



Australian Government

Defence Honours and Awards Appeals Tribunal

McLeod-Dryden and the Department of Defence [2016] DHAAT 02 (29 January 2016)

File number (s) 2012/016

Re **Mr Frederick McLeod-Dryden**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)
Rear Admiral James Goldrick AO CSC RAN (Retired)

Hearing Date 11 December 2015

DECISION

On 29 January 2016 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Frederick McLeod-Dryden is not eligible for the award of the Republic of Vietnam Campaign Medal.

CATCHWORDS

DEFENCE AWARDS – refusal to recommend the award of the Republic of Vietnam Campaign Medal

LEGISLATION

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

Joint General Staff of the Republic of Vietnam Armed Forces (RVNAF) Directive, Pertaining to awarding of Campaign Medal HT.655-430 – dated 1 September 1965

Republic of Vietnam Armed Forces (RVNAF) Order No. 183 Pertaining to the conferral of the Vietnamese Campaign Medal on Australian Military Forces – dated 31 August 1966

REASONS FOR DECISION

Introduction

1 The applicant, Mr Frederick McLeod-Dryden seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Republic of Vietnam Campaign Medal (RVCM).

1. On 7 September 2011, Mr McLeod-Dryden applied to the Directorate for the RVCM. On 29 November 2011, Defence replied to Mr McLeod-Dryden and advised him that he could not receive the award because he 'did not complete the minimum requirement of 181 days service in accordance with the qualifying criteria.' Mr McLeod-Dryden served in HMAS *Sydney* from 11 November 1966 to 25 June 1967. During his time in HMAS *Sydney*, the ship undertook three logistic missions to Vietnam, two in April 1967 and one in May 1967. She was anchored in Vung Tau Harbour for less than 24 hours on each occasion.

3. On 31 May 2012, Mr McLeod-Dryden applied to the Tribunal for a review of Defence's decision to deny him the award of the RVCM.

Tribunal Jurisdiction

4. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) of the Defence Act and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence or foreign award in response to an application. The term *foreign award* is defined in s110T of the Defence Act as an honour or award given by a government of a foreign country, or by an international organisation. The RVCM was instituted on 12 May 1964 by the Government of the Republic of Vietnam (GVM). On 24 June 1966 Her Majesty the Queen granted unrestricted approval for members of the Australian armed forces to accept and wear the RVCM.¹ The RVCM is a foreign award approved by the Queen and accordingly, the Tribunal has jurisdiction to review decisions in relation to this award. The role of the Tribunal is to determine whether the decision of the Directorate is the correct and preferable decision having regard to the applicable law and the relevant facts.

Steps taken in the conduct of the review

5. In accordance with the *Defence Honours and Awards Appeals Tribunal's Procedural Rules 2011*, on 21 June 2012, the Tribunal wrote to the Secretary of the Department of Defence to seek a report on Defence's decision to deny Mr McLeod-Dryden the RVCM.² This report was sent to the Tribunal on 25 July 2012.³ On 31 July 2012, the Tribunal Secretariat wrote to Mr McLeod-Dryden to provide him with a copy of the report and seek his comments.⁴ Mr McLeod-Dryden replied with

¹ Cable, London to Canberra, 24 June 1966, NAA:3111, 1966/3374

² DHAAT/OUT/2012/316 dated 21 June 2012

³ DHA 2012/1048250/4 (1) dated 25 July 2012

⁴ DHAAT/OUT/2012/384 dated 31 July 2012

his comments on 5 September 2012.⁵ On 25 February 2013, a telephone hearing was conducted by the Tribunal Members then assigned to the review (Mr Alan Rose, Chair and Presiding Member, Ms Christine Heazlewood and Mr John Jones) with Mr McLeod-Dryden. The latter provided additional material to the Tribunal for consideration on 27 February 2013⁶ and a further telephone hearing was conducted on 19 March 2013.

