



Australian Government

Defence Honours and Awards Appeals Tribunal

Kofoed and the Department of Defence [2018] DHAAT 04 (13 June 2018)

File Number 2017/012

Re **Mr Francis Kofoed**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Graham Mowbray (Presiding Member)
Ms Jo Lumb

Hearing Date 8 May 2018

DECISION

On 13 June 2018 the Tribunal affirmed the decision of the Directorate of Honours and Awards of the Department of Defence of 15 December 2015 affirming the cancellation of the award of the Australian Active Service Medal 1945-1975 with Clasp 'MALAYA' to Mr Francis Kofoed, and not recommending Mr Francis Kofoed for the award of this Medal.

CATCHWORDS

DEFENCE AWARDS – *Australian Active Service Medal 1945-1975 – Returned from Active Service Badge*

LEGISLATION

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

Defence Regulation 2016 – ss 6, 36

Commonwealth of Australia Gazette No. S 54, Australian Active Service Medal 1945-1975 Regulations: Declaration under Regulation 3, Determination under Subregulation 4(2), 10 February 1998

Commonwealth of Australia Gazette No. S 18, Schedule, Regulations Governing the Award of the Australian Active Service Medal 1945-1975, 19 January 1998

Commonwealth of Australia Gazette No. S 102, Declaration and Determination under the Australian Active Service Medal 1945-75, 27 March 2001

REASONS FOR DECISION

Introduction

1. The applicant, Mr Francis Kofoed, seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence to affirm an earlier decision to cancel the award of the Australian Active Service Medal 1945-1975 with Clasp 'MALAYA' (AASM 1945-1975) and the Returned from Active Service Badge (RASB).¹ This was effectively a decision to refuse to recommend Mr Kofoed for these awards.

2. On 27 March 2014 Mr Kofoed applied to the Tribunal for review of a decision of the Directorate concerning his eligibility for the Naval General Service Medal 1915-1962 with Clasp 'MALAYA' (NGSM).² In the course of its reassessment of Mr Kofoed's eligibility for the NGSM, the Directorate formed the view that Mr Kofoed had been awarded the AASM 1945-1975 and the RASB in error.³ Consequently, on 8 September 2014 the Governor-General cancelled the award of the AASM 1945-1975.⁴

3. On 18 August 2015 Mr Kofoed contacted the Defence Service Centre regarding the decision to cancel and recall the AASM 1945-1975 and the RASB. On 15 December 2015 Ms Emily Jacka, Director Honours and Awards in the Department of Defence, advised Mr Kofoed that she had affirmed the cancellation decision. She also told Mr Kofoed that he could seek review of this decision in the Tribunal.⁵

4. Mr Kofoed's local member of Parliament, the Hon Sussan Ley MP made further representations on behalf of Mr Kofoed to the Minister for Veterans' Affairs in March 2016 and the Assistant Minister for Defence in May 2016. These representations were unsuccessful.⁶

5. On 15 September 2017 Mr Kofoed applied to the Tribunal for review of the decisions on the AASM 1945-1975 and the RASB. While the Tribunal accepted the application for review of the AASM 1945-1975, Mr Kofoed was advised that the Tribunal did not have jurisdiction to review the decision concerning the RASB.⁷

¹ Application for Review to the Tribunal, 15 September 2017 Mr Kofoed says that both the AASM 1945-1975 and the RASB were awarded on 17 May 2010

² On 3 September 2014 Mr Kofoed abandoned this NGSM appeal

³ Letter Ref No – AF18597905, DHA – R53426, Director Honours and Awards to F Kofoed, 5 August 2014

⁴ Minute 'Recommendation for Awards', Director Honours and Awards to Governor-General, 5 September 2014, Schedule 425/14

⁵ Letter Ref No – AF22997601, DHA – R53426, Director Honours and Awards to F Kofoed, 15 December 2015

⁶ Letters MC16-001061, the Hon M McCormack MP, Assistant Minister for Defence, to the Hon S Ley MP, 2 May 2016, Letter DH&A/OUT/2016/0108/MC16-001959, Director Honours and Awards to the Hon S Ley MP, 7 June 2016

⁷ Letter DHAAT/OUT/2017/433, DHAAT/APPEAL/2017/012, Executive Director, DHAAT, to F Kofoed, 6 October 2017

Tribunal Jurisdiction

6. Pursuant to s 110VB(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 s 110V(1) and includes a decision made by a person within the Department of Defence or the Minister to refuse to recommend a person for an honour or award in response to an application. Section 6 of the *Defence Regulation 2016* defines a defence award as being those awards set out in Section 36 of the Regulation. Included in the defence awards set out in Section 36 is the AASM 1945-1975.

