



Australian Government

Defence Honours and Awards Appeals Tribunal

McAuley and the Department of Defence [2015] DHAAT 045 (15 October 2015)

File Number(s)	2014/089
Re	Captain William John Watson McAuley Applicant
And	Department of Defence Respondent
Tribunal	Brigadier M. Bornholt AM (Retd) (Presiding Member) Ms N. Isenberg
Hearing Date	7 August 2015

DECISION

On 15 October 2015 the Tribunal decided to:

- a. **Affirm** the decision of the Directorate of Honours and Awards of the Department of Defence that Captain William McAuley is not eligible for the award of the Reserve Force Decoration.
- b. **Set aside** the decision of the Chief of Staff to the Parliamentary Secretary for Defence Support that Captain William McAuley does not qualify for the Defence Long Service Medal.
- c. **Substitute** its decision that Captain William McAuley is eligible for the award of the Defence Long Service Medal and directs that the medal be issued.

CATCHWORDS

DEFENCE AWARDS – Reserve Force Decoration, Defence Long Service Medal

LEGISLATION

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

Defence Force Regulations 1952, Reg 93C

Commonwealth of Australia Gazette No S78 dated 27 April 1982

REASONS FOR DECISION

Introduction

1. The Applicant, Captain William John Watson McAuley (Captain McAuley) seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he did not qualify for the award of the Reserve Force Decoration (RFD)¹ and a decision by the Chief of Staff to the Parliamentary Secretary for Defence Support that he did not qualify for the Defence Long Service Medal (DLSM).²

2. On 3 January 2002 Captain McAuley wrote a Minute addressed to his unit Orderly Room Corporal wherein he made an election to receive and made application for the RFD and Clasp.³ On 20 December 2002 the Directorate sent the RFD to Captain McAuley at his home address.⁴ On 4 February 2004 the Directorate informed Captain McAuley that the RFD had been 'issued in error' as an examination of his records indicated that he had not completed 15 years of efficient service and therefore did not qualify for the RFD.⁵ He was asked to return the award.

3. On 2 March 2011, Mr Douglass Cahill of Cahills, Barristers and Solicitors, (Mr Cahill) acting on behalf of Captain McAuley, wrote to the Tribunal seeking 'an enquiry' in relation to Captain McAuley's entitlement to the RFD.⁶ The Tribunal advised that Captain McAuley should make his request for review in writing and provide a copy of the decision sought to be reviewed.⁷ On 23 November 2011 Captain McAuley made application to the Tribunal 'for review of my entitlement to the RFD'.⁸

4. The Tribunal (the previously constituted Tribunal) conducted a review hearing on 22 January 2013 (the 2013 hearing) and on 14 October 2013, affirmed the decision that Captain McAuley was not eligible for the RFD or the DLSM.⁹ However, on 30 July 2014, by consent, the Federal Court of Australia ordered that the decision of the previously constituted Tribunal be set aside and the matter be remitted for 'reconsideration according to law'.¹⁰ The respondents in those proceedings, the Tribunal and Defence, had conceded that the previously constituted Tribunal did not accord the Applicant procedural fairness in that it failed to disclose to Captain McAuley the outcome of the examination of his pay records and provide him with the opportunity to respond before making its decision.

¹ DHA 2004/1003614/1 dated 4 February 2004

² Office of the Parliamentary Secretary for Defence Support letter dated 17 March 2010

³ HQ 22 Construction Regiment Minute dated 3 January 2002

⁴ ADF Medals Section 2002/4934 dated 20 December 2002

⁵ DHA 2004/1003614/1 dated 4 February 2004

⁶ Cahill Letter DWC:ma2031171 dated 2 March 2011

⁷ DHAAT/OUT/20111/046 dated 21 March 2011

⁸ McAuley Letter dated 23 November 2011

⁹ DHAAT 2011/015 dated 14 October 2013

¹⁰ Federal Court of Australia (P)VID1280/2013 dated 30 July 2014

Tribunal Jurisdiction

5. 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. The application for the award of the RFD was made by Captain McAuley on 3 January 2002.¹¹ The application for review was made by letter on 23 November 2011.¹² The term *reviewable decision* is defined in s110V(1) and includes a decision made ‘by or on behalf of the Minister ... or by a person within the Department of Defence’ to refuse to recommend a person for an award in response to an application. The decisions in this case are the decision of the Directorate that ‘you do not qualify for the RFD’ made on 4 February 2004¹³ and the decision by the Chief of Staff to the Parliamentary Secretary for Defence Support that ‘he does not qualify for the DLSM’ made on 17 March 2010.¹⁴

6. 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 at item 29 of Part 2 is the Reserve Force Decoration and at item 31 of Part 2 is the Defence Long Service Medal. Therefore the Tribunal has jurisdiction to review the above decisions of the Directorate and the Chief of Staff to the Parliamentary Secretary for Defence Support. The role of the Tribunal is to make the correct and preferable decisions having regard to the applicable law and the relevant facts.

Application for Review - The Defence Long Service Medal

7. At the commencement of the hearing on 7 August 2015 (the hearing), Mr Brett Mitchell who appeared for Defence indicated that the Directorate had, on 14 July 2015, conducted another assessment of Captain McAuley’s eligibility for the DLSM.¹⁵ As a result of this assessment, the Directorate had concluded that Captain McAuley:

‘can be recommended for the DLSM because he has completed 15 qualifying years within the meaning of the DLSM Regulations (as amended).’¹⁶

8. In view of the Respondent’s concession at the hearing that confirmed Captain McAuley was eligible for the DLSM and would not be required to make further application for the award; the Applicant did not press the request for review in relation to eligibility for the DLSM, in the event his application for review for the RFD was unsuccessful.

9. The Tribunal therefore determined that the decision by the Chief of Staff to the Parliamentary Secretary for Defence Support that Captain McAuley does not qualify for DLSM be set aside. The Tribunal decided that should Captain McAuley be found

¹¹ HQ 22 Construction Regiment Minute dated 3 January 2002

¹² McAuley Letter dated 23 November 2011

¹³ DHA 2004/1003614/1 dated 4 February 2004

¹⁴ Office of the Parliamentary Secretary for Defence Support letter dated 17 March 2010

¹⁵ Directorate Assessment Working Paper dated 14 July 2015

¹⁶ DH&A/OUT/2015/0159 dated 20 July 2015

not to be eligible for the RFD, the Tribunal would substitute its decision that he is eligible for the DLSSM and that the medal is to be issued to him. The Applicant acknowledged during the hearing that he could not be issued with both awards. Consequently, the DLSSM matter will not be considered further in this review.

Conduct of the Review

10. In accordance with its *Procedural Rules 2011*, on 23 February 2012, the Tribunal wrote to the Secretary of the Department of Defence informing him of Captain McAuley's application for review and inviting him to provide a submission. On 23 March 2012, the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence submission.¹⁷ There the Directorate confirmed its position that Captain McAuley 'completed only 10 years qualifying service for the RFD prior to 20 April 1999 and as a result did not serve the necessary 15 years in order to qualify for the award.'¹⁸ Subsequently, additional material was obtained, including submissions from the Applicant (discussed below), and a hearing was conducted before the previously constituted Tribunal reached its decision in October 2013.

11. Following the Federal Court decision of July 2014, the Tribunal received a letter from Mr Cahill on 20 August 2014 indicating that as a result of the decision, he considered that Captain McAuley 'clearly met the conditions ... for the granting of the RFD ... when properly considered as a Specialist Officer...'. The letter indicated that Mr Cahill considered that '...it would seem unnecessary to burden DHAAT and indeed our client with the necessity to make a fresh appearance before the Tribunal...'. The letter proposed that proceedings could be finalised relying on documents which had been provided by the Respondents during the Federal Court hearing.¹⁹ In the interests of transparency and to ensure procedural fairness, the Chair of the Tribunal empanelled a reconstituted Tribunal to consider the matter afresh.

12. This reconsideration was delayed by a number of months as five of the Tribunal's original Members retired in July 2014 and were not replaced until later in the year. Captain McAuley was advised of the expected delay by the Parliamentary Secretary for Defence Support in early 2015. The reconstituted Tribunal met on 4 and 19 February 2015 when it considered the material provided by Captain McAuley, his representative Mr Cahill, and the Directorate. The Tribunal agreed that it would be essential to ensure that all parties had the same material, given the decade of correspondence contained in the files. A complete copy of the papers before the Tribunal containing 745 numbered pages was sent to Captain McAuley.

13. The Tribunal conducted a preliminary hearing on 2 March 2015 with Captain McAuley and Mr Cahill where it became apparent that the file had not been received. The hearing was adjourned and another file was subsequently despatched with advice that a Directions Hearing was scheduled for 2 June 2015 to allow sufficient time for all parties to consider the material. In April 2015 the Chair of the Tribunal directed that the panel of members to re-hear the matter be adjusted to ensure that only those who had sufficient tenure to complete the review would continue as the reconstituted

¹⁷ DHA 2012/1048250/1(1) dated 23 March 2012

¹⁸ Ibid. Paragraph 30

¹⁹ Cahill Letter DWC:CA:31171 dated 15 August 2014

Tribunal.²⁰ Captain McAuley was advised of the new Tribunal members on 7 April 2015.

14. The Directions Hearing on 2 June 2015 confirmed that both the Respondent and Applicant were in possession of the same set of papers, confirmed the scope of the new review, discussed the nature of the reviewable decision, discussed timelines for further comments and a further hearing, and invited Captain McAuley to make any further comments on the matter or to call witnesses. The matter was listed for hearing on 7 August 2015. The Directions also contained the requirement that if Mr Cahill wanted witnesses to be summonsed by the Tribunal to appear to give evidence, he would need to provide written reasons for that request, and advise their current whereabouts. These Directions were issued by the Tribunal on 4 June 2015.²¹

15. Mr Cahill wrote to the Tribunal on 10 June 2015 ‘requiring’ Summons (sic) to attend for four witnesses: Corporal Westie (the Orderly Room Corporal at 22 Construction Regiment), Commodore Watson (the former Director-General of Career Management Policy, Department of Defence), Ms Bermingham (the Executive Officer of the Defence Honours and Awards Appeals Tribunal) and Mr Bodziak (sic) (a member of the previously constituted Tribunal).²² The letter stated that:

‘... if the two (sic) witnesses are not available for cross-examination ... the matter ... may even require a further appearance before the Federal Court...’.

16. This letter also stated:

‘...Our client has stood before the Federal Court and satisfied His Honour Major General Mr Justice R.R.R. Tracey QC as to his position, the rights of which included being adjudged on his entitlement ... to the RFD ...’

17. The Tribunal notes that in fact the Federal Court decision was an order made with the consent of both parties and did not relate to judgement of Captain McAuley’s entitlement to the RFD.

18. The letter also sought the Tribunal’s agreement for the attendance at the hearing of Ms Jennifer Jacomb, the Secretary of the Association for the Victims of Abuse in the Australian Defence Force. Mr Cahill’s letter stated that this Association had ‘a keen interest in the outcome of the matter’.

19. The letter also disputed the Directorate’s right of appearance at the hearing.

20. Mr Cahill wrote again on 12 June 2015 seeking a number of assurances from the Tribunal that it would not ‘mislead’ his client, would only use disclosed evidence and would conduct the hearing in accordance with published procedures.²³

²⁰ Air Commodore Mark Lax was appointed as the Presiding Member for the newly constituted panel however his tenure on the Tribunal ceased with effect 30 June 2015. He was removed from the panel and Brigadier Mark Bornholt assumed the Presiding Member role.

²¹ DHAAT/OUT/2015/232 dated 4 June 2015.

²² Cahill Letter DWC:sm:31171 dated 10 June 2015

²³ Cahill Letter DWC:CA:31171 dated 12 June 2015

21. On 15 June 2015 the Tribunal responded to Mr Cahill's letter of 10 and 12 June 2015 and declined the request to summons witnesses as he had failed to provide reasons for his request as required by the Directions.²⁴ The Tribunal advised Mr Cahill that he was welcome to invite witnesses to attend and that they would be heard if they decided to attend. The Tribunal did not agree to the attendance of Ms Jacomb as Tribunal hearings in relation to awards are required to be conducted in private and having 'a keen interest' was not considered an appropriate reason for her attendance.

22. On 16 June 2015 Mr Cahill again wrote to the Tribunal indicating that 'it is clear that our client is not going to be provided with a fair and/or unbiased hearing of this matter'.²⁵ This letter stated that subpoenas (sic) must be issued to the four nominated parties or 'the hearing of the matter cannot and will not proceed'. Again Mr Cahill failed to provide reasons for the Tribunal to require the attendance of the witnesses, stating only:

'the reasons for subpoenaing (sic) are obvious as they have all been involved in the conduct of the matter and are relevant to the proceedings'.

23. On 17 June 2015 Mr Cahill again wrote to the Tribunal asserting that there was no requirement for reasons to be given for a request for a 'subpoena'. He asserted that there was a 'blatant exercise of bias against a [his] client'.

24. The Tribunal did not consider that adequate reasons were provided to 'compel' Corporal Westie to attend but did consider that she should be given the opportunity to comment on the processing of Captain McAuley's application. The Tribunal decided to write to Corporal Westie on 22 June 2015 inviting her to attend the hearing in person or by telephone so that the Tribunal could hear what actions she took when she received Captain McAuley's original nomination.²⁶ A copy of this request was provided to Mr Cahill.

25. On 23 June 2015 Mr Cahill again wrote to the Tribunal repeating his view that the four individuals; 'Corporal Westie, Commodore Watson, Ms Bermingham and Mr Bodzioc (sic)' must be summonsed to provide evidence 'which they have firsthand knowledge in relation to the granting and recall of Captain McAuley's RFD'. The letter acknowledged that the Tribunal had requested Corporal Westie's presence but stated that should she choose 'not to attend or provide the material sought (sic)' then an adjournment would be immediately sought.²⁷ In a further letter also dated 23 June 2015, Mr Cahill stated that the Tribunal was 'in contravention of your agreement at the Directions Hearing that the Tribunal did have the power to Subpoena' the four individuals. He again asserted bias, unfairness and the denial of natural justice. He also requested that the hearing set down for 7 August 2015 be adjourned 'until the Subpoena issues are resolved'.²⁸

²⁴ DHAAT/OUT/2015/288 dated 15 June 2015

²⁵ Cahill Letter DWC:CA:31171 dated 16 June 2015

²⁶ DHAAT/OUT/2015/296 dated 22 June 2015

²⁷ Cahill Letter DWC:sm:31171 dated 23 June 2015 (12:15)

²⁸ Cahill Letter DWC:sm:31171 dated 23 June 2015 (11.09)

26. In response to Mr Cahill's letters, the Tribunal consistently stated in letters dated 17, 22 and 25 June 2015 that it would not summons the individuals without satisfactory justification. The correspondence also indicated that the Directions were clearly provided to Mr Cahill by letter on 4 June 2015 and that the Tribunal did not agree to adjourn the hearing. The Tribunal strongly refuted Mr Cahill's allegations of bias, unfairness or denial of natural justice²⁹. The Tribunal emphasised to Mr Cahill that he had failed to provide reasons for the issue of summonses but that he was able to invite witnesses to attend should he wish them to provide evidence to support Captain McAuley's claims³⁰.

