible’ yet this description was used to justify his discharge. He questioned the authority under which his discharge had been ordered.

21. In response to questions regarding his ability to produce evidence to support his assertion of innocence at the District Court Martial, he was unable to produce any new evidence. He did state that the soldier who had actually committed the offence was still alive but he was not prepared to have him involved at this late stage of his life. During the hearing, the Tribunal informed Mr McGlinchey that it was accepted that his discharge had not been ordered by the District Court Martial. His service record clearly indicates that he was discharged in Townsville by the Army in 1944 under the authority of AMR&O 253A(1)(k) as a result of his numerous convictions.

22. Mr McGlinchey stated that to the best of his knowledge at the time, he was simply being discharged as a result of the looming cessation of the war. The Tribunal pointed out that his discharge actually occurred in April 1944 almost 18 months prior to the war ending. Mr McGlinchey wrote to the Tribunal following the hearing and enclosed a copy of his discharge medical examination record which was conducted on 21 March 1944. In the letter he stated that this examination provided evidence that his ‘shoulder injury also precluded my medical fitness for further military service’. He also attached a copy of the last page of his Service and Casualty Form and contended that as the last entry on the form was dated 11 November 1944, the Tribunal should note that he ‘was under military jurisdiction and discipline for seven months after the quasi Army discharge date of 13 April 1944’. He concluded this submission by again reiterating his objection to the classification “‘incorrigible’ without a fair assessment by an independent panel” and stating that ‘the imposition of a secondary punishment is unjust and unconscionable’.

The Directorate’s Submission

23. In its written submission to the Tribunal, the Directorate confirmed that Mr McGlinchey’s service had qualified him for the 1939-45 Star, Pacific Star, War Medal 1939-45 and ASM 1939-45 however because of the nature of his discharge, his medal entitlement was correctly withheld pursuant to relevant instructions of the time. The Directorate indicated that a Statement of Service had been issued to Mr McGlinchey on 14 August 1968 which stated that his entitlement to service awards had been forfeited. The Directorate confirmed that Mr McGlinchey had applied for his awards in 1980 and again in 1995. The Directorate stated that on 28 June 1996, the Delegate of the Assistant Chief of the General Staff Personnel - Army had approved restoration of the 1939-45 Star, Pacific Star and War Medal 1939-45 and that these awards were issued to Mr McGlinchey on 25 July 1996.

24. The Directorate’s submission provided a detailed description of the criteria for the ASM 1939-45 and the Army policy on Dishonourable Discharges. Included in this description were the following relevant passages:

...Only those who have received, or would be entitled to receive an honourable discharge shall be eligible...⁷

...the following grounds of discharge...are regarded as 'dishonourable':...(e) By reason of numerous convictions, deemed to be incorrigible...⁸.

25. The submission further pointed to clarification of dishonourable discharge policy issued in 1949 through Military Board Instructions which provided that:

...a member discharged for any of the following reasons will be deemed to be discharged dishonourably...(b) in the case of a soldier...that he has been sentenced during his service to detention for a period of not less than six months...⁹

26. The Directorate confirmed that the Department had advised Mr McGlinchey on 26 September 1996 and again on 3 September 2013 that he was not entitled to the ASM 1939-45 due to the nature of his discharge – specifically that he had been dishonourably discharged. During the re-assessment of Mr McGlinchey's eligibility in 2014, the Directorate confirmed that his discharge was under the provisions of AMR&O 253A(1)(k) – that, 'by reason of numerous convictions, he was deemed to be incorrigible'. The Directorate again emphasised that his discharge constituted, under Army policy, a dishonourable discharge and accordingly, he did not meet the eligibility criteria for the ASM 1939-45 which provides that only those who have received or would be entitled to receive, an honourable discharge would be eligible for the award.

