



Australian Government

Defence Honours and Awards Appeals Tribunal

Payne on behalf of Murphy and the Department of Defence [2018] DHAAT 30 (22 November 2018)

File Number 2018/003

Re **Mr Mark Payne obo Mr James Joseph Murphy**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Graham Mowbray (Presiding Member)
Mr David Ashley AM

Appearances Mr Mark Payne (by telephone)
Ms Allison Augustine, Department of Defence
Mr Brett Mitchell, Department of Defence

Hearing Date 2 October 2018

DECISION

On 22 November 2018 the Tribunal set aside the decision of the Department of Defence of 26 September 2017 and substituted a decision to recommend that Mr Murphy be awarded the Australia Service Medal 1939-45 for his service from 1 April to 28 November 1940.

CATCHWORDS

DEFENCE AWARD – Australia Service Medal 1939-45

LEGISLATION

Defence Act 1903 – ss 110VB(2), 110VB(6)
Commonwealth of Australia Gazette No. 91, Royal Warrant, The Australia Service Medal 1939-45 – dated 30 November 1949
Commonwealth of Australia Gazette No.S309, Amendment of Royal Warrant for Award of the Australia Service Medal 1939-45 – dated 21 August 1996

REASONS FOR DECISION

Introduction

1. Mr Mark Payne seeks review of a Department of Defence decision of 26 September 2017 refusing the award of the Australia Service Medal 1939-45 (ASM 1939-45) to his uncle, Mr James Joseph Murphy, for service during the Second World War.¹ Mr Murphy died in 1975.

2. Mr Murphy had two periods of service as a Private/Gunner during the War

- 1 April 1940 to 28 November 1940 with the 2nd Australian Imperial Force
- 21 November 1941 to 27 November 1942 with the Australian Military Forces followed by 28 November 1942 to 7 February 1945 with the 2nd Australian Imperial Force.

3. Mr Murphy served overseas in New Guinea with 101 Australian Tank Attack Regiment from 17 September 1942 until 21 October 1943. His Medal Card indicates that his entitlement to medals was assessed but his card was annotated with 'Awards Withheld' on 9 July 1946. Mr Murphy's entitlement was reassessed some years later and he was awarded the

- 1939-45 Star
- Pacific Star
- War Medal 1939-45

Eligibility Criteria for the ASM 1939-45

4. Following the conclusion of the Second World War the Australian Defence Committee recommended that Australia institute a medal of its own in connection with the War. Subsequently the ASM 1939-45 was created by Royal Warrant on 30 August 1949. This was published in the *Commonwealth of Australia Gazette* in November that year.²

5. For the purposes of this review two criteria in the Warrant are relevant

- the period of qualifying service for full-time duty of 18 months at home or overseas
- only 'those who have received, or would be entitled to receive, an honourable discharge shall be eligible'.

¹ This review also encompasses a further unsuccessful assessment of Mr Murphy's eligibility for the ASM 1939-45 undertaken by Ms Jo Callaghan of Defence on 27 July 2018

² *Royal Warrant for the Australia Service Medal 1939-45*, Commonwealth of Australia Gazette No. 91, dated 30 November 1949

6. The 18 month period was reduced in 1996 to 30 days as set out in a *Commonwealth of Australia Gazette* in August that year.³

7. Copies of both Gazette notices containing the eligibility criteria are at Attachment A.

The Issues

8. The issues for the Tribunal are

- did Mr Murphy have the required period of qualifying service
- what was Mr Murphy's record during his service
- what is an honourable or dishonourable discharge
- was Mr Murphy honourably discharged.

Mr Murphy's Periods of Service

9. Mr Murphy enlisted in the 2nd Australian Imperial Force in Brisbane on 1 April 1940 for his first period of service and was allocated to the 1st Infantry Training Battalion at the age of 20. He was discharged on 28 November 1940.

10. He re-enlisted for his second period of service on 21 November 1941, being discharged on 7 February 1945. As will become obvious, it is not necessary to consider this second period for this application.

