



## Australian Government

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### Defence Honours and Awards Appeals Tribunal

## **Hoebee and the Department of Defence [2018] DHAAT 25 (1 November 2018)**

File Number(s)            2016/022

Re                            **Lieutenant Colonel Huibrecht Pieter Matthijs Hoebee  
(Retd)**  
Applicant

And                          **Department of Defence**  
Respondent

Tribunal                    Mr Graham Mowbray (Presiding Member)  
Ms Jane Schwager, AO  
Rear Admiral James Goldrick, AO, CSC, RAN (Retd)

Hearing Dates            26 April & 9 October 2018

### **DECISION**

On 1 November 2018 the Tribunal set aside the decision of 1 May 2008 of the Directorate of Honours and Awards of the Department of Defence and substituted its new decision to recommend that Lieutenant Colonel Huibrecht Pieter Matthijs Hoebee (Retd) be awarded the Republic of Vietnam Campaign Medal for his service in Vietnam in 1969.

### **CATCHWORDS**

*FOREIGN AWARD – refusal to recommend the award of the Republic of Vietnam Campaign Medal - wounded in action - infectious disease.*

### **LEGISLATION**

*Defence Act 1903 – ss 110T, 110V(1) and 110VB(2),  
Defence Force Regulations 1952 - Reg 93C and Schd 3  
Defence Regulation 2016 – s 85  
Military Board Instruction 102-4, 23 December 1968, ‘Medals – The Vietnamese Campaign Medal’*

## REASONS FOR DECISION

### Introduction

1. Lieutenant Colonel Huibrecht (Bert) Pieter Matthijs Hoebee (Retd) is seeking award of the Republic of Vietnam Campaign Medal (RVCM) for his service in Vietnam in 1969. Lieutenant Colonel Hoebee was not awarded the medal because he was evacuated from theatre after contracting Infective Hepatitis (Hepatitis A) four days short of the qualifying time of 181 days. Although then he could have received the medal had he been evacuated after being wounded in action, Defence policy is that the definition of being 'wounded in action' does not extend to physical illness.<sup>1</sup>

2. Lieutenant Colonel Hoebee has applied for a review of the decision, claiming that the nature and timing of his illness were such that it could only have been acquired while on operational service in the field and was thus equivalent to having been wounded in action.<sup>2</sup> Given that a key criterion for being 'wounded in action' is that it be the direct result of the actions of the enemy, the questions for consideration are whether Infective Hepatitis was acquired the same way and whether physical illness so acquired meets the criterion.

### Tribunal Jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* 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 an 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. On 24 June 1966 Her Majesty the Queen granted unrestricted approval for members of the Australian armed forces to accept and wear the RVCM.<sup>3</sup>

### Conduct of the Review

4. On 8 October 2007, Mr Robert H. Smith made application to the Directorate of Honours and Awards in the Department of Defence that Lieutenant Colonel Hoebee be awarded the Republic of Vietnam Campaign Medal.<sup>4</sup> After confirmation from Lieutenant Colonel Hoebee that Mr Smith had his authority to make the application on his behalf, on 1 May 2008 the Directorate responded to Lieutenant Colonel Hoebee through Mr Smith, advising him that, as he did not complete the qualifying period of 181 days in the operational area in Vietnam and his medical evacuation to Australia was not the result of his having been wounded in action, he did not qualify for the RVCM. This is the decision under review.

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<sup>1</sup> DHA Letter 08/267139 dated 1 May 2008

<sup>2</sup> Application for Review of Decision dated 17 October 2016

<sup>3</sup> Cable, London to Canberra, 24 June 1966. NAA: 3111, 1966/3374.

<sup>4</sup> Mr Robert H. Smith Letter dated 8 October 2007

5. On 1 and 24 January 2014, Lieutenant Colonel Hoebee wrote to the Chief of Army regarding entries in versions of his Certificate of Service relating to his medallic awards and his eligibility for the RVCM.<sup>5</sup> On 3 June 2014, the Chief of Army confirmed that personnel who had been evacuated from theatre after less than six months service were not eligible if their removal had been due to illness and that Lieutenant Colonel Hoebee was not qualified for the award.<sup>6</sup> On 17 October 2016 Lieutenant Colonel Hoebee applied to the Tribunal for review of the Directorate's decision of 1 May 2008.

