



Australian Government

Defence Honours and Awards Appeals Tribunal

Phoenix and the Department of Defence [2018] DHAAT 07 (14 June 2018)

File number	2017/015
Re	Stanley PHOENIX Applicant
And	The Australian Army on behalf of the Department of Defence Respondent
Decision under appeal	Decision of 7 April 2018
Tribunal	Ms Naida Isenberg (Presiding Member) Brigadier Kevin O'Brien CSC (Retd) Ms Anne Trengove
Attendance	Mr Phoenix by telephone Brigadier Mark Holmes AM MVO (Army Representative, Historical Honours Review Board) Major Phil Rutherford (Army Headquarters, Research Officer) Ms Alexandra Stewart (Directorate of Honours and Awards)
Hearing	1 June 2018 in Canberra

DECISION

On 14 June 2018 the Tribunal decided to recommend to the Minister that the decision not to recommend Stanley Phoenix for the Conspicuous Service Medal be affirmed.

CATCHWORDS

DEFENCE HONOUR – Conspicuous Service Medal – eligibility criteria - whether Applicant's service should be recognised.

LEGISLATION

*Defence Act 1903 - ss 110VB(1), 110VB(6)
Defence Amendment Regulations (No.1) 2010 - Schedule 3 Part 2
Commonwealth of Australia Gazette No. S108 dated 7 May 1990 (Letters Patent and Regulations for the Conspicuous Service Medal)*

REASONS FOR DECISION

Introduction

1. The Applicant, Stanley Phoenix seeks a Conspicuous Service Medal (CSM) in recognition of his Australian Regular Army (ARA) service between 1985 and 1989. He asserts that he was overlooked at the time for his contribution to improving Army Reserve (ARES) recruitment processes. On 27 August 2015 an assessor at the Directorate of Honours and Awards refused to consider his application. By letter to the Tribunal dated 7 April 2018 the Director-General Personnel - Army attached a report of review in respect of Mr Phoenix's claim, stating that there was insufficient evidence pointing to his service constituting *meritorious achievement or devotion to duty* as required for a CSM. Mr Phoenix seeks in this Tribunal a review of the decision not to grant him a CSM. Mr Phoenix states his recruiting initiatives were essentially commended by his higher Headquarters at 8th Brigade to his Regiment, but for which he did not receive any personal recognition. Rather, he believed a senior officer, initially believed to be his Commanding Officer, Lieutenant Colonel (LTCOL) Wood was awarded a CSM in 1989 for what were essentially his own initiatives and achievements with respect to ARES recruitment.

2. The CSM was created on 18 October 1989 to provide recognition to members of the Australian Defence Force and certain other persons for

*meritorious achievement or devotion to duty in non-warlike situations*¹

3. Mr Phoenix solely relies upon his service from 1985 – 1989 as justifying CSM recognition. It is agreed that his relevant experience during this time constitutes duty in a 'non-warlike situation'. The issue for the Tribunal is whether his actions during that period amount to *meritorious achievement or devotion to duty*.

Merits review

4. The Tribunal is required to review a reviewable decision on the merits. In this case, the reviewable decision is that of the Australian Army of 7 April 2018.²

5. The facts, law and policy aspects of the decision are all considered afresh and a new decision is made.³ 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 original decision was correct.⁴ 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.

6. In considering Mr Phoenix's review, the Tribunal is bound by the relevant eligibility criteria for the claimed honour at the date of the decision under review.⁵

¹ Commonwealth of Australia Gazette No S108, 7 May 1990, *Letters Patent and Regulations for the Australian Conspicuous Service Decorations*

² Minute of Australian Army DGPERS-A/OUT/2018/R33757682

³ Pearson, Linda, 'Merit Review Tribunals', in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68

⁴ *McDonald v Director-General of Social Security* (1984) 1 FCR 354

⁵ Section 110VB(6) of the *Defence Act 1903*.