27. Corporal Westie advised the Tribunal by e-mail on 26 June 2015 that she would not attend the hearing as she had already explained her involvement in the process to both Captain McAuley and Mr Cahill, to her unit and to Defence Legal.³¹ She stated:

'... I do not wish to see Mr McAuley as this was and is now again harassment ... he contacted me at home repeatedly to sign a Statutory Declaration back in 2011, early 2012 which I refused to do...'

28. Corporal Westie also attached an e-mail she had sent to Mr Cahill on 6 March 2012 which stated that:

*'he (McAuley) is telling me I thoroughly checked his eligibility but I cannot agree to that ... he wants me to sign some of your statements ... I cannot support his investigation ... I am only now prepared to let him know via you what years show effective service which as discussed with you yesterday do not add up to 15 years...'*³²

29. This e-mail had not previously been disclosed to the Tribunal. The Tribunal provided the e-mail and attachments from Corporal Westie to Mr Cahill on 3 July 2015 for comment and added them to the document file as pages 757 to 772.³³

30. On 26 June 2015 the Tribunal again refuted Mr Cahill's assertions regarding powers to subpoena, pointing out that the decision to summons rests with the Tribunal, not the Applicant and that the Directions were clear – Mr Cahill was required to provide satisfactory reasons for requiring their attendance which he had failed to do.³⁴

31. On 26 June 2015 Mr Cahill again wrote to the Tribunal asking whether the Tribunal was receiving legal advice and if so, from whom. This letter also noted that the Tribunal did not acknowledge that Captain McAuley was still a serving officer in the Standby Reserve. The letter demanded a response by noon on 30 June 2015.³⁵

²⁹ DHAAT/OUT/2015/295 dated 22 June 2015

³⁰ Ibid.

³¹ Email Westie to Tribunal dated 26 June 2015

³² Email Westie to Mr Cahill dated 6 March 2012

³³ DHAAT/OUT/2015/390 dated 3 July 2015

³⁴ DHAAT/OUT/2015/308 dated 26 June 2015

³⁵ Cahill Letter DWC:CA:31171 dated 26 June 2015

32. The Tribunal's response to this letter on 30 June 2015 indicated that Captain McAuley had been content to be referred to as Mr McAuley at the 2013 hearing and if he now wished to be addressed by his military rank, he should advise the Tribunal accordingly. Mr Jay Kopplemann, Deputy Executive Officer of the Tribunal also pointed out that the responses to Mr Cahill's correspondence were consistent with the direction of the Tribunal members.³⁶

33. On 29 June 2015 Mr Cahill wrote to the Tribunal and stated that:

'...under protest we submit our Clients (sic) submissions ... we note that the Tribunal already has these documents in its possession...'

'...the Tribunals (sic) failure to subpoena the witnesses ... clearly demonstrates bias, lack of natural justice and a failure to administer the law...'

'...should our Clients Application be unsuccessful these matters will be raised at a higher level.'³⁷

34. This document had no attachments and on 30 June 2015, the Tribunal asked Mr Cahill to confirm that this letter was in fact the Applicant's only submission and that he had no additional material beyond that which was already held in the documents (which he had confirmed were in his possession during the Directions Hearing). Mr Cahill responded on 30 June 2015 seeking an extension of two days to complete submissions as he had been ill.³⁸ The Tribunal duly granted this extension to 2 July 2015.

35. Mr Cahill provided a submission on behalf of Captain McAuley on 2 July 2015.³⁹ This submission included several documents already contained in the material before the Tribunal with the only new document being an internal Tribunal e-mail from Ms M. Cunningham dated 15 April 2013 which the Tribunal assumed was obtained by Mr Cahill in the course of the Federal Court proceedings.⁴⁰ This submission was sent to Defence on 2 July 2015 for comment and added to the file of documents as pages 746 to 756.

36. In response to the provision of the documents provided by Corporal Westie (see paragraph 29), in a letter dated 2 (sic) July 2015 (but most likely written on 6 July 2015), Mr Cahill wrote that he 'noted with great concern that Corporal Westie will not attend the hearing'⁴¹. He did not address the material provided by Corporal Westie, nor the content of her email. He asserted again that the Tribunal's failure '...to compel her and other relevant parties to appear...' would prejudice his client's right to a fair hearing, demonstrated bias and failed to provide natural justice. He stated that:

³⁶ DHAAT/OUT/2015/309 dated 30 June 2015

³⁷ Cahill Letter DWC:CA:31171 dated 29 June 2015

³⁸ Cahill Letter DWC:CA:31171 dated 30 June 2015

³⁹ Cahill Submission DWC:sm:31171 dated 2 July 2015

⁴⁰ Ibid. Attachment 'A'

⁴¹ Cahill Letter DWC:sm:31171 dated 2 July 2015 but likely to have been written on 6 July

‘... as the Tribunal was subject to the Defence Act, we are instructed to remind you that that includes the Subpoenaing of witnesses as nominated by our client’.

37. Mr Cahill concluded this letter by indicating that he had ‘some concern’ regarding the production of previously undiscovered documents, asserting that this may ‘explain the whereabouts of Captain McAuley’s missing file’.

38. The Tribunal responded to this letter on 10 July 2015 indicating that the issue of ‘subpoenaing and summoning’ witnesses had been addressed in previous correspondence and that the advice contained therein was extant.⁴²

39. On 13 July 2015 Mr Cahill again wrote to the Tribunal and stated:

‘...we are instructed to put the Tribunal on notice that unless Corporal Westie, Mary Bermingham and Commodore Watson are subpoenaed to attend the forthcoming hearing by 12.00 noon on Friday the 17th July 2015, then their non- appearance will potentially disadvantage our client as he would not have the right to either examine or cross-examine them as to their evidence.

Should our client’s application for his RFD Medal be unsuccessful at the forthcoming hearing, then this and earlier correspondence will be used if necessary upon appeal to demonstrate the Tribunal’s bias and failure to apply the rules of natural justice ...’⁴³

40. On 20 July 2015 the Directorate provided a detailed submission addressing the ‘specific matters’ contained in Mr Cahill’s submission dated 2 July 2015.⁴⁴ The submission also contained another assessment of Captain McAuley’s eligibility for the RFD.⁴⁵ The outcome of this re-assessment was a conclusion that Captain McAuley could not be recommended for the RFD.

41. The Defence submission was sent to Mr Cahill for consideration on 21 July 2015 and the submission was added to the file of evidence as pages 773-809.

42. Following receipt of the Defence submission, Mr Cahill lodged another submission on 27 July 2015.⁴⁶ This submission was added to the evidence file as pages 810-824 and a copy was sent to the Directorate.

43. The 27 July 2015 submission, which is discussed in more detail below, strenuously asserted that Captain McAuley was a specialist member of the Reserve as evidenced by his deployment to East Timor to ‘handle the specialist task’. The submission included six ‘Senior Officer’ statements already contained in the papers which Mr Cahill asserted supported his contention that Captain McAuley was a specialist. In that regard, Mr Cahill’s assertions are best summarised by the statement that Captain McAuley should be considered as such because he:

⁴² DHAAT/OUT/2015/403 dated 10 July 2015

⁴³ Cahill Letter DWC:CA:31171 dated 13 July 2015

⁴⁴ DH&A/OUT/2015/0159 dated 20 July 2015

⁴⁵ Ibid. Attachment 14

⁴⁶ Cahill Submission DWC:sm:31171 dated 27 July 2015

‘...acted, smelt and tasted like a Specialist and was tasked as a Specialist... whether or not Captain McAuley was classified as a General Service Officer is not material...’⁴⁷

44. The submission also continued the theme from his original nomination in 2002 and his and Mr Cahill’s subsequent submissions that Captain McAuley ‘was never advised that he was Inefficient’. Mr Cahill also requested that the Tribunal provide copies of letters which were attached to the Cunningham email that he had provided in his submission of 2 July 2015. These attachments, which were actually emails, were provided to Mr Cahill at the hearing.

45. The 27 July 2015 submission also asserts that the Defence Submission:

‘...appears contrived ... to conceal the corrupt actions of Lieutenant Colonel Bell and those assisting his actions...’⁴⁸

46. On 29 July 2015 Mr Cahill again wrote to the Tribunal stating that:

‘... it is clear that the presence of both Corporal Westie and Mary Bermingham is essential to our Clients (sic) case they appear to be giving conflicting evidence ... to deny our Client the right to have these two witnesses present ... is a clear breach of the rules of natural justice ...

... if this hearing proceeds without those witnesses and our Clients (sic) application is unsuccessful the matter will be referred to a further authority by way of complaint...’⁴⁹

47. On 3 August 2015 Mr Cahill wrote to the Tribunal and stated:

‘Further to our earlier correspondence we presume the Tribunal will have no objection to the press being present at the forthcoming Hearing.’⁵⁰

48. The Tribunal responded to this letter on 5 August 2015, drawing Mr Cahill’s attention to previous correspondence that had informed him that in accordance with Procedural Rule 12, hearings in relation to defence awards must be conducted in private. This letter also included eight pages of extracts from Australian Military Regulations which was the legislation that was in place when Captain McAuley was appointed.⁵¹ The Tribunal asked that Mr Cahill add these pages to the evidence file as pages 825-833 and a copy was sent to the Directorate.

49. The hearing of Captain McAuley’s application for review was conducted in Melbourne on 7 August 2015. Mr Cahill appeared for Captain McAuley and the Respondent was represented by Mr Brett Mitchell. Mr Cahill and Captain McAuley arrived at the hearing in the company of Ms Jacomb. Ms Jacomb was refused entry to

⁴⁷ Ibid. Page 2

⁴⁸ Ibid. Page 7

⁴⁹ Cahill Letter DWC:sm:31171 dated 29 July 2015

⁵⁰ Cahill Letter DWC:sm:31171 dated 3 August 2015

⁵¹ Commonwealth Statutory Rules No 119/65, 59/76 and 61/83

the hearing for the reasons previously advised to Mr Cahill in letters written in June 2015.

50. Following his opening address, Mr Cahill placed on the record his strong protest that the Tribunal's failure to subpoena Corporal Westie and Ms Bermingham 'placed his client at a severe disadvantage as they had both been instrumental in the award, assessment, entitlement and ultimately the withdrawal of the RFD and that their evidence was critical to the outcome'. He stated that his client was therefore disadvantaged as he was denied the opportunity to cross examine the two witnesses. The Tribunal again pointed out that it is not *required* to summons witnesses and that the Applicant had not provided satisfactory reasons for them to be summonsed. Having duly noted Mr Cahill's protestations, the hearing proceeded based on the evidence available in the papers and the further evidence provided by Captain McAuley.

51. During the hearing, the Tribunal discussed each of the years where Captain McAuley's qualifying service was in dispute or not clear. A summary of the evidence in relation to those years is recorded later in this decision. At the conclusion of the hearing the Tribunal agreed to provide the Applicant another two weeks (to 21 August 2015) to produce additional information to support his claim of remunerated attendance for each of the years in dispute, such as bank statements or the like. The Tribunal emphasised that any new material needed to be evidence that Captain McAuley was 'remunerated for [his] attendance'.⁵²

52. On 18 August 2015 the Tribunal received a 140 page binder of material from Captain McAuley purporting to 'highlight Lieutenant Colonel Bell's actions calculated to traduce and defame the reputation of Captain McAuley', and statutory declarations from Captain J.J. Rebbechi, RAE and Warrant Officer Class One G.N. Christie RAE (the Rebbechi and Christie statutory declarations, respectively).⁵³ Captain McAuley submitted that these two declarations '... establish my time served, more particularly in the years 1986-1987 and 1992-1997...'. In fairness to the Respondent, the Tribunal provided this material to the Directorate on 25 August 2015 and added the binder to the evidence file as pages 834-973.

53. On 2 September 2015 the Tribunal received comments from the Directorate in relation to the material provided by Captain McAuley on 18 August 2015.⁵⁴ The Directorate indicated that it had considered the additional statutory declarations but concluded that they did not make a compelling case which would cause Defence to reconsider its decision in relation to the RFD. These comments were sent to the Applicant on 7 September 2015.

54. The Tribunal subsequently sought from Defence further information about a number of matters which had arisen at the hearing. The Tribunal requested information about the medallic assessment of Major Parfitt, who the Applicant said was the Second in Command (2IC) of his unit and had been awarded the RFD at the same time as he had. The Directorate, however, was unable to locate information about Major Parfitt's assessment. The Tribunal sought information about the service

⁵² Presiding Member Closing statements 7 August 2015 hearing.

⁵³ McAuley letter dated 18 August 2015

⁵⁴ E-mail from Assistant Director Policy and Tribunal, DHA dated 1637 hrs on 2 September 2015

record of Lieutenant Colonel Bell to verify his command tenure. Information about 'scientists' was also requested. Lieutenant Colonel Bell's service record, Defence's explanation regarding the Parfitt assessment and the advice about scientists was provided to the Applicant on 7 September 2015. The information is discussed below.

55. On 7 September Mr Cahill wrote to the Tribunal to acknowledge receipt of the records and advice.⁵⁵ In this letter Mr Cahill also refuted Defence's views in relation to the statutory declarations he had provided and stated that '...they do, au contraire, make a compelling case for the Tribunal to find in Captain McAuley's favour...'.

56. In concluding, Mr Cahill stated that Captain McAuley:

'... reserves his rights, to amongst other things, head back to the Federal Court on Appeal, to seek Orders that DHAAT be compelled to produce those witnesses required by our Client and The Court then properly hear this matter on the subject of natural justice and procedural fairness'.

57. On 8 September 2015 Mr Cahill wrote to the Tribunal and stated that he was 'somewhat bemused' by the Defence comments regarding the Rebbechi and Christie statutory declarations. He stated that the Defence comments should be either 'totally disregarded or both Rebbechi and Christie should attend a Hearing to clarify the issue'.⁵⁶ There was no application for a resumed hearing.

58. The Tribunal commenced its review of the evidence and preparation of this decision on 8 September 2015.

Long Service Awards and the Reserve Force Decoration

59. Australian service personnel have received honours and awards under two systems – the Imperial system and the Australian system. The Imperial System was used until February 1975 when the Government introduced the Australian system. When the Australian system was established, the National Medal (NM) was intended to replace all existing Imperial long service and good conduct medals for the Australian Defence Force (ADF) and other services including police, ambulance and emergency services. Regulations governing the award of the NM were published in the Commonwealth Gazette on 17 February 1975.⁵⁷ The eligibility criteria for the award of the NM included a qualifying period of fifteen years of service. Following several representations and reviews it was decided that there should be a long service medal introduced to replace the NM which would recognise the uniqueness of ADF service.

