



Australian Government

Defence Honours and Awards Appeals Tribunal

Arthur and the Department of Defence re: Percival [2018] DHAAT 028 (15 November 2018)

File Number(s) 2018/029

Re **Mr D. Arthur** on behalf of **Mr D.K. Percival (deceased)**
Applicant

And **Department of Defence**
Respondent

Tribunal Brigadier M. Bornholt, AM (Retd) (Presiding Member)
Ms N. Isenberg

Hearing Date 16 October 2018

DECISION

On 15 November 2018 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr D.K. Percival is not eligible for the award of the Australia Service Medal 1939-45.

CATCHWORDS

DEFENCE AWARD – Australia Service Medal 1939-45 - honourable discharge - dishonourable discharge – Court Martial – order for discharge made in sentencing.

LEGISLATION

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

Defence Regulation 2016 - S36

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

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

REASONS FOR DECISION

Introduction

1. The applicant, Mr David Arthur, on behalf of his deceased grandfather Mr Douglas Percival (referred to hereafter as Private Percival), seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate), that Private Percival is not eligible for the award of the Australia Service Medal (ASM) 1939-45.¹ On 24 June 2017 Mr Arthur submitted an application to the Directorate for an assessment of Private Percival's medallic entitlements for his service in the Middle East with the Australian Imperial Force between 1940 and 1942.² Private Percival's medals had been withheld and subsequently forfeited after he was found guilty by Court Martial of the charge of Desertion from 9 September 1942 to 23 March 1945. He was sentenced to detention and discharge from the Defence Force. Private Percival's detention sentence was remitted and he was discharged on 15 May 1945.

2. In response to Mr Arthur's 2017 application for assessment, the Directorate subsequently issued Private Percival's forfeited medals with the exception of the ASM 1939-45. Mr Arthur was not provided with written correspondence as to why Private Percival was not awarded the ASM 1939-45 and was only advised by the Directorate by telephone that the ASM 1939-45 'cannot be awarded due to him not being honourably discharged'.³ When the Directorate conducted a re-assessment in July 2018 its papers confirm that Private Percival was not recommended for the award. The Assessing Officer stated:

*After reviewing Mr Percival's service records and reading the regulations, I cannot recommend him for the award of the ASM 1939-45 ... due to his discharge being deemed to be dishonourable ...*⁴

Tribunal Jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence award in response to an application. *Defence Regulation 2016 – s36* specifies defence awards for the purposes of s110T of the Defence Act. Included in the defence awards at Item 13 of s36 is the ASM 1939-45. Therefore, the Tribunal has jurisdiction to review the decision.

¹ Application for Review of Decision dated 1 June 2018.

² Application to the Directorate of Honours and Awards from Mr Arthur dated 24 June 2017.

³ Mr Arthur letter to DHAAT dated 1 June 2018.

⁴ Assistant Director Service Assessments and Awards decision dated 27 June 2018.

Steps taken in the conduct of the review

4. In accordance with its *Procedural Rules 2011*, on 7 June 2018, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Arthur's application for review and requesting that he provide a report.⁵ On 18 July 2018 the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence Submission.⁶ In that submission, the Directorate confirmed its position that Private Percival was 'not eligible for the ASM 1939-45 as he did not receive, nor was he entitled to receive an honourable discharge'.⁷ On 19 July 2018 the Tribunal forwarded a copy of the Defence Submission to Mr Arthur for comment.⁸ Mr Arthur's response indicated that:

*Defence's position is entirely correct but from a moral and ethical stand point
Defence's position is incorrect*⁹

5. The Tribunal heard oral evidence from Mr Arthur by telephone on 16 October 2018. The hearing was also attended by the Respondent, represented by Ms Alison Augustine and Mr Mark Jordan from the Directorate.

Australia Service Medal 1939-45

6. Following the conclusion of the Second World War in 1945, the Australian Defence Committee recommended that Australia institute a medal of its own in connection with the War. An 18-month qualifying period for full time personnel was proposed.

7. On 17 January 1946 Cabinet decided that a medal would 'be instituted for all members of the Defence Forces of the Commonwealth of Australia who participated in the 1939-1945 war; these to include members of the Mercantile Marine, Civil Air pilots, members of the Comforts Funds and Red Cross Funds, and to include both men and women'.¹⁰ Subsequently His Majesty King George VI instituted the Australia Service Medal 1939-45 by Royal Warrant on 30 August 1949. The Royal Warrant was published in the *Commonwealth of Australia Gazette* in November that year.¹¹ There is provision in the Royal Warrant for the Governor-General to make Regulations to carry out the purposes of the Warrant, but no Regulations have ever been made. Pertinent to this review, the Royal Warrant in part states:

⁵ DHAAT/OUT/2018/402 letter to the Secretary of Defence dated 7 June 2018.

⁶ DH&A/OUT/2018/0051 letter to the Tribunal – *The Defence Submission* dated 18 July 2018.

⁷ Defence Submission P.5, Para 35.

⁸ DHAAT/OUT/2018/481 letter to Mr Arthur dated 19 July 2018.

⁹ Mr Arthur letter to the Tribunal dated 29 July 2018.

¹⁰ Cabinet Agendum No 1002A: Proposal for an Australian Decoration, National Archives of Australia (NAA): A816, 66/301/251.

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

...

3) *The persons eligible for the Medal shall be those of Our faithful subjects and others, male and female, who between the 3rd September 1939 and the 2nd September 1945, rendered the required service in the Australian Armed Forces, in the Australian Mercantile Marine or as civil members of the Royal Australian Air Force Reserve who served as aircrew in civil aircraft in operational areas.*

...