7. The Tribunal went on to determine whether the available evidence supports a finding that Mr Phoenix's service was sufficiently meritorious so as to come within the eligibility criteria for the CSM.

Evidence before the Tribunal

8. The Tribunal had regard to a number of statements provided by Mr Phoenix, a comprehensive Report into the Review of Retrospective Recognition for Mr Phoenix researched by Major (MAJ) Rutherford of March 2018, which also included a short interview with his former Commanding Officer, LTCOL Lyall Wood AM (Retd) on 14 March 2018. The report sought to identify any new or compelling evidence relevant to Mr Phoenix's application for recognition. At the hearing Mr Phoenix supplemented his statements by giving evidence by conference telephone. Brief submissions were made by Brigadier Holmes. It was the Army's submission that notwithstanding Mr Phoenix's valued and lengthy Army service, he did not meet the threshold for the honour of a CSM.

9. Given the passage of time, only a limited number of Army documents are now available to assist with any written record of Mr Phoenix's actions during the relevant period. For example, no documents were able to be sourced from his Regiment. The only documents before the Tribunal are a Minute of 14 December 1988 and a handwritten Memorandum of 14 February 1989 from Mr Phoenix's higher Headquarters. These are documents which Mr Phoenix kept. The Tribunal also had access to Mr Phoenix's personnel management file which included annual performance reporting, in the form of Confidential Reports for the relevant years.

Mr Phoenix's Army service

10. Mr Phoenix enlisted in the ARA in 1973, and served until 1999, having attained the rank of Staff Sergeant. From December 1985 to June 1990 he was posted to 2/17 Battalion, Royal New South Wales Regiment (2/17 RNSWR). The battalion's higher headquarters was 8 Brigade (8 BDE). The battalion's headquarters was at Pymble and there were a number of local Army Reserve Depots across NSW that were utilised in the training of the battalion subunits and specialist platoons. Mr Phoenix served at the rank of Sergeant (SGT) attached to the Regular Army cadre staff allotted to Delta Company, based at the Orange Depot. He also looked after other smaller depots at Parkes and Dubbo. As a member of the cadre staff, he supported the training needs of a large number of ARES members, who attended on parade nights and training weekends. LTCOL Wood was his Commanding Officer for all but the last six months of his posting to the Battalion.

11. Mr Phoenix was for the most part the Training Sergeant stationed at the Orange Depot except for a short time when he was the acting Training Warrant Officer. He explained that he was largely left to work unsupervised by ARES officers. A source of concern to his chain of command was the low numbers of ARES at the Regiment and low turn-outs at parade nights and training weekends at the depots. Of his own initiative, he set about trying to improve parade nights and weekends by introducing drill and various social initiatives. 'Everything', he said, was '[his] idea and he 'brought others along with [him]'.

Mr Phoenix's actions in relation to ARES recruitment

12. Mr Phoenix states that during his posting to 2/17 RNSWR he observed several unsatisfactory aspects in the way in which Army Reserve recruitment was conducted. Mr Phoenix sought to assist the recruitment cell by introducing novel ways to boost numbers. This included group weapon patrols and physical training in uniform outside the confines of the depots so as to be 'seen' by members of the public. He explained that ARES numbers at the Parkes Depot were increased due to his efforts, from six to thirty soldiers and this at least was recognised by LTCOL Wood in his annual reporting of him in 1988.

13. A national television advertising campaign for Army Reserve recruitment resulted in viewers telephoning the advertised number at times outside of core business hours when there were no cadre staff to take the calls or reservists had to be organised to work at the unmanned depots to take calls at additional cost to the Regiment. This issue also occurred from advertisements in local newspapers. Mr Phoenix sought to address this issue and enquired of the relevant television station to see whether the advertisements could be scheduled at a specific time, during business hours and providing telephone numbers for manned depots only. He was advised by staff at the television station that this was not possible, as they were community announcements.

