



Australian Government

Defence Honours and Awards Appeals Tribunal

Foxlee and the Department of Defence [2018] DHAAT 027 8 November 2018

File number 2018/032

Re **Mr Roger Halley Foxlee**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)
Mr Graham Mowbray

Appearances Mr R Foxlee, by telephone
Ms A Augustine, Directorate of Honours and Awards
Mr M Jordan, Directorate of Honours and Awards

Hearing 5 October 2018 in Canberra

DECISION

On 8 November 2018 the Tribunal affirmed the decision under review.

CATCHWORDS

DEFENCE AWARD – Australian Service Medal with Clasp 'SE ASIA' - Australian Service Medal 1945-75 with Clasp 'SE ASIA' previously awarded – no discretion

LEGISLATION

Defence Act 1903: s 110VB(6)

Commonwealth of Australia Gazette (CAG) S336, Letters Patent for the Australian Service Medal dated 13 September 1988

Commonwealth of Australia Gazette S 64, Declaration and Determination under the Australian Service Medal Regulations - Australian Service Medal with Clasp 'SE ASIA' - dated 28 February 2002

REASONS FOR DECISION

Introduction

1. The Applicant, Mr Roger Halley Foxlee seeks the award of an Australian Service Medal with Clasp 'SE ASIA' (ASM with Clasp 'SE ASIA') in recognition of his service in Butterworth, Malaysia from 24 January 1978 to 24 July 1980. His application for the award was refused on 22 May 2018 by the Directorate of Honours and Awards in the Department of Defence. He now seeks review of that decision by the Tribunal.

Eligibility Criteria for the ASM with Clasp 'SE ASIA'

2. The Australian Service Medal (ASM) was instituted by Letters Patent on 13 September 1988¹. The ASM is awarded to recognise military service in a prescribed non-warlike military operation. The Schedule to the Letters Patent sets out the Regulations governing the award of the ASM (the Regulations). Regulation 3 states that the Governor-General, on the recommendation of a Minister, may declare a non-warlike operation in which members of the Defence Force were engaged on or after 14 February 1975, to be such an operation. Regulation 4 of the Regulations specifies that the conditions for the award of the medal may be similarly determined.

3. On 28 February 2002, an amending Declaration and Determination was issued which stated, relevantly, that for the purposes of Regulation 4 a declared operation included Defence Force activities on land in Malaysia during the period that commenced on 14 February 1975 and ended on 31 December 1989.²

4. It was also determined, under Regulation 4, that the ASM with Clasp 'SE ASIA' may be awarded to a member of the Australian Defence Force who rendered service as such while serving as a member of the Australian element for the declared operation, for 30 days, or periods amounting in the aggregate to 30 days.³

5. The Declaration and Determination also provides, relevantly, that a person is *not* eligible if a separate award of the Australian Service Medal 1945-75 with Clasp 'SE ASIA' has been awarded.⁴

6. The Tribunal is required to undertake a merits review and is bound to apply the eligibility criteria which applied at the date of the decision under review.⁵ In this case, the reviewable decision is that of 22 May 2018.

¹ *Commonwealth of Australia Gazette (CAG) S336, Letters Patent for the Australian Service Medal* dated 13 September 1988

² *CAG S 64, Declaration and Determination under the Australian Service Medal Regulations - Australian Service Medal with Clasp 'SE ASIA'* - dated 28 February 2002 Clause (b)(i)

³ *Ibid* (c)(i)

⁴ *Ibid* (d)(ii)

⁵ Defence Act 1903: s 110VB(6)

Did Mr Foxlee serve for the qualifying period for the ASM with Clasp 'SE ASIA'?

7. According to his service record Mr Foxlee enlisted in the Permanent Air Force on 30 May 1969 and, on 29 May 1981, was discharged at the end of his 12-year enlistment period. Relevantly, he was posted to 478 Squadron in Butterworth, Malaysia from 11 February 1972 to 27 August 1973, and also served in Malaysia with 75 Squadron from 27 August 1973 to 20 February 1974.

8. For this service in Malaysia Mr Foxlee was awarded the ASM 1945-75 with Clasp 'SE ASIA'.

9. Mr Foxlee was again posted to 75 Squadron Malaysia from 24 January 1978 to 24 July 1980. There was no dispute that Mr Foxlee served in Malaysia for more than 30 days during the relevant period. Consequently, this service is qualifying service for the ASM with Clasp 'SE ASIA'.

As Mr Foxlee served the required period, is there some reason the ASM with Clasp 'SE ASIA' cannot be awarded?

10. The Tribunal and Mr Foxlee were provided with a copy of a Defence policy statement dated 2 July 2001⁶ (the policy statement) which Defence said explained why a previous entitlement (or award) of the ASM 1945-75 with Clasp 'SE ASIA' precluded the award of the ASM with Clasp 'SE ASIA' for service in the same area but during a later period. A feature of the policy in addressing “double-medalling” was that, while the elements of South East Asian deployments may have been subject to different agreements, “they existed essentially with the one aim – to provide security within the South-East Asia region”. Non-warlike operations were not to attract two Australian awards.

11. Mr Foxlee was given the opportunity to comment on the policy statement, which had not been made available to him prior to the hearing. Mr Foxlee, while acknowledging the content of the policy statement provided some clarification, maintained that the award should be available in respect of two different periods of service. However, clause (d)(ii) of the eligibility criteria in the Declaration and Determination for the ASM with Clasp 'SE ASIA', referred to above, is clear: Defence Force members cannot be awarded both the ASM with Clasp 'SE ASIA' and the ASM 1945-75 with Clasp 'SE ASIA'.

12. The Tribunal accepts that, as Mr Foxlee contended, the environment in his later deployment to Malaysia may have been more volatile than at the time of his earlier deployment. The Tribunal also acknowledges Mr Foxlee’s perceived unfairness that about two and a half years of his service in Malaysia, which if taken alone, would have entitled him to the award sought, but he is precluded from the award because of his earlier award of the ASM 1945-75 with Clasp 'SE ASIA'.

⁶ Department of Defence DEFGRAM NO 233/2001: *Awards for Service in South-East Asia 1955-1989*, 2 July 2001.

13. For the reasons given above, Mr Foxlee cannot be awarded the ASM with Clasp 'SE ASIA', notwithstanding that this was a separate deployment to that which attracted his entitlement to the ASM 1945-75 with Clasp 'SE ASIA'. As observed above, the Tribunal does not have any discretion in this regard.

DECISION

14. The Tribunal affirms the decision under review.