5) *Eligibility shall not be affected by the grant of any other general award for service in the war of 1939-45...*

6) *Only those who have received, or would be entitled to receive, **an honourable discharge** shall be eligible.* (Highlight added for clarity)

7) *The period of qualifying service for full-time duty shall be eighteen months at home or overseas ...*

...

12) *It shall be competent for Our Governor-General for the time being to cancel and annul the award to any person of the above Medal, and thereupon the name of such person in the Register shall be erased, but it shall be competent for Our Governor-General to restore any Medal which may have been so forfeited.*

...

8. The power to vary the conditions of the 1949 Royal Warrant was delegated to the Governor-General in 1995 by way of an exchange of letters between Prime Minister Paul Keating and Her Majesty the Queen. This delegated power was used in 1996 to reduce the qualifying period for the ASM 1939-45 from eighteen months to 30 days for full time service; and from three years to 90 days for part-time service.¹²

Private Percival's Service and the Operational Background

9. Private Percival enlisted in the 2nd Australian Imperial Force on 24 April 1940 at the age of 22 and, after basic training at the Infantry Wing at Ingleburn, was allocated to the 2/1st Australian Infantry Battalion. Although enlisted as an Infantryman, it appears that Private Percival was actually employed as a cook in the Battalion and during his war service due to the 'condition of his feet'.¹³ Private Percival's service record indicates that he arrived in Palestine on 30 September 1940 and served in Egypt, Libya, Gaza and

¹² *Commonwealth of Australia Gazette* No. S 309, 21 August 1996.

¹³ Medical History completed form by Deputy Commissioner Carswell dated 24 March 1948, supplied by the Applicant on 23 October 2018.

Israel.¹⁴ The 2/1st Battalion's first campaign of the Second World War was the advance from Egypt into eastern Libya in January 1941. The Battalion participated in the successful attack on the Italians at the port of Bardia on 3 January. On 21 January 1941 the Battalion led the follow-on attack on the town of Tobruk which was seized within 24 hours. Private Percival's service record indicates that he suffered a gunshot wound to the ankle on 21 January 1941. He was evacuated and hospitalised in Palestine until 10 March 1941. He then remained in the Middle East rehabilitating, whilst the 2/1st Battalion fought in Greece and Crete in April/May 1941 before they returned to Palestine.

10. Private Percival's service record indicates that he was officially posted back to the 2/1st Battalion on 9 May 1941 following his rehabilitation. His service record has no entries for the period July 1941 to March 1942 however the Battalion War Diary shows Private Percival rostered for guard duty on 8 June 1941 and he is also recorded as working in the Battalion Sergeant's Mess on 1 September 1941.¹⁵ The Battalion moved into Syria in November 1941 and conducted training exercises there until February 1942 when it relocated to Egypt. Private Percival's service record indicates that he departed the Middle East with the Battalion on 10 March 1942 to return to Australia. The Battalion's history records that during the voyage back to Australia it was diverted to Ceylon to defend Colombo from Japanese attack.¹⁶ The Battalion remained in Ceylon until 8 July 1942 when it embarked to recommence its return to Australia. The 2/1st Battalion arrived in Melbourne on 7 August 1942.

11. The 2/1st Infantry Battalion War Diary records that its soldiers were sent on leave for two weeks from Melbourne in August 1942 and ordered to report to Sydney Showground on completion of their leave. From there they were moved in groups to Wallgrove Army camp to the west of Sydney.¹⁷ From 26 August to 3 September 1942 the 2/1st Battalion reconstituted at Wallgrove camp and on 5 September 1942 the Battalion led the 16th Brigade on a parade through the streets of Sydney before finishing at Central Station. That afternoon they were moved by train to Greta in the Hunter Valley where they prepared for deployment. On 10 September 1942 the Commanding Officer explained to all men that there was a 'position of emergency' in New Guinea and on 11 September the Battalion cleared the Greta camp and entrained bound for Brisbane.

12. The 2/1st Battalion arrived at South Brisbane Station on the evening of 12 September and immediately embarked in SS *Anhui*. By the morning of 13 September, the Battalion was fully embarked and the ship set sail as part of a convoy bound for New Guinea. They arrived in Port Moresby on 26 September and by the end

¹⁴ Service and Casualty Form – Private D.K. Percival.

¹⁵ AWM 52, Item 8/3/1, *2/1 Infantry Battalion War Diary* June – July 1941, P.19 and *2/1 Infantry Battalion War Diary* August – September 1941, P.86

¹⁶ Service and Casualty Form – Private D.K. Percival.

¹⁷ AWM 52, Item 8/3/1, *2/1 Infantry Battalion War Diary* July – September 1942

of the month were deployed at the base of the Owen Stanley Range ready to oppose the Japanese.

13. Private Percival's service record verifies that he was granted 14 days 'home leave' on 10 August 1942.¹⁸ There is no confirmation in the service record of Private Percival returning from the initial period of 14 days leave. The next entry in the record establishes that on 29 March 1943 a Court of Inquiry reported that he had been absent without leave from 9 September 1942:

Percival illegally absconded from 9/9/42 and is still absent

14. On 14 April 1943 a warrant was issued for his arrest. Private Percival was apprehended on 23 March 1945 nearly 2½ years after he absented himself. He was held in custody at 6 Australian Guard Compound in Victoria Barracks at Paddington for 39 days.