14. Undeterred, Mr Phoenix explained that he typed, in Army-style language but not on letterhead, a 'letter of suggestions'. He either delivered it by hand or sent it, by mail, through the chain of command at Pymble. His letter was not acknowledged but he thought it was forwarded to what was then the 2nd Division 2nd Australian Reserve Recruiting Unit (2 Div 2 ARRU). The letter is now no longer available. He believed that the letter set out suggested timeframes for the advertising campaigns and a central contact number to a central location.

Higher Headquarters correspondence on recruiting - 1988 and 1989

15. A Minute headed 'Advertising 2/17 RNSW (Orange Depot)' dated 14 December 1988 was sent to Headquarters 2 Div and signed by MAJ Samuel on behalf of the Director, Army Reserve Recruiting.⁶ The Minute expressed appreciation for the received suggestions and detailed the changes made to recruiting.

16. The Minute sets out the changes to the National (television) Advertising Campaign which were to come into effect in 1989, which included asking interested viewers to ring during office hours via a national 008 number to ARRU, which would be forwarded to the nearest depot for action.

17. The Minute does not refer to any letter from Mr Phoenix but rather a document from Headquarters 8 BDE of 18 September 1988 and a document of Headquarters 2 Div of 10 October 1988. These documents were not available before the Tribunal so the content is not known. However, the Minute refers to these documents containing welcomed feedback comments from the regions seeking improvements in recruiting processes.

18. The Minute was forwarded to 2/17 RNSWR as an enclosure to a handwritten Memorandum headed 'Advertising 2/17 RNSSWR (Orange Depot)' signed by MAJ Morrison, 8 BDE on 14 February 1989.⁷

⁶ Minute A88-1495 HQ 2 Div, dated 14 December 1988

⁷ Memorandum R711-1-6 8 BDE dated 14 February 1989

19. The Memorandum states:

a positive response to the 2/17 RNSWR complaints on the advertising in the Orange area.

[The Regiment's] initial action to rectify the problem is commended because it has established improvements which have been adopted throughout Australia.

It is requested that those in Orange be notified of this success.

20. The Memorandum would tend to suggest that the communication from the Regiment was not viewed as a recommendation for improvements but a 'complaint' about the existing system. It also may imply that solutions were subsequently formulated elsewhere other than at the Regiment.

21. There is no direct evidence that the suggested changes came from Mr Phoenix or even from within 2/17 RNSWR. There may have been other complaints from members of 2/17 RNSWR, including at the Orange Depot or nationally. On the basis of these documents and reference to the Orange Depot and Mr Phoenix's evidence, the Tribunal determines that it is possible that Mr Phoenix's 'letter of suggestions' is what is referred to as the '2/17 RNSWR complaints' in relation to advertising at the Orange Depot. Further, the Tribunal determines that it is possible that some of his input assisted in changing the recruiting policies on a national level during this time.

Notification of the commendable recruiting outcome to the Orange Depot

22. Mr Phoenix came across the Memorandum and the accompanying Minute at the Orange Depot, filed in the Minute Book. He explained that he decided to keep a copy of the documents for personal reasons as he felt it was a 'pat on the back'.

23. It is clear from the Memorandum from the higher Headquarters at 8 BDE that the Orange Depot was singled out as being the depot to be notified of the commendable outcome.

24. Mr Phoenix related that sometime after coming across the documents and shortly before he was posted to another unit in May 1990, there was a training weekend at the Orange Depot, probably in 1989. At an informal social event 'over some beers', a senior officer was awarded a medal and at the same time positive comments were made about the Depot's efforts in recruiting. Mr Phoenix was 'pretty sure' that LTCOL Wood, his Commanding Officer was awarded a CSM, said to be for his improvements to Army Reserve recruitment. A list of achievements was read out which, in Mr Phoenix's view, were directed to LTCOL Wood and not him. Mr Phoenix states that fellow soldiers present also indicated to him the achievements read out were essentially his and alluded to the unfairness.