60. As a result, the Defence Force Service Awards (DFSA) Regulations were introduced by Letters Patent on 20 April 1982 for the purpose of:

⁵⁵ Cahill Letter DWC:CA:31171 dated 7 September 2015

⁵⁶ Cahill letter DWC:sm:31171 dated 8 September 2015

⁵⁷ *Commonwealth of Australia Gazette No S28* dated 17 February 1975

... according recognition to persons who render long and efficient service as members of the Defence Force...for a period of 15 years...⁵⁸

61. Three awards were established; the Defence Force Service Medal awarded to members of the Regular Forces; the Reserve Forces Decoration for Reserve officers and the Reserve Forces Medal for Reserve members who were not officers.

62. The DFSA Regulations are set out in the Schedule attached to the Letters Patent and state:

3. *(1) For the purpose of determining whether a person has rendered efficient service as member of the Defence Force but without limiting the matters that may be taken into account for that purpose, regard shall be had to such matters (if any) as are for the time being specified in directions given by the Chief of the Defence Force Staff or his delegate for the purposes of this sub-regulation.*

(2) For the purposes of these Regulations, a person shall be taken to have rendered service in the Reserve Forces throughout a year if –

(a) the person by virtue of his membership of the Reserve Forces, was required to undergo training or render service in the capacity of a member of the Reserve Forces for a period not less than, or for periods that in the aggregate, were not less than, a period determined by the Chief of the Defence Force Staff or his delegate; and

(b) the person completed that training or rendered that service as the case may be.

(3) For the purpose of the application of sub-regulation (2) in relation to a particular person, “year” means the period of 12 months that commenced on the day on which the person became a member of the Reserve Forces or on the anniversary of that day.

...

7. *The Reserve Force Decoration may be awarded to a person who has, on or after 14 February 1975, completed the qualifying service as a member of the Defence Force required by regulation 8.*

8. *(1) Subject to sub-regulation (2), the qualifying service as a member of the Defence Force required for the award of the Reserve Force Decoration is efficient service as an officer of the Defence Force for a period of 15 years or for periods that, in the aggregate, amount to 15 years, being service that includes efficient service as an officer of the Reserve Forces for a period not less than 12 years or for periods that, in the aggregate, amount to not less than 12 years.*

63. Pursuant to sub-regulation 3(2) of the DFSA Regulations, the Chief of the General Staff (CGS) determined on 25 November 1983 that the period which a person

⁵⁸ *Commonwealth of Australia Gazette No S78 dated 27 April 1982*

shall be required to undergo training or render service in the capacity of a member of the Army Reserve to be:

...26 days, comprising such periods of continuous training and home training as are directed by the proper military authority...Supplementary Reserve units...14 days...⁵⁹

64. This training requirement was amended on 26 August 1993 when the CGS determined that in order to qualify for Defence Force Service Awards a person:

...shall be required to undergo training or render service in the capacity of a member of the Australian Army Reserve, in order to qualify for Defence Force service awards, shall be:

- a. 7 days in each training period for specialist consultants who have had that period of service approved by a formation commander; and*
- b. 14 days in each training period for all other members.⁶⁰*

65. In 1994, the Committee of Inquiry into Defence Awards held a review of the Defence honours and awards system. The report recommended that the Defence Force Service Awards be replaced by one single long service award - the Defence Long Service Medal. This medal was introduced by Letters Patent on 26 May 1998.⁶¹

66. On 30 March 2000, the DFSA Regulations were amended to effectively provide a cessation date for the award of the RFD by changing Schedule 7 of the Regulations to:

7. The Reserve Force Decoration may be awarded to a person who has, on or after 14 February 1975 and before 20 April 1999, completed the qualifying service as a member of the Defence Force required by regulation 8.⁶²
(Highlight added for clarity)

Captain McAuley's Service Record

67. On the basis of his service records, Captain McAuley enlisted in the Citizen Military Force as a Private in the Sydney University Regiment, physically located in Armidale on 4 April 1970. He was engaged for a two year period. He was discharged at his own request on 29 October 1970 after seven months of part time service. On 13 January 1976 Captain McAuley was appointed as a Lieutenant in the Permanent Naval Force (PNF). He separated from this service after eight months on 7 September 1976.⁶³ There is no indication in his service records as to the reason for his separation.

⁵⁹ Australian Army CGS Determination - *Defence Force Service Awards Regulation 3* dated 25 November 1983

⁶⁰ AHQ MS A92-495 – *Defence Force Service Awards Regulation 3* dated 26 August 1993

⁶¹ *Commonwealth of Australia Gazette No S352* dated 10 July 1998

⁶² *Commonwealth of Australia Gazette No S160* dated 30 March 2000

⁶³ RAN Certificate of Service dated 27 September 1976

68. On 3 June 1981 Captain McAuley made application for a commission in the Active Citizen Military Forces.⁶⁴ He was appointed as a Captain in the Royal Australian Engineers (Supplementary Reserve), Active Citizen Military Forces on 3 December 1981.⁶⁵ He assumed his first posting as a Production Officer in 91 Forestry Squadron, a Supplementary Reserve Unit⁶⁶ with effect 1 February 1982⁶⁷. His service record which he acknowledged as being correct during the 7 August 2015 hearing, indicates he was posted to the following units:⁶⁸

Date	Unit
01 Feb 82 – 30 Jun 83	91 Forestry Squadron
01 Jul 83 – 30 Jun 85	203 Works Section
01 Jul 85 – 31 Jan 86	3 Training Group
01 Feb 86 – 23 Nov 88	6 Engineer Group
24 Nov 88 – 31 Dec 92	106 Construction Squadron
01 Jan 93 – 05 Apr 94	107 Plant Squadron
06 Apr 94 – 07 Mar 95	3 Training Group
08 Mar 95 – 31 Dec 97	22 Construction Regiment
01 Jan 98 – 05 Mar 01	3 Training Group
06 Mar 01- 03 Feb 05	22 Construction Regiment

69. On 4 February 2005 Captain McAuley transferred from the Active Army Reserve to the Standby Army Reserve in the Southern Region at the rank of Captain, and continues to so serve.⁶⁹

70. For his service in the Army, Captain McAuley was awarded the Australian Defence Medal and the Australian Active Service Medal with Clasp ‘East Timor’.

Defence’s Submissions

Submission of 28 March 2012

71. The Directorate provided its first submission on 28 March 2012.⁷⁰ It acknowledged that on 15 April 2002 it had received a minute Captain McAuley had written to his Headquarters on 3 January 2002 making application for the RFD.⁷¹ The Tribunal noted that the minute received by the Directorate was in fact a copy of

⁶⁴ McAuley Application for Commission dated 3 June 1981

⁶⁵ Chief of Personnel – Army Determination I10486 dated 3 December 1981

⁶⁶ The supplementary reserve scheme used the resources of various government departments, including personnel, to raise a reserve military capability within the Citizens Military Force particularly for engineers. The scheme allowed for individuals to be placed under conditions of service that enabled them to serve with only limited impact upon their civilian careers. This was done by allowing members to only have to parade for one two week camp per year. These conditions remained until 1993 when all personnel became subject to the same requirements of other Reserve units. - Greville, Phillip (2002). *Paving the Way: The Royal Australian Engineers 1945 to 1972* Page 62

⁶⁷ Changes Affecting Officers – ACMF dated 7 December 1981

⁶⁸ Biographical Details Profile dated 4 February 2004

⁶⁹ Changes Affecting Army Reserve Officers dated 4 February 2005

⁷⁰ DHA 2012/1048250/1(1) dated 23 March 2012

⁷¹ Ibid. Attachment A

the original minute that was sent to the headquarters by Captain McAuley and had been altered to add 'Miss Joe Budden' at the Directorate as the addressee. The Directorate confirmed that it had also received a minute from the unit dated 31 January 2002 seeking advice on eligibility of Captain McAuley for the DLSM.⁷²

72. The Directorate could not explain what had happened to these two documents as there is no evidence on its files of any eligibility assessments.

73. The Directorate stated that Captain McAuley 'was never placed on a schedule and no approval was given by the Governor General for the RFD'. It was also unable to provide the reason why Miss Budden, a former employee, had subsequently sent the RFD to Captain McAuley⁷³.

74. The Directorate stated that in September 2003 it had requested the Reserve pay history of Captain McAuley and, on the basis of these records found that he was not eligible for the RFD. On 4 February 2004 the Directorate informed Captain McAuley that he did not qualify for the RFD and would be required to return the award as it had been issued in error⁷⁴.

75. On 10 March 2004, in response to a letter of 9 March 2004 from Mr Cahill, Mr Waddell from the Defence Personnel Executive wrote that the reasons for the revocation included the assessment that Captain McAuley had only completed '11 years of efficient service', and that Government House could find no evidence that the award had been approved by the Governor General.⁷⁵

76. The Department of Defence wrote to Mr Cahill in September 2005 to advise that Captain McAuley qualified for the DLSM but it 'will not be awarded ... until the miniature RFD is returned'. The Tribunal notes that the letter to Mr Cahill was written by the Director General Career Management Policy in the Defence Personnel Executive, (Commodore M.E. Watson, RAN) presumably on the advice of the Directorate.⁷⁶

77. The advice that Captain McAuley qualified for the DLSM was subsequently revoked in a letter to Mr Cahill from the Chief of Staff to the Parliamentary Secretary for Defence dated 17 March 2010.⁷⁷

78. In its submission, the Directorate set out the eligibility criteria for the RFD noting that only service as a commissioned officer could be counted when assessing Captain McAuley's eligibility. The Directorate completed a working sheet of Captain McAuley's service and concluded that he had completed only 10 years of efficient service prior to 20 April 1999 and as a result, did not qualify for the RFD⁷⁸.

⁷² HQ 22 Const Regt 426-1-1 dated 31 January 2002

⁷³ ADF Medals Section 2002/4934 dated 20 December 2002

⁷⁴ DHA 2004/1003614/1 dated 4 February 2004

⁷⁵ DPE HA(ADF) 110/04 dated 10 March 2004

⁷⁶ DPE CMP 377/05 dated 13 September 2005

⁷⁷ Chief of Staff to the Parliamentary Secretary for Defence letter dated 17 March 2010

⁷⁸ DHA 2012/1048250/1(1) dated 23 March 2012 Attachment J

79. The Directorate indicated that confusion existed over the use of the term ‘anniversary of enlistment date’ and as a result, the Directorate, in its reassessment, had allowed aggregation of service and had not used the enlistment anniversary in its calculation. The working sheets attached to the reassessment indicate a period of non-efficiency in 1986-1987 and from June 1991 to June 1997.

80. On 24 August 2012 the Tribunal sought supplementary information from the Department of Defence on what constituted efficient and effective service. This information was received on 18 September 2012 and concluded that ‘in assessing long service entitlements, the terms “efficient service” and “effective service” are both used and have been interchangeable’.⁷⁹

Submission of 20 July 2015

81. The Directorate provided another submission on 20 July 2015.⁸⁰ This submission refuted Mr Cahill’s claims that Captain McAuley was a specialist officer, pointing to an appointment Determination, various posting orders and letters to support its view that he was in fact a General Service Officer (GSO) with normal training obligations. The submission also addressed ‘efficiency’ and ‘effectiveness’ and concluded that Captain McAuley was obliged to complete 14 days of training each year to be considered efficient. The submission pointed to several sources of evidence which indicated that Captain McAuley had many periods of non-efficiency between 1982 and 1997.

82. The submission also addressed the management of Captain McAuley’s applications and speculated on how Miss Budden had despatched an RFD to Captain McAuley without approval. The Directorate indicated that in 2002 there was a significant backlog of applications due to ADF operational tempo and new medallic entitlements as a result of reviews. The Directorate stated that lengthy delays were being experienced with Army long service applications and Reserve applications were complex. In support of this opinion the Directorate pointed to the eight month delay between receipt of Captain McAuley’s application and the issue of the RFD.

83. The Directorate indicated that it had sought advice from Mr Paul Waddell, a current staff member who stated that he had checked Captain McAuley’s entitlement after he had made application for a Clasp to the RFD which had been issued by Miss Budden.⁸¹ It was during this check that he (Waddell) became aware that the RFD had been issued in error and, on 10 March 2004, he had written to Captain McAuley to explain the mistake.⁸²

84. As previously mentioned, the submission also contained another assessment of Captain McAuley’s eligibility for the RFD. This assessment was slightly different to the original assessment in 2012 in that in respect of 1997, it was prepared to accept that Captain McAuley met the criteria for that year, notwithstanding that his attendance was short of the required 14 days by half a day. Otherwise the assessment was essentially unchanged concluding that Captain McAuley had only completed 10

⁷⁹ DHA 2012/1048250/1 dated 18 September 2012

⁸⁰ DH&A/OUT/2015/0159 dated 20 July 2015

⁸¹ Ibid. Attachment 12

⁸² DPE HA(ADF) 110/04 dated 10 March 2004

years of efficient service. The outcome of this re-assessment was that Captain McAuley:

'...cannot be recommended for the RFD because he did not complete 15 qualifying years within the meaning of the Defence Force Service Awards Regulations (as amended) prior to 20 April 1999...'

Captain McAuley's Submissions

85. For clarity, what follows is a consolidation of the numerous letters and submissions made by Captain McAuley or on his behalf as they relate to eligibility for the RFD.

86. Captain McAuley, after consulting the 2IC of his unit, Major Parfitt, the Army Medals Section – Melbourne, and the Defence Force Pay Accounting Centre – Melbourne, had nominated himself for the RFD by Minute to his unit Headquarters (22 Construction Regiment) on 3 January 2002.⁸³ In the nomination he made several statements and assertions including:

'...I am certain that I am entitled to the award of the RFD...';

'...I have never been categorized as inefficient...';

'...AMAN shows non-effective service for the period 28 Aug 1996 – 1 Sep 1997...';

'...DOD records show no break in service of 12 months or more...'; and

'...(I have) continuously offered and fulfilled my service obligations attending at least one AFX for each year of effective service...'

87. In his nomination he also states that:

'...I elect to be awarded the RFD...'

88. In his nomination he quoted from Defence Instructions⁸⁴ and asserted that, as he was worthy of retention in the Service, he should be considered to be efficient for the period of his service. He concluded his nomination by restating that this document is his election for the RFD and should be sent to Russell Offices for processing.

89. In a letter dated 9 December 2004⁸⁵ Captain McAuley indicated that his nomination had been processed by the Orderly Room Corporal, Corporal Westie, 'who was experienced in making applications to the Directorate'. He indicated that Corporal Westie had checked his records before submitting the application and was

⁸³ HQ 22 Const Regt hand written Minute dated 3 January 2002

⁸⁴ DI(G) Pers 31-1 – Defence Force Service Awards dated 6 April 1984, Paragraph 11

⁸⁵ McAuley letter dated 9 December 2004

subsequently surprised to learn that the award had been revoked. He emphatically stated that:

'...Corporal Westie was entirely satisfied with my time served...'