15. On 2 May 1945 Private Percival appeared before a District Court Martial convened at Paddington before Major J.A. Radford and two other officers.¹⁹ He was charged with one charge being whilst on war service, he committed the offence of:

DESERTING HIS MAJESTY'S SERVICE in that he with intent permanently to avoid service absented himself without leave from his unit from 2359 hrs on 9th Sep. 42, until he was arrested by the Military Police at 0345 hrs on 23rd Mar. 45 at 31 Kensington St., Waterloo.²⁰

16. Private Percival was found guilty of the charge of Desertion from 9 September 1942 to 23 March 1945 and was sentenced to:

detention for 22 months and to be discharged from the Defence Force of the Commonwealth of Australia²¹

17. Private Percival's sentence was remitted and his service record states that he was discharged on 15 May 1945. The discharge certificate provides the reason for discharge as being:

Discharged, having been sentenced by DCM to be discharged from the Defence Forces of the Commonwealth of Australia²²

¹⁸ Service and Casualty Form – Private D.K. Percival.

¹⁹ Form of Proceedings for General and District Courts Martial A.A. Form A.9.

²⁰ Charge Sheet No. 4 dated 1 May 1945.

²¹ Record of Court Martial 43139, P/2/2727 – PTE D.K. Percival, 2/1 Aust Inf Bn, promulgated 15 May 1945.

²² Discharge Certificate, NX13166 Pte Percival, D.K.

18. The discharge certificate states that Private Percival's medal entitlements were subsequently forfeited including the 'Australia Service Medal'. The certificate states that the authority for forfeiture was:

MBI 3/57 Para 2(b)

19. Private Percival's medal slip attached to his service record indicates that he was entitled to receive the following awards:

- 1939-45 Star,
- Africa Star,
- Defence Medal,
- War Medal 1939-45, and
- Australia Service Medal 1939-45.²³

20. The medal slip records that on 9 July 1946 these medals were withheld because he had been found 'guilty of desertion'. A further annotation on the medal slip was made on 20 October 1958 indicating that Private Percival's medal entitlement had been forfeited under the authority of MBI 3/57 Para 2(d). The Defence Submission suggests that this authority on the medal slip was written in error and the correct reason is as given on Private Percival's discharge certificate - MBI 3/57 Para 2(b) which relates to forfeiture of medals if sentenced by a court-martial to be discharged.²⁴

21. Private Percival made application to Defence for his medals in 1958.²⁵ He was advised formally by the Central Army Records Office that 'by reason of the nature of your discharge, you are not eligible to receive either Campaign Awards or Returned from Active Service Badge'.²⁶

22. Following the Tribunal's *Inquiry into the refusal to issue entitlements to, withholding and forfeiture of Defence Honours and Awards* (the Forfeiture Inquiry)²⁷ the Directorate advised Mr Arthur that he should make application concerning Private Percival's medallic entitlements.²⁸ The Directorate's assessment working papers indicate that as a result of this application, Private Percival's entitlements were reassessed and with the exception of the ASM 1939-45, his medals were restored and gifted to Mr Arthur.²⁹

²³ Medal Slip – Percival D.K.

²⁴ Defence Submission, P.4 Para 25.

²⁵ Mr Percival letter to Defence dated stamped 1 October 1958.

²⁶ Central Army Records Office letter to Mr Percival dated 7 October 1958.

²⁷ Defence Honours and Awards Appeals Tribunal *Inquiry into the refusal to issue entitlements to, withholding and forfeiture of Defence Honours and Awards* dated 7 September 2015

²⁸ Defence Submission, P.5 Para 29.

²⁹ Directorate Assessment Working Paper, P.5.

Mr Arthur's Submissions

23. There is no dispute by Mr Arthur or Defence that Private Percival's medals were withheld in 1946, forfeited in 1958 and, with the exception of the ASM 1939-45, restored in 2017. At issue is the entitlement to the ASM 1939-45 and its restoration. In his application Mr Arthur stated that:

*I acknowledge the Royal Warrant which does state that an honourable discharge is a requirement. Inconsistently though, it is not a requirement for the above-mentioned service medals. If this condition was not stipulated in the Royal Warrant, I believe this medal would have been awarded with the others during my most recent application.*³⁰

24. Mr Arthur claimed that because his grandfather established his entitlement to the medal in October 1941, 'twelve months before he went absent without leave' he therefore should receive the award. During the hearing he acknowledged that the medal was created after the cessation of the War.

25. Mr Arthur also claimed in mitigation for his grandfather's absence that he 'became mentally unwell whilst deployed', had a 'clear disciplinary record' prior to absence and was given 'less than 24 hours notice of his Court Martial'. He asserted that his grandfather's claims at the Court Martial were not adequately investigated nor were witnesses called and examined. He also stated that despite his grandfather's mental health being questioned and his claim that he was unwell, the Court disregarded the mitigation and convicted him.

26. Mr Arthur claimed that the Court Martial heard 19 cases on the day his grandfather was tried and as a result, his grandfather's particular circumstances could not have been given adequate consideration. He asserted that:

for a matter as serious as "Desertion" I believe it reasonable to expect that more time would be spent and/or made available before deciding someone's fate

27. Mr Arthur claimed that insufficient consideration was given to his grandfather's admission of guilt and that the circumstances at the time which saw his grandfather's unit (2/1st Battalion) moving from Sydney to Greta and then to Brisbane at very short notice before immediately embarking on a vessel for New Guinea. He claimed that this speed of deployment gave his grandfather little chance to return. He stated that this short notice movement was also the 'fundamental cause of his increasing anxiety'. He stated that when his grandfather arrived in Brisbane and again 'missed the 2/1', a 'lack of food, five days to think about things and an obvious lack of leadership' exacerbated

³⁰ Application for Review of Decision dated 1 June 2018.

his grandfather's situation and again caused him to absent himself by returning to Sydney.