6. On 20 October 2016, in accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011*, the Tribunal wrote to the Secretary of the Department of Defence advising of the review of Lieutenant Colonel Hoebee's eligibility for the RVCM and inviting submissions and an explanation of how Defence had reached its decision to refuse the award. A written submission was issued by the Directorate on 28 March 2017. This submission concluded that Lieutenant Colonel Hoebee did not serve in Vietnam for a continuous or aggregated period of 181 days and that, having been evacuated from theatre due to illness rather than as a battle casualty, he was not eligible for the award of the RVCM.<sup>7</sup>

7. The Defence submission was provided to Lieutenant Colonel Hoebee on 29 March 2017.<sup>8</sup> On 19 May 2017, Lieutenant Colonel Hoebee requested an extension of time to complete his response to the report.<sup>9</sup> Lieutenant Colonel Hoebee provided a response on 14 August 2017.<sup>10</sup> On 26 April 2018 the Tribunal heard evidence from Lieutenant Colonel Hoebee at a hearing also attended by Brigadier Kerry Mellor (Retd) in support of Lieutenant Colonel Hoebee, as well as Ms Margot Kropinski-Myers and Ms Allison Augustine as representatives of the Department of Defence. At the first hearing, the Tribunal put a number of questions on notice to Defence, which they responded to by email on 16 June 2018.<sup>11</sup> This response was provided to Lieutenant Colonel Hoebee.

8. At Lieutenant Colonel Hoebee's request, after he had received the Defence response, a further hearing was conducted on 9 October 2018. This heard evidence from Ms Jo Callaghan, Ms Augustine and Colonel Rodney Petersen on behalf of the Department of Defence, as well as from Lieutenant Colonel Hoebee.

### **Republic of Vietnam Campaign Medal**

9. The Government of the Republic of Vietnam established a campaign medal known in Australia as the Republic of Vietnam Campaign Medal (RVCM). This was offered to the Australian Government in May 1966 for award to Australian service personnel who had served in Vietnam. The offer was accepted. The RVCM remains a

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<sup>5</sup> Lieutenant Colonel H.P.M. Hoebee Letters dated 1 January 2014 & 24 January 2014

<sup>6</sup> Chief of Army Letter OCA/OUT/2014/R18214014 dated 3 June 2014

<sup>7</sup> DH&A/OUT/2017/0048 dated 28 March 2017

<sup>8</sup> DHAAT/OUT/2017/108 dated 29 March 2017

<sup>9</sup> Lieutenant Colonel Hoebee email letter to the Tribunal dated 19 May 2017

<sup>10</sup> Lieutenant Colonel Hoebee letter to the Tribunal dated 14 August 2017

<sup>11</sup> Defence response to questions from the Defence Honours and Awards Appeals Tribunal into Lieutenant Colonel Hoebee's eligibility for the Republic of Vietnam Campaign Medal. Email received 16 June 2018.

foreign medal and is additional to the Australian and Imperial campaign medals which have been issued to recognise service in Vietnam.

10. The original directive by the Chief of the Joint General Staff of the Republic of Vietnam Armed Forces which related to the RVCN for foreign military forces was dated 1 September 1965. Article 2 laid down the conditions for the award to Vietnamese personnel and Article 3 set out the conditions for award to 'Allied soldiers assigned to the Republic of Vietnam after 6 months.'<sup>12</sup> The criteria were amended in March 1966, but not in such a way as to affect Lieutenant Colonel Hoebee's case. Although the amendment did direct that 'Eligibility of individuals for the award will be determined by Royal Australian authorities (sic),'<sup>13</sup> this does not grant Australia the authority to amend the criteria.

11. The Secretary of the Department of Defence set out the conditions for award of the RVCN to Australian service personnel in a memorandum to the three Service Departments dated 16 September 1966. These were

- (a) *Special Service – as defined by the Repatriation (Special Overseas Service) Act 1962 for a minimum of 6 months duration, either continuous or aggregated, in Vietnam with retrospective effect to 31<sup>st</sup> July 1962.*
- (b) *'Special Service' in Vietnam of less than six months' duration since 31<sup>st</sup> July 1962 if*
  - (1) *Killed on active service or wounded-in-action and evacuated,*
  - (2) *Captured and later released or escaped.*

12. The instrument by which the criteria were interpreted by Army and promulgated for Army use was *Military Board Instruction 102-4* dated 23 December 1968.<sup>14</sup> This set out qualifying conditions as:

*To qualify for the award a member must be allotted for 'Special Service' in Vietnam as defined by MBI 216-1 and one of the following:*

- a. *Must serve in Vietnam for a minimum period, either continuous or aggregated, of 181 days from 31 Jul 62 inclusive to a future date,*
- b. *Have served in Vietnam for a period of less than 181 days from 31 Jul 62 inclusive to a future date if:*
  - (1) *Killed on active service.*
  - (2) *Wounded in action (i.e. classified as a Battle Casualty in a NOTICAS signal vide MBI 38-1).*
  - (3) *Captured and later released or escaped.*

