



## Australian Government

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### Defence Honours and Awards Appeals Tribunal

#### **Ryan and the Department of Defence [2016] DHAAT 043 (21 December 2016)**

**File Number(s)** 2015/04

**Re** **Staff Sergeant Geoffrey Ryan**  
Applicant

**And** **Department of Defence**  
Respondent

**Tribunal** Brigadier Mark Bornholt AM (Retd) (Presiding Member)  
Mr Dave Ashley, AM

**Hearing Date** 9 December 2016

#### **DECISION**

On 21 December 2016 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Staff Sergeant Geoffrey Ryan is not eligible for the award of the Fifth Clasp to the Defence Force Service Medal.

#### **CATCHWORDS**

DEFENCE AWARDS – Defence Force Service Medal, Clasp to the Defence Force Service Medal

#### **LEGISLATION**

*Defence Act 1903* – ss 110T, 110V(1) and 110VB(2)  
*Defence Force Regulations 1952*, Reg 93C  
*Commonwealth of Australia Gazette No S78* (Letters Patent and Regulations – *Defence Force Service Awards*) dated 27 April 1982  
*Commonwealth of Australia Gazette No S352* (Amendments - *Defence Force Service Awards Regulations*) dated 10 July 1998  
*Commonwealth of Australia Gazette No S160* (Amendment - *Defence Force Service Awards Regulations*) dated 30 March 2000

# REASONS FOR DECISION

## Introduction

1. The applicant, Staff Sergeant Geoffrey Ryan (SSGT Ryan) seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Fifth Clasp to the Defence Force Service Medal (DFSM). On 11 April 2014 SSGT Ryan made application to the Directorate for the award of the Fifth Clasp to the DFSM. On 24 November 2014, the Directorate advised SSGT Ryan that he did not qualify for the award as he only completed 38 years, ten months and 18 days of the required 40 years of service.<sup>1</sup> On 5 December 2014 SSGT Ryan made application for review of this decision.<sup>2</sup> On 26 August 2016 SSGT Ryan confirmed that he wished to continue with the review.<sup>3</sup>

## Tribunal Jurisdiction

2. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) 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. Regulation 93C of the *Defence Force Regulations 1952* defines a defence award as being those awards set out in Part 2 of Schedule 3.<sup>4</sup> Included in the defence awards set out in Part 2 is the DFSM.

3. The Tribunal was satisfied that SSGT Ryan's letter to the Directorate of 11 April 2014 constituted an application as defined in s110V(1)(c) of the Defence Act. The Tribunal also considered that the Directorate's letter of 24 November 2014 constituted a refusal by a person within the Department to recommend SSGT Ryan for a defence award therefore satisfying the requirements of s110V(1)(a) and (b) of the Defence Act. The Tribunal therefore has jurisdiction to conduct the review and was satisfied that the *reviewable decision* is the decision by the Directorate in 2014 to refuse to recommend SSGT Ryan for the Fifth Clasp to the DFSM. The role of the Tribunal is to determine whether the decision of the Directorate is the correct or preferred decision having regard to the applicable law and the relevant facts.

## Conduct of the Review

4. In accordance with its *Procedural Rules 2013* as amended, on 29 January 2015, the Tribunal wrote to the Secretary of the Department of Defence informing him of SSGT Ryan's application for review and inviting him to provide a report.<sup>5</sup> On 13 April 2015, the Directorate, on behalf of the Secretary, provided the Tribunal with

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<sup>1</sup> Letter from DH&A – 223799/8246706 to SSGT Ryan dated 24 November 2014, received under cover of Letter from SSGT Ryan to the Tribunal dated 5 December 2014

<sup>2</sup> Letter from SSGT Ryan to the Tribunal dated 5 December 2014

<sup>3</sup> Letter from SSGT Ryan to the Tribunal dated 26 August 2016

<sup>4</sup> Under Section 85 of the *Defence Regulation 2016*, the *Defence Force Regulations 1952* continue to apply to an application made under those regulations before their repeal on 1 October 2016.