6. On 3 April 2013, the Executive Officer of the Tribunal spoke with Mr McLeod-Dryden who asked that his review be held over pending the completion of the *Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* (the first Inquiry)⁷. As part of the Inquiry, the Tribunal received 76 submissions, including one from Mr McLeod-Dryden. Mr McLeod-Dryden also appeared as a witness during the Inquiry's hearing in Melbourne in September 2013. As a result of the first Inquiry, the Tribunal recommended to the Australian Government that no action be taken to change the criteria for the award of the RVCM. Subsequently, in November 2014 the Government directed a further inquiry into the *Feasibility of Amending the Eligibility Criteria for the Republic of Vietnam Campaign Medal* (the second Inquiry)⁸.

7. The Tribunal had advised Mr McLeod-Dryden on 5 April 2013 that it would hold over his review until the (first) Inquiry had been completed.⁹ After the announcement of the second Inquiry, the Tribunal further advised Mr McLeod-Dryden that his review would be held over until its completion.¹⁰ On 18 September 2015 the Australian Government announced that it had accepted the recommendation of the second Inquiry that it did not have the legal ability to amend the eligibility criteria for the RVCM. Mr McLeod-Dryden had already advised the Tribunal on 4 August 2015 that he wished to proceed with the review.¹¹

8. New Members of the Tribunal (Ms Isenberg, Presiding Member, and Rear Admiral Goldrick) were assigned to the review to replace the original membership as a result of the conclusion of the latter's terms of appointment. On 11 December 2015 the Tribunal conducted a telephone hearing with Mr McLeod-Dryden. Following the hearing, Mr McLeod-Dryden provided further written material by fax to the Tribunal. A corrected version of this material was supplied to the Tribunal on 14 December 2015. After the hearing Mr McLeod-Dryden was provided with a copy of the Reports of Proceedings (ROPs) for HMAS *Sydney* and was invited to comment. He agreed with the record and wished to make no further comment. Also, shortly before publication Mr McLeod-Dryden provided a copy of a cablegram dated 5 July 1966 from Defence to the Australian Embassy canvassing possible changes to eligibility criteria.

⁵ McLeod-Dryden letter dated 5 September 2012

⁶ McLeod-Dryden letter dated 27 February 2013

⁷ Report of the *Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* dated 24 March 2014

⁸ Report of the *Inquiry into the Feasibility of Amending the Eligibility Criteria for the Republic of Vietnam Campaign Medal* dated 25 June 2015

⁹ DHAAT/OUT/2013/171 dated 5 April 2013

¹⁰ DHAAT/OUT/2013/1150 dated 21 November 2014

¹¹ McLeod-Dryden letter dated 4 August 2015

The Republic of Vietnam Campaign Medal

9. In May 1964 the GVM established its campaign medal for the Vietnam War.¹² The medal (known in Australia as the RVCM) was for all military personnel of the Republic of Vietnam Armed Forces (RVNAF) who had 12 months service in the field and for allied soldiers assigned to the Republic of Vietnam who had 6 months service. In September 1965 the Joint General Staff of the RVNAF issued a Directive setting out the eligibility criteria for the RVCM.¹³

10. In May 1966, the GVM offered the medal to Australian servicemen. In considering whether or not to accept the medal, the Australian Government received advice from the Department of Defence that, as the conditions for the award of the RVCM required six months' service, this created sufficient differentiation to the conditions for Australia's Vietnam Medal and accordingly, the Department supported acceptance of the award.¹⁴ The offer from the GVM was subsequently accepted by the Australian Government and, on 24 June 1966, Her Majesty The Queen granted unrestricted approval for members of the Australian armed forces to accept and wear the RVCM.¹⁵

11. From the cablegram of 5 July 1966 provided by Mr McLeod-Dryden, it appears Defence recommended the South Vietnamese Government be approached to amend eligibility criteria for Australian servicemen which would require, relevantly, *six months service with unit on operational role*. It is unknown if such an approach was made but, in any event, by RVNAF Order No. 183 dated 31 August 1966 authority to determine eligibility criteria for the award of the RVCM was delegated to Australian authorities in accordance with the conditions set out in the September 1965 Directive.¹⁶ On 22 March 1966 the GVM amended Article Three of the original Directive for the award of the RVCM.¹⁷ The Directive, as amended relevantly states:

Chapter 1 : Eligibilities

Article 1: ...