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<sup>12</sup> 'Directive Pertaining to awarding of Campaign Medal' dated 1 September 1965 Joint General Staff Republic of Vietnam Armed Forces

<sup>13</sup> Government of the Republic of Vietnam Memorandum Nr 183/TTM/QD dated 31 August 1966. Appendix 5, Defence Honours and Awards Appeals Tribunal *Report of the Inquiry into the feasibility of amending the qualifying criteria for the Republic of Vietnam Campaign Medal*, p. 29.

<sup>14</sup> Military Board Instruction 102-4 dated 23 December 1968, 'Medals – the Vietnamese Campaign Medal'

## Agreed Facts

13. At the start of the first hearing, the Tribunal sought and obtained the consent of Lieutenant Colonel Hoebee and the representatives of the Department of Defence to a number of agreed facts. These were:

- a. The length of Lieutenant Colonel Hoebee's service in Vietnam in 1969 was 177 days, which falls short of the total required for the RVCM.
- b. Lieutenant Colonel Hoebee acquired Infective Hepatitis (now known as Hepatitis A) while in Vietnam.
- c. Lieutenant Colonel Hoebee's condition was assessed as requiring his medical evacuation to Australia.
- d. The timings and circumstances of acquiring the disease indicate Lieutenant Colonel Hoebee's having caught Hepatitis A while engaged in an operation in the field in the operational area, specifically Operation *Neppabunna*.

## Lieutenant Colonel Hoebee's Submission

14. Lieutenant Colonel Hoebee's argument is that his Hepatitis A was acquired during actual combatant service in the field. He noted that the incubation period for the disease is between 15 and 50 days and, in view of the fact that his symptoms manifested on 2 September, the most likely period in which he was infected was while engaged in Operation *Neppabunna* between 15 and 19 August 1969. During the periods in the field, he claimed that his company, C Company 9 RAR, waded up to shoulder deep through streams, flooded areas and paddy fields, all of which were likely to have been contaminated with human waste. Lieutenant Colonel Hoebee stated that the hygiene standards enforced while in camp were very high and no other soldier acquired Hepatitis A at Nui Dat.<sup>15</sup> His application was accompanied by evidence from his company commander and the battalion operations officer. These confirmed the nature of Operation *Neppabunna*, notably the fact that it took place during the wet season, requiring soldiers to move through flooded areas up to shoulder level for extended distances.<sup>16</sup> Further evidence about conditions which would increase the potential for infection was provided by a section commander from Lieutenant Colonel Hoebee's platoon.<sup>17</sup>

15. In the submission provided to the Tribunal and in their oral evidence, Lieutenant Colonel Hoebee and his representative, Brigadier Mellor, centred their argument on the contention that Defence's interpretation of the criteria for award of the RVCM for less than 181 days service was both unduly narrow and harsh.<sup>18</sup> They noted that the assessment of whether personnel were 'wounded in action' was complex and that Defence itself had been inconsistent in its definitions. In Lieutenant Colonel Hoebee's case, they argued that the nature of the operations in the field required that personal protection against the sources of contamination which create the possibility of infection with Hepatitis A be secondary to the achievement of the

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<sup>15</sup> Application for Review of Decision dated 17 October 2016

<sup>16</sup> Brigadier L.J. Lewis Letter dated 15 October 2016; Brigadier John Sheldrick Letter dated 16 October 2016

<sup>17</sup> Mr Don Wust Letter dated 11 October 2016

<sup>18</sup> Lieutenant Colonel H.P.M Hoebee 'Applicant's Submission to Defence Honours and Awards Appeals Tribunal Hearing dated 26 April 2018

mission. They explained that movement through flooded paddy fields and natural water features was essential to making contact with an elusive enemy. They pointed out that the shallow bunds which normally allowed dry passage across the fields were customarily booby trapped or mined. This forced personnel into neck deep water to make their transits. The applicant and his representative argued therefore that there was a direct connection between Lieutenant Colonel Hoebee's infection and deliberate enemy action, which meant that his illness met the key criterion required to satisfy the definition of 'wounded in action'.

### **The Defence Submission**

16. The Defence submission of 28 March 2017 indicates that the decision maker in this case holds the appropriate delegation. The submission indicates that the legislative basis for the decision is *Military Board Instruction 102-4* dated 23 December 1968.