<sup>5</sup> Letter from DHAAT/OUT/2015/036 to the Secretary dated 29 January 2015

the Defence submission in the form of a written report.<sup>6</sup> In that report the Directorate confirmed its position that SSGT Ryan was not eligible for the Fifth Clasp to the DFSM as he had ‘not completed forty years’ service that is required by the regulations’.<sup>7</sup> The Tribunal forwarded a copy of the report of the Directorate to SSGT Ryan for comment on 22 April 2015.<sup>8</sup> SSGT Ryan’s comments were finally received by e-mail on 6 September 2016.<sup>9</sup>

5. The Tribunal met on 12 September 2016 when it considered the legislation, material provided by SSGT Ryan and the Directorate’s report. SSGT Ryan was invited to provide evidence at a hearing held in Canberra on 9 December 2016. The Directorate was represented at the hearing by Mr David Bell.

### **Staff Sergeant Ryan’s Service Record**

6. SSGT Ryan enlisted in the Australian Regular Army (ARA) on 12 February 1974 and was allocated to the Royal Australian Artillery. He subsequently transferred to the Royal Australian Corps of Transport before becoming a Royal Australian Army Ordnance Corps clerk. He transferred to the Army Reserve on 15 February 1999 after 25 years of service. On 9 December 1999, SSGT Ryan transferred back to the ARA and his service concluded on 24 October 2013 when he was discharged as medically unfit.<sup>10</sup>

7. During his service SSGT Ryan deployed to Butterworth, Malaysia in 1981; Egypt on Operation Mazurka in 2002/03 and East Timor in 2004/05. For his service SSGT Ryan received the following awards:

- Australian Service Medal with Clasps, ‘SE ASIA’, ‘SINAI’ and ‘EAST TIMOR’,
- United Nations Mission in Support of East Timor Medal,
- Multinational Force and Observers Medal,
- Defence Force Service Medal with 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Clasps, and
- Australian Defence Medal.

### **Australian Long Service Awards**

8. Australian service personnel have received honours and awards under two systems – the Imperial system and the Australian system. The Imperial System was used until February 1975 when the Government introduced the Australian system. The Defence Force Service Awards (DFSA) Regulations were introduced by Letters Patent on 20 April 1982 for the purpose of:

*... according recognition to persons who render long and efficient service as members of the Defence Force...for a period of 15 years...<sup>11</sup>*

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<sup>6</sup> Letter from DH&A/OUT/2015/00039 to the Tribunal dated 13 April 2015

<sup>7</sup> Ibid. p4, para23

<sup>8</sup> Letter from DHAAT/OUT2015/167 to SSGT Ryan dated 22 April 2015

<sup>9</sup> Geoffrey Ryan E-mail to Honours and Awards dated 1753 hours on 6 September 2016

<sup>10</sup> ADO Service Record - 8246706 dated 26 February 2015, p.2

<sup>11</sup> *Commonwealth of Australia Gazette No S78 – Defence Force Service Awards* dated 27 April 1982 as amended in 1998 and 2000

9. Three awards were established; the DFSA awarded to members of the Regular Forces; the Reserve Forces Decoration for reserve officers and the Reserve Forces Medal for reserve members who were not officers. To qualify for a DFSA, a member of the permanent force was required to complete 15 years of efficient remunerated service prior to 20 April 1999 and must have been serving on or after 14 February 1975. SSGT Ryan became eligible for and received this award on 13 February 1989 when he had completed his first 15 years of service.

10. The DFSA Regulations define 'Permanent Forces' as the Permanent Naval Forces, the Australian Regular Army, the Regular Army Supplement and the Permanent Air Force. 'Reserve Forces' means the Australian Naval Reserve, the Australian Army Reserve and the Australian Air Force Reserve. The Regulations as amended state that the conditions for the award of the DFSA are:

...

4. *The Defence Force Service Medal may be awarded to a person who has, on or after 14 February 1975 and before 20 April 1999, completed the qualifying service as a member of the Defence Force required by regulation 5.*

5. *(1) Subject to sub-regulation (2), the qualifying service as a member of the Defence Force required for the award of the Defence Service Medal is efficient service as a member of the Defence Force for a period of 15 years or for periods that in the aggregate, amount to 15 years, being service that includes efficient service as a member of the Permanent Forces for a period not less than 12 years or for periods that, in the aggregate, amount to not less than 12 years.*

...

6. *A clasp to the Defence Force Service Medal may be awarded to a member of the Defence Force after the completion of each period of 5 years' efficient service as a member of the Permanent Forces after the completion of the qualifying service required by regulation 5.<sup>12</sup>*

...