25. Mr Phoenix recalled feeling angry that another was given credit for his achievements and no mention was made of his endeavours. A few days later he inquired of the Chief Clerk as to why the Commanding Officer got the honour for what was his work. He was told that 'this was the way they do it in the Reserve.'⁸ Mr Phoenix, in disgust, said he later screwed up the Memorandum and accompanying Minute which he had earlier saved.

⁸ Statement of Mr. Phoenix dated 20 April 2015.

Was a CSM awarded to an officer at the Orange Depot in 1989?

26. When it was pointed out to Mr Phoenix that LTCOL Wood did not receive a CSM in 1989 but a Member of the Order of Australia (AM) in the 1989 Queen's Birthday Honours List⁹ for services unrelated to recruitment processes, Mr Phoenix acknowledged his memory may not have been correct. He then stated that it was likely that it was not LTCOL Wood who received the CSM, but another senior officer. He thought it may have been another officer, possibly the Major who was the Officer Commanding Delta Company, but he could not recall his name.

27. When LTCOL Wood was interviewed he confirmed that he had never received a CSM. In any event, the first CSM was not awarded until 4 November 1991.¹⁰ There is no evidence before the Tribunal what medal may have been awarded on the evening in question, or to whom.

28. During the hearing, it was put to Mr Phoenix whether the officer in question may have received a medal of a different kind, noting that the first CSM was not awarded until some two years after the training weekend in 1989 to which Mr Phoenix had referred. It was also pointed out that CSMs are usually presented by the Governor at Government House. A scenario was put to Mr Phoenix as to the possibility that the training weekend social event was an occasion to both notify the Depot as to the commendable recruiting outcome and to award an officer with a medal of the kind more routinely presented at the unit level. To this scenario, Mr Phoenix properly conceded that it was indeed a 'possibility'.

29. The Tribunal finds that no CSM was awarded to LTCOL Wood or any officer during the training social event at the Orange Depot as described by Mr Phoenix. The Tribunal finds that a medal of some kind, unrelated to the CSM, was presented at the same time the Orange Depot were advised of the commendable outcome of the recruiting complaints, and unfortunately Mr Phoenix's efforts went unacknowledged during the evening.

Mr Phoenix's annual performance reporting 1987 - 1990

30. The Tribunal looked closely at Mr Phoenix's performance reports for the years 1987 – 1990 as they fell across the relevant period.

31. The purpose of annual reporting was primarily to assess a soldier's suitability for future promotion. Assessing officers were also able to appraise against set criteria and make comments concerning a soldier's strengths and weaknesses and record any duties performed other than normally associated with a posting. The Commanding Officer also had the opportunity to make additional remarks and soldiers were able to make written submissions in relation to the report if desired.

32. Mr Phoenix stated he rarely saw an officer above the rank of Lieutenant as they were located at Headquarters, where he did not attend regularly. The Tribunal inferred that his actions may not have been routinely observed by assessing officers who were of the rank of Captain, Major or Commanding Officer rank of LTCOL.

⁹ Government House Canberra. The Queen's Birthday 1989 Honours List dated 7 June 1989 at page 6.

¹⁰ Gulf War Honours List, dated 4 November 1991

Confidential Report: 2 October 1987 to 1 October 1988

33. MAJ Russell, Operations Officer, stated that SGT Phoenix was hard working and was extremely interested to further the training level of his soldiers. He stated SGT Phoenix was not afraid to act independently to achieve unit goals. His Commanding Officer, LTCOL Wood stated he performed tasks reliably and had demonstrated initiative on several occasions and that, as Mr Phoenix pointed out, at Parkes he had been *instrumental in rebuilding the strength of the Depot*. MAJ Keech of Personnel Branch stated: *A fair report. SGT Phoenix maintains a steady performance without setting the world on fire.*

Confidential Report: 2 October 1988 to 1 October 1989

34. MAJ Russell stated that SGT Phoenix produced good results without being necessarily 'flashy'. Warrant Officer Class 1 Schemermann of Personnel Branch, stated that SGT Phoenix would have to improve his performance to be considered for promotion courses in the immediate future. The incoming Commanding Officer, LTCOL Morrison did not add any further comments.