17. The submission states that the assessment of Lieutenant Colonel Hoebee's eligibility for the RVCN was based upon his service record. In making the assessment, the Directorate relied upon the following material facts:

- a. Lieutenant Colonel Hoebee commenced his service in Vietnam on 25 March 1969;<sup>19</sup> and
- b. On 16 September 1969, Lieutenant Colonel Hoebee was the subject of a medical evacuation from Vietnam as a result of his suffering from Infective Hepatitis (Hepatitis A).<sup>20</sup>

18. The Directorate confirmed that Lieutenant Colonel Hoebee did not complete the required 181 days in Vietnam and that his departure from theatre, being for illness, did not meet the other qualifying criteria for a lesser period of service. Accordingly, the Delegate determined that Lieutenant Colonel Hoebee was not entitled to the RVCN as he did not meet the eligibility criteria. During the second hearing, the Directorate acknowledged that the wording of the letter sent to Lieutenant Colonel Hoebee on 1 May 2008 was poor, in that it was open to the interpretation that Lieutenant Colonel Hoebee's evacuation might indeed fall within the eligibility criteria for the RVCN. The Acting Director, Ms Jo Callaghan, apologised for the potential misunderstanding this created, but did not resile from the actual decision to refuse the award.<sup>21</sup>

19. During the first Hearing, the Tribunal drew the attention of the Defence representatives to a number of inconsistencies in the Defence records relating to Lieutenant Colonel Hoebee and the RVCN. In particular, Lieutenant Colonel Hoebee's Record of Service carries an entry, 'Campaign 15 Sep 71 60B-Vietnam Medal 87M – Vietnamese Campaign Medal'. This was accompanied by a notation under RO (Routine Order) Issue of 32/3578/71 (8). This suggested that the authority had been an Australian Infantry Corps Routine Order 3578 of 1971 and that Lieutenant Colonel Hoebee's entry had been the eighth from whatever promulgation

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<sup>19</sup> Record of Service – 44149 Huibrecht Pieter Matthjis Hoebee

<sup>20</sup> Record of Service – 44149 Huibrecht Pieter Matthjis Hoebee

<sup>21</sup> Ms Jo Callaghan evidence to the second hearing 9 October 2018.

list that the Routine Order contained.<sup>22</sup> Defence were unable to cast any light on this entry. Lieutenant Colonel Hoebee noted that he himself had been unable to locate a copy of the RO. The Defence representatives indicated that it was their belief that the Certificates of Service provided to Lieutenant Colonel Hoebee in 1993 and 2013 which had included the RVCM within his list of ‘Decorations, Medals and Commendations’ would have been based on this entry.<sup>23</sup>

### **Lieutenant Colonel Hoebee’s Service Record**

20. Lieutenant Colonel Hoebee’s service record indicates that he enlisted in the CMF on 5 October 1965. He was discharged from the CMF on 31 October 1966 and enlisted in the Australian Regular Army on 1 November 1966. He was allotted for Special Service in Vietnam on 13 March 1969 and emplaned in Sydney for Vietnam on 24 March 1969. He transferred to 9 RAR on 14 April 1969 and, at the time of his illness, was in command of 8 Platoon in C Company. The then Lieutenant Hoebee was diagnosed with Infective Hepatitis on 2 September 1969, transferred to 1 Australian Field Hospital and approved for return to Australia on the grounds of his illness. He emplaned at Vung Tau for Butterworth on 16 September and arrived in Australia at Richmond Air Base on 18 September 1969.

### **The Tribunal’s Consideration of Eligibility for the RVCM**

21. There is no dispute regarding Lieutenant Colonel Hoebee’s period of service in Vietnam being from 25 March to 16 September 1969 – a period of 177 days. There is also no dispute that he was medically evacuated from Vietnam because he was suffering from Hepatitis A. Defence has accepted that it is reasonable to conclude that Colonel Hoebee acquired the infection while in the field on Operation *Neppabunna*. Defence provided written evidence from a senior medical officer to this effect.<sup>24</sup> This was confirmed by Colonel Peterson at the second hearing. At issue is whether the condition which required Lieutenant Colonel Hoebee’s removal from theatre can be classified as ‘wounded in action’.

22. We are satisfied that the Directorate decision was made by an appropriately authorised Delegate and the correct legislation was applied in the making of the decision - being *Military Board Instruction 102-4*.<sup>25</sup>

23. The Tribunal is bound by the eligibility criteria that governed the award of the RVCM at the time of the reviewable decision. Accordingly, in order for Lieutenant Colonel Hoebee to be eligible for the award of the RVCM, we must be satisfied that he either completed the qualifying period of 181 days of service in Vietnam or that the reason for his early removal from theatre fell within one of the prescribed exceptions.