28. In his written comments in response to the Defence Submission, Mr Arthur summarised the situation as he perceived it in regard to his grandfather's eligibility:

*... he became "eligible" in 1940, but then eighteen years later "forfeited"; but then seventy-seven years later was "restored"; and then had some "gifted"; but only some, not all – because of the legislation which was written nine years after becoming "eligible"*³¹

29. Relying initially on *Bardia – Myth, Reality and the Heirs of ANZAC*, Mr Arthur asserted that his grandfather was mentally unwell potentially with 'nervous dyspepsia' at the time he absented himself.³² He also stated that 'repatriation records' relating to Private Percival's veterans' entitlements indicated that in his view:

the fact remains that Defence dishonourably discharged, sentenced and imprisoned a mentally unwell man which was caused by and occurred during his war service

30. During the hearing Mr Arthur stated that his grandfather should have been discharged medically as he suffered from a number of conditions including anxiety which were caused by his service, particularly in Tobruk.

31. He said that Private Percival's medical conditions had been diagnosed before his Court Martial. He stated that this anxiety was the probable reason that he did not hand himself in during the period he was absent. Mr Arthur sent copies of Private Percival's repatriation records to the Tribunal after the hearing.³³ The records confirm that he was suffering from 'mild anxiety state' in April 1945 but was found to be 'fit to undergo detention'.³⁴ His final medical examination prior to discharge also confirmed that he suffered from 'anxiety state'.³⁵ There was no indication as to the cause of the condition. The records indicate that in 1948 Private Percival was diagnosed with anxiety.³⁶ The condition was also present in 1993.³⁷

32. Mr Arthur also made a claim in his written submission that:

the argument is one of consistency – he was eligible for this medal in May 1940 – all of his other medals are for the same period of service

³¹ Mr Arthur letter to the Tribunal dated 29 July 2018.

³² Ibid.

³³ Mr Arthur letter to the Tribunal dated 23 October 2018.

³⁴ Concord Military Hospital patient summary dated 12 April 1945.

³⁵ Final Medical Board Record dated 25 July 1945.

³⁶ Medical History form by Deputy Commissioner Carswell dated 24 March 1948.

³⁷ Repatriation Commission Determination dated November 1993.

33. Mr Arthur questioned why the ASM 1939-45 criteria was ‘more stringent than the higher Imperial awards’ and signalled his intention in the future to ‘petition Parliament for a change in legislation’ to remove restrictive clauses for medallic entitlements which had been forfeited.³⁸ He stated:

in summary, the reality is that my Grandfather has only been partially recognised for his service, despite being eligible, due to a legislative criteria that is inconsistent with the other medals from the same period of war service

34. At the hearing Mr Arthur continued to press his claims regarding inconsistency in the criteria and the mitigating circumstances regarding his grandfather’s health. In response to questions from the Tribunal regarding why Private Percival did not hand himself in between September 1942 and May 1945 at a time when the state of the War in the Pacific was in the balance, he believed that it was a matter of his grandfather’s health, particularly, his anxiety.³⁹

35. Following the hearing Mr Arthur e-mailed the Tribunal seeking a determination as to whether or not his grandfather was entitled to be awarded the Returned from Active Service Badge noting that he had been refused in 1958.⁴⁰ The Badge is not included in *Defence Regulation 2016 - s36* and therefore the Tribunal does not have jurisdiction to review individual entitlements to this badge.

36. Mr Arthur also e-mailed the Tribunal on 30 October 2018 in response to material forwarded to him after the hearing regarding the Army policy on dishonourable discharge and particularly seeking evidence that an ‘examination’ of the grounds of discharge by order of Court Martial had been conducted’.⁴¹

The Defence Submission

37. In its written submission to the Tribunal, the Directorate confirmed that the eligibility criteria for the award of the ASM 1939-45 is contained in the *Commonwealth of Australia Gazette No. 91* dated 30 November 1949. The Directorate stated that Private Percival’s service had qualified him for the 1939-45 Star, the Africa Star, the Defence Medal, the War Medal 1939-45 and the ASM 1939-45 however because ‘his discharge is regarded as a dishonourable discharge under paragraph 2(b)(i) of Military Board Instruction (MBI) 187/1948, he does not satisfy criteria 6 of the qualifying criteria’ to be eligible for the ASM 1939-45.⁴² The submission concluded that Private

³⁸ Mr Arthur letter to the Tribunal dated 29 July 2018.

³⁹ Mr Arthur, Oral Submission to Canberra hearing, 16 October 2018.

⁴⁰ E-mail from Mr Arthur to the Tribunal ‘Returned from Active Service Badge – NX13166 Mr D.K. Percival’ dated 9.06pm 30 October 2018.

⁴¹ E-mail from Mr Arthur to the Tribunal ‘Further Document for Pack’ dated 5.02pm 30 October 2018

⁴² Defence Submission P.5 para 34.

Percival could not receive the ASM 1939-45 'as he did not receive, nor was he entitled to receive an honourable discharge'.