90. Captain McAuley restated the content of his original nomination and added:

'...I was never advised ... that I was either non-efficient or non-effective for the period 1 July 1993 to 24 April 1998, or indeed any period of time whatsoever...'

91. He stated that he was never advised that he was required to serve more than 14 days per year. He claims in the letter that Army Reserve pay and attendance records which were relied upon by the Directorate were 'notoriously poor'. He concluded the letter by stating that if he had been non-efficient from 1993 to 1998 then he should have been discharged, and implies that as he wasn't discharged, then he was in fact efficient.

92. Between 2005 and 2010 several letters were exchanged between the Department, the Directorate, Captain McAuley and Mr Cahill. These letters add little more to Captain McAuley's original contention regarding his eligibility for the RFD. The Department's letters however served to create confusion as compounding errors of detail were made by various Departmental representatives in their respective responses regarding his eligibility for the DLSM and the Australian Active Service Medal with Clasp 'East Timor'. Captain McAuley points to these examples as evidence of the Directorate's alleged 'incompetence and the prejudicial manner in which he has been treated'.⁸⁶

93. At the hearing Captain McAuley also tendered an extract of a Senate Committee report from 2008 into Australia's involvement in peace keeping, asserting that this was further evidence of poor record keeping by Defence.⁸⁷

94. Mr Cahill made representation to the Parliamentary Secretary for Defence Support on behalf of Captain McAuley on 12 January 2010. This representation was answered by the Parliamentary Secretary's Chief of Staff on 17 March 2010.⁸⁸ The response indicated that a reassessment had concluded that Captain McAuley was not entitled to the RFD or the DLSM and invited him to appeal the decision with the Tribunal. The response also acknowledges the errors made by the Directorate and offers its apology.

Submission dated 23 November 2011

95. In Captain McAuley's written submission to the Tribunal dated 23 November 2011,⁸⁹ he restated his view that Corporal Westie had reviewed his eligibility for the RFD prior to submission and she had subsequently signed a copy of the 2004 letter he had written to the Directorate to signify that she had 'read and agreed' with the

⁸⁶ McAuley Oral Evidence 22 January 2013

⁸⁷ Department of Foreign Affairs, Defence and Trade – Senate Committee Report – 2008 page 325

⁸⁸ Office of the Parliamentary Secretary for Defence Support letter dated 17 March 2010

⁸⁹ McAuley Letter dated 23 November 2011

statements he had made regarding eligibility.⁹⁰ At the 2013 hearing and the 2015 hearing he continued to press that Corporal Westie had checked his eligibility and agreed that he was entitled to the RFD. He indicated that she had confirmed to him and to Mr Cahill that:

‘...I had indeed qualified for the award of the RFD...’

96. This submission also introduces a theory of Captain McAuley’s that his previous Commanding Officer, Lieutenant Colonel Bell:

‘...had the requisite knowledge, power and motive to influence the matter of my RFD...’.

97. On 23 May 2012 in response to the Defence submission, Captain McAuley introduced the possibility that the Directorate may not have disclosed all of the contents of his records.⁹¹ He continued to assert that pay records and protocols which were relied upon by Defence were imperfect. He contended that the records that Corporal Westie relied upon to prepare his nomination which were contained in his Regimental file held by his unit were now missing. He restated that he was never advised that he was categorised as inefficient and that he is relying on:

‘...my unbroken service which Defence acknowledges from 1 Feb 82 to 20 Apr 99 to qualify for the RFD...’⁹²

98. He indicated that he and Mr Cahill suspect that Lieutenant Colonel Bell:

‘...has had a hand in scotching the award of my RFD...’.

99. Captain McAuley concluded this submission by indicating that the entire experience has caused him to suffer depression and anxiety.

100. On 12 June 2012 Captain McAuley provided additional documentation and opinion regarding Lieutenant Colonel Bell including evidence of his (McAuley’s) referral of the matters to the Chief of Staff of Army Headquarters.⁹³ In this letter Captain McAuley again asserted that Lieutenant Colonel Bell ‘...has had a hand in depriving him of his entitlement...’; and in essence asserting that Bell had interfered with the unit files by removing documentation related to his award.

101. In response to supplementary advice from the Directorate, Captain McAuley, on 18 October 2012, restated his earlier position that he was never warned or informed that he was inefficient as evidenced by the fact that he was retained in the Army. He concluded by again stating his belief that Lieutenant Colonel Bell was involved ‘...in corrupting the administration of my awards...’; but indicated that he is no longer able to compel Bell to appear before the Tribunal as he had died a month earlier.⁹⁴

⁹⁰ McAuley Letter dated 9 December 2004

⁹¹ McAuley Letter dated 23 May 2012

⁹² RESPAY/3144402 dated 28 September 1998

⁹³ McAuley Letter dated 12 June 2012

⁹⁴ McAuley Letter dated 18 October 2012

102. During the 2013 hearing, the previously constituted Tribunal urged Captain McAuley to examine his records for evidence of attendance in the period 1991-1996 as this was the period where there is no record of him parading. Captain McAuley stated that he was certain that he would have served 14 days in each year of his service and as an example, recalled going on an exercise in Shoalwater Bay in about 1992. The Tribunal advised Captain McAuley that if he was concerned that he not been given full disclosure of documents, he should seek his records through a Freedom of Information (FOI) request to the Department.

103. During this hearing Captain McAuley indicated that he no longer had faith in the 'system' as evidenced by the fact it had taken nearly ten years for his service in East Timor to be recognised. He continued to assert that '...I was at no time advised I was categorized as non-efficient...' and stated that his treatment at the hands of the Directorate was 'incomprehensible and unreliable'.

104. Captain McAuley's assertions throughout the hearing were of disbelief that a system with so many checks and balances could possibly issue him with a medal and shortly thereafter revoke it. He claimed again that a combination of poor administration and the hand of Lieutenant Colonel Bell had conspired against him. The Tribunal advised Captain McAuley that it would seek another assessment of the pay records with emphasis on the period 1993 to 1998 and would send these to him once they were received to enable him to comment.

105. On 4 March 2013 Captain McAuley provided the Tribunal with the information he had received from his FOI request and further opinions regarding maladministration.⁹⁵ He also attached a statutory declaration by Major David Taylor regarding his attendance at Shoalwater Bay, claiming that the declaration:

*'...verifies my military service between 12 November 1991 and 11 November 1996...'*⁹⁶

Submissions for the Hearing

106. Following the Directions Hearing on 2 June 2015, Mr Cahill made a further written submission on behalf of Captain McAuley.⁹⁷ This submission included an internal Tribunal e-mail from a Research Officer dated 15 April 2013 which stated amongst other issues '...as previously mentioned Mr McAuley is a Specialist Member...'⁹⁸ Referring to this e-mail, Mr Cahill's submission asserted that this document:

'...records the fact that Captain McAuley is recognised by Defence as a specialist member ... and accordingly, accept that his military service attendance is reduced to seven days a year for the purposes of calculating his medal entitlements...'

⁹⁵ McAuley Letter dated 4 March 2013

⁹⁶ Ibid.

⁹⁷ Cahill Submission DWC:sm31171 dated 2 July 2015

⁹⁸ E-mail Marilyn Cunningham to Christine Heazlewood dated 15 April 2103

107. In this submission, Mr Cahill also indicated that he had concluded that Captain McAuley's reserve service totalled 353 days and that as he was a specialist officer who was required to serve a minimum of seven days per annum, his service would be 'equivalent to 50 years service'. Mr Cahill submitted that:

'...it is the aggregate of days served over the 15 year period which gives rise to his entitlement to the RFD...'

108. The submission again reiterated that Captain McAuley was never warned at any stage that he was non-efficient, nor was he the subject of discharge action. The submission pointed to documents already contained in the files as evidence that Captain McAuley only had one period of 'non-effective' service in the period August 1996 to September 1997.⁹⁹

109. The submission also repeated the assertion included in Captain McAuley's original application for review that the correct definition of 'Efficiency' was as defined in the Director General Preparedness and Mobilisation - Army Technical Instruction of 1994.¹⁰⁰ Mr Cahill again stated that Captain McAuley was never advised or recorded as being non-efficient.

110. The submission again asserted that Corporal Westie had examined Captain McAuley's pay records and files and found that he qualified for the RFD. Mr Cahill again attached the letter that Corporal Westie had annotated as 'read and agreed'¹⁰¹

111. Mr Cahill also included a copy of a record of meeting conducted in February 2010 by the Directorate to discuss the preparation of a Ministerial representation response in relation to Captain McAuley's entitlements.¹⁰² This document was part of the FOI request package previously provided to the Tribunal by Captain McAuley. Mr Cahill asserted that because the document had no reasons for decision, there was a breach of the rules of natural justice. He also asserted that because the meeting had been chaired by Ms Bermingham as the Acting Director of Defence Honours and Awards, there was a conflict of interest as she subsequently became the Executive Officer of the Tribunal and had therefore been involved in Mr McAuley's review. He stated:

'...It also demonstrates the conflict of interest position of Ms Mary Bermingham, then Director of DH&A. A response is required.'

112. Mr Cahill concluded his submission by stating that despite repeated requests to the Tribunal:

'communications between the late Lieutenant Colonel Bell and Ms Bermingham had not been revealed and are certainly not revealed in the discovered material'.

⁹⁹ Cahill Submission DWC:sm31171 dated 2 July 2015

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

113. In Mr Cahill's submission of 27 July 2015, he reiterated his theory that there was some type of deliberate conspiracy to deny Captain McAuley his entitlement, going so far as to declare that a statement made in the Defence submission:

*'...appears contrived to rationalise the real reasons behind the RFD being recalled so as to conceal the corrupt actions of Lieutenant Colonel Bell and those assisting his actions...'*¹⁰³

114. In this submission Mr Cahill categorically denied that Captain McAuley had subsequently applied for the Clasp to the RFD as stated by Mr Waddell in the Defence Submission. Mr Cahill pointed out that Captain McAuley's original nomination was for the RFD 'and Clasp' so Mr Waddell's recollection that he (Waddell) had initiated the review of eligibility after receiving the application for the Clasp in 2003 was 'absurd'.

115. In his oral evidence at the hearing, Captain McAuley continued to assert that the records which the Directorate relied upon were in error or missing, that Lieutenant Colonel Bell had deliberately removed documents and potentially made representation to the Directorate to have his medal revoked and subsequently his eligibility reviewed. Captain McAuley indicated that another officer in the unit, Major Parfitt, had his nomination processed at the same time and was awarded the RFD. He stated that Corporal Westie had also checked Major Parfitt's application, inferring, it appeared, that if Major Parfitt's was correct, then so was his own.

116. Furthermore, during his oral evidence Captain McAuley indicated that Corporal Westie would have prepared the nomination for his RFD and passed it to the Chief Clerk who would have forwarded it to the Directorate for action. In his view, Corporal Westie at some time after his nomination was processed, had changed her approach towards him which was previously friendly and supportive and that her subsequent negativity was a result of the influence of Lieutenant Colonel Bell.

117. Mr Cahill, in support of his theory that there was some sort of conspiracy to deny Captain McAuley the award, expressed an opinion that it was difficult to accept that the Directorate could possibly get an RFD application wrong due to the 'importance' of the medal. He opined that the RFD was 'an important medal as it comes with a post nominal' and accordingly would come under a greater level of scrutiny. The Defence representative at the hearing denied this was the case, indicating that the Directorate viewed all awards as important and treated all applications equally.

118. During the hearing Mr Cahill and Captain McAuley constantly expressed the view that Lieutenant Colonel Bell had deliberately interfered in the matter. Captain McAuley was adamant that Lieutenant Colonel Bell had a personal dislike of him and gave examples of Lieutenant Colonel Bell reprimanding him, both as the Commanding Officer of the unit and in his previous capacity as a Career Manager at the Army Personnel Agency - Melbourne. Captain McAuley stated that he believed that Lieutenant Colonel Bell, who as the Commanding Officer of the unit having unlimited access to files, had corrupted his Regimental file by removing his records.

¹⁰³ Cahill Submission DWC:sm31171 dated 27 July Page 7

He also opined that Lieutenant Colonel Bell had used his position to influence the Directorate to review his RFD eligibility leading to withdrawal of the award.

119. During the hearing, Mr Cahill indicated that Lieutenant Colonel Bell had been ‘found to be corrupt’ and that was the reason he suspected that Corporal Westie would not appear before the Tribunal. He offered to provide the Tribunal with material from previous closed proceedings to support the finding of corruption. Under questioning, Mr Cahill stated that in fact there had not been a formal finding of corruption and the matter to which he referred was actually a mediation between parties. Subsequent to the hearing, on 21 August 2015, Captain McAuley provided the Tribunal with a substantial binder of material purporting to:

‘... highlight Lieutenant Colonel Bell's actions calculated to traduce and defame the reputation of Captain McAuley...’¹⁰⁴

120. The material included records of conversation between Lieutenant Colonel Bell and Captain McAuley regarding performance and his annual appraisal in 2004; and declarations that Captain McAuley had made to the Defence Abuse Response Taskforce in 2013 and 2014. These declarations, he claimed, set out in detail the assertions regarding Lieutenant Colonel Bell’s:

‘... active participation in corrupting my military career...’.

121. During the hearing Mr Cahill and Captain McAuley continued to press that Captain McAuley was a specialist, had never been told that he wasn’t a specialist and that he had never been told that he was not efficient. Captain McAuley was also adamant that in the years where there was no evidence of attendance and in all other years that he:

‘...would have attended at least two periods of 14 days being the Annual Field Exercise and the other one – the Regimental camp...’

122. When pressed on the provision of evidence that he had been remunerated for these periods he indicated that he rarely checked to see if he was remunerated as his service was not motivated by money. He remained adamant that he attended for a minimum of 14 days each year and that he was never advised that he was not efficient. Captain McAuley also tendered an extract of ‘RFD Diary Note Transcripts’. These notes indicated that he had had telephone contact with the Directorate in September 2002 and November 2004.

123. In conclusion, Captain McAuley and Mr Cahill stated that in their view, Lieutenant Colonel Bell had been involved in a deliberate vendetta to deny the medal and that his influence could be partially verified by compelling Corporal Westie to attend and testing her evidence.

124. The Tribunal advised Captain McAuley and Mr Cahill that its role was to stand in the place of the original decision maker and the key issue was the need for Captain McAuley to provide evidence of remunerated service for a minimum of 14

¹⁰⁴ McAuley Letter dated 18 August 2015

days per annum in a total of 15 years of qualifying service. The Tribunal concluded the hearing by providing Captain McAuley with another two weeks to submit any additional evidence of remunerated service.

