



Australian Government

Defence Honours and Awards Appeals Tribunal

Thompson and Hearder and the Department of Defence [2017] DHAAT 19 (10 August 2017)

File number (s) 2014/091

Re **Colonel Terence Roche Bill Thompson (Retd)**
Lieutenant Colonel Simon Hearder (Retd)
Applicants

And **Department of Defence**
Respondent

Tribunal Mr R. Rowe PSM (Presiding Member)
 Ms J. Schwager AO
 Mr D. Ashley AM

Hearing Dates 16 February and 28 March 2017

DECISION

On 10 August 2017 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Colonel Terence Roche Bill Thompson is not eligible for the award of the Cambodian National Defence Medal of the Brigade with Bronze Star.

CATCHWORDS

FOREIGN AWARDS – refusal to recommend the award of the Cambodian National Defence Medal of the Brigade with Bronze Star; the United States Meritorious Unit Commendation; and the Republic of Vietnam Cross of Gallantry with Palm Unit Citation

LEGISLATION

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

REASONS FOR DECISION

Introduction

1. The applicant, Colonel Terence Roche Bill Thompson (Retd) (Colonel Thompson) seeks review of the 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 Cambodian National Defence Medal of the Brigade with Bronze Star (the Cambodian NDM).

2. Colonel Thompson's original application before the Tribunal was also in respect of his eligibility for the United States Army Meritorious Unit Commendation¹ (the US Army MUCOM); and the Republic of Vietnam Cross of Gallantry with Palm Unit Citation (the Vietnamese CGWPUC), however during the course of the review the Directorate withdrew its original refusal to recommend Colonel Thompson for these two awards.

Background

3. On 22 February 2012, Colonel Thompson wrote to the Directorate with questions concerning the Cambodian NDM and the US Army MUCOM.² The terms of this letter constituted an application for the two awards. On 21 August 2012 the Directorate advised Colonel Thompson that he was not eligible for the US Army MUCOM as he did not meet the eligibility criteria. In respect of the Cambodian NDM, the Directorate's letter referred to the appendix which Colonel Thompson had provided with his letter and stated '*as your name does not appear on the approved list, the Directorate of Honours and Awards has no authority to retrospectively issue or recommend foreign awards*'.³

4. On 28 February 2014, Lieutenant Colonel Simon Hearder (Retd), the National Secretary of the Australian Army Training Team Vietnam Association (AATTVA), provided a submission to the Tribunal's *Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards* on behalf of Colonel Thompson.⁴ Lieutenant Colonel Hearder had lodged the submission on behalf of members who were placed under the operational control of the United States Army Republic of Vietnam - Individual Training Group/FANK Training Command, in a program for the training of Cambodian infantry battalions in Phuoc Tuy Province, South Vietnam in 1971. Included in Lieutenant Colonel Hearder's submission was a further submission from Colonel Thompson, which provided some historical material relating to the operations of the Individual Training Group/Force Armees Nationale Khmer (FANK) Training Command.

¹ Incorrectly referred to in some material before the Tribunal as the United States Meritorious Unit Citation.

² Letter from Colonel Thompson to DH&A dated 22 February 2012

³ DHA 215476 dated 21 August 2012

⁴ Submission to the *Inquiry into Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards* by Lieutenant Colonel Hearder dated 28 February 2014

5. On 1 May 2014 the then Tribunal Chair advised Lieutenant Colonel Hearder that the purpose of the Inquiry was to focus on the policies developed over time by the three services and the Department of Defence relating to the withholding and forfeiture of medals, and not the issues referred to in his submission.⁵ The Chair further advised that the matter could possibly be considered by way of the Tribunal's review function, and gave procedural guidance on how to go about making an application for such a review.

6. On 14 September 2014, Lieutenant Colonel Hearder provided his response to the Chair's letter, including evidence of Colonel Thompson's application for the awards together with Defence's advice that Colonel Thompson was not eligible for the awards.⁶ Lieutenant Colonel Hearder's letter refers to Colonel Thompson having made an application in his letter of 22 February 2012 for approval to be awarded two unit awards (the US Army MUCOM and the Vietnamese CGWPUC) and the Cambodian NDM. Lieutenant Colonel Hearder requested that the Tribunal '*review the non-approval decisions by the Defence Directorate Honours and Awards and award to Colonel Thompson the two unit citations and the Cambodian medal*'.

7. On 20 October 2014, Colonel Thompson and Lieutenant Colonel Hearder were advised that the application for review, in respect of the three awards listed above, had been accepted.