38. The Directorate stated during the hearing that Private Percival's other awards had been restored following the Forfeiture Inquiry however the Delegate was bound by the eligibility criteria for the ASM 1939-45 which clearly stated that a requirement was an honourable discharge.⁴³ They also asserted at the hearing that the discharge in this case was authorised by MBI 3/1957 pointing out that this instruction has application to those who are sentenced by court-martial.⁴⁴ The Tribunal took the view that notwithstanding the Directorate's assertion, this particular Instruction relates to the reasons for forfeiture of medals, not discharge and that the issue for the Tribunal remained the nature of discharge and specifically the matter of what would constitute an honourable discharge.

39. The Tribunal asked the Directorate during the hearing to address the Applicant's claims regarding the potential for Private Percival's discharge to be reconsidered as a medical discharge due to his state of anxiety. The Directorate stated that they could only apply the Regulations as they relate to medallic recognition and that they did not have the power to change the reason for discharge even if evidence was presented supporting the contention.⁴⁵

Tribunal Consideration

40. **General.** The Tribunal is required to review decisions 'on the merits'. This requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.⁴⁶ The merits review revolves around the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the decision-maker.

41. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.⁴⁷ The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof, and there is no presumption that the decision was correct.⁴⁸ The Tribunal is bound to make what it regards as the 'correct and preferable' decision and must reach a decision that is legally and factually correct.

42. **Private Percival's Record of Service and Qualifying Service.** There is no dispute about Private Percival's service record from his enlistment through to the return of his Battalion from the Middle East on 7 August 1942. There is also no dispute that his service qualified him for the suite of medals which are listed in his service record

⁴³ Mr Jordan, Oral Submission to Canberra hearing, 16 October 2018.

⁴⁴ Military Board Instruction 3/1957 *Awards – Medals – Forfeiture and Restoration* dated 1 January 1957.

⁴⁵ Ms Augustine, Oral Submission to Canberra hearing, 16 October 2018.

⁴⁶ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2.

⁴⁷ Pearson, Linda, "Merit Review Tribunals", in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68.

⁴⁸ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

including the ASM 1939-45. At issue is his eligibility for the ASM 1939-45 and this eligibility turns on the manner of his discharge which the Directorate regarded as 'dishonourable'.

43. **Private Percival's Admission of Absence Without Leave.** The Tribunal noted that Private Percival made a sworn statement at the District Court Martial.⁴⁹ In this statement Private Percival said:

... I was given 14 days leave and then reported back to Greta. After I had been back a few days I heard my unit was likely to go north, and as I had only 14 days leave after serving 2 years abroad I decided to take a day off and see my people. They live in Sydney. So, I came down to Sydney from Greta and was AWL for one day ... That was about 8 September. I returned to Greta the next day and found my unit had gone ...

44. The Tribunal noted that the 2/1st Infantry Battalion War Diary records the Battalion arriving in Greta on 5 September and leaving on 11 September 1942.⁵⁰ These dates cast some doubt on the accuracy of Private Percival's statement, particularly as it relates to 'returning the next day and finding my unit gone'.⁵¹ However, regardless of this doubt, the Tribunal was reasonably satisfied that Private Percival, by his own admission was absent without leave from his unit whilst it was encamped at Greta.

45. Private Percival's statement also addresses his journey to Brisbane after his return to Greta and his subsequent return to Sydney:

... I reported to Lieutenant Murray who was on the Brigade staff ... I went with him and a rear party of about 7 men to Brisbane⁵² ... I was about five days in Brisbane. I ascertained there that the 2/1 Bn had gone north, and I was left in Brisbane to await posting. I became very upset and worried. Although I had been absent only one day I had been put in a very serious position, and my nerves were in such a state that I went AWL and came back to Sydney. I have remained in Sydney ever since.

46. The Tribunal noted the material provided by the Applicant after the hearing which confirmed that Lieutenant Murray was in charge of the rear party and accompanied it to Brisbane before leaving himself for New Guinea.⁵³ Notwithstanding this material, the Tribunal notes that Private Percival once again admitted in his sworn statement that he decided to absent himself without leave some five days after arriving

⁴⁹ Sworn Statement by the Accused to the Defending Officer on 2 May 1942.

⁵⁰ AWM 52, Item 8/3/1, 2/1 Infantry Battalion War Diary July – September 1942.

⁵¹ Sworn Statement by the Accused to the Defending Officer on 2 May 1942.

⁵² During cross examination by the Prosecutor, Private Percival stated that there was no rear party 'it was just stragglers that came in'.

⁵³ Mr Arthur letter to the Tribunal dated 23 October 2018.

in Brisbane and that he then returned to Sydney. The Tribunal was therefore reasonably satisfied that Private Percival was intentionally absent without leave from mid-September 1942.

47. Private Percival's statement also addresses his period in Sydney after he left Brisbane:

I have a defacto wife now and a child aged 3 months, and since I have been back in Sydney I have been doing casual work on the wharves and with the Sugar Coy. I wanted to surrender but did not have the courage to do it ...

48. Having considered the material, the Tribunal relying on Private Percival's sworn statement, finds that he was absent without leave from his unit from September 1942 until his arrest on 23 March 1945, a period of approximately 30 months.

49. **Private Percival's 'Anxiety'**. Private Percival describes in his statement that he was in a state of anxiety whilst he was absent and had lost weight.⁵⁴ He attributed his anxiety to not having handed himself in during the period of absence. He stated that:

... a result of my anxiety at being away I lost weight – about 2 stone ... it was my state of nerves that kept me from surrendering ...