The Tribunal's Consideration

27. The Tribunal carefully considered all the material placed before it including written submissions and oral evidence. There is no dispute about Mr McGlinchey's service record from enlistment to discharge on 13 April 1944. There is no dispute that Mr McGlinchey qualified for the award he has claimed. At issue is his eligibility for the award and this eligibility relies on the manner of his discharge.

28. The Tribunal considered that one of the key issues in Mr McGlinchey's submission was his contention that he was innocent of the offences for which he was convicted by the District Court Martial in December 1943. The Tribunal examined Mr McGlinchey's assertion that 'evidence was available to clear him' of the Court Martial conviction. The Tribunal noted that Mr McGlinchey made several statements regarding the evidence provided to the Court and the majority of this was consistent with the record of proceedings. The Tribunal also noted that Mr McGlinchey was unable to produce any new evidence in support of his assertion of innocence.

29. The Tribunal found that the District Court Martial had been properly constituted, fairly conducted and that all parties were appropriately represented. The Tribunal gave significant weight to the fact that the findings of guilt and the sentence had been confirmed by the General Officer Commanding the 7th Australian Division on 23 December 1943. The Tribunal found that Mr McGlinchey's contention of innocence

⁷ Royal Warrant, Australia Service Medal 1939-45, *Commonwealth of Australia Gazette* No. 91 30 November 1949.

⁸ Letter, Secretary of the Department of the Army, 23 September 1944 NAA: MP742/1, 84/1/1067.

⁹ Military Board Instruction 115/1949, 8 July 1949.

in respect of the District Court Martial finding could not be sustained and in any case, the Tribunal is bound by the findings of the District Court Martial and does not have the power to overturn the conviction or sentence.

30. The Tribunal reviewed the 1971 document Mr McGlinchey referenced from the JAG regarding his Court Martial and subsequent discharge. The Tribunal noted that the JAG in the same letter also stated that:

...it follows that no review or variation of the findings and sentence of the court will have any effect upon Mr McGlinchey's discharge or the forfeiture of his decorations...

31. The Tribunal considered that the context in which the JAG was writing was in relation to restoration of general entitlements and that he was not seeking to interfere with the outcome of the Court Martial.

32. The Tribunal reviewed Mr McGlinchey's contention that his Commanding Officer had provided a favourable conduct report and character assessment and that in his opinion there had been no previous misconduct other than Absence Without Leave which had been dealt with summarily. The Tribunal considered that it was appropriate and common practice during Military disciplinary proceedings for an individual's superior to provide a character assessment to assist the Summary Authority to determine an appropriate sentence.

33. The Tribunal agreed that Mr McGlinchey's discharge and the withholding of his medal entitlements was not directed by the District Court Martial.

34. The Tribunal considered Mr McGlinchey's statement that he had 'no previous misconduct' to be understated. In the opinion of the Tribunal, five separate occasions of absence within a 12 month period points to a pattern of poor behaviour. The Tribunal accepted Mr McGlinchey's mitigation that he had deliberately absented himself in August 1943 to cause his reduction in rank and subsequent ability to deploy, but considered that there would have been other more sensible options to pursue at that time including voluntary reduction.

35. The Tribunal considered Mr McGlinchey's view that he had never been judged 'incorrigible' by his superiors yet this term had been used to justify his discharge. The Tribunal noted that the definition of incorrigible as it relates to discipline includes:

*...impervious to punishment; wilful...*¹⁰

36. The Tribunal concluded that it was likely that the term incorrigible was used in the various Regulations concomitant to the terms 'numerous convictions' and it was therefore reasonable to assume that an excessive number of convictions could lead to the conclusion that an individual was impervious to punishment and therefore incorrigible. The Tribunal considered that it was reasonable for a Discharge Authority to conclude in Mr McGlinchey's case, those five separate convictions of absence, three convictions for stealing and one conviction for prejudicial conduct; all in a relatively short period of

¹⁰ The Macquarie Dictionary 1990

time, were the actions of an individual who had been the subject of numerous convictions, was impervious to punishment and therefore by definition, incorrigible.