7. Mr Kofoed made an application via an ‘inquiry’ to the Defence Service Centre on 18 August 2015 leading to the 15 December 2015 affirmation of the decision to cancel the award of the AASM 1945-1975. This amounted to a refusal to recommend Mr Kofoed for an award as required by s 110V(1) of the Act. However, although the AASM 1945-1975 is included as a defence award in Section 36 of the *Defence Regulation 2016*, the RASB is not.

8. Thus, the Tribunal has jurisdiction to review the decision on the AASM 1945-1975 but not on the RASB.

Conduct of the Review

9. In accordance with its *Procedural Rules 2011*, on 18 October 2017 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Kofoed’s application and requesting a report on the material questions of fact and the reasons for the decision made on Mr Kofoed’s eligibility for the AASM 1945-1975.⁸

10. The Director Honours and Awards in the Department of Defence provided a report and Defence’s submissions on 1 December 2017, noting that the Tribunal had no jurisdiction to consider the RASB. Defence recommended that its decision should be affirmed as Mr Kofoed did not serve in the Malayan Emergency in the Federation of Malaya and the Colony of Singapore during the relevant period for the AASM 1945-1975.⁹

11. On 5 December 2017 the Tribunal forwarded the Defence report to Mr Kofoed for his comments.¹⁰ Mr Kofoed provided these on 19 December 2017.¹¹

12. The Tribunal met on 2 March 2018 to consider the material provided by Mr Kofoed and Defence and to set a hearing date.

13. On 8 May 2018 the Tribunal held a hearing by telephone with Mr Kofoed. Defence was represented by Ms Alexandra Stewart and Mr Mark Jordan, with several officers attending as observers.

⁸ Letter DHAAT/OUT/2017/438, Ref Applic No 2017/012, Chair DHAAT to Secretary, Department of Defence, 18 October 2017

⁹ Letter DH&A/OUT/20170184, 2011/1169027, fAL2177043, Director Honours and Awards to the Tribunal, 1 December 2017

¹⁰ Letter DHAAT/OUT/2017/502, Ref Applic No 2017/012, Executive Director, DHAAT, to F Kofoed, 5 December 2017

¹¹ Letter F Kofoed to the Tribunal, 19 December 2017

Mr Francis Kofoed's Service Record

14. Mr Francis Kofoed was born on 13 July 1940 and enlisted in the Royal Australian Navy on 26 August 1957 with initial training as a Telegraphist. This rating was subsequently reclassified as a Radio Operator.¹² He was discharged from the service on 9 February 1963.

15. According to Mr Kofoed's service record he was posted to the Royal Navy shore establishment HMS *Terror* in Singapore from 4 June 1962 to 21 September 1962.¹³ It is for this period of overseas service for which Mr Kofoed sought the AASM 1945-1975.

16. For his service in the RAN, Mr Kofoed has received the following awards

- the Australian Service Medal 1945-75 with Clasp 'SE ASIA'
- the Australian Defence Medal
- the Pingat Jasa Malaysia.

Eligibility Criteria for the Australian Active Service Medal 1945-1975

17. The AASM 1945-1975 was established by Letters Patent on 11 December 1997 'for the purpose of according recognition to members of the Defence Force, and certain other persons, who rendered service in warlike operations'.¹⁴

18. The award of the medal is governed by regulations set out in the Schedule to the Letters Patent.¹⁵ Of particular relevance to the current application are the following regulations

2. *In these regulations:*

...

"prescribed operation" means an operation in respect of which a declaration has been made under regulation 3.