50. He said that he had been examined by a doctor whilst at '6 Aust Gd Compound' who allegedly certified him as 'unfit by reason of my physique and loss of weight' and that 'I was suffering from anxiety'. The Tribunal notes that Private Percival's sworn statement contains an annotation to the effect that the Court sighted a medical certificate which declared that he was 'fit for detention' but 'unfit for heavy work' and that one of the reasons he was unfit was due to 'anxiety state'.⁵⁵

51. Mr Arthur tendered copies of Mr Percival's repatriation records which supported his contention that Private Percival had had 'anxiety state' accepted as a war caused condition under the *Veterans' Entitlement Act*.⁵⁶ Relying on Private Percival's sworn statement, the Tribunal was of the view that his anxiety at the time of the Court Martial and in the period of detention was in all likelihood caused by his absence which may have been contributed to by his war service. Whilst his condition may explain why he did not hand himself in, this cannot reasonably be considered as an excuse. In any case, the Tribunal noted that there is no dispute that private Percival was certified as fit for detention.

⁵⁴ Sworn Statement by the Accused to the Defending Officer on 2 May 1942.

⁵⁵ Ibid.

⁵⁶ Mr Arthur letter to the Tribunal dated 23 October 2018 enclosing Repatriation Commission. Determination dated November 1993.

52. The Tribunal therefore finds that Private Percival's medical condition at the time of the Court Martial has no relevance to the manner of his discharge and even if it did, the Tribunal has no power to alter the reason for discharge.

53. **Was Private Percival's District Court Martial Properly Constituted and Conducted?** The Tribunal noted that Mr Arthur made a number of assertions regarding the deliberations and adequacy of the Court Martial and the lack of witnesses to support Private Percival's position. The Tribunal notes that the records verify that Private Percival was properly declared an Illegal Absentee on 29 March 1943 and that the proforma so declaring him was tendered to the Court Martial as an exhibit.⁵⁷

54. The Tribunal further notes that the Court Martial was suitably ordered and convened on 1 May 1945 by Colonel L.E. Vail, was correctly constituted by a President and two Members and Private Percival was provided with the services of a Defending Officer. The Tribunal also notes that Private Percival declared that he would not call witnesses in his own defence.⁵⁸ The Tribunal noted Mr Arthur's claims during the hearing that certain witnesses if called may have been able to verify Private Percival's account. As the Tribunal observed at the hearing, it may have been impractical to arrange witnesses, given the Court Martial occurred almost three years after the absence. Further, importantly, Private Percival, presumably on the advice of his Defending Officer, waived his right to call witnesses at the Court Martial.

55. The Tribunal notes that the Finding of Guilt in relation to the charge of Desertion and the Sentence of the Court Martial were confirmed by the Convening Authority and found to be valid on review by a Legal Officer and by the Judge Advocate General on 25 May 1945.⁵⁹

56. Having reviewed the record of proceedings and supporting material, the Tribunal finds that the District Court Martial was properly constituted, fairly conducted and that all parties were appropriately represented. In any event, the Tribunal does not have the power to overturn the conviction or sentence and is therefore bound by the findings of the District Court Martial.

57. **What is an Honourable or Dishonourable Discharge?** The issue of dishonourable discharge was canvassed widely in the Forfeiture Inquiry.⁶⁰ The Inquiry indicated that the necessity of introducing 'honourable' and 'dishonourable' discharges was discussed in 1944 and in May of that year, the War Cabinet decided that only those

⁵⁷ Extract of Record of Service – Proforma P.80 dated 29 March 1943.

⁵⁸ Form of Proceedings for General and District Courts-Martial A.A. Form A.9.

⁵⁹ Department of the Army Minute - P/2/2727 DCM NX13166 Pte D.K. Percival, 2/1 Aust Inf Bn dated 25 May 1945.

⁶⁰ Defence Honours and Awards Appeals Tribunal *Inquiry into the refusal to issue entitlements to, withholding and forfeiture of Defence Honours and Awards* dated 7 September 2015.

members with ‘honourable discharges’ would be entitled to receive certain post service benefits.⁶¹

58. In 1944 the three Services defined ‘dishonourable’ for various reasons and purposes usually related to conditions of service. Navy considered those who were discharged as deserters to be ‘other than honourable’.⁶² Air Force also discharged ‘illegal absentees and deserters dishonourably’.⁶³ Army similarly issued guidance in 1944 for what it considered to be grounds for the discharge of individuals it would regard as ‘dishonourable’.⁶⁴ Relevantly, some of the grounds that would constitute ‘dishonour’ was discharge in the following circumstances:

- ...
- (c) *Discharge with ignominy from His Majesty’s Service.*
- ...
- (e) *By reason of numerous convictions, deemed to be incorrigible.*
- ...
- (f) *Sentenced during his service to penal servitude or imprisonment by a civil court or Court-Martial*
- ...
- (h) *Sentenced by Court Martial to be discharged.*

59. Sub-paragraph (h) above was qualified with the statement ‘*prima facie, but subject to examination of grounds by LHQ in any particular case*’. The Tribunal noted Mr Arthur’s comments of 30 October 2018 regarding this qualification but dismissed his various assertions as it considered that the qualification related to the review process conducted as a part of all Courts Martial and, as previously noted, the trial was confirmed by the Convening Authority and found to be valid on review by a Legal Officer and the Judge Advocate General on 25 May 1945.