37. The Tribunal reviewed Mr McGlinchey's discharge which was ordered by the Army under the authority and provisions of AMR&O 253A(1)(k) on 13 April 1944 at the 2/1st Australian Detention Barracks in Townsville. The Tribunal considered that the options open to the Army at that time would have been to continue to detain Mr McGlinchey for the remainder of his sentence (until 11 November 1944), remit his sentence and return him to active war service or, if he was considered to be at risk of further ill-discipline, order his administrative discharge. The Tribunal considered that in examining these options, the Army would have reviewed Mr McGlinchey's conduct record and in all likelihood, would have considered that as a result of the numerous convictions in a relatively short period of time, both at home and overseas, he would have been thought to be a considerable risk of becoming a repeat offender.

38. The Tribunal noted that Mr McGlinchey's Service Record was annotated with a discharge authority and accordingly the Tribunal found that Mr McGlinchey's discharge was appropriately ordered by the Army under the authority and provisions of AMR&O 253A(1)(k) on 13 April 1944 as a result of his numerous convictions.

39. The Tribunal examined the law as it applied to discharges in 1944. Mr McGlinchey was discharged under the provision of AMR&O 253A(1)(k) which also refers to Statutory Rules No. 249 of 1943, Regulation 184A(k). The provision states:

*...a soldier on war service, whether enlisted voluntarily or in pursuance of Part IV of the DA [Defence Act] ... may be discharged under this regulation from the Military Forces for any of the following reasons, that is to say:-
...(k) that, by reason of numerous convictions, he is deemed to be incorrigible;...*

40. The Tribunal next examined Army General Routine Order (GRO) 65 of 15 February 1946 which outlines the reasons for a soldier's discharge which were deemed to constitute a dishonourable discharge. Paragraph 2(ii)(b) provides:

... that a member discharged for the reason 'that, by reasons of numerous convictions, he is deemed to be incorrigible', is deemed to have been dishonourably discharged...

41. The Tribunal considered Mr McGlinchey's written submission dated 26 March 2015 and found that his assertion that he had a shoulder injury which precluded further military service could not be sustained as the record clearly stated that he had suffered a fractured right collar bone in March 1943 and that he was 'in good health now'. The Tribunal also considered his assertion that he 'was under military jurisdiction and discipline for seven months after the quasi Army discharge date of 13 April 1944', as the last entry on his Service and Casualty Form was dated 11 November 1944. The Tribunal found that this assertion could not be sustained as the entry on the record clearly states that 11 November 1944 was the date that his detention would have ended if his sentence had not been remitted on the date of his discharge.

42. The Tribunal considered that the Royal Warrant underpinning the award of the ASM 1939-45¹¹ leaves no discretion in that it clearly stipulates that only those who have received or would be entitled to receive an honourable discharge shall be eligible for the award. The Tribunal concluded that Mr McGlinchey's Certificate of Service¹² correctly states that the reason for his discharge was 'that by numerous convictions he is deemed to be incorrigible (Dishonourable Discharge)'.

Finding

43. For the reasons stated above, the Tribunal finds that Mr McGlinchey is not entitled to be awarded the Australia Service Medal 1939-45.

The Returned From Active Service Badge

44. The Tribunal noted that it does not have jurisdiction to review individual entitlements to the RASB. The Tribunal noted however that Mr McGlinchey's eligibility for the badge would most likely be affected by the provisions of AMF General Routine Order No. 65 of 1946¹³. This order states in relation to the RASB that soldiers who have been '...dishonourably discharged ... by reason of numerous convictions ... deemed to be incorrigible...' will not be entitled to the badge.

DECISION

45. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Keith McGlinchey is not eligible for the award of the Australia Service Medal 1939-45.

¹¹ Royal Warrant, Australia Service Medal 1939-45, *Commonwealth of Australia Gazette* No.91,30 November 1949

¹² Central Army Records Office – Certificate of Service, 22 November 1975

¹³ AMF General Routine orders No 65 of 15 February 1946