11. There is no dispute that Mr Murphy met the criterion of 30 days for each of his periods of service, even if allowance is made for periods for which he may be unable to claim. This may include 'non-effective' service such as periods Absent Without Leave (AWOL or AWL) or when under arrest or in detention. Defence representatives were specifically questioned on this at the hearing on 2 October 2018 and agreed that he satisfied the 30 days requirement.

12. Mr Murphy's first period of service was about 240 days, of which 96 days were prior to 6 July 1940 when he went 'AWL'. His second was over three years.

Mr Murphy's Record

13. Mr Murphy's service record⁴ is missing important detailed information, but it does indicate, and it is not in question, that during his first period of service

- he was absent without leave from 30 June 1940 until 1 July 1940
- he was absent without leave on 6 July 1940 and 'still absent on 8 August 1940'.

³ Amendment of Royal Warrant for Award of the Australia Service Medal, *Commonwealth of Australia Gazette* No. S 309, 21 August 1996

⁴ Service and Casualty Form, NAA B883, QX7065, Murphy, James Joseph, Service Record

14. His record contains no information about where Mr Murphy was or what he did after the July-August 1940 AWL. It is uncertain when he returned but he appears to have been placed under close arrest on his return. He was awaiting trial on 11 November 1940, with the trial dispensed with when he was discharged. He was marched out from the Detention Camp on 27 November 1940 for discharge the following day.⁵ Although it is not clear from the record, it is likely that Mr Murphy was either under a form of arrest or in detention during that period.

15. The Defence submission suggested that he had also been an illegal absentee on 28 April 1940, returned and was placed under close arrest.⁶ This assessment is probably a misreading of Mr Murphy's service record.

16. Mr Murphy was discharged on 28 November 1940. The first entry on his record of service placed on 28 November 1940 stated *Discharged U.D.H.C* (unfit for the duties of his corps). This was amended by a correction entered on 22 November 1946, as the result of General Routine Order 65 of 1946⁷ which had broad application across the Army, to a discharge under Australian Military Regulation and Orders 253A(1)(iv) (sic 253(1)(iv)) – as unfit for the duties of his corps (on account of discreditable service).⁸

17. None of Mr Murphy's records expressly state that this discharge was 'honourable' or 'dishonourable'.⁹

18. When Mr Murphy enlisted on 21 November 1941 for his second period of service, his attestation form indicated that he declared that he had previous service of 242 days and the reason for his discharge was 'AWL'.¹⁰ This reason appears to have been accepted by the authorities at the time.

19. In his written submissions and at the hearing Mr Payne accepted that his uncle was not a perfect soldier and was absent without authorisation for quite a period during his two periods of service.

Honourable and Dishonourable Discharges

20. The Tribunal's Inquiry into the *Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards* gave some consideration to the issue of dishonourable discharge.¹¹ It noted that the War Cabinet decided in May 1944 that only those members with an honourable discharge would be entitled to receive certain post service benefits.

⁵ *Ibid*

⁶ Department of Defence, Directorate of Honours and Awards *Tribunal Assessment Working Paper* dated 27 July 2018

⁷ Army General Routine Order 65/1946 dated 15 February 1946 – folios 50-52

⁸ Service and Casualty Form, NAA B883, QX7065, Murphy, James Joseph, Service Record

⁹ See Service and Casualty Form, Receipt for Certificate of Discharge, and Attestation Forms on re-enlistment Service and Casualty Form, NAA B883, QX7065, Murphy, James Joseph, Service Record

¹⁰ Mobilization Attestation Form dated 21 November 1941 NAA B883, QX7065, Murphy, James Joseph, Service Record

¹¹ *DHAAT Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards*, 7 September 2015. See especially chapter 3.

21. In 1944 the three Services defined 'dishonourable' for various reasons and purposes usually related to conditions of service. Relevantly, some of the grounds that would constitute 'dishonour' was discharge in the following circumstances

- discharge with ignominy from His Majesty's Service
- by reason of numerous convictions deemed to be incorrigible
- sentence during his service to penal servitude or imprisonment by a civil court or Court Martial
- sentence by a Court Martial to be discharged.

22. The Tribunal Report also noted that the practice of annotating a member's service record with the term 'dishonourable' was only Army practice between July 1949 and January 1953, well after both of Mr Murphy's discharges.