Tribunal Jurisdiction

8. 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) of the Defence Act and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence or foreign 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 Cambodian NDM, the United States Army MUCOM and the Vietnamese CGWPUC are foreign awards. Accordingly, the Tribunal has jurisdiction to review decisions in relation to these awards.

9. The Tribunal was satisfied that Lieutenant Colonel Hearder's letter of 14 September 2014, on behalf of Colonel Thompson, constituted an 'application properly made' as required by s110VB(2) of the Defence Act and that Colonel Thompson's application to the Directorate dated 22 February 2012 constituted an application as defined in s110V(1)(c) of the Defence Act. The Tribunal was also satisfied that the Directorate decision of 21 August 2012 constituted a refusal to recommend a person for a foreign award as defined in s110V(1)(a)(iii) of the Defence Act.

10. Accordingly, the Tribunal was satisfied that the *reviewable decision* is the decision by the Directorate to refuse to recommend Colonel Thompson for the Cambodian NDM, the US MUCOM and the Vietnamese CGWPUC. The Tribunal

⁵ DHAAT OUT/2014/590 dated 1 May 2014

⁶ Letter from Lieutenant Colonel Hearder to DHAAT dated 14 September 2014

is therefore bound by the eligibility criteria that governed the making of that decision in 2012 as required by s110VB(6) of the Defence Act. The role of the Tribunal is to determine whether the decision of the Directorate is the correct and preferred decision having regard to the applicable law and the relevant facts.

Colonel Thompson's Service Record

11. On 22 October 1963 Colonel Thompson enlisted as a soldier in the Australian Regular Army, having previous service in the Citizens Military Force (CMF) and the Regular Army Special Reserve. During the next 18 years Colonel Thompson served both in Australia and overseas including in Papua New Guinea and in Singapore. Relevantly, he served with the AATTV from 11 September to 9 December 1972. After his service in Vietnam he was commissioned as a Lieutenant. On 19 July 1981 Colonel Thompson resigned to re-enlist in the CMF from which he was discharged on 11 May 1990. From 12 May 1990 until 27 June 1997 Colonel Thompson was a member of the Inactive Army Reserve (IARes).

12. For his service Colonel Thompson has been awarded the:

- Australian Active Service Medal 1945-75 with Clasp 'VIETNAM'
- Vietnam Medal
- Australian Service Medal 1945-75 with Clasps 'PNG' and 'SE ASIA'
- Defence Force Service Medal with First Clasp
- National Medal
- Australian Defence Medal
- Republic of Vietnam Campaign Medal
- Returned from Active Service Badge

Conduct of the Review

13. In accordance with the *Defence Honours and Awards Appeals Tribunal's Procedural Rules 2011*, on 20 October 2014 the Tribunal wrote to the Secretary of the Department of Defence advising him of Colonel Thompson's application for review of the three foreign awards listed above. The Tribunal requested the Secretary provide a report on the reasons for the original decision and the provision of relevant material that was relied upon in reaching the decision.⁷ On 6 May 2015 the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence submission in the form of a written report. The Tribunal forwarded a copy of the Defence submission to both Colonel Thompson and Lieutenant Colonel Header for comment on 27 May 2015.⁸ On 23 June 2015 Colonel Thompson provided his comments on the Defence submission. On 25 June 2015 Lieutenant Colonel Header provided his comments.

14. After conducting further research and consideration, on 16 February 2017 the Tribunal held a hearing with Colonel Thompson and Mr Header. Defence was represented by Ms Margot Kropinski-Myers, Director, Honours and Awards,

⁷ DHAAT OUT/2014/1097 dated 20 October 2014

⁸ DHAAT OUT/2015/215 and 216 dated 27 May 2015

Ms Tiffany Dawes from the Directorate, and Mr Michael McCulloch, Acting Special Counsel (Defence People Group). At the commencement of the hearing, Defence confirmed advice contained in a letter from the Directorate to the Tribunal dated 14 February 2017, that following recent developments of Defence's review into additional units that may be eligible for the Vietnamese CGWPUC, Defence had identified Colonel Thompson as meeting the Citation's eligibility criteria.⁹ Defence further advised that it would proceed to issue the Citation device to Colonel Thompson in the near future.