125. On 18 August 2015 Captain McAuley sent the Tribunal the Rebbechi and Christie statutory declarations referred to above. The Rebbechi statutory declaration indicated that he recalled Captain McAuley ‘parading and attending the 6 Engineer Group camps during the period 1986-1987’.¹⁰⁵ The Christie statutory declaration stated that he recalled Captain McAuley ‘parading and attending most, if not all 6 Engineer Group camps during the period 1992 – 1997’.¹⁰⁶

126. In summary, Captain McAuley believes that he is entitled to the RFD as he completed the requisite qualifying service. It was asserted that as Captain McAuley was a Specialist Member, he was only required to serve 7 days or an aggregate of seven days each year for 15 years. Even if he were found not to be a Specialist Member, Captain McAuley asserts that he in fact served at least 14 days in each year and that the records held by Defence were inaccurate. He believes that he was in fact ‘effective’ for the period of his service with the exception of one year and, as he was effective, then he was also ‘efficient’, noting that he was not administratively discharged for being non-efficient. At no time was he advised that his service was non-efficient. He contends that when his application for the RFD was made in 2002, his unit file was checked by the Orderly Room Corporal and his eligibility was proven from the records contained in the unit file. He implies that these records and his other associated service records were subsequently interfered with, potentially by his previous Commanding Officer, to deny him his entitlement. He supports his assertion regarding inaccuracy of service records by pointing to numerous examples of alleged incompetence by the Department who he alleges treated him with prejudice.

Tribunal Consideration

127. The Tribunal carefully considered all the material placed before it including written submissions, oral evidence, policies and the law.

128. There is no dispute about Captain McAuley’s service record in the Army from his first posting as an officer on 1 February 1982 until the expiration of the eligibility period for the RFD on 20 April 1999. The Tribunal noted that during the hearing Captain McAuley agreed that his service record was accurate. The Tribunal was also satisfied that Captain McAuley’s service as an officer in the Permanent Naval Force from 13 January 1976 to 7 September 1976 could be considered as one year of qualifying service for the RFD.

The Regulations

129. Section 110VC(6) of the Defence Act provides that the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision. The

¹⁰⁵ Statutory Declaration dated 18 August 2015 – Enclosure 2 to McAuley letter dated 18 August 2015

¹⁰⁶ Statutory Declaration dated 18 August 2015 – Enclosure 3 to McAuley letter dated 18 August 2015

reviewable decision that Captain McAuley was not entitled to the RFD was made on 4 February 2004. The Regulations governing his eligibility are set out in *Commonwealth of Australia Gazette No S78* dated 27 April 1982¹⁰⁷ as amended in 2000¹⁰⁸. The DFSA Regulations are set out in the Schedule attached to the Letters Patent and in relation to the RFD they provide:

...

3. (1) *For the purpose of determining whether a person has rendered efficient service as member of the Defence Force but without limiting the matters that may be taken into account for that purpose, regard shall be had to such matters (if any) as are for the time being specified in directions given by the Chief of the Defence Force Staff or his delegate for the purposes of this sub-regulation.*

(2) *For the purposes of these Regulations, a person shall be taken to have rendered service in the Reserve Forces throughout a year if –*

(a) *the person by virtue of his membership of the Reserve Forces, was required to undergo training or render service in the capacity of a member of the Reserve Forces for a period not less than, or for periods that in the aggregate, were not less than, a period determined by the Chief of the Defence Force Staff or his delegate; and*

(b) *the person completed that training or rendered that service as the case may be.*

(3) *For the purpose of the application of sub-regulation (2) in relation to a particular person, “year” means the period of 12 months that commenced on the day on which the person became a member of the Reserve Forces or on the anniversary of that day.*

...

7. *The Reserve Force Decoration may be awarded to a person who has, on or after 14 February 1975, and before 20 April 1999, completed the qualifying service as a member of the Defence Force required by regulation 8.*

8. (1) *Subject to sub-regulation (2), the qualifying service as a member of the Defence Force required for the award of the Reserve Force Decoration is efficient service as an officer of the Defence Force for a period of 15 years or for periods that, in the aggregate, amount to 15 years, being service that includes efficient service as an officer of the Reserve Forces for a period not less than 12 years or for periods that, in the aggregate, amount to not less than 12 years.*

¹⁰⁷ *Commonwealth of Australia Gazette No S78* dated 27 April 1982

¹⁰⁸ *Commonwealth of Australia Gazette No S160* dated 30 March 2000

Qualifying Service

130. Defence Instruction (General) Personnel 31-1 dated 6 April 1984 defines Qualifying Service for Reserve Force members with training obligations:¹⁰⁹

20. A member of the Reserve Forces whose service entails an obligation to undergo training shall, subject to the provisions of paragraph 13, be regarded as having served throughout a year if in that year he has completed training for a period, or for periods, in the aggregate not less than a period determined by the Chief of Defence Force Staff or his delegate.

131. Subsequently the Delegate for determining annual training requirements made Determinations pursuant to the Regulations which specify that annual minimum training obligations to meet eligibility criteria during service will be:

- *Supplementary Reserve Unit until 25 August 1993* - *14 days*¹¹⁰
- *Normal Reserve Unit until 25 August 1993* - *26 days*¹¹¹
- *26 August 1993 – 20 April 1999* - *14 days*¹¹²

Was Captain McAuley a Specialist?

132. The Tribunal noted that on 26 August 1993, the CGS determined that qualifying service for ‘specialist consultants who have had their period of service approved by a formation commander’ would be 7 days in each year.¹¹³ The Tribunal noted that for the purposes of the RFD, this would apply for the period 26 August 1993 to 20 April 1999.

133. The Tribunal noted that in his letter to the Minister for Defence dated 25 November 2014,¹¹⁴ Captain McAuley stated:

‘...I have at all times endeavoured to prosecute my duties as a Specialist Officer (geologist) in pursuit of every military objective...’.

134. The Tribunal noted that in Mr Cahill’s letter of 15 August 2014, he asserted that Captain McAuley met the conditions for the granting of the RFD when his service was:

‘...properly considered as a Specialist Officer...’

135. The Tribunal notes that in Mr Cahill’s submission of 27 July 2015 it was asserted that Captain McAuley’s classification ‘...as a GSO is not material...’. The Tribunal considered that Captain McAuley’s classification was material as this would govern his annual training obligation, in the event he was not found to be a specialist consultant.

¹⁰⁹ *Defence Instructions (General) Personnel 31-1* dated 6 April 1984

¹¹⁰ DFSA Regulation 3 Determination by CGS dated 25 November 1983

¹¹¹ *Ibid.*

¹¹² DFSA Regulation 3 Determination by CGS dated 26 August 1993

¹¹³ *Ibid.*

¹¹⁴ McAuley Letter dated 25 November 2014

136. The Tribunal also noted that in Mr Cahill's submission of 2 July 2015 and referred to in his 27 July 2015 submission, he produced an internal Tribunal e-mail from Ms M. Cunningham, a Tribunal Research Officer which indicated that Captain McAuley was a 'Specialist Member'¹¹⁵ because he had been a member of the 'Special Reserve'. Relying on this e-mail, Mr Cahill therefore asserted that the document:

'...records the fact that Captain McAuley is recognised by Defence as a specialist member ... and accordingly, accept that his military service attendance is reduced to seven days a year for the purposes of calculating his medal entitlements...'

137. The Tribunal did not accept the assertion that because a Research Officer in the Tribunal had made a statement in an internal e-mail regarding Captain McAuley's status, that this could be accepted as the 'recognised Defence' position. The Tribunal explained at the hearing that it was not bound to accept the advice of its Research Officer. The Tribunal considered that the comment regarding the 'Special Reserve' was inaccurate and in all likelihood, a misinterpretation of 'SR' – Supplementary Reserve.

138. The Tribunal noted that Mr Cahill had been informed on numerous occasions that the Tribunal is an independent statutory body and not a part of Defence. The Tribunal considered that internal communication between staff of the Tribunal is not an authority that can reasonably be construed to be an endorsed position of the Department of Defence.

139. The Tribunal noted that Captain McAuley was appointed as a Captain in the Active Citizen Military Forces on 3 December 1981. The instrument of appointment records that:

*'[he] possesses the experience and qualifications sufficient for the performance by him of the duties of an officer of the rank of Captain in the Royal Australian Engineers (Supplementary Reserve), Active Citizens Military Forces'*¹¹⁶.

140. Captain McAuley's appointment was made pursuant to Section 10 of the *Defence Act 1903*. Captain McAuley gave evidence that he understood he was accepted because of his 'credentials'. Mr Mitchell submitted that Captain McAuley's entry rank was likely to have been granted as a result of his previous military service.

141. At the hearing the Applicant referred to the Minute recommending his appointment which noted his previous service, his educational background and also his current employment as a geologist¹¹⁷. The Tribunal accepted that Captain McAuley's previous service, professional qualifications, and his work as a geologist are likely to have contributed to his appointment at the rank of Captain rather than a lower rank.

¹¹⁵ E-mail Marilyn Cunningham to Christine Heazlewood dated 15 April 2103

¹¹⁶ Chief of Personnel – Army Determination I10486 dated 3 December 1981

¹¹⁷ Military Secretary Minute 81-M-450 dated 2 December 1981

142. The Tribunal noted that Australian Military Regulation 2 allocated officers to Divisions of the Australian Staff Corps. ‘Special List’ Officers for two support Corps (RAAOC and RAEME) were listed in Statutory Rule 122¹¹⁸. The Royal Australian Engineer Corps, to which Captain McAuley was appointed, did not have special list officers.

143. In 1983 Australian Military Regulation 2 was amended to establish three divisions, the Specialist Service Officer (SSO), Prescribed Service Officer (PSO) and General Service Officer (GSO) Divisions.¹¹⁹ Regulation 22 listed twenty specialities for SSO division officers such as legal officers, health officers, education officers, scientific officers and veterinary officers. The list did not include ‘geologists’.

144. During the hearing Mr Cahill noted that the Regulation contained the specialist listing for ‘Scientific Officer’ and asked the Tribunal to consider that, as his client was a geologist, he was also a scientist, and therefore fell within that category. The Tribunal indicated that it would seek further information on the matter. It was subsequently confirmed by the Director of Officer Career Management - Army that ‘Scientific Officer’ was a career division for specialists and all were Medical Corps Officers employed by the Army Malarial Research Unit.

145. The Tribunal also noted that, in any event, Captain McAuley was appointed to the Australian Staff Corps prior to the 1983 amendment and that Regulation 25 of 1983 states that the GSO division ‘shall consist of officers who are not included in the SSO division...’.¹²⁰ These Regulations were subsequently superseded by Defence Instruction (Army) PERS 47-9 which also lists SSO employment categories, most of which are replicated from the earlier Regulation. This list also does not contain ‘geologist’.¹²¹

146. At the hearing Captain McAuley’s attention was directed to his having completed a ‘GSO Compulsory Retirement Age One-Time Election’ on 25 March 1996 wherein he elected to serve to 55 years of age as a GSO.¹²² His attention was also drawn to the numerous Evaluation and Development Report – Officers (EDROs) raised by Captain McAuley where he indicated that he was a GSO. Personnel Advisory Committee Promotion Determinations were also included in the papers in which he was consistently described as a GSO.¹²³ Captain McAuley said that no distinction was made to him between ‘Specialist’ and ‘General’ officer, but conceded that his records did show that he was a ‘GSO’.

147. Captain McAuley gave evidence that, nonetheless, he was a de facto specialist because his skills as a geologist were often utilised, including during his deployment to East Timor in 1999. He provided six Senior Officer statements which had originally been acquired in support of his request for recognition of this deployment

¹¹⁸ Statutory Rules 1965, No 122 (1)

¹¹⁹ 1983 No. 61 Australian Military Regulations (Amendment) – Reg 2

¹²⁰ Ibid.

¹²¹ Defence Instruction (Army) Pers 47-9 dated 6 February 2003

¹²² GSO Compulsory Retirement Age One Time Election Proforma dated 25 March 1996

¹²³ PAC for Promotion to MAJ – Southern Region 2000 to 2004

and he now asserted that the statements ‘demonstrated the regard the Army had for his Specialist skills’.¹²⁴

148. The Tribunal could find no evidence that Captain McAuley was appointed as a ‘specialist consultant’ or that his employment as such had ever been considered by a formation commander, as required by the 1993 CGS Determination.¹²⁵

149. Having regard to Captain McAuley’s appointment determination;¹²⁶ his personally signed election to serve to 55 years of age as a GSO; the Personnel Advisory Committee Promotion Determinations and his annual appraisal reports, the Tribunal finds that Captain McAuley was appointed to the Australian Staff Corps and subsequently served as a GSO, in accordance with Australian Military Regulations and the Defence Instruction.

150. Whilst Captain McAuley may have considered himself to be a specialist and as a result of his particular qualifications, he may have been tasked from time to time to perform specific duties which relied upon those qualifications, the fact remains that he was categorised as a GSO.

151. The Tribunal was satisfied that, in any event, the specialist consultant categorisation was only relevant from 26 August 1993 and from this date to at least 1997, as discussed below, Captain McAuley’s attendance is recorded as less than seven days per annum.

Service as a GSO

152. Having reviewed Captain McAuley’s service record the Tribunal found that Captain McAuley served in Supplementary Reserve units from his Army enlistment until 5 April 1994. In accordance with the CGS Determination of 1983 he was therefore required to ‘render service’ being the completion of 14 days of efficient service per annum in this period. He then served in standard Reserve units until 20 April 1999 where he was also required, on the basis of the CGS Determination of 1993 to complete 14 days of efficient service per annum. The Tribunal therefore determined that Captain McAuley’s annual minimum training obligation to meet eligibility criteria for the RFD was 14 days per annum for each year of his service in the Army as an officer until 20 April 1999.

153. The Tribunal noted that for the purposes of determining a year of ‘rendering service’ the Regulation states:

‘3.(3) ...in relation to a particular person, “year” means the period of 12 months that commenced on the day on which the person became a member of the Reserve Forces or on any anniversary of that day.’¹²⁷

154. The Tribunal considered the assertion by the Directorate in its 2012 submission that ‘...regulations allow aggregation of service and the anniversary of

¹²⁴ Cahill Submission DWC:sm:31171 dated 27 July 2015 – Page 8

¹²⁵ DFSA Regulation 3 Determination by CGS dated 26 August 1993

¹²⁶ Chief of Personnel – Army Determination I10486 dated 3 December 1981

¹²⁷ *Commonwealth of Australia Gazette No S78* dated 27 April 1982

enlistment when calculating 12 month periods will no longer be applicable...’. The Tribunal was unable to ascertain how or why ‘anniversary of enlistment ... will no longer be applicable...’ as stated by the Directorate and no authority was provided for this interpretation, or if this represented some change in policy. Noting that this statement was made in 2012 and the decision to refuse Captain McAuley was made in 2004, the Tribunal is obliged to apply the prevailing Regulation as at 2004 as stated in the preceding paragraph.