23. Significantly, there is no evidence of what would constitute an 'honourable' discharge. It appears that unless stated otherwise and in the absence of certain forms of misconduct, it became generally accepted that most discharges could be considered 'honourable'. The Tribunal Report provides little further assistance.

24. Defence relied on two instruments to show that Mr Murphy's discharge in 1940, and his later one in 1945, were both 'dishonourable', and therefore precluded award of the ASM 1939-45. These are

- Army General Routine Order 65 of 1946 dated 15 February 1946
- Military Board Instruction 187 of 1948 dated 8 October 1948.

25. Paragraph 2(ii)(c) of the Army General Routine Order 65 of 1946 suggests that a person discharged as 'considered unfit for the duties of his corps' will be deemed to have been dishonourably discharged.¹² But a closer examination of this General Routine Order reveals its purpose was to determine 'Ineligibility to Service Benefits on Discharge of a Soldier...', benefits which included leave, pay in lieu of leave, clothing ration coupons, civilian clothing, etc. No mention is made of withholding of medallic recognition for service rendered. It is instead directed at post service benefits.¹³

26. This Army General Routine Order was cancelled on 8 October 1948 by Military Board Instruction 187 of 1948 dated 8 October 1948 which also was concerned with discharge benefits.¹⁴ It in turn was cancelled on 8 July 1949 by Military Board Instruction 115 of 1949. These three instruments postdate Mr Murphy's two dates of discharge and predate the creation of the ASM 1939-45 on 30 August 1949.

27. At the hearing on 2 October 2018 the Defence representatives accepted that these instruments were not binding legal authority for the Tribunal in determining what amounted to an honourable or dishonourable discharge for the ASM 1939-45. They

¹² Army General Routine Order 65/1946 dated 15 February 1946

¹³ *ibid*, heading and para 1

¹⁴ Military Board Instruction 187/1948 dated 8 October 1948

were indicative of the type of thinking or common parlance of the time. They only provided guidance. In our view these concessions were appropriately made.

28. There are various dictionary definitions of ‘honour’, ‘honourable’, ‘dishonour’ and ‘dishonourable’. The Macquarie Dictionary speaks of ‘honour’ as being of ‘high public esteem; fame; glory ... credit or reputation for behaviour that is becoming or worthy’.¹⁵ ‘Honourable’ is ‘in accordance with principles of honour; upright’.

29. ‘Dishonour’ is defined as ‘lack of honour ... disgrace; ignominy; shame’ and ‘dishonourable’ as ‘showing lack of honour; ignoble; base; disgraceful; shameful’.

30. We have given some weight to the dictionary definitions and the Army Orders and Instructions in determining this issue. But we note that none of these are definitive and we are consequently bound to take a common sense approach. Importantly we are of the view that, in determining whether a discharge is ‘honourable’ in the context of military service, in reality we must examine whether the circumstances of the discharge were ‘dishonourable’ at the time of the discharge.

31. Having carefully considered the material before us, we are of the view that normally for a discharge to be considered ‘dishonourable’, a soldier would need to have been discharged by order of a Court Martial, sentenced to a significant period of imprisonment by a civil court or Court Martial, or have been deemed incorrigible in the sense of incurably bad or beyond correction. His record would also need to have been annotated as ‘dishonourable discharge’. If these circumstances did not exist, a soldier should be considered to have been ‘honourably’ discharged.

32. We have reached this conclusion recognising that each case is different and should be judged on its own merits. We are also conscious that the circumstances in question occurred around 75 years ago.

Mr Murphy’s First Discharge was Honourable

33. As stated above, Mr Murphy’s was first discharged from the Australian Imperial Force on 28 November 1940. The first entry on his record of service placed on 28 November 1940 stated

Discharged U.D.H.C.