15. While welcoming this advice, the Tribunal expressed concern that such important information had been provided by Defence at an extraordinarily late stage, and in doing so Defence did not afford appropriate procedural fairness to the applicant. The Tribunal noted that the applicant would likely wish to consider this development and its relevance to, and implications for the other awards which were being sought. This was especially relevant given that Defence had indicated in its submission to the Tribunal of 6 May 2015 that such implications did exist, in that awarding of one of the three foreign awards may lead to further awards of the other two awards referenced in the application.

16. The Tribunal further explained that all parties would need to have a full explanation as to the reasons why this decision had now been made in order to assess its relevance and further implications in respect of the other two awards sought by the applicant.

17. The Tribunal directed that the hearing be adjourned until that information had been provided by Defence, and the Tribunal and the applicant had appropriate time to consider it. The Tribunal requested Defence to provide this information by 28 February 2017. Defence responded to the Tribunal's request by letter dated 27 February 2017.¹⁰

18. A further hearing was held on 28 March 2017. The Tribunal heard statements by Colonel Thompson and Lieutenant Colonel Hearder. It also heard evidence, via telephone, from Brigadier Garth Hughes (Retd), a former Executive Officer of the FANK Training Command; Major Ian Gore (Retd) also a former Executive Officer FANK Training Command; Colonel Kerry Gallagher (Retd), a former adjutant at Free World Military Forces Headquarters in Saigon, and National President of the AATTV association; and Major Bruce Davies MBE (Retd), a former AATTV member and author. Defence was represented by Ms Margot Kropinski-Myers, Director, Honours and Awards and Ms Tiffany Dawes from the Directorate.

The Cambodian National Defence Medal of Brigade with Bronze Star

19. The Cambodian NDM was instituted on 9 September 1948 by the Kingdom of Cambodia, under Royal Decree. It is divided into Gold, Silver and Bronze classes. Eligibility was determined by decision of the Minister of the Khmere National Defense.

⁹ DHA OUT/2017/0033 dated 14 February 2017.

¹⁰ DHA OUT/2017/038 dated 27 February 2017.

20. No specific eligibility criteria for the Cambodian Medal could be located by Defence or by the Tribunal. The only relevant document that could be located was a letter from the Office of Representation Forces Armee National Khmer dated 28 August 1972 referring to a Ministerial Decision¹¹ which attached a list of names of Australian serving members that had been identified to receive the Medal. This letter is in French. A translation of the French into English is as follows:

‘(3) The minister of the state, (tasked of) the National Defence, decided to award the medals of the National Defence to the Australian people, of which the names feature a joint Army that has actively contributed to the training of the (something) Khaara (?) to the centres of Instruction to BIEN HOA, LONG HAI and PHOC THY Vietnamese Republic.’

21. The date of translation and the name of the translator are unknown. While the translation is inelegant and imprecise it does refer to a decision to award the Cambodian Medal to those Australian personnel whose names are included in an annexed list. Colonel Thompson’s name was not included in the list.

Australian Policy on Foreign Awards

22. Foreign governments may confer honours or awards on ADF personnel in recognition for gallantry on operations, bravery in civil actions or for meritorious or outstanding service. Awards recognising operational service may also be made. The *Guidelines Concerning the Acceptance and Wearing of Foreign Honours and Awards by Australians* were approved by Her Majesty the Queen and issued on 5 December 1997.¹² The Tribunal noted that in 2009, the Chiefs of Service Committee agreed to a set of principles that would apply to the acceptance of foreign honours and awards. These principles informed the policy detailed in the Defence Honours and Awards Manual. The policy states:

35.29 The first principle of the Australian Honours System in relation to foreign awards is that a formal offer needs to be made by a foreign government to the Australian Government for a unit or individual to be issued an award.

35.30 The policy of successive Australian Governments has been that foreign governments are not formally approached to pursue their awards for Australians. Such requests are considered confronting, place the foreign government involved in a difficult situation and serve only to diminish the integrity of awards within the Australian Honours System.

23. The Tribunal noted that Colonel Thompson had referred to ‘*the Guidelines concerning the acceptance and wearing of foreign honours and awards by Australians (approved by Her Majesty the Queen August 2012).*’ The Tribunal noted further that those Guidelines were consistent with the principles enunciated in 2009, referred to above.