60. The Tribunal also noted that in relation to annotating a member’s service record with the term ‘dishonourable’, it was not the Army’s policy to do so except in the period from July 1949 to January 1953.⁶⁵

61. Significantly, there was no evidence put before the Tribunal that would define what constituted an ‘honourable’ discharge. The Directorate stated during the hearing that they were unaware of any such definition.⁶⁶ They also indicated that it appeared that unless stated otherwise, and in the absence of any misconduct or history of offences,

⁶¹ Ibid. P.70. Para 17.

⁶² Ibid. P.77. Para 48.

⁶³ Ibid. P.77 Para 50.

⁶⁴ Memorandum 132110 - Secretary of the Department of the Army, *Members Discharged from the Forces Other Than Honourable* dated 23 September 1944 NAA: MP742/1, 84/1/1067.

⁶⁵ Defence Honours and Awards Appeals Tribunal *Inquiry into the refusal to issue entitlements to, withholding and forfeiture of Defence Honours and Awards* dated 7 September 2015, P.70. Para 18.

⁶⁶ Ms Augustine, Oral Submission to Canberra hearing, 16 October 2018.

it had become generally accepted that most discharges could be considered to be honourable.

62. The Tribunal was not aware of the term ‘honourable discharge’ being commonly used in the contemporary Australian military lexicon. The Tribunal notes that the United States military has used the term since at least the Second World War. They have five reasons for discharge with the least desirable manner known as a ‘dishonorable discharge’. This is defined as ‘termination of a person’s military service because of serious misconduct’.⁶⁷ Relevantly, the only way such a discharge can be levied is by General Court Martial during which it may be included as part of the sentence. A ‘dishonorable discharge’ in these circumstances is seen as a ‘punitive discharge’.

63. The Tribunal notes that there are various dictionary definitions of ‘honour’ and ‘honourable’. The Oxford Dictionary describes honourable as being ‘morally correct, honest, moral, ethical, principled, righteous’ etc.⁶⁸ None of these definitions is helpful, particularly as the Tribunal was of the view that what may be considered ‘honourable’ in 2018 may be quite different to what a reasonable person may have thought was honourable in 1945 at the conclusion of the Second World War.

64. In forming this view the Tribunal was cognisant of the opinions expressed in the Forfeiture Inquiry and had regard to the Defence Supplementary Submission to that Inquiry⁶⁹ which was discussed at the hearing and sent to Mr Arthur on 18 October 2018.⁷⁰ This submission indicated that ‘dishonourable discharges’ were ‘connected with the advent of the Commonwealth Reconstruction Training Scheme’.⁷¹ The Tribunal also noted additional material discovered subsequent to the Forfeiture Inquiry and provided by Defence which emphasised that in 1944 and in the years following, policy on ‘honour’ and ‘dishonour’ was focussed fundamentally on ‘ineligibility to Service benefits on discharge’.⁷² The material indicated that the desire to differentiate between honourable and dishonourable came from civilian employers wanting to determine if they had liability for superannuation payments whilst their employees were absent on service, and from various Commissions seeking to reduce liability for entitlements including war homes and other service benefits.⁷³

65. The Tribunal noted that the consistent theme in the material presented in support of what may constitute ‘dishonour’ in the Australian military context in the 1940-50s was that a member could be so deemed if ordered to be discharged from service as a result of a conviction for a serious offence by a properly constituted civil or military

⁶⁷ <https://legaldictionary.net/dishonorable-discharge> accessed 17 October 2018.

⁶⁸ Oxford Dictionaries accessed on line 18 October 2018.

⁶⁹ Defence Supplementary Submission to the Forfeiture Inquiry.

⁷⁰ DHAAT letter to Mr Arthur OUT/2018/613 dated 18 October 2018.

⁷¹ Defence Supplementary Submission to the Forfeiture Inquiry, p. 2 Para. 9.

⁷² Director Personnel Services Memo 110883 of 24 August 1945 *Ineligibility to Service Benefits on Discharge of Soldier ...*

⁷³ *Ibid.*

court. The Tribunal noted that this was in many ways consistent with the approach taken by the United States as previously discussed.

66. The Tribunal noted from the research material that judgements were often made that where a member had been convicted of numerous ‘serious’ offences and then a discharge ordered administratively, this was also regularly seen as ‘dishonourable’ by Defence. The Tribunal considered that this approach was open to inconsistency and there were numerous examples where the nature of the offences could reasonably be considered ‘minor’ such as absence without leave for a few days but on repeated occasions. The inconsistency of this approach was exacerbated by the fact that service records were only annotated as ‘dishonourable’ from July 1949 to January 1953.⁷⁴

67. The Tribunal noted that in *Kenneth Stephens and the Department of Defence* [2012] DHAAT (18 October 2013), the Tribunal in that matter concluded that:

... in the absence of a soldier being discharged in the circumstances outlined above or ‘dishonourable discharge’ being written on certificates and records at the time, it could be reasonably concluded that the soldier’s discharge was therefore ‘honourable’.

68. The Tribunal agreed with this conclusion noting that ‘the circumstances outlined above’ included discussion regarding the ‘sentiment of the time’ ~ 1944, type of discharge and eligibility criteria for the ASM 1939-45. The discussion noted that there were mandatory circumstances when ‘dishonourable discharge would apply’ including:

... sentence by court martial to discharge with ignominy, or discharge from the Defence Force ...

69. The Tribunal also noted that in *Hanson and the Department of Defence* [2015] DHAAT 13 (19 April 2015) the subject soldier was found guilty of desertion by District Court Martial and as part of the court review process by the Judge Advocate General, discharge was recommended. Additionally, in *McGlinchey and the Department of Defence* [2015] DHAAT 20 (10 April 2015), the subject soldier was found guilty of stealing by District Court Martial, was discharged administratively as ‘incorrigible’ as a result of numerous other offences and his discharge certificate was annotated as ‘dishonourable discharge’.