34. This was amended by a correction entered on 22 November 1946 as the result of General Routine Order 65 of 1946 which had broad application across the Army

Discharge : AMR & O 253A(1)(iv) Unfit for the duties of his corps (on account of discreditable service)¹⁶

35. It is accepted that the reference to AMR & O 253A should be to AMR & O 253. This form of discharge may have disentitled him to certain post service benefits under General Routine Order 65 of 1946. However as noted above this instrument says nothing about withholding medallion recognition. His discharge was by administrative

¹⁵ *Macquarie Dictionary*, Revised Third Edition, 1997

¹⁶ Service and Casualty Form – Private J.J. Murphy NAA B883, QX7065, Murphy, James Joseph, Service Record

action and was not the result of any Court Martial or civil court decision. None of his records are annotated to show Mr Murphy had been dishonourably discharged.¹⁷

36. Mr Murphy's discharge was at the end of a period of service which included one very short period of unauthorised absence, followed by one longer period, the details of which are unclear.¹⁸

37. None of the misdemeanours involving unauthorised absence which led to Mr Murphy being discharged are 'base', 'ignoble', 'lacking in honour' or amounting to 'ignominy'. He was not guilty of desertion or disgraceful conduct, or the subject of serious criminal convictions. Indeed he had no criminal convictions during this period. He was just deemed unfit for the duties of his corps.

38. The fact that his service was labelled as 'discreditable' in a correction to the record some six years after the discharge, following a General Routine Order of general application across the Army, does not necessarily make the discharge 'dishonourable'. One needs to have regard to the particular circumstances.

39. Mr Murphy was accepted for reenlistment on 21 November 1941 a year after his first discharge with nothing on his record that cast doubt on his honour on being accepted again for the Australian Military Forces. His Mobilization Attestation Form does note that the reason for his previous discharge was 'AWL'.¹⁹ This was therefore known to the enlisting authorities at the time.

40. Importantly therefore, with full knowledge of his having been 'AWL' during his previous service, his superiors accepted him back into the Army. This would preclude a reasonable person from concluding that his earlier discharge was dishonourable. In our view for Mr Murphy's first period of service to have been dishonourable would have required it to have rendered him unfit for further service. This it clearly did not do.

41. In our view a person could not reasonably conclude that Mr Murphy was so dishonourable that he could not serve in Australia, but was honourable enough to serve later in New Guinea. For Mr Murphy's first discharge to have been deemed dishonourable, his aberrant behaviour would need to have been of such an order as to render him permanently unfit for further military service. Mr Murphy's second period of service makes clear that this was not the case, nor was it the likely intention of the decision makers at the time.

42. Mr Murphy's record for his first period of service shows that he was an unreliable, ill-disciplined and unsuitable soldier at that time. This does not mean he was a dishonourable one. Furthermore he later went on to provide service for more than three years, including over a year in New Guinea. As Mr Payne noted his biggest crime was to go AWOL, after which during his later period 'he put his life on the line for Australia'.

¹⁷ *ibid.* See also Receipt for Certificate of Discharge, 28 November 1940

¹⁸ Service and Casualty Form, NAA B883, QX7065, Murphy, James Joseph, Service Record. See also paras 13, 14 and 15 above.

¹⁹ Mobilisation Attestation Form, 21 November 1941, question 7(b), NAA B883, QX7065, Murphy, James Joseph, Service Record

43. We therefore find that Mr Murphy's discharge on 28 November 1940 was not dishonourable. For the purposes of clause 6 of the Royal Warrant we find that he 'received ... an honourable discharge'.

Findings – Mr Murphy is Entitled to the ASM 1939-45

44. For the reasons stated above we find that for Mr Murphy's first period of service from 1 April 1940 to 28 November 1940

- Mr Murphy performed more than 30 days of qualifying service (clause 7 of the Royal Warrant, as amended)
- Mr Murphy received an honourable discharge (clause 6 of the Royal Warrant).

45. Mr Murphy is therefore entitled to be awarded the ASM 1939-45 for this period of service.

46. Having reached this decision, it is unnecessary to determine whether Mr Murphy would otherwise be entitled to this medal for his second period of service.

TRIBUNAL DECISION

47. The Tribunal sets aside the decision of the Department of Defence of 26 September 2017 and substitutes a decision to recommend that Mr Murphy be awarded the Australia Service Medal 1939-45 for his service from 1 April to 28 November 1940.



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[1949.

GEORGE R.

ROYAL WARRANT.

THE AUSTRALIA SERVICE MEDAL 1939-45.