155. The Tribunal was unable to find any evidence of policies or determinations to support Mr Cahill’s assertion of 2 July 2015 that:

‘...it is the aggregate of days served over the 15 year period which gives rise to his entitlement to the RFD...’¹²⁸

156. The Tribunal found that as Captain McAuley served in standard Reserve units as a GSO he had a normal obligation to undergo training annually for periods determined by the Delegate, which for the purposes of the DFSA Regulations and as previously stated above, was a minimum of 14 days each year.

Did Captain McAuley provide ‘Efficient’ service?

157. The Tribunal considered that the principal issue in relation to eligibility is Captain McAuley’s annual training obligation. To be eligible for the award of the RFD he is required by the Regulation to give qualifying service for at least 15 years as a member of the Reserve Forces and that service must be ‘efficient’ service as an officer.¹²⁹

158. The Tribunal noted that in Captain McAuley’s nomination dated 3 January 2002 he quoted from Defence Instructions and asserted that, as he was worthy of retention in the Service, he should be considered to be efficient for the period of his service.¹³⁰ The Instruction provides the conditions and procedures governing the DFSA for both the Regular and Reserve Forces as well as members of philanthropic organisations. Paragraph 11 provides guidance on the determination of efficiency for all members and states:

11. The CDFS has directed that in assessing whether a member has rendered efficient service for the required qualifying period ... any period during which the member was the subject of a formal warning, adverse report or other formal notice specifically concerning inefficiency shall not be counted as a period of qualifying service. However a member shall be regarded as having rendered efficient service throughout the required qualifying period if, on completion of that period, his efficiency is such that other considerations apart he is considered under the rules applying to his Service to be worthy of retention in that Service..

159. Captain McAuley quoted the second sentence of this paragraph in the nomination and concluded that ‘I have been so considered’. The Tribunal considered

¹²⁸ Cahill Submission DWC:sm31171 dated 2 July 2015

¹²⁹ Ibid.

¹³⁰ DI(G) Pers 31-1 – Defence Force Service Awards dated 6 April 1984, Paragraph 11

that the context in which the efficiency determination paragraph was written was applicable to the Regular Force and that the rules applying to Captain McAuley's Service (Army Reserve Service) were articulated in the paragraphs of the Instruction which follow relating to 'Qualifying Service – Reserve Forces'. The Tribunal did not accept Captain McAuley's assertion that he had been 'so considered' as there is no evidence that such an assessment was ever conducted. Indeed there is evidence that he was actually declared to be 'non-effective' on at least one occasion¹³¹ and that his retention was in doubt as evidenced by his annual appraisal reports which are discussed later.

160. The Tribunal noted that there was confusion regarding the terms efficiency and effectiveness and accordingly had requested that the Directorate provide advice on what they used to define these terms as they relate to the DFSA. The Directorate provided this advice on 18 September 2012.¹³² The Tribunal did not agree with the Directorate advice that 'the terms "efficient service" and "effective service" are both used and have been interchangeable', as was submitted. Letters Patent are classified as subordinate legislation and allow for the granting of awards if certain conditions are met. The Letters Patent and Regulations refer only to 'efficient' service and this is the term that the Tribunal considered must be used in conducting assessments of eligibility.

161. The Tribunal considered that 'effective' is an administrative term associated with an internal Army concept introduced in 1994 as a 'strength management tool to enable members that were unable to render service to be identified in a timely manner' referred to in Director General Preparedness and Mobilisation Technical Instruction 2/94.¹³³ It is not a term which influences qualifying service definitions for the purpose of awards. The Tribunal considered that Mr Cahill's assertions regarding the definition of 'efficiency' as stated in Technical Instruction 2/94 was not relevant to the application of DFSA Regulations as such instructions are considered to be policy, whereas Letters Patent and Regulations are subordinate legislation. During the hearing, the Directorate indicated that they were not aware of any examples of the use of the term 'effective' in any Letters Patent, Instruments, Regulations or Determinations. Accordingly the Tribunal considered that the Applicant's various assertions regarding his 'effectiveness' as opposed to 'efficiency' were not relevant to the assessment of his eligibility.

162. The Tribunal noted that the Defence Instruction in relation to qualifying service stated:¹³⁴

*13...Only service rendered under Service conditions of service **and remunerated at Service rates of pay** may be taken into account as qualifying service for members of the Permanent and Reserve Forces...(Tribunal's emphasis)*

163. The Tribunal reviewed the Defence Instruction and observed that the document has a specific area dedicated to the Reserve under the heading 'Qualifying

¹³¹ 22 Const Regt Personal Occurrence Report 275/96 dated 8 October 1996

¹³² DHA 2012/1048250/1 dated 18 September 2002

¹³³ DGPM-A Tech Instr 2/94

¹³⁴ *Defence Instructions (General) Personnel 31-1* dated 6 April 1984

Service – Reserve Forces’ (Paragraphs 19-22). These paragraphs discuss members with and without training obligations and their requirement to render service in order to qualify for the DFSA. As previously discussed, the Tribunal has found, Captain McAuley was a GSO with an obligation to undergo training. The Instruction states:

...Members with Training Obligations.

*20. A member of the Reserve Force whose service entails an obligation to undergo training shall, subject to the provisions of paragraph 13, be regarded as having served throughout a year if in that year he has completed training for a period, or for periods, in aggregate, not less than a period determined by the CDFS or his delegate...*¹³⁵

164. The Tribunal therefore determined that in deciding whether Captain McAuley had rendered service which was qualifying service for the purpose of the DFSA, this part of the Defence Instruction relating to ‘Members with Training Obligations’, read together with paragraph 13 relating to remunerated service was the applicable standard.

165. The Tribunal therefore considered that to be eligible for the RFD, Captain McAuley must have been efficient for 15 years of his service in the years from February 1982 to April 1999 and to be declared as such he must have been remunerated for the minimum period of his obligation which as previously discussed was 14 days per annum. The Tribunal noted that during the hearing Captain McAuley stated that his service was not motivated by remuneration and accordingly he rarely if ever checked to see if he had been paid for his attendances including at annual camps. The Tribunal informed Captain McAuley at the hearing that notwithstanding his motivations for serving, he would be required to provide evidence of remuneration if he was to demonstrate his eligibility.

Unbroken Service

166. In relation to Captain McAuley’s claim that he was relying on ‘...my unbroken service which Defence acknowledges from 1 Feb 82 to 20 Apr 99 to qualify for the RFD...’ as stated in the message from Reserve Pay Section in 1998;¹³⁶ the Tribunal considered that the term ‘unbroken service’ in this context actually refers to his entire period of service from enlistment up until the date of the minute. It indicates that his service had not been broken by transfer between the Services or discharge between those dates. It does not relate to his efficiency in the period.

Retention

167. The Tribunal noted that Captain McAuley has also relied upon his retention in the Army as grounds for him being declared efficient for the purposes of the award. In so doing he quotes from a Defence Instruction:

11.... a member shall be regarded as having rendered efficient service throughout the required qualifying period if, on completion of that period, his

¹³⁵ Ibid. Paragraph 20

¹³⁶ RESPAY/3144402 dated 28 September 1998

*efficiency is such that other considerations apart he is considered under the rules applying to his Service to be worthy of retention in that Service...’*¹³⁷

168. The Tribunal noted Captain McAuley’s consistent claims that he had never been advised that he was considered to be non-efficient. The Tribunal accepted that whilst he may not have been formally advised that he was non-efficient, the Tribunal noted that such advice was not a requirement stipulated in the Regulations and conditions for the award of the RFD. The Tribunal also considered that, in any event, there was sufficient evidence from Captain McAuley’s records to indicate that his suitability for retention may have been in question on a number of occasions as evidenced by comments by his Formation Commander on Evaluation Reports in July 1991¹³⁸ and November 1991,¹³⁹ his Senior Reporting Officer in 1998¹⁴⁰ and 1999¹⁴¹ and in November 2000 when his Formation Commander stated that his performance was unsatisfactory and that he should:

*‘...be asked to show cause for retention’*¹⁴².

Assessment of Eligibility

169. In undertaking its fresh assessment of Captain McAuley’s eligibility for the RFD, the Tribunal noted that the evidence provided in the papers included numerous separate assessments of annual attendance. The two assessments conducted by Defence Pay and Accounting (DEFPAC) in 1999¹⁴³ and 2001¹⁴⁴ are not overly useful in that they are reported by Financial Year rather than enlistment year. They do however point to a prolonged period of non-attendance for a four year period between 1993 and 1997.

170. Another three assessments were conducted in 2004¹⁴⁵, 2010¹⁴⁶ and 2013.¹⁴⁷ These later assessments are conducted by enlistment year and are generally consistent. They also point to a four year period of non-attendance between 1993 and 1997. An additional review of pay records was also conducted in June 2013, and these records confirmed previously received assessments.¹⁴⁸

171. The Tribunal noted that the Directorate conducted yet another assessment on 14 July 2015¹⁴⁹. This assessment again concluded that Captain McAuley was not eligible for the RFD as he had only completed 10 years of efficient service even after allowing for aggregation of his previous service in the CMF and PNF.

¹³⁷ *Defence Instructions (General) Personnel 31-1* dated 6 April 1984

¹³⁸ EDRO dated 24 July 1991

¹³⁹ EDRO dated 20 November 1991

¹⁴⁰ EDRO dated 6 October 1998

¹⁴¹ EDRO dated 28 October 1999

¹⁴² EDRO dated 5 November 2000

¹⁴³ RESPAY/3144402 dated 24 August 1999

¹⁴⁴ RESPAY/3144402 dated 11 September 2001

¹⁴⁵ DPE HA(AD)110/04 dated 10 March 2004

¹⁴⁶ Office of Parliamentary Secretary for Defence Support letter dated 17 March 2010

¹⁴⁷ RPAC/OUT/2013/162 dated 12 March 2013

¹⁴⁸ RPAC/OUT/2013/430 dated 17 June 2013

¹⁴⁹ Defence Submission DH&A/OUT/2015/0159 dated 20 July 2015 – Attachment 13

172. Having reviewed all of the assessments and records, the Tribunal found that there was clear evidence that Captain McAuley met his annual training obligation, was remunerated for his service and could therefore be correctly deemed to be efficient for the purposes of the DFSA for the following ten enlistment years:

Year Ending	Days of Service
31 January 1983	50
31 January 1984	55
31 January 1985	41
31 January 1986	27
31 January 1988	18
31 January 1989	17
31 January 1991	41
31 January 1992	14
31 January 1998	16
31 January 1999	16

173. The Tribunal was satisfied that service in the PNF as an officer from 13 January 1976 to 7 September 1976 could be considered as one year of qualifying service for the RFD. At the hearing, the Tribunal agreed that there was no dispute regarding Captain McAuley's efficiency in these ten enlistment years and that the year of service in the PNF would also be regarded as a year of efficient service. The Tribunal was also satisfied that Captain McAuley's previous service as a Private in 1970 could not be considered in relation to the RFD as he was not commissioned.

174. The Tribunal turned to a detailed review of each of the years where efficiency was in dispute. Captain McAuley was asked about his service during these years at the hearing.

175. **1 February 1986 – 31 January 1987.** Captain McAuley was posted to Headquarters 6th Engineer Group from 1 February 1986 to 23 November 1988. In the enlistment year he was required to complete 14 days of training. The DEFPAC assessments concluded that he completed a total of 1 day. The unit Chief Clerk also declared Captain McAuley 'non-efficient TY87/88' in his Minute dated 31 January 2002. Captain McAuley also made a comment on his annual EDRO in relation to the duties he had performed during the period:

*'...Nil, business and family matters precluded attendance...'*¹⁵⁰ and his Reporting Officer stated:

*'...no comment can be made as the officer has been rarely sighted...'*¹⁵¹

- a. Captain McAuley stated that he would have attended two periods of continuous training in that year, each of 14 days being the Annual Field Exercise and the Regimental Camp. He stated that he assumed he was paid for attendance but he never checked his pay records. He agreed that he had indeed stated in relation to his duties that he had written 'Nil' on

¹⁵⁰ EDRO dated 12 December 1986

¹⁵¹ Ibid.

the report. He pointed to the fact that his father was seriously ill during this period which he recalled may have limited his attendance. He was unable to produce any evidence of additional remunerated service in this period. Subsequent to the hearing he produced the Rebbechi statutory declaration in which he (Rebbechi) ‘recalled Captain McAuley parading and attending the 6 Engineer Group camps during [1986-1987 inclusive]’. This was not evidence of remunerated service.

- b. The Tribunal gave some weight to the statutory declaration but noted that it was provided almost thirty years after the relevant period and provided no context of where and when the camps were conducted or who attended.
- c. Giving significant weight to the EDRO comment and Captain McAuley’s own declaration that family matters precluded attendance, the Tribunal found that Captain McAuley did not complete 14 days of remunerated service in the enlistment year 1 February 1986 to 31 January 1987 and was therefore correctly deemed to be non-efficient in this period.

176. **1 February 1989 – 31 January 1990.** Captain McAuley was posted to Plant Troop 106 Construction Squadron from 24 November 1988 to 31 December 1992. In the enlistment year he was required to complete 14 days of training. The DEFPAC assessments concluded that he completed a total of 3.2 days. The pay sheets for the period reveal that he was remunerated for non-continuous parades on 18 February, 27 February, 1 July and 2 July 1989.¹⁵² His annual EDRO was raised on 12 February 1990 for the period ended December 1989. The Reporting Officer stated:

‘...Captain McAuley attended the annual camp during the reporting period ... was only able to perform his Supplementary Reserve commitment plus a small amount of training...’¹⁵³

- a. The Tribunal noted that the Defence assessment of 20 July 2015 indicated that Captain McAuley completed more than 14 days in 1989 although the assessment is not by enlistment year. Captain McAuley again stated that he would have attended two periods of continuous training in that period, each of 14 days. The Tribunal considered that it was more likely than not that Captain McAuley met his training obligation in this period by virtue of attendance at the annual camp which, on the evidence, probably ran for two weeks. There is however no evidence that he was remunerated for this possible attendance.
- b. Giving significant weight to the EDRO comment, the Tribunal found that there was doubt regarding Captain McAuley’s remunerated attendance in the enlistment year 1 February 1989 – 31 January 1990 and that his efficiency, as defined, was therefore unclear.