¹¹ Decision Ministerielle No. 17.026/IN/DMR/BCH/2S dated 28 August 1972

¹² *Commonwealth of Australia Gazette(CAG) No S 548 ‘Guidelines concerning the acceptance and wearing of foreign honours and awards by Australians’* dated 22 December 1997

The revised Defence submission

24. In the Tribunal's view, Defence's letter of 27 February 2017 formed the basis of a revised Defence submission to the Tribunal. This letter:

- addressed the reasons in respect of the decision to award Colonel Thompson the Vietnamese CGWPUC.
- contained a fresh assessment of Colonel Thompson's eligibility in respect of the other two awards germane to the review.
- commented on other AATTV members who served in similar circumstances as Colonel Thompson and who might now be eligible for the above awards, in light of Defence's recent decision(s).

25. Contrary to its earlier submission, Defence advised that it was of the view that eligibility for one of the foreign awards listed in Colonel Thompson's application did not automatically mean a member is eligible to receive the others.

The Republic of Vietnam Cross of Gallantry with Palm Unit Citation

26. Defence further submitted that the AATTV were awarded the Vietnamese CGWPUC by the Armed Forces of the Republic of Vietnam, Chief of the Joint General Staff in 1971. It was from this initial decision that Colonel Thompson was considered not eligible for the citation as, according to Defence, he was not in Vietnam during the prescribed period. Additionally, the orders for the award had previously been interpreted to include a member of the AATTV who fulfilled a specified role. Defence has since revised this interpretation.

27. Defence has confirmed that Colonel Thompson served with the AATTV and was under operational control of the CO FANK Training Command between 11 September 1972 and 9 December 1972. Defence has decided that this is consistent with the eligibility requirements for the award, and accordingly, Defence decided that the award for the Vietnamese CGWPUC should be made to Colonel Thompson.

The US Meritorious Unit Commendation

28. Defence submitted that the US Army MUCOM was awarded under the direction of the Secretary of the United States Army, for exceptionally meritorious achievements in the performance of outstanding service. Units eligible for the award were originally identified in (United States) Department of the Army Pamphlet 672-3, dated 28 October 1986, titled '*Unit Citation and Campaign Participation Credit Register*'.

29. Defence submitted that since that original decision was made, the above criteria had been superseded by way of a later iteration of the document, dated 29 January 1988, but that this only came to the attention of Defence on 20 February 2017.

30. Table 13 of the Register of the 1988 document lists the following as eligible for the US Meritorious Unit Commendation:

Forces Armee Nationale Khmer (FANK) Training Command Meritorious Unit Commendation – 24 Feb 71-30 Nov 72, DAGO 32, 73

RVN Gallantry Cross w/Palm – 1 Nov 70-30 Dec 72, DAGO 6, 74

31. Defence also submitted that it had received further information from Major Gore, confirming that AATTV members were involved with the FANK Training Program, working out of three battalions based at Long Hai, Phuoc Tuy and Dong Ba Thin and under the operational control of the CO FANK Training Command. This is supported by documentary evidence in an Australian War Memorial file.

32. Therefore, with this understanding and by virtue of the United States directive, Defence found Colonel Thompson to be eligible for the US Army MUCOM.

33. Defence however reiterated its position that eligibility for the US Army MUCOM does not automatically entitle a member to other awards.

Cambodian National Defence Medal

34. Defence submitted that for Colonel Thompson to be eligible for the Cambodian National Defence Medal, an official offer would have had to have been made from the Cambodian Government to the Australian Government. Defence identified that an official offer was made by the Cambodian Government, on 13 June 1972. The offer stated:

‘The Minister of the Khmere National Defense has decided to award the National Defense Medals to Australian Officers and Non-Commissioned Officers, whose names appear on this attached inclosure (sic), who have contributed to the effectiveness of the training of the Khmere trainees at Long Hai and Phuoc Tuy Training Centers.’

35. Colonel Thompson’s name does not appear on the attached list, and Defence submitted that it could find no evidence of a further offer being made or being known to exist.

36. Defence submitted that as the Australian Government does not have the jurisdiction to make recommendations or award the Cambodian Medal outside of the criteria specified in the Ministerial decision, Defence is unable to recommend it to Colonel Thompson. The role of Defence in these cases is to administer the award in accordance with the directions of the issuing authority. Accordingly, Defence submitted that Colonel Thompson is not eligible for the award. Defence further submitted that the Australian Government does not approach foreign countries to issue particular awards or to amend the criteria for particular awards for the benefit of Australians.