George the Sixth, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, to All to whom These Presents shall come:

Greeting:

WHEREAS We in Our Government of the Commonwealth of Australia have taken into Our Royal consideration the services rendered during the War of 1939 to 1945 by all members of the Australian Armed Forces and Australian Mercantile Marine and by civil members of the Royal Australian Air Force Reserve as aircrew in Australian registered civil aircraft in operational areas, who, when their country was in danger, answered the call and saw service in their country's defence;

And whereas We are desirous of recognising this service to the Commonwealth of Australia;

We do by these presents for Us, Our Heirs and Successors institute and create a new Medal.

1. The Medal shall be designated and styled "The Australia Service Medal 1939-45".

2. The Medal shall be circular in form and of nickel silver, an alloy of copper, nickel and zinc, and shall on the obverse bear the Crowned Effigy of the Sovereign, and on the reverse the coat of arms of the Commonwealth of Australia, surrounded by the words "The Australia Service Medal 1939-45".

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.

4. Representatives of philanthropic bodies, official press correspondents, official photographers and other civil personnel attached to the Armed Forces in an official capacity for full-time duty in uniform shall also be eligible.

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 honorable discharge shall be eligible.

7. The period of qualifying service for full-time duty shall be eighteen months, at home or overseas. For this purpose any period of continuous training shall count as full-time duty. In the case of members of the Australian Mercantile Marine, it shall be a requirement that the eighteen months shall have been served at sea. In the case of civil aircrew personnel eligible for the Medal, it shall be a requirement that they shall have made at least three separate flights over, or three or more landings in, military operational land areas, this rule being waived only in favour of those whose full-time service of less than eighteen months was brought to an end by death due to service or by disability due to service.

8. The period of qualifying service for part-time duty shall be three years, provided that where full-time service of less than eighteen months has been rendered, the period of full-time service shall count doubly towards the part-time service qualification, and provided also that defence duty must have been performed on at least sixty days during the service.

9. Full-time service for a lesser period than eighteen months, or part-time service for a lesser period than three years, if brought to an end by death due to service, or by disability due to service, shall qualify for an award.

10. The Medal shall be worn on the left breast suspended by a khaki ribbon, one and a quarter inches in width, edged dark blue and light blue respectively, each nine-thirtieths of an inch wide, with two intervening red stripes, each one sixteenth of an inch wide. The ribbon shall be worn with the dark blue stripe furthest from the left shoulder.

11. The Medal shall be worn immediately after the War Medal issued by Us in recognition of service during the Second World War.

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.

13. It is ordained that it shall be competent for Our Governor-General for the time being to make regulations to carry out the purposes of this Warrant.

Given at Our Court at St. James's on the thirtieth day of August One thousand Nine Hundred and Forty-nine in the thirteenth Year of Our Reign.

By His Majesty's Command,

J. B. CHIFLEY

Prime Minister.



Commonwealth
of Australia

Gazette

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SPECIAL



Government House
Canberra ACT 2600

IT is notified for general information that the Governor-General has approved the following amendments to the Royal Warrant for the award of the Australia Service Medal 1939-45.



COMMONWEALTH OF AUSTRALIA

AMENDMENT OF ROYAL WARRANT FOR AWARD OF THE
AUSTRALIA SERVICE MEDAL 1939-45

I, WILLIAM PATRICK DEANE, Governor-General of the Commonwealth of Australia, in accordance with powers delegated to me by The Queen on 10 February 1995, approve the following amendments of the Royal Warrant dated 30th August 1949 for the award of the Australia Service Medal 1939-45.

1. Clause 7:

- (a) Omit "eighteen months, at home", substitute "30 days, at home"
- (b) Omit "eighteen months shall", substitute "30 days shall".
- (c) Omit "eighteen months was brought", substitute "30 days was brought".

2. Clause 8:

Omit the clause, substitute:

"8. The period of qualifying service for part-time duty shall be 90 days, provided that where full-time service of less than 30 days has been rendered, the period of full-time service shall count doubly towards the part-time service qualification."

3. Clause 9:

- (a) Omit "eighteen months.", substitute "30 days."
- (b) Omit "three years.", substitute "90 days."

Dated 16th August 1996.

Governor-General

By His Excellency's Command.

Prime Minister