177. **1 February 1992 – 31 January 1993.** Captain McAuley remained posted to Plant Troop 106 Construction Squadron until 31 December 1992. In the enlistment year he was required to complete 14 days of training. The DEFPAC assessments

¹⁵² RPAC/OUT/2013/162 dated 12 March 2013

¹⁵³ EDRO dated 12 February 1990

concluded that he completed a total of 12 days. The pay sheets for the period reveal that he was remunerated for continuous training from 27 August 1992 to 9 September 2002 (12.5 days) as a member of 106 Construction Squadron, paid by Land Headquarters (LHQ). A statutory declaration by Major David Taylor confirms Captain McAuley attended Shoalwater Bay Training Area (SWBTA) in 1992¹⁵⁴ and the Applicant supplied an Exercise Swift Eagle 1992 Exercise Control Pass¹⁵⁵. The statutory declaration does not support Captain McAuley's assertion that the statutory declaration would '...verify my military service between 12 November 1991 and 11 November 1996...' ¹⁵⁶, as it covers only his attendance at the exercise. No annual EDRO was raised on Captain McAuley for this period however previous EDRO comments written in July and November 1991 point to an emerging pattern of non-attendance. These include:

'...civilian work requirements and personal restrictions prevent Captain McAuley from meeting the requirements of his posting...' ¹⁵⁷; and

'...he is unavailable for tasking in normal duties expected of an engineer officer...' ¹⁵⁸.

- a. Subsequent to the hearing Captain McAuley produced a statutory declaration by Warrant Officer Class One G.N. Christie, RAE (the Christie statutory declaration) which indicated that he (Christie) 'recalled Captain McAuley parading and attending most, if not all, 6 Engineer Group camps during [1992-1997 inclusive]'. The Tribunal gave limited weight to the statutory declaration noting that it was provided almost twenty years after the event. The Tribunal noted that the declaration did not provide any evidence as to when the camps occurred, where they were conducted or what units attended.
- b. The Tribunal noted that the Defence assessment of 20 July 2015 indicated that Captain McAuley completed 13.5 days between June 1991 and June 1992 and having applied a 'balance of probability' weighting, the assessment granted 14 days service for the year.
- c. Noting that Exercise Swift Eagle was a LHQ Exercise conducted in SWBTA in August/September 1992, and that Captain McAuley's remuneration was by LHQ for 12.5 days; and giving weight to statements regarding attendance on the 1991 EDROs, the Tribunal found that Captain McAuley may have completed 14 days of service in the enlistment year 1 February 1992 to 31 January 1993 and that his efficiency for that year was therefore unclear.

178. 1 February 1993 – 31 January 1994. Captain McAuley was posted to 107 Plant Troop (Hy) from 1 January 1993 to 5 April 1994. In the enlistment year he was

¹⁵⁴ Statutory Declaration – David Taylor dated 13 January 2013

¹⁵⁵ Control Pass 43

¹⁵⁶ McAuley Letter dated 4 March 2013

¹⁵⁷ EDRO dated 2 November 1991

¹⁵⁸ EDRO dated 10 July 1991

required to complete 14 days of training.¹⁵⁹ The DEFPAC assessments concluded that he did not complete any training and his pay sheets for the period reveal that he was last remunerated on 9 September 1992 and was not paid again until 7 September 1997¹⁶⁰. The Tribunal discussed the 9 September 1992 pay sheet entry with Captain McAuley during the hearing. He opined that ‘NES’ referred to effectiveness and that he agreed that he was ‘non-effective during this period’. The Tribunal confirmed that the entry actually refers to efficiency and is the acronym for ‘Non Efficient Service’. In any event, the entry confirms non-attendance regardless of efficiency or effectiveness.

- a. There is no EDRO for the period in question. There are no entries of any activity on Captain McAuley’s Service record in the period. Captain McAuley again stated that he would have attended two periods of continuous training in that period, each of 14 days. He was unable to produce any evidence of remunerated service in this period. The Christie statutory declaration, indicated that he (Christie) ‘recalled Captain McAuley parading and attending most if not all 6 Engineer Group camps during [1992-1997 inclusive]’.
- b. For the reasons discussed above the Tribunal gave limited weight to the Christie statutory declaration.¹⁶¹
- c. In the absence of evidence of remunerated service and on balance, the Tribunal found that Captain McAuley did not complete 14 days of remunerated service in the enlistment year 1 February 1993 to 31 January 1994 and was therefore correctly deemed to be non-efficient in this period.

179. **1 February 1994 – 31 January 1995.** Captain McAuley was posted to 107 Plant Troop (Hy) until 5 April 1994 before being posted to 3rd Training Group from 6 April 1994 to 7 March 1995. In the enlistment year he was required to complete 14 days of training. The DEFPAC assessments concluded that he did not complete any training and his pay sheets for the period reveal that he was last remunerated on 9 September 1992 and was not paid again until 7 September 1997. An EDRO was raised on 9 January 1995 reporting for the period ending in September 1994. Captain McAuley stated on this report in relation to the duties he had performed during the period:

‘...Nil...’¹⁶² and his Reporting Officer stated:

‘...not known – has not attended unit since posting in...’¹⁶³

- a. Captain McAuley agreed during the hearing that in relation to duties performed he had indeed written ‘Nil’ on the report. There are a number

¹⁵⁹ Although the annual training obligation was changed from 26 days to 14 days on 30 June 1993 by CGS Determination, Captain McAuley remained liable for 14 days as he was a member of a Supplementary Reserve Unit.

¹⁶⁰ RPAC/OUT/2013/430 dated 17 June 2013 Enclosure 1

¹⁶¹ Directorate E-mail to Tribunal dated 1637 hours on 2 September 2015

¹⁶² EDRO dated 9 January 1995

¹⁶³ Ibid.

of related letters between Captain McAuley, the Reporting Officer and his career management office between September 1994 and October 1996 regarding non-attendance¹⁶⁴. The Tribunal notes that the content of these letters and the EDRO indicate that Captain McAuley did not attend any training activities in the period. During the hearing Captain McAuley noted that the report was written in January 1995 but raised in September 1994 and he opined that perhaps he had attended the camp after September. He was unable to produce any evidence of remunerated service in this period also.

- b. For this period the Applicant again relied on the Christie statutory declaration to which the Tribunal gave limited weight for the reasons discussed above. Furthermore, the Tribunal was not inclined to accept the recollection of Warrant Officer Class One Christie for this period as Captain McAuley's service record indicates that he (McAuley) was posted to 3rd Training Group for the majority of this period. The Tribunal considered it unlikely that an officer posted to 3rd Training Group would attend exercises twice a year with another formation, in this case 6th Engineer Group and that such attendance would not be recorded in either the individual's annual appraisal report or pay records. The Tribunal also considered that if Captain McAuley had indeed attended the 6th Engineer Group camps, he would have noted this on his annual appraisal report as a duty completed to draw his parent commander's attention to his annual efficiency. The Tribunal noted that Captain McAuley had in fact noted on the report that he had completed 'Nil' duties in that year.
- c. Giving significant weight to the EDRO comments, in particular Captain McAuley's declaration of 'Nil' duties performed in the period, the Tribunal found that Captain McAuley did not complete 14 days of remunerated service in the enlistment year 1 February 1994 to 31 January 1995 and was therefore correctly deemed to be non-efficient in this period.

180. 1 February 1995 – 31 January 1996. Captain McAuley was posted to 3rd Training Group until 7 March 1995 before being posted to Headquarters 22 Construction Regiment from 8 March 1995. In the enlistment year he was required to complete 14 days of training. The DEFPAC assessments concluded that he did not complete any training and his pay sheets for the period reveal that he was last remunerated on 9 September 1992 and was not paid again until 7 September 1997. There is no EDRO for the period in question. There are no entries of any activity on Captain McAuley's Service record in the period.

- a. Captain McAuley again stated that he would have attended two periods of continuous training in that period, each of 14 days. He was unable to produce any evidence of remunerated service in this period also. As previously stated the Tribunal gave limited weight to the Christie statutory declaration.

¹⁶⁴ 3RTU 557/94 dated 29 September 1994; 3RTU 003/95 dated 9 January 1995; 22 Const Regt 437/96 dated 25 September 1996 and APA-M 3692/96 dated 30 October 1996

- b. On balance, the Tribunal found that Captain McAuley did not complete 14 days of remunerated service in the enlistment year 1 February 1995 to 31 January 1996 and was therefore correctly deemed to be non-efficient in this period.

181. **1 February 1996 – 31 January 1997.** Captain McAuley remained posted to Headquarters 22 Construction Regiment during this period. In the enlistment year he was required to complete 14 days of training. The DEFPAC assessments concluded that he did not complete any training and his pay sheets for the period reveal that he was last remunerated on 9 September 1992 and was not paid again until 7 September 1997. There is no EDRO for the period in question. On 25 September 1996 the Commanding Officer of the unit wrote to Captain McAuley seeking a declaration of his future intentions and encouraging him to transfer to the Inactive Reserve.¹⁶⁵ Captain McAuley responded on 7 October 1996 and a series of letters followed regarding training obligations and changes to conditions of service. The Tribunal noted that in his response, Captain McAuley stated:

*‘...my last period of 14 days continuous training was conducted in SWBTA appointed to the Staff of Exercise Control ...at no time since have I received any correspondence concerning training with the Regiment...’*¹⁶⁶

- a. There are no entries of any activity on Captain McAuley’s Service record in the period. The Service record contains a Personal Occurrence Report (POR) dated 8 October 1996 which states Captain McAuley was:

*‘...deemed non-effective (sic) due to unauthorised absence. Last parade date 9 Sep 92.’*¹⁶⁷

- b. In the 27 July 2015 submission, Mr Cahill stated that the content of this POR ‘... is agreed by our Client...’¹⁶⁸ During the hearing Captain McAuley maintained that he would have attended two periods of continuous training. He was unable to produce any evidence of remunerated service in this period also.
- c. As to the Christie statutory declaration wherein he (Christie) declared that Captain McAuley had attended camps in the period up to and including 1997, the Tribunal was not inclined to accept this recollection for 1996-1997, as, in Mr Cahill’s submission of 2 July 2015, he asked the Tribunal to ‘note that only one period of Non-Effective service is recorded this commenced on 28 August 1996 and ceased on 1 September 1997’.¹⁶⁹
- d. The Tribunal noted that in Captain McAuley’s nomination for the RFD on 3 January 2002, he had stated that:

¹⁶⁵ 22 Const Regt 437/96 dated 25 September 1996

¹⁶⁶ McAuley Letter dated 7 October 1996

¹⁶⁷ 22 Const Regt Personal Occurrence Report 275/96 dated 8 October 1996

¹⁶⁸ Cahill Submission DWC:sm:31171 dated 27 July 2015 page 4

¹⁶⁹ Cahill Submission DWC:sm:31171 dated 2 July 2015 page 2

‘...AMAN shows non-effective service for the period 28 Aug 1996 – 01 Sep 1997¹⁷⁰,

- e. Giving significant weight to the comments made by Captain McAuley regarding his last period of continuous training in SWBTA and his statement regarding non-effective service in his nomination for the award, the Tribunal found that Captain McAuley did not complete 14 days of remunerated service in the enlistment year 1 February 1996 to 31 January 1997 and was therefore correctly deemed to be non-efficient in this period

Summary of Annual Efficiency in the Years in Dispute

182. The Tribunal gave significant weight to Captain McAuley’s own statement in 1996 that his ‘last period of 14 days continuous training was conducted in SWBTA’ (conducted in 1992) and considered that this further supported the conclusion that there was a prolonged period of non-attendance between 1993 and 1997.¹⁷¹

183. The Tribunal also gave significant weight to the Personal Occurrence Report that indicated non-attendance from 9 September 1992 to 28 August 1996.¹⁷²

184. The Tribunal gave some weight to the many career management letters and annual EDROs where these made comments regarding attendance. Greater weight was given to portions of the EDROs where Captain McAuley had personally indicated the duties he had undertaken during the reporting period.

185. The Tribunal gave weight to the many pay records and assessments noting that where these occasionally differed, they consistently pointed to extensive periods of non-remuneration.

186. The Tribunal also noted that in providing the Applicant with time to obtain additional information to support his attendance, it had emphasised that he needed to produce evidence such as bank statements and that any new material needed to be evidence that Captain McAuley was remunerated for attendance.¹⁷³ The Tribunal noted that no such evidence was produced.

187. The Tribunal gave limited weight to the Rebbeschi and Christie statutory declarations as they failed to provide context or elaborate on where and when camps were conducted, who attended and in some cases, were contradicted by other more substantive evidence including EDROs, the Service Record and Personal Occurrence Reports.

188. Relying on Captain McAuley’s statement from 1992 regarding continuous training, the Personal Occurrence Report dated 8 October 1996 and the analysis of each year of service as discussed above, the Tribunal found that Captain McAuley was correctly determined to be non-efficient from 1 February 1986 to 31 January 1987 and from 1 February 1993 to 31 January 1997.

¹⁷⁰ HQ 22 Const Regt hand written Minute dated 3 January 2002

¹⁷¹ McAuley Letter dated 7 October 1996

¹⁷² 22 Const Regt Personal Occurrence Report 275/96 dated 8 October 1996

¹⁷³ Presiding Member’s Closing Statements at 7 August 2015 Hearing.

Alleged interference with records and/or the assessment process

189. The Applicant contended that his records were inaccurate and had been interfered with.

190. The Tribunal noted Captain McAuley's contention that he trusted that Corporal Westie had reviewed his eligibility for the RFD correctly prior to submission and that she would not have sent it to the Directorate if there was an issue.¹⁷⁴ In his evidence he contended that Corporal Westie would have reviewed his unit file at the time and would have checked his eligibility and, were he not eligible, the reasons would have been drawn to his attention and the submission would not have gone forward. He also said that Corporal Westie was subsequently surprised to find the medal was revoked and had certified that what he had said in his application for the RFD was correct by annotating one of his letters as 'Read and Agreed'.¹⁷⁵

191. The Tribunal noted that only three weeks after Captain McAuley submitted his RFD nomination to Corporal Westie (a part time member of the unit), the Regular Army Chief Clerk of the unit (and Corporal Westie's technical and command superior), Warrant Officer Class Two D. Taylor, had written to the Directorate in relation to the DLSSM and in detailing Captain McAuley's service at the time had stated:

2.c. Periods of Non-Efficient Service : 5 years (TY 87/88, 93/94, 94/95, 95/96, 96/97);

*2.d. Periods of Non-Effective Service: 28 Aug 96 to 1 Sep 97.*¹⁷⁶

192. Those observations by the Chief Clerk regarding the DLSSM were equally relevant to consideration of Captain McAuley's eligibility for the RFD. In any case, the Tribunal found that the document provided by the Chief Clerk clearly pointed to the existence of material within the unit in 2002 that Captain McAuley had been non-efficient in the period 1987-1988 and from 1993 to 1997. The Tribunal also noted that, in any event, Corporal Westie, in an email to Mr Cahill on 6 March 2012, indicated that she could not agree that she had thoroughly checked the eligibility and that whilst she may have raised the paperwork, responsibility for accuracy would rest with the Directorate.¹⁷⁷

193. The Tribunal reviewed the handwritten document dated 3 January 2002 which Captain McAuley stated was his nomination for the RFD which was submitted to his unit.¹⁷⁸ The Tribunal noted that the actual document received by the Directorate on 15 April 2002 was a copy of the document and not the same document he had sent to the unit. This copy was addressed to 'Miss Joe Budden' by Captain McAuley.¹⁷⁹

¹⁷⁴ McAuley Letter dated 23 November 2011

¹⁷⁵ McAuley letter dated 9 December 2004

¹⁷⁶ 22 Construction Squadron 426-1-1 dated 31 Jan 2002

¹⁷⁷ Email Westie to Mr Cahill dated 6 March 2012

¹⁷⁸ HQ 22 Const Regt hand written Minute dated 3 January 2002

¹⁷⁹ HQ 22 Const Regt hand written Minute dated 3 January 2002 addressed to 'Miss Budden'

194. The Tribunal asked Captain McAuley during the hearing to explain how the nomination came to be addressed to Miss Budden in his own hand and if he had indeed sent the nomination directly to the Directorate after submitting the original to his unit. Captain McAuley indicated that the second document addressed to Miss Budden was in his handwriting but he had no idea how it had gotten to the Directorate. He stated that he was:

‘...at a disadvantage, it remains opaque to me...’