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<sup>22</sup> Record of Service –44149/8214366 Huibrecht Pieter Matthjis Hoebee

<sup>23</sup> Certificate of Service – 44149 Lieutenant Colonel Huibrecht Hoebee dated 20 July 1993 Certificate of Service – 44149/8214366 Lieutenant Colonel Huibrecht Hoebee dated 06 December 2013

<sup>24</sup> Email from Colonel Glenn Wells (Directorate of Strategic Clinical Governance, JHC) of 13 December 2016 to DHA

<sup>25</sup> Military Board Instruction 102-4 dated 23 December 1968, ‘Medals – the Vietnamese Campaign Medal’

24. We carefully considered the key argument made by the applicant and his representative, as well as the evidence provided in support. This centres on the contention that Lieutenant Colonel Hoebee's exposure to Hepatitis A was the direct result of the enemy's deliberate action to boobytrap and mine the bunds which normally allowed passage through the flooded paddy fields, thereby forcing Australian personnel shoulder or neck-deep into contaminated water. The Tribunal accepts that this argument creates an issue of interpretation of the criterion of 'wounded in action' rather than a requirement to amend it. There is a clear precedent for such revisions in interpretation in the Tribunal's 2014 recommendation to accept psychological injury as a direct result of action with the enemy as being 'wounded in action'<sup>26</sup> and Defence's subsequent incorporation of that recommendation into its policies.

25. The Tribunal noted that judgements as to whether a soldier was 'wounded in action' as a result of enemy action are inherently subjective. This was acknowledged in the Tribunal's *Report of the Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* when the Tribunal explicitly accepted that, 'In an extreme case, a casualty caused by crawling through a tunnel constructed by the enemy in a defensive position, would be caused by the enemy even though the enemy was not present at the time the casualty was incurred.'<sup>27</sup> Although the Tribunal's report immediately followed this with the judgement that, 'A casualty caused by illness (such as malaria or encephalitis) would not be eligible', in this particular case the manner of acquiring the disease deserves consideration. It involves unique circumstances which sit outside the Defence policy endorsed in the Tribunal's Report. There is merit in Lieutenant Colonel Hoebee's argument that the nature of the operation, shaped as it was by the requirement to respond to the enemy's actions, created the circumstances in which he acquired the disease. While there are a number of tropical diseases, notably both malaria and encephalitis, which can readily be caught simply by being in a tropical country, despite prophylactic measures, Hepatitis A is not so simply acquired, provided individuals are in reasonable conditions and maintain basic, largely common sense precautions. Operation *Neppabunna* was a combination of very poor conditions with an inability to take such precautions. It is clear the actions of the enemy had created this combination of circumstances.

26. The Tribunal is not of the view that accepting that Lieutenant Colonel Hoebee's illness equated to him being wounded in action makes a general change to the prohibition on physical illness being considered as 'wounded in action'. It is limited to the particular circumstances of this case. We do not accept that, for example, an individual's being infected with disease while in a rear area can be considered as the result of enemy action in the same way, however obvious the relationship between deployment into theatre and the general actions of the enemy which have required a military response by Australia. It remains necessary in each case to establish credible causal links between the individual's being infected and the enemy's actions within the operational environment. For an illness to be eligible, conditions similar to those for psychological injury would need to be met. That is, the illness would need to have been acquired when taking part in operations against the enemy; the illness would need to be noted on the member's medical records at the

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<sup>26</sup> Defence Honours and Awards Appeals Tribunal *Report of the Inquiry into Eligibility for the Republic of Vietnam Campaign Medal*, p.31

<sup>27</sup> *Ibid* p. 30



time; and the member would need to have been evacuated from the operational theatre as a result of the illness. The Tribunal is of the view that these conditions have been met in the case of Lieutenant Colonel Hoebee.

### **Finding**

27. For the above reasons we find that Lieutenant Colonel Hoebee is eligible for the RVCN according to reasonable interpretation of the criteria for its award. We therefore find that the decision of the Directorate should be set aside and that Lieutenant Colonel Hoebee should be awarded the RVCN.

### **DECISION**

28. The Tribunal therefore sets aside the decision of 1 May 2008 of the Directorate of Honours and Awards of the Department of Defence and substitutes its new decision to recommend that Lieutenant Colonel Huibrecht Pieter Matthijs Hoebee (Retd) be awarded the Republic of Vietnam Campaign Medal for his service in Vietnam in 1969.