Article 2: ...

...

Article 3: *Foreign military personnel serving in South Vietnam for six months during wartime and those serving outside the geographic limits of South Vietnam and contributing **direct combat support** to the RVNAF for six months*

¹² GVM Decree No.149/SL/CT dated May 12, 1964 creating 'Campaign Medal'

¹³ Joint General Staff of the RVNAF Directive, Pertaining to awarding of Campaign Medal HT.655-430 – dated 1 September 1965

¹⁴ The Vietnam Medal is the Australian campaign medal for the war instituted by Royal Warrant on 8 June 1968 and required one day of service on land, one operational sortie or 28 days on inland waters or off the coast of Vietnam.

¹⁵ Cable, London to Canberra, 24 June 1966, NAA:3111, 1966/3374

¹⁶ RVNAF Order No. 183 Pertaining to the conferral of the Vietnamese Campaign Medal on Australian Military Forces – dated 31 August 1966

¹⁷ Cable 882, Australian Embassy, Saigon, to Canberra, 13 July 1966

in their struggle against an armed enemy will also be eligible for the award of the Campaign Medal. (Tribunal emphasis)

Foreign authorities will determine eligibility of their personnel for this award, Foreign military personnel are also entitled to this award under the special conditions provided for in Article Two of this Directive.

12. On 16 September 1966 the Secretary of the Department of Defence wrote to the Secretaries of the Departments of the Navy, Army and Air Force setting out the criteria for the award of the RVCN.¹⁸ The memorandum included the amended Article Three and set out that conditions for the grant of the award of the RVCN would require:

- (a) *'Special service' (as defined by the Repatriation (Special Overseas Service) Act) of a minimum of six months duration, either continuous or aggregated, in Vietnam with retrospective effect to 31 July 1962;*
- (b) *'Special service' in Vietnam of less than six months duration since 31 July 1962 if:*
 - (i) *killed on active service or wounded-in-action and evacuated,*
 - (ii) *captured and later released or escaped.*

13. There was no contention that either of these provisions applied to Mr McLeod-Dryden.

Some of these criteria were reiterated in Navy, Army and Air Force instructions and orders between 1966 and 1970 although these documents do not appear to have included the amended Article Three of the source 1965 Directive. The Naval criteria were complicated by the error in the original Australian Navy Order 500/67 *Vietnamese Campaign Medal – Award for Service in South Vietnam* which stated that the award would be granted on the basis of allotment for special service in Vietnam for a minimum of six months. Such 'allotment' included all the time between departure from the last Australian port to return to Australia, rather than the just the period spent in the operational area (the port-to-port provisions). In 1987, advice was provided to the Navy that its original interpretation was incorrect and that no period in transit to or from Vietnam outside the operational area should be included in the calculation.¹⁹ This advice was acknowledged by Navy and, from April 1987, award of the RVCN was made only on the basis of time in theatre.

14. The first Inquiry was begun in 2013 to:

- (a) report on the application of the eligibility criteria for the RVCN over time;
- (b) identify unresolved issues with the application of the criteria; and
- (c) review how future claims for the award should be administered.

¹⁸ Memo, Secretary, Department of Defence 'Vietnamese Campaign Medal' dated 16 September 1966

¹⁹ Minute, CDF 54/1987 'Vietnamese Campaign Medal – Conditions Governing Awards'

15. The first Inquiry recommended that no action be taken to change the criteria, that Defence amend its interpretation of ‘wounded-in-action’ to include psychological injury and that assessments of claims for the award continue, mindful of the first two recommendations.