Prescribed operations

3. *The Governor-General, on the recommendation of the Minister, may declare a warlike operation in which members of the Defence Force were engaged at any time during the period that commenced on 3 September 1945 and ended on 13 February 1975, to be a prescribed operation for these Regulations.*

¹² Application for Review to the Tribunal, 15 September 2017

¹³ Record of Service R53426, Francis Edward Kofoed

¹⁴ *Commonwealth of Australia Gazette No. S 18*, 19 January 1998

¹⁵ *Commonwealth of Australia Gazette No. S 18*, Schedule, Regulations Governing the Award of the Australian Active Service Medal 1945-1975, 19 January 1998

Conditions for award of the Medal

4. (1) *The Medal may be awarded to the following persons who served in connection with a prescribed operation:*

(a) *a member, or a former member, of the Defence Force;*

(b) *a person in a class of persons determined by a Minister for these Regulations.*

(2) *The conditions for the award of the Medal are determined by the Governor-General on the recommendation of a Minister.*

(3) *The Medal may only be awarded to a person who fulfils the conditions for the award of the Medal.*

...

19. On 23 March 2001 the Governor-General made the following declaration:

*declare, under regulation 3 of the Regulations, warlike operations in which members of the Australian Defence Force were engaged in during the Malayan Emergency in the Federation of Malaya and the Colony of Singapore during the period that commenced on 16 June 1948 and ended on 31 July 1960 to be a prescribed operation for the purposes of the Regulations;*¹⁶

20. The conditions for the award of the Medal determined under subregulation 4(2) are all ‘in respect of that *prescribed operation*’.¹⁷ Furthermore the previous declaration and determination made on 30 January 1998 are similarly confined.¹⁸

Mr Kofoed’s Evidence and Submissions

21. Mr Kofoed provided evidence and submissions to the Tribunal in two written documents, notably in his application and attachments to the Tribunal of 15 September 2017 and his comments of 19 December 2017 on the Defence report. He also presented brief oral evidence and submissions by telephone at the hearing on 8 May 2018.

22. In his 15 September 2017 submissions Mr Kofoed said¹⁹

- in 1962 he volunteered and was accepted for service as a member of a RAN Communication Detachment to be based in Singapore
- prior to posting he underwent training for ‘R/O (S)’ at HMAS Harman and short arms and pyrotechnics training

¹⁶ *Commonwealth of Australia Gazette No. S 102*, Declaration and Determination under the Australian Active Service Medal 1945-75, 27 March 2001

¹⁷ *ibid*

¹⁸ *Commonwealth of Australia Gazette No. S 54*, Australian Active Service Medal 1945-1975 Regulations: Declaration under Regulation 3, Determination under Subregulation 4(2), 10 February 1998

¹⁹ Application for Review to the Tribunal, 15 September 2017

- he arrived in Singapore in June 1962 ‘I believe on loan to Royal Navy at HMS Terror, did not serve a single day in Terror, billeted at RAF Seletar’
 - he believed his work station was Kranji W/T Station, a Royal Navy facility on Singapore Island
 - a Department of Veterans’ Affairs determination of February 1991 stated he rendered ‘Operational Service’ under the Veterans’ Entitlements Act
 - in January 2007 he was told he was not eligible for either the NGSM or the AASM 1945-1975, but received the AASM 1945-1975 in May 2010 only for it to be cancelled in 2014
 - he believed his service should be reclassified as ‘War Service’ given the determination by the Department of Veterans’ Affairs and the type of weapons training he undertook in preparation for the Singapore deployment.
23. Mr Kofoed expressed concern in his 19 December 2017 letter that the Defence report had not addressed the issues he had raised²⁰
- why he had undertaken short arms and pyrotechnic training prior to the Singapore deployment
 - the Department of Veterans’ Affairs letter saying his cancer was not due to war service
 - errors relating to his Singapore service, being land based not seagoing
 - the nature of his Singapore service.

24. Mr Kofoed said

*... apart from anything else I have been subject to a fair amount of various departmental mismanagement over a very long period and still believe my service in Singapore should be recognised as War Service.*²¹

25. At the hearing on 8 May 2018 Mr Kofoed reiterated many of these points. However, critically he accepted that having served in Singapore in 1962 he fell outside the qualifying period for the AASM 1945-1975 which ended on 31 July 1960. He agreed he was not therefore entitled to the AASM 1945-1975 and was not seeking its reinstatement.

26. However he wished to pursue with the Defence officials why his service was not classed as ‘War Service’ and wanted answers to the concerns he had raised in his submissions. Mr Kofoed referred to the embarrassment he had suffered, especially in ex-service circles, as a result of initially being awarded the AASM 1945-1975 and wearing the medal, and subsequently being advised he was not entitled to it. He also sought a corrected Certificate of Service.