195. During the hearing Captain McAuley said that he expected that Corporal Westie would have prepared the application based on his nomination and would have sent it to the Chief Clerk for further processing. The Tribunal considered that if an application for an award had been processed by the unit, a cover sheet or Minute from a responsible person such as the unit Adjutant or Chief Clerk including a command recommendation, would be likely to have accompanied the application and the application would have in all likelihood have been submitted on the correct form (AC694).¹⁸⁰

196. During the hearing Captain McAuley indicated that another officer from the unit, Major Parfitt, had his application for the RFD ‘processed’ by Corporal Westie at the same time and that it was approved. The Tribunal considered that Major Parfitt’s eligibility to the RFD was of marginal relevance to the present matter. However, in view of the allegations made by the Applicant about impropriety within the unit, the Tribunal sought Major Parfitt’s records from the Directorate. The Tribunal was informed that there was no record of his assessment; however schedules indicated that he had had the Reserve Force Medal (RFM) cancelled on Schedule 04/04 with the DLSM and three clasps issued on Schedule 18/04. It suggested that the Directorate had probably received correspondence from 22 Construction Regiment requesting issue of the RFD for Major Parfitt and as he did not have an entitlement, an election to change the RFM to the DLSM would have been offered directly to the member and an exchange would have occurred in 2004 (schedule 04/04 and 18/04).

197. Irrespective of what may have transpired in relation to Major Parfitt’s application, there is no evidence that Captain McAuley’s application was formally recommended by unit staff or the Commanding Officer. The Tribunal considered that in all likelihood, his application was passed to the Chief Clerk by Corporal Westie and, the Chief Clerk, as evidenced by the letter he wrote on 31 January 2002 regarding the DLSM,¹⁸¹ considered that Captain McAuley was not eligible for the RFD and advised the Commanding Officer to not recommend the application. It is most probable that the Commanding Officer agreed with the Chief Clerk’s advice and the application was never sent to the Directorate.

198. The Tribunal considered it unusual given Captain McAuley’s record-keeping and memory of events surrounding his application that he was unable to recall whether he had sent his copy of the application directly to the Directorate. The Tribunal was satisfied on the balance of probabilities that the document which had

¹⁸⁰ Defence Form AC694 ‘Application for the Issue or Replacement of ADF Medals and/or Awards’ was used by Defence from 2001 to 2006 – Referred to in DHAAT 533 of 7 September 2015 to Mr Cahill

¹⁸¹ 22 Const Regt 426-1-1 dated 31 January 2002

been adjusted by Captain McAuley, addressed to Miss Budden and stamped as received by the Directorate on 15 April 2002 was the actual document which was relied upon by Miss Budden at the Directorate as his nomination.

199. The Tribunal therefore considered that Corporal Westie's involvement in the apparent checking or otherwise of the application was irrelevant as the nomination that was actioned by the Directorate was unlikely to have emanated from the unit. In any event, Corporal Westie, as an orderly room clerk, was in no position to reach any conclusion about eligibility.

200. The Tribunal noted that in the many submissions by Mr Cahill, he consistently asserted that there had been some kind of conspiracy to deny Captain McAuley's eligibility conducted by the now deceased Lieutenant Colonel Bell and others. In particular, his submission of 27 July 2015 stated:

*'...appears **contrived** to rationalise the real reasons behind the RFD being recalled so as to conceal **the corrupt actions of Lieutenant Colonel Bell and those assisting his actions...**'*¹⁸² (Highlight added for clarity)

201. The Tribunal considered the Applicant's assertions that Lieutenant Colonel Bell had in some way either corrupted records or had undue influence on the assessment of his eligibility. The Tribunal noted that Lieutenant Colonel Bell did not assume the role of Commanding Officer 22nd Construction Regiment until 1 January 2004, that is, nearly two years after Captain McAuley's application for the RFD. Accordingly, Lieutenant Colonel Bell would not have been in a position to access Captain McAuley's Regimental files before this date. Lieutenant Colonel Bell's service record indicated that he commanded the unit until 7 December 2005.¹⁸³ The Tribunal also noted and advised the Applicant at the hearing that the files referred to by Mr Cahill and Captain McAuley were Regimental files, not Captain McAuley's service records which were, at that time, held centrally in Canberra by the Directorate of Officer Career Management (DOCM). The Tribunal also noted that Lieutenant Colonel Bell previously served as a Career Advisor at the Army Personnel Agency in Melbourne. His service record indicates that he served in this appointment from 8 August 2000 to 31 December 2001. This service pre-dates Captain McAuley's application for the RFD.

202. During the hearing, the Tribunal discussed with Mr Cahill and Captain McAuley that the annual appraisal reports contained in the papers had come from DOCM and that his record of service was actually populated by the use of Personal Occurrence Reports. The Tribunal considered that even if Lieutenant Colonel Bell did actually interfere with Captain McAuley's Regimental file and unit records, he was only in a position to do this in 2004-2005, that is after the original application had been considered and presumably rejected by the previous Commanding Officer.

203. The Tribunal considered the assertion by Captain McAuley that Lieutenant Colonel Bell had used his position to influence the Directorate to review Captain

¹⁸² Cahill Submission dated 27 July Page 7

¹⁸³ Service Record 8245168 LTCOL S.A. Bell printed 1548 hrs 20 August 2015

McAuley's eligibility. In so doing, the Tribunal noted that in a document written by Captain McAuley in 2009 he stated:

'I do not wear the RFD, but do instead wear the DLSM'.¹⁸⁴

204. Given that Captain McAuley had never been awarded the DLSM, the Tribunal considered that Lieutenant Colonel Bell, or indeed any informed person, may have enquired about the legitimacy of wearing the medal. The Tribunal considered that if Lieutenant Colonel Bell had doubts regarding Captain McAuley's medallic eligibility, it was open to him to make inquiries of the Directorate. Noting that Lieutenant Colonel Bell is deceased, the veracity of this view is unlikely to be ever known.

205. The fact that Captain McAuley was subsequently found to be not entitled to the award does not mean that Lieutenant Colonel Bell acted inappropriately by having the matter reviewed, if this is in fact what occurred.

206. The Tribunal also noted that Captain McAuley in his 18 August 2015 submission asked if the Tribunal would:

'... examine the improper action Bell took in usurping my superiors' annual Appraisal Report of me (raised in 2004)...'

207. The Tribunal noted that two reports provided by Captain McAuley were raised in September 2004, one with Major Hogben as the assessor and one with Lieutenant Colonel Bell as the assessor.¹⁸⁵ Neither report was signed by the assessor or by Captain McAuley although it was clear that the Lieutenant Colonel Bell's report had been used as the basis of a performance counselling session conducted on 20 November 2004. The Tribunal does not have jurisdiction to review the processes for the raising of annual reports or who is authorised to be an individual's immediate assessor.

208. The Tribunal noted that Mr Cahill on 2 July 2015 stated that despite repeated requests to the Tribunal:

'... communications between the late Lieutenant Colonel Bell and Ms Bermingham had not been revealed and are certainly not revealed in the discovered material'

209. The Tribunal noted that Mr Cahill was informed by letter on 12 June 2015 that Ms Bermingham advised that she had never corresponded with Lieutenant Colonel Bell and that a search of Tribunal records had found no evidence of any correspondence between Lieutenant Colonel Bell and Ms Bermingham, nor any other member of the Tribunal's staff.

210. In relation the Applicant's assertion of inappropriate use by Lieutenant Colonel Bell of his military position in the assessment of Captain McAuley's character, the Tribunal noted that Defence stated that they 'did not condone the

¹⁸⁴My Observations Regarding Bell's Email to Burrows... – statement by Captain McAuley to the Defence Abuse Response Taskforce, Page 6

¹⁸⁵ McAuley Submission dated 18 August 2015, Enclosures 5 and 6

comments made by Lieutenant Colonel Bell’ and that an investigation of the matter ‘was unable to identify any potential service offences’¹⁸⁶ The Tribunal also noted that Army Headquarters had had the specific issue of inappropriate comment investigated, reviewed and had subsequently considered the matter closed.¹⁸⁷ The Tribunal did not consider that this provided evidence of likely interference with Captain McAuley’s files.

Compelling Witnesses

211. The Tribunal noted Mr Cahill’s ongoing demands that the Tribunal must summons witnesses to allow his client to be accorded natural justice and to allow for cross examination. The Tribunal has the power to summons but at no stage did Mr Cahill provide satisfactory justification to the Tribunal to compel witnesses. The Tribunal noted that in the June-July 2015 period, Mr Cahill wrote several letters to the Tribunal and in these documents continually adjusted who he was demanding to have summonsed with the only consistent witness that he wished to compel being Corporal Westie.

212. The Tribunal was satisfied that the evidence provided by witnesses in the papers was sufficient to deal with the matter and that the witnesses had either provided a satisfactory account of their actions or were not material to the outcome. Similarly, the Tribunal did not consider that Corporal Westie’s involvement in the assessment was relevant – even if she had checked the application and determined it was correct, she was not the delegate to make the decision and, for whatever reason, a re-assessment of Captain McAuley’s eligibility by the Directorate had subsequently found him to be not entitled and that he had been incorrectly awarded the medal.

213. Even if this reassessment had been instigated by Lieutenant Colonel Bell, as the Applicant asserts, the Tribunal considered that the issue remained that Captain McAuley was unable to provide evidence to support his claim of having met his training obligations. The Tribunal considered that even if Captain McAuley’s Regimental files at 22 Construction Regiment had been interfered with after 2002, this would not have affected his service records (including his pay records) which were held in Canberra and were the basis of his eligibility.

214. The Tribunal therefore considered that it was not necessary to compel witnesses as the evidence provided in the material before the Tribunal and Captain McAuley’s own evidence regarding remunerated attendance was sufficient to allow for the correct and preferable decision to be made.

Harassment and Conflict of Interest Allegations

215. The Tribunal noted that Corporal Westie in her advice by e-mail on 26 June 2015 stated that:

¹⁸⁶ AHQ OCA/OUT/2012/R11413954 dated 15 May 2012

¹⁸⁷ Ibid.

‘... I do not wish to see Mr McAuley as this was and is now again harassment ... he contacted me at home repeatedly to sign a Statutory Declaration back in 2011, early 2012 which I refused to do...’¹⁸⁸

216. The Tribunal considered that this statement by a serving Junior Non-Commissioned Officer in relation to her dealings with a serving Officer previously of the same unit may constitute a reportable allegation of unacceptable behaviour. It is open to Corporal Westie to pursue this matter through her chain of command should she consider it necessary.

217. The Tribunal noted Mr Cahill’s assertion on 2 July 2015 that there was a breach of natural justice and a conflict of interest as a result of a meeting held in February 2010 by the Directorate to discuss Captain McAuley’s entitlements.¹⁸⁹ In this submission Mr Cahill demanded ‘a response’. Having reviewed the document as tendered (Record of meeting dated 17 February 2010) and other supporting documents acquired by Captain McAuley in his FOI request, the Tribunal considered it entirely appropriate that a meeting would be conducted to provide advice to a delegate to enable the preparation of a response to a Ministerial representation and that the reasons for the decision were subsequently provided in the actual response. In relation to a conflict of interest, the Tribunal noted that Ms Bermingham was the Director of Honours and Awards from February to April 2010 prior to commencing her appointment as the Executive Officer with the Tribunal in May 2010. Her role at the Directorate significantly post-dated the decision under review.

218. In her latter capacity Ms Bermingham’s only involvement with the McAuley review was to facilitate the passage of information between the panel members, the Respondent and the Applicant. The Tribunal did not consider this to be a conflict of interest however to assuage any perception of a conflict, the Deputy Executive Officer assumed the support role to the re-constituted panel from April 2015. The Tribunal did not consider that Mr Cahill’s assertion of a conflict of interest could be sustained and in any case, was irrelevant to the requirement that his client needed to provide evidence of attendance to prove eligibility.

Conclusion

219. The Tribunal concluded, after analysis of the evidence of remunerated service between 1 February 1982 and 19 April 1999, that Captain McAuley completed 10 years of efficient service in the period and that he did not provide sufficient evidence of efficient service in five of the remaining seven years. The Tribunal accepted that there was some element of doubt regarding his attendance in enlistment years 1 February 1989 – 31 January 1990 and 1 February 1992 – 31 January 1993. Even if the Tribunal were prepared to accept those years, it remains that he falls short of the eligibility requirements for the RFD. The Tribunal was satisfied that Captain McAuley’s previous service in the PNF could be counted as one year of qualifying service, however this was largely immaterial to the overall outcome as he still falls

¹⁸⁸ Email Westie to Tribunal dated 26 June 2015

¹⁸⁹ Cahill Submission DWC:sm:31171 dated 2 July 2015 – Page 2

well short of the requirement to have 15 years of efficient service as a member of the Reserve Forces before 19 April 1999 to be eligible for the award of the RFD.

Finding

220. For the reasons set out above, the Tribunal finds that Captain McAuley is not eligible for the RFD as he did not complete a minimum of 15 years of efficient service as a member of the Reserve Forces. Accordingly the Tribunal finds that the decision of the Directorate is correct and is therefore affirmed.

221. The Tribunal considered that as Captain McAuley is eligible for and will be issued with the DLSSM, he has met the intent of the Defence Force Service Awards in that he has now been accorded recognition for rendering long and efficient service as member of the Defence Force as defined in the Regulations for this particular award.

DECISION

222. The Tribunal decided to:

- a. **Affirm** the decision of the Directorate of Honours and Awards of the Department of Defence that Captain William McAuley is not eligible for the award of the Reserve Force Decoration.
- b. **Set aside** the decision of the Chief of Staff to the Parliamentary Secretary for Defence Support that Captain William McAuley does not qualify for the Defence Long Service Medal.
- c. **Substitute** its decision that Captain William McAuley is eligible for the award of the Defence Long Service Medal and directs that the medal be issued.