70. Having carefully considered the significant amount of material relating to honour and dishonour, this Tribunal concludes that for a discharge to be considered as ‘dishonourable’, a soldier would normally have been discharged by order of a Court Martial, or deemed to be incorrigible by an appropriate authority and likely to have had

⁷⁴ Defence Honours and Awards Appeals Tribunal *Inquiry into the refusal to issue entitlements to, withholding and forfeiture of Defence Honours and Awards* dated 7 September 2015, P.70. Para 18.

his service record annotated with ‘dishonourable discharge’. It is the Tribunal’s view that if these circumstances did not exist or could not be proven to the reasonable satisfaction of the decision-maker (or the Tribunal on review), then a soldier should be considered to have completed the obligations expected of him and his service could therefore be deemed to be ‘honourable’.

71. In drawing this conclusion, the Tribunal noted that every potential circumstance would be different and each should be considered on the merits - recognising that most matters will have occurred more than 75 years ago and should be reviewed with regard to what was ‘reasonable’ and what would have been considered to be ‘honourable’ at that time.

72. **Was Private Percival’s Discharge Honourable?** The Tribunal notes that the Directorate in its written submission determined that Private Percival’s discharge ‘is regarded as a dishonourable discharge under paragraph 2(b)(i) of MBI 187/1948’. The Tribunal notes that the purpose of this Instruction is to determine ‘Ineligibility for Discharge Benefits on Discharge of a Soldier’.⁷⁵ The Instruction lists the ‘discharge benefits to which this instruction shall apply’ including pensions and gratuities, furlough, training and fares for discharge travel. The Instruction makes no mention of medallic entitlements or of them being an applicable ‘benefit’. The Tribunal is of the view that this Instruction is therefore not relevant to the circumstances of Private Percival’s discharge as the Royal Warrant for the ASM 1939-45 requires that his discharge be ‘honourable’ and in any case, the MBI post-dates Private Percival’s actual discharge.

73. The Tribunal notes that at the time of Private Percival’s discharge (May 1945) the Army policy to annotate discharge certificates was not in place therefore his service record does not record his discharge as ‘dishonourable’. The Court Martial outcome however, was clear: Private Percival was to serve a term of imprisonment and was then to be discharged. The Tribunal considered there was a clear inference that his discharge, consequent upon his being court martialled, was other than honourable.

74. The Tribunal gave significant weight to the Army guidance of 1944 which was in place at the time of Private Percival’s trial and stated that a Court Martial sentence of discharge was regarded as a dishonourable discharge.⁷⁶ Private Percival appeared before a District Court Martial on 2 May 1945 charged and convicted during war service of ‘Deserting His Majesty’s Service’ from 9 September 1942 until 23 March 1945. He

⁷⁵ Military Board Instruction 187/1948 *Ineligibility for Discharge Benefits on Discharge of a Soldier or Termination of an Officer’s Appointment* dated 8 October 1948.

⁷⁶ Memorandum 132110 - Secretary of the Department of the Army, *Members Discharged from the Forces Other Than Honourable* dated 23 September 1944 NAA: MP742/1, 84/1/1067.

was found guilty of the charge and sentenced to detention for 22 months and to be 'discharged from the Defence Force of the Commonwealth of Australia'.⁷⁷

75. Having previously found that the District Court Martial was properly constituted and fairly conducted and having formed a view about what constitutes honourable and dishonourable discharges as articulated above, the Tribunal finds that Private Percival's discharge cannot reasonably be considered to be honourable.

76. The Tribunal was sympathetic to the claim that Private Percival may have been suffering from anxiety; however it noted that Private Percival had stated to the Court that it was his absence which caused his anxiety:

*... as a result of my anxiety at being away...*⁷⁸

77. In any case, it is clear from the record of proceedings of the Court Martial that this condition was drawn to the attention of the members of the Court and it must therefore be assumed that it was taken into consideration.

78. **Consistency and the Eligibility Criteria.** The Tribunal noted Mr Arthur's various assertions regarding consistency and the eligibility criteria for the ASM 1939-45 being 'more stringent than the higher Imperial awards'. The Tribunal did not accept that consistency between awards was relevant in determining eligibility for defence awards as eligibility is determined by the conditions as declared in the Instruments, Regulations and Determinations for each particular award and is determined in each matter according to its own facts. Each of the medals which Private Percival was eligible to receive had clear conditions attached to them. The Imperial awards for Second World War service did not include provisions relating to an individual's discharge. The Royal Warrant for the ASM 1939-45 does have such provision. Mr Arthur conceded that this was the case during the hearing.

79. Accordingly, the Tribunal dismissed Mr Arthur's claim regarding consistency between medals as the Tribunal has an obligation to determine eligibility based on the merits of each case and must apply the eligibility criteria for the award the applicant seeks.

Finding

80. As previously stated, the Tribunal considers that this matter turns on the manner of Private Percival's discharge and for the reasons stated above, the Tribunal finds that he is not entitled to be awarded the Australia Service Medal 1939-45 as his discharge could not be considered to be honourable.

⁷⁷ Record of Court Martial 43139, P/2/2727 – PTE D.K. Percival, 2/1 Aust Inf Bn, promulgated 15 May 1945.

⁷⁸ Sworn Statement by the Accused to the Defending Officer on 2 May 1942.

DECISION

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