16. The Government accepted the second and third recommendations and directed that a second Inquiry be conducted to determine if it had the legal authority to amend the eligibility criteria for the RVC, given that the GVM had ceased to exist in 1975. The second Inquiry was completed in September 2015 and recommended that the eligibility criteria not be amended as the Australian Government did not have the legal authority to do so. This recommendation was accepted by the Government.

17. The eligibility criteria for the RVC therefore remain anchored by the Joint General Staff of the RVNAF September 1965 Directive as amended, to include conditions relating to service outside the geographic limits of South Vietnam, the contribution of direct combat support, the additional conditions imposed by the Secretary’s memorandum of September 1966 and informed by the recommendation of the first Inquiry as it relates to considerations of those suffering from psychological injury.

18. Mr McLeod-Dryden served in the RAN from 10 October 1965 to 19 March 1970. His record of service is not in dispute in any way significant to this review, although his service record shows that his posting to HMAS *Sydney* began on 11 November 1966, not his claim of 29 October 1966, which is four days after he began a short attachment to the shore training establishment, HMAS *Watson* on 25 October. This means that he spent 226 days (including 21 days’ long leave) aboard the ship until 25 June 1967 before proceeding on 20 days’ leave and joining the shore establishment, HMAS *Cerberus*, on 16 July 1967 for category training. For his service with the RAN, Mr McLeod-Dryden has been awarded the:

- Australian Active Service Medal 1945-75 with Clasp ‘VIETNAM’
- Vietnam Logistic and Support Medal
- Australian Defence Medal
- Returned from Active Service Badge

Mr McLeod-Dryden’s Submission

19. Mr McLeod-Dryden’s appeal, throughout his various submissions is centred on his view that the entirety of his service in HMAS *Sydney* falls within the definition of ‘direct combat support’ set out by the eligibility criteria and that he achieved the total of 181 days qualifying service.

20. Mr McLeod-Dryden argues that HMAS *Sydney*’s ‘primary function between the years 1965 to 1973 was “direct combat support for the RVNAF in their struggle

against an armed enemy.”²⁰ He therefore believes that all service in the ship during the years in question would qualify, subject to an individual achieving the required minimum of 181 days, as eligible service for the RVCM.

The Directorate’s Submission

21. The Directorate’s submission, dated 25 July 2012, indicates that a delegation for the RVCM does not exist and that the award is managed under extant administrative practices. The submission relies upon the Secretary of the Department of Defence’s memorandum of 16 September 1966 to establish eligibility criteria for the award. The submission explained the error in relation to ‘allotment’ made in the original Australian Navy Order (362 of 1966) which set out the eligibility criteria for RAN personnel. It confirmed that the Navy had been advised of the error in 1987 and that any awards of the RVCM made after that point would be on the basis of time in the operational theatre.

22. The submission confirms Mr McLeod-Dryden’s deployment dates in HMAS *Sydney* and states that he completed 3 eligible days of service towards the RVCM. The submission confirms Defence’s position that, as he did not complete 181 days of service in Vietnam from 31 July 1962, he was not eligible for the RVCM.

The Tribunal’s Consideration

23. The Tribunal carefully considered all the material placed before it. In the 11 December 2015 hearing with Mr McLeod-Dryden he confirmed the accuracy of his service records and that he had been provided with the Departmental material which the Tribunal had in its possession, which included HMAS *Sydney*’s ‘Reports of Proceedings’ for the deployments undertaken during his service onboard. Mr McLeod-Dryden later informed the Tribunal that he had been under some stress during the hearing because the funeral of an old friend and comrade was taking place at the same time and at which he could not be present. He indicated that he was concerned that he had not made his arguments as coherently as he might otherwise have done.²¹ The Tribunal noted his concern and gave it due weight, however assessed that it had been able to grasp Mr McLeod-Dryden’s arguments with the benefit not only of the telephone hearing, but Mr McLeod-Dryden’s extensive submissions, which included appearance before the Tribunal during the first Inquiry.