### **Staff Sergeant Ryan's Submission**

11. SSGT Ryan's submission to the Directorate dated 5 December 2014 states that:

*'as a career soldier it was my goal to achieve 40 years' service and be issued the fifth clasp to the DFSA and the Federation Star. I was discharged medically unfit on 23 October 2013 short of my career goal'.<sup>13</sup>*

12. In his submission, SSGT Ryan acknowledged that his service in the Permanent Force was for a total of 38 years, ten months and 18 days. He stated that

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<sup>12</sup> Ibid.

<sup>13</sup> Letter from SSGT Ryan to the Tribunal dated 5 December 2014

for superannuation purposes his length of service was ‘deemed to be 40 years’. He also stated that the Australian Defence Medal (ADM) has ‘provisions for medals to be awarded to members medically unfit’. He asserted that the DFSM can be ‘issued for periods of not less than 12 years or for periods that, in the aggregate amount to not less than 12 years’. SSGT Ryan uses this assertion to base his claim that a ‘precedent has been set and the non-entitlement is discriminatory’. He submitted that as:

*‘... members may receive the DFSM for less than 15 years (12) and members may be awarded the ADM if discharged medically unfit ... I submit that Commonwealth of Australia Gazette No. S78 of 27 April 1982 is discriminatory and is amended to include “the discharge of a member as medically unfit due to a compensable impairment” therefore entitling me to be awarded the fifth clasp to the DFSM and the Federation Star’.*

13. After receiving advice regarding his application from the Directorate in October 2014, SSGT Ryan indicated in an e-mail that:

*‘... I am confused that other awards have a provisor (sic) to award medals to medically discharged but not to the DFSM. I was discharged from the army medically unfit. For discharge purposes, I was discharged with 40 years service for DFRDB purposes and retirement pay, with this in mind I submit that I have the required service for the Federation Star to the DFSM’.*<sup>14</sup>

14. In a further email to the Tribunal on 6 September 2016, SSGT Ryan restated his assertion that *Commonwealth of Australia Gazette No. S78 of 27 April 1982, Regulation 5* created a precedent that entitled him to the award of the Federation Star. He stated that:

*‘I take this very personally as a member who gave all and was medically discharged. It was a milestone I had set myself. 40 years and the Federation Star’.*<sup>15</sup>

15. During the hearing SSGT Ryan continued to assert that as the ADM Regulations allowed for discretion in relation to medical discharge, the DFSM Regulations should similarly allow for discretion and thus he would be eligible for the Federation Star. He asserted that because he had been medically discharged he had been ‘robbed of the Federation Star’.

### **The Defence Submission**

16. On 21 October 2014, the Directorate advised SSGT Ryan that it was assessing his application against the qualifying provisions of the *Commonwealth of Australia Gazette No. S78, Defence Force Service Award Regulations* dated 27 April 1982.<sup>16</sup> The letter confirmed SSGT Ryan’s period of service as totalling 38 years, ten months and 18 days and that the service record confirmed that he was discharged medically unfit on 24 October 2013. The Directorate advised SSGT Ryan that whilst some

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<sup>14</sup> E-mail from SSGT Ryan to the Directorate dated 1237 hours on 28 October 2014

<sup>15</sup> E-mail from SSGT Ryan to the Tribunal dated 1753 hours on 6 September 2016

<sup>16</sup> Letter from DH&A – 223799/8246706 to SSGT Ryan dated 21 October 2014

medals within the Australian Honours and Awards system do have provisions for issue to members who serve less than the qualifying period due to medical discharge:

*‘there is no such provision in the DFSM Regulations’.*

17. The Directorate informed SSGT Ryan that ‘this letter is not a decision on your eligibility for the Fifth Clasp to the DFSM’ and invited him to provide any further evidence he may have ‘to show that you completed 40 years of service’.<sup>17</sup>

18. On 24 November 2014, the Directorate advised SSGT Ryan that he could not be recommended for the Fifth Clasp to the DFSM as his service did not meet the provisions of Clause 6 of the regulations which required ‘completion of each period of 5 years’ and that he did not qualify for the award as he completed 38 years, ten months and 18 days’ service of the required 40 years’ service.<sup>18</sup>

19. The Directorate completed a full re-assessment of SSGT Ryan’s claim on 13 April 2015.<sup>19</sup> This assessment confirmed that the decision maker was appropriately delegated to make the decision and that the legal basis for the decision was ‘*Defence Force Service Awards Regulations (Consolidated Incorporating Commonwealth of Australia Gazette No S352 of 10 July 1998, Commonwealth of Australia Gazette No S160, of 30 March 2000)*’.