Other members of the AATTV

37. In relation to other former members of the AATTV who served under the operational control of the FANK Training Program, Defence submitted that they should make further applications to Defence for an assessment of their own specific entitlements.¹³

38. The Tribunal held a further hearing on 28 March 2017. In light of the advice from Defence that Colonel Thompson was eligible for both the US Army MUCOM and the Vietnamese CGWPUC, the hearing was confined to considering Colonel Thompson's application for review of the decision that he was not eligible for the Cambodian NDM.

Colonel Thompson's Submission

39. Colonel Thompson's submission to the Tribunal is essentially that while his name did not appear on the list referred to above, he believes that there were marked inconsistencies in the awarding process, and that *'the preponderance of evidence suggests that all AATTV members of the FANK Program were intended to be awarded'*.

40. Colonel Thompson went on to state that *'whilst it is not denied that an entitlement exists for those personnel listed (in the attachment to the letter (from the Office of Representation Forces Armee National Khmer dated 27 August 1972) it is considered that it is an error to conclude that the persons so listed are the only ones entitled to the award...the administration for awarding the Medal, imperfect and erratic as it was, points to the conferring of a collective award.....and that all AATTV members assigned to the Program were intended to be awarded the Medal'*.

Tribunal Consideration – The Merits Review

41. On the basis of the evidence presented to it, the Tribunal accepted that 43 Australian personnel members of the AATTV serving with the FANK received the Cambodian National Defence Medal: 29 pursuant to a Cambodian Ministerial Direction dated 13 June 1972 and 14 pursuant to another Ministerial Direction dated 28 August 1972. The names of the recipients were included in a list attached to the Direction. There is, however, no evidence of a further Direction or list of recipients after August 1972, covering the period (September to December 1972) when Colonel Thompson served with the AATTV. Colonel Thompson's name does not appear on any list.

42. The Tribunal took account of the assertions by the applicant and other witnesses that it was intended that all members of the AATTV involved in the FANK program should receive the Cambodian Medal as it was meant to be a collective award. Further it was asserted that the fact that they were not awarded the medal was because the process was procedurally defective, particularly in the post-August phase of the AATTV's presence in Vietnam when the situation on the ground was one of disarray. The Tribunal also noted the evidence provided by one

¹³ DHA OUT/2017/038 dated 27 February 2017.

witness that no lists had been prepared or received after August 1972 and that there was a definite cut-off date of mid-1972 for the Award. The Tribunal noted that Defence had informed the Tribunal that there was no evidence of a further offer of the award having been made or known to exist post-August 1972 and that Colonel Thompson's name did not appear on any Cambodian list.

43. The Tribunal acknowledges that the AATTV is held in very high regard within the ADF and the Australian community and by military historians. It also recognised that the AATTV was held in similar high regard by the then Cambodian government. It further recognised that Colonel Thompson had given valuable service as a member of the AATTV.

44. The Tribunal, while acknowledging that there may well have been an expectation by AATTV members that they would all receive the Cambodian Award, has to give full effect, in considering applications for review, to the Australian Policy on Foreign Awards, as set out in paragraph 29 above. In this regard, and in accordance with that Policy, the Tribunal does not have the jurisdiction or the authority to recommend or award the Cambodian Medal nor amend the criteria for the Award.

45. In this latter respect and with reference to Colonel Thompson's request that the Tribunal consider the matter of making awards by '*now defunct regimes*', the Tribunal notes the advice provided by the Australian Government Solicitor in relation to the *Inquiry into the Feasibility of Amending the Eligibility Criteria for the Republic of Vietnam Campaign Medal* that:

"...the fact that the Government of the Republic of Vietnam no longer exists does not have the result of conferring any power on the Australian government to change the eligibility criteria for the RCVM".¹⁴

46. The Tribunal notes that no specific eligibility criteria for the Cambodian Medal can be located. The authority for awarding the Medal was a Ministerial Decision and the award was made to individuals whose names appeared on a list annexed to the Decision. Although the Cambodian Government of the time no longer exists, this does not confer on the Australian Government any power to make the award. For Colonel Thompson to be eligible for the award his name would have to have been included on a list attached to a letter advising of the Cambodian Ministerial decision. No such letter and list in relation to Colonel Thompson is known to exist.

Finding

48. For the reasons set out above, the Tribunal finds that Colonel Thompson is not eligible for the Cambodian NDM. Accordingly, the Tribunal finds that the decision of the Directorate is the correct decision.

¹⁴ AGS advice provided to the Tribunal dated 3 February 2015

DECISION

49. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Colonel Terence Roche Bill Thompson is not eligible for the award of the Cambodian National Defence Medal of the Brigade with Bronze Star.