24. In assessing Mr McLeod-Dryden’s submission, the Tribunal noted the accepted recommendations of the first Inquiry, which examined the application of the eligibility criteria for the RVCM at the direction of the Parliamentary Secretary of Defence. It also noted the accepted recommendation of the second Inquiry ‘that the eligibility criteria for the Republic of Vietnam Campaign Medal not be amended because the Australian Government does not have the legal authority to do so’.²²

²⁰ Mr Frederick McLeod-Dryden ‘Submission to the Defence Honours and Awards Tribunal (sic) for rejection of an application for the Vietnam Campaign Medal by a former ships company crew member of H.M.A.S. Sydney III for his service in that ship during the period of the Vietnam War’.

²¹ McLeod-Dryden letter dated 12 December 2015

²² Report of the *Inquiry into the Feasibility of Amending the Eligibility Criteria for the Republic of Vietnam Campaign Medal* dated 25 June 2015, p. 14.

25. It is not in dispute that HMAS *Sydney* spent only 3 days in a Vietnamese harbour with short associated time at sea within the operational area during Mr McLeod-Dryden's time onboard, or that the totals of her logistic support deployments while he was serving in the ship would not be able to satisfy even the mistaken Navy definition up until 1987 of 'allotment', since they amount to only 34 (April-May 1967) and 35 (May-June 1967) days respectively.

'Direct combat support'

26. The key point to be determined relates to Mr McLeod-Dryden's argument that *all* his service in HMAS *Sydney* should be counted towards qualification for the RVCMB, because it was, he claimed 'direct combat support' to the RVNAF

27. The Tribunal considered the meaning of 'direct combat support', which was not defined in the Directive, nor in the subsequent Defence Instructions in respect of the eligibility criteria. The phrase, as far as the Tribunal could ascertain, has been considered only once: *Francis v Department of Defence, Repatriation Commission (joined party)* [1995] AATA 708. There, the Administrative Appeals Tribunal (AAT), in an application for review under the *Veterans' Entitlement Act 1986* for acceptance of the applicant's conditions as service-related, used the phrase, in our view, in a convenient short-hand and non-technical fashion to describe the whereabouts of HMAS *Sydney*, the ship in which the applicant served during the service which he alleged gave rise to his claimed conditions. As the discussion throughout the decision otherwise related to the applicant's medical and service records, and no finding was made in relation to the phrase, we consider the AAT did not turn its mind to the meaning of the phrase.

28. As observed by the Tribunal in its Report of the first Inquiry, that although logistic support to the Australian forces in Vietnam was clearly the highest priority task for the ship during the Vietnam conflict, it was not the only work that the ship undertook between 1965 and 1972.²³ Amongst other activities, this included amphibious exercises (1968), training cruises (1968 and 1970), a training and logistic voyage to Canada and the United States (1971) and other logistic support for Australian forces in Singapore (1971). HMAS *Sydney* also spent time in maintenance and refitting, and a major refit was undertaken in the second half of 1967.

29. We accept that HMAS *Sydney's* highest priority during the Vietnam conflict was logistic support to the Australian forces in Vietnam. However, in our view, not every task undertaken during the period of the Vietnam conflict amounted to *direct combat support*.

Further, even if we were to accept the port-to-port provisions applied in calculating the period of direct combat support, in Mr McLeod-Dryden's case, he still falls well short of the required 181 days.

²³ Report of the *Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* dated 24 March 2014, p. 33.

30. The Tribunal concludes that Mr McLeod-Dryden's qualifying service for the RVCM does not meet the required 6 months of direct combat support to the RVNAF.

Finding

31. For the reasons set out above, the Tribunal finds that Mr McLeod-Dryden is not eligible for the RVCM. Accordingly, the Tribunal finds that the decision of the Directorate is the correct and preferable decision.

DECISION

32. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Frederick McLeod-Dryden is not eligible for the award of the Republic of Vietnam Campaign Medal.