20. The Directorate’s re-assessment included a number of ‘findings on material questions of fact’. The most relevant of these included confirmation of SSGT Ryan’s period of service in the Permanent Force being 38 years, ten months and 18 days. The Directorate again confirmed that SSGT Ryan was ‘not eligible for the fifth Clasp to the DFSM as he has not completed the forty years of service that is required by the Regulations’.

### **Tribunal Consideration**

21. **General.** The Tribunal is required to review decisions ‘on the merits’. This requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.<sup>20</sup> 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.

22. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.<sup>21</sup> 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.<sup>22</sup> 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.

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<sup>17</sup> Ibid.

<sup>18</sup> Letter from DH&A – 223799/8246706 dated 24 November 2014

<sup>19</sup> Letter from DH&A/OUT/2015/00039 to Tribunal dated 13 April 2015

<sup>20</sup> *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2

<sup>21</sup> Pearson, Linda, “Merit Review Tribunals”, in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68

<sup>22</sup> *McDonald v Director-General of Social Security* (1984) 1 FCR 354

23. **SSGT Ryan's Service Record.** Relying on the service record, the Tribunal was reasonably satisfied that SSGT Ryan enlisted in the Australian Regular Army (ARA) on 12 February 1974. The service record also records that SSGT Ryan was discharged on 24 October 2013 and that this generally accords with his statement that 'I was discharged medically unfit on 23 October 2013 short of my career goal'.<sup>23</sup> During the hearing SSGT Ryan also acknowledged that he had not completed 40 years of service and that even if his nine months and 24 days of Reserve service in 1999 were added, he would still be short of the required 40 years. The Tribunal asked SSGT Ryan if he had made application to have his discharge date held in abeyance to allow him to complete the 40 years of service; he stated that his discharge was stayed for one or two months but the chain of command at the time would not support any further delay. The Tribunal therefore finds that SSGT Ryan's service in the ARA was for a combined total of 38 years, ten months and 18 days and that he was discharged because he was medically unfit for further service on 24 October 2013.

24. **The Legislation.** The Tribunal noted that the Directorate in its re-assessment of SSGT Ryan's application had used as the legal basis for its decision a set of consolidated Gazettes. Whilst not having a material impact upon the final conclusion, the Tribunal considered that these consolidated Gazettes were not a legislative instrument and preferred to use as the basis for its review the Regulations contained in the *Commonwealth of Australia Gazette No S78* dated 27 April 1982 and the 1998 and 2000 amendments to these Regulations. The Tribunal noted that the consolidated Regulations used by the Directorate have the same relevant clauses (Clauses 5 and 6) as those provided in *Commonwealth of Australia Gazette No S78* dated 27 April 1982 as amended.

25. **The Defence Submission.** The Tribunal noted that the Defence report concluded that SSGT Ryan was 'not eligible for the fifth Clasp to the DFSM as he has not completed forty years service that is required by the Regulations'. The Tribunal is reasonably satisfied that this statement is correct as it relates to the total amount of his service, however to be eligible for the Fifth Clasp, the Tribunal considered that SSGT Ryan's service must be assessed against the relevant Regulation for Clasps – Regulation 6.

26. **The Eligibility Criteria.** There is no dispute that SSGT Ryan qualified for and received the DFSM. At issue is whether or not his period of service made him eligible for the Fifth Clasp to the DFSM. The DFSA Regulations in relation to Clasps state that:

6. *A clasp to the Defence Force Service Medal may be awarded to a member of the Defence Force after the completion of each period of 5 years' efficient service as a member of the Permanent Forces after the completion of the qualifying service required by regulation 5.*<sup>24</sup>

27. The Tribunal was reasonably satisfied that in order for SSGT Ryan to be eligible for the Fifth Clasp to the DFSM it must be established that he completed five

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<sup>23</sup> Letter from SSGT Ryan to the Tribunal dated 5 December 2014