²⁰ Letter F Kofoed to the Tribunal, 19 December 2017

²¹ *Ibid*

The Defence Submissions

27. The Defence Report and Submission provides the background to this application and Mr Kofoed's relevant service.²² In a section on the eligibility criteria for the AASM 1945-1975, it sets out provisions from the regulations and associated declaration and determinations. This material includes a number of serious errors and is so confused that it is surprising that the Department was able to reach the correct conclusion.²³ The Tribunal Assessment Working Paper prepared by Ms N Shingles and signed off by Mr M Jordan attached to the Submission however contains a correct statement of the applicable rules.²⁴

28. Defence concludes that Mr Kofoed is not entitled to the AASM 1945-1975 as he did not serve in the Malayan Emergency in the Federation of Malaya and the Colony of Singapore during the period 16 June 1948 to 31 July 1960. It also states that Mr Kofoed is not able to be issued with the RASB as it can only be given in his case if the AASM 1945-1975 had been awarded.

29. Defence therefore recommends that the decision under review be affirmed.²⁵

30. At the hearing the Defence representatives briefly confirmed the Department's written submissions. They apologised to Mr Kofoed for the errors which had occurred within the Department over the years in relation to the AASM 1945-1975 and for the embarrassment it had caused him. They undertook to obtain answers to the questions he had raised and to pursue the issue of a new corrected Certificate of Service.

Tribunal Consideration

31. **Merits Review.** The Tribunal is required to review decisions 'on the merits'. This involves an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.²⁶ 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.

32. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.²⁷ 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.²⁸ The Tribunal is bound to make what it regards as the 'correct or preferable' decision and must reach a decision that is legally and factually correct.

33. **Eligibility Criteria for the AASM 1945-1975.** These are set out at paras 17-20 above.

²² Letter DH&A/OUT/20170184, 2011/1169027, fAL2177043, Director Honours and Awards to the Tribunal, 1 December 2017

²³ *Ibid* – see paras 8-11

²⁴ *Ibid* – see para 25

²⁵ *Ibid* para 28

²⁶ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 para 1.3.1.2

²⁷ Pearson, Linda, "Merit Review Tribunals", in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, page 68

²⁸ *McDonald v Director-General of Social Security* (1984) 1 FCR 354

34. The critical criterion is that a member of the Defence Force must have rendered service in a *prescribed operation* declared by the Governor-General as such. In the case of the AASM 1945-1975 the prescribed operation for the Malayan Emergency was for a period from 16 June 1948 until 31 July 1960.

35. **Mr Kofoed's Service.** It is not disputed that Mr Kofoed's period of service in Singapore was from 4 June 1962 to 21 September 1962. Nor is it suggested that he served in the relevant area at any time between 16 June 1948 to 31 July 1960. Mr Kofoed himself does not contest this.

36. **Mr Kofoed's Eligibility for the AASM 1945-1975.** Mr Kofoed does not meet the critical criterion for the grant of this award; that is service in *prescribed operation* declared by the Governor-General as such. Mr Kofoed accepted this at the hearing on 8 May 2018.

37. For completeness the Tribunal notes that an entitlement or determination under the Veterans' Entitlements Act is not determinative nor usually relevant when dealing with eligibility for Defence Awards. This is a common source of confusion, as it has been for Mr Kofoed.

Tribunal Finding

38. For the reasons given above, the Tribunal finds that Mr Kofoed is not eligible for the AASM 1945-1975. His service in Singapore was not part of a *prescribed operation* entitling him to this award.

39. The Tribunal notes with appreciation that the representatives of the Department of Defence have agreed to provide answers to the questions Mr Kofoed raised in his submissions and at the hearing, and to forward to him a corrected Certificate of Service.²⁹ In particular, Mr Kofoed sought an explanation of why his service in Singapore was not recognised as 'warlike'.

TRIBUNAL DECISION

40. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence of 15 December 2015 affirming the cancellation of the award of the Australian Active Service Medal 1945-1975 with Clasp 'MALAYA' to Mr Francis Kofoed, and not recommending Mr Francis Kofoed for the award of this Medal.

²⁹ See paras 23, 26 and 30 above