Confidential Report: 2 October 1989 to 1 October 1990

35. This reporting period covered SGT Phoenix's newly posted position as well as his final months at 2/17 RNSWR until June 1990, however he does not refer to his time at Regiment.

Did Mr Phoenix provide input to the ARES recruiting reforms?

36. The Tribunal accepts Mr Phoenix's contention that LTCOL Wood had acknowledged, in the 1988 report, his contribution to rebuilding the strength of the Parkes Depot. However, the Tribunal noted that, nothing was recorded of his efforts which he said he undertook to identify and propose solutions to the recruiting issues, which he claimed had led to national changes.

37. When asked by the Tribunal as to why his reporting did not reflect the full extent of his efforts as he saw them, he freely stated that he did not have much regard for the performance reporting process as a measure of a member's worth generally and this was true of his own reporting. (He also acknowledged he did not challenge the content of any of his reports during this relevant period, he chose not to do so).

38. The Tribunal considers that the full extent of Mr Phoenix's efforts was likely not observed or known to his reporting officers, because his contact may have been infrequent. The confidential reports do, however, acknowledge his initiative, reliability and willingness to take on tasks outside of his normal duties. To that extent, his reporting is broadly consistent with his evidence as to taking initiative outside of his core role.

39. Taking Mr Phoenix's written statements, his sworn evidence, together with his annual reporting and the commendable outcome response by his higher Headquarters, the Tribunal finds:

- (1) Mr Phoenix was instrumental in rebuilding the strength of the Parkes Depot prior to October 1988; and
- (2) Mr Phoenix's complaints and/or suggestions may have been adopted by his higher Headquarters and passed on to Recruiting. These are likely to have had some positive input which assisted in building a case for recruiting reforms, which were then implemented nationally from 1989.

40. The Tribunal notes that these findings are consistent with the analysis and position arrived at in the comprehensive report compiled by Defence and the submissions made by Brigadier Holmes at the hearing.

Was Mr Phoenix recommended for an honour or award?

41. Mr Phoenix acknowledged that until now he had not sought recognition for his service and he was not aware of any recommendation which may have been submitted on his behalf. Army advise that a search of 8 BDE records concerning honours and awards revealed that none were held for any period prior to 2003. LTCOL Wood recalled that he had considered two recommendations for honours and awards during his command of the Regiment, neither of which was for Mr Phoenix. Therefore, there is no evidence of any recommendation submitted or award granted to any member as a result of the recruiting changes in the ARES at this time, including Mr Phoenix.

Should Mr Phoenix be awarded the CSM?

42. The Tribunal then went on to determine whether the findings it made on the available evidence would support a further finding that Mr Phoenix's service was sufficiently meritorious so as to come within the eligibility criteria for the CSM.

43. Notwithstanding Mr Phoenix's successful efforts at the Parkes Depot and his input into recruiting initiatives, the Tribunal does not find these actions distinguished him at level required for a CSM. The Tribunal found Mr Phoenix was a conscientious and hard-working senior non-commissioned officer. However, while he put these attributes to good effect at the Regiment, these acts did not meet the threshold for a CSM as defined.

44. The Tribunal further noted that his annual reporting was of a level of performance expected of Sergeant rank with his level of training and experience, with some additional tasks of his own initiative. Overall, the Tribunal did not consider his reports to be consistent with those that might be expected for a member who was considered to have performed with *meritorious achievement or devotion to duty*, as required by the eligibility criteria.

45. The Tribunal finds that Mr Phoenix was a valued member of the 2/17 RNSWR and the ARA generally but at no time did his service meet the criteria for a CSM.

46. The decision of the Tribunal does not diminish Mr Phoenix's long and valuable service to the Army.

DECISION

47. The Tribunal decided to recommend to the Minister that the decision not to recommend Mr Phoenix for the Conspicuous Service Medal be affirmed in accordance with s110VB(1) of the *Defence Act 1903*.