<sup>24</sup> *Commonwealth of Australia Gazette No S78 – Defence Force Service Awards* dated 27 April 1982

periods each of 'five years' efficient service' after the completion of the qualifying service date. The Tribunal noted from the service record that SSGT Ryan received the following DFSM awards:<sup>25</sup>

- |                    |                    |                   |
|--------------------|--------------------|-------------------|
| • 12 February 1989 | Approved 31 May 89 | DFSM              |
| • 12 February 1994 | Approved 28 Mar 94 | First Clasp DFSM  |
| • 12 February 1999 | Approved 8 Oct 99  | Second Clasp DFSM |
| • 12 February 2004 | Approved 20 Dec 06 | Third Clasp DFSM  |
| • 12 February 2009 | Approved 11 Feb 10 | Fourth Clasp DFSM |

28. The Tribunal was therefore reasonably satisfied that to be eligible for the Fifth Clasp to the DFSM, SSGT Ryan must have completed a further five years of efficient service from and including 12 February 2009. Relying on the service record which records SSGT Ryan's discharge date as 24 October 2013, and SSGT Ryan's own evidence regarding his discharge date, the Tribunal finds that SSGT Ryan completed 4 years, eight months and 12 days of efficient service after 12 February 2009. The Tribunal determined that this period does not total five years and therefore finds that SSGT Ryan is not eligible for the award of the Fifth Clasp to the DFSM.

### **SSGT Ryan's Other Claims**

29. The Tribunal reviewed SSGT Ryan's claims, in particular that he considered that:

- his length of service was 'deemed to be 40 years' for superannuation purposes;
- the ADM has 'provisions for medals to be awarded to members medically unfit';
- the DFSM can be 'issued for periods of not less than 12 years or for periods that, in the aggregate amount to not less than 12 years'; and
- a 'precedent has been set and the non-entitlement is discriminatory'.

30. **Service for Superannuation Purposes.** The Tribunal considered that SSGT Ryan's claims regarding superannuation could not be sustained. Superannuation entitlements and eligibility are not relevant to medallic eligibility. Eligibility for the DFSM is determined by the criteria as set out in the DFSA Regulations.

31. **The ADM.** SSGT Ryan is correct that the ADM Regulations have provisions for discretion to be applied to members who may not have completed the prescribed period of qualifying service if discharged as medically unfit. The Tribunal discussed this with SSGT Ryan during the hearing and informed him that these provisions do not apply to the DFSM which was established for different purposes and has its own Regulations. The Tribunal therefore dismissed SSGT Ryan's claims regarding the ADM Regulations as they do not apply to the DFSM.

32. **'Periods of Not Less Than 12 Years'.** The Tribunal noted SSGT Ryan's claim that the DFSM can be 'issued for periods of not less than 12 years or for periods that, in the aggregate amount to not less than 12 years'. The Tribunal discussed this

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<sup>25</sup> ADO Service Record - 8246706 dated 26 February 2015, p.10-11



with SSGT Ryan during the hearing and subsequently dismissed this claim as Regulation 5 (1) states that the regulation is 'subject to sub-regulation (2)'. Sub-regulation (2) refers specifically to qualifying service for the Reserve Force Decoration and the Reserve Force Medal.

33. **Precedent.** The Tribunal noted SSGT Ryan's written assertion that a 'precedent has been set and the non-entitlement is discriminatory'. The Tribunal did not accept that precedent was a justifiable factor in determining eligibility for defence awards. Eligibility is determined by the criteria as declared in the Instruments, Regulations and Determinations for each particular award. Eligibility is determined in each matter according to its own facts and in the case of service awards, decisions are not discretionary. The Tribunal dismissed SSGT Ryan's assertion regarding precedent, preferring to determine entitlement based on whether or not he met the eligibility criteria.

### **Finding**

34. For the reasons set out above, the Tribunal finds that SSGT Ryan is not eligible for the Fifth Clasp to the DFSM as he did not complete a further five years of efficient service after 12 February 2009. Accordingly, the Tribunal finds that the decision of the Directorate is correct and is therefore affirmed.

### **DECISION**

35. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Staff Sergeant Geoffrey Ryan is not eligible for the award of the Fifth Clasp to the Defence Force Service Medal.