



Australian Government

Defence Honours and Awards Appeals Tribunal

McCann and the Department of Defence [2013] DHAAT (03 February 2014)

File Number(s) 2013/007

Re **David James McCann OAM**
Applicant

And **Department of Defence**
Respondent

Tribunal Air Commodore M. Lax (Retd) (Presiding Member)
Mr A.Bodzioch

Hearing Date 1 October 2013

DECISION

On 03 February 2014 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr David James McCann is not eligible for the award of the Australian Service Medal with Clasp 'CT/SR'

CATCHWORDS

DEFENCE AWARD – Australian Service Medal with Clasp 'CT/SR' - minimum criteria of 60 days continuous service in a Tactical Assault Group or Recovery Force.

LEGISLATION

Defence Act 1903 – ss 110V(1), 110T
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Service Medal Regulations 1988
Australian Service Medal Regulations 2011

REASONS FOR DECISION

Introduction

1. The applicant, Mr David James McCann (Mr McCann), a former member of the Royal Australian Air Force (RAAF), seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate), to refuse to recommend him for the award of the Australian Service Medal (ASM) with Clasp 'CT/SR'. CT stands for Counter-Terrorism and SR, Special Recovery – both specific roles performed by Australia's Special Forces. Mr McCann's application for the awards had been made on the basis of his service in the RAAF, as a No. 5 Squadron helicopter loadmaster, between 1986 and 1989.

2. Mr McCann lodged an application with the Directorate for the award ASM with Clasp 'CT/SR' on 18 April 2011. On 2 December 2011, the Directorate referred the application to Special Operations Command (SOCOMD) for further consideration. On 7 December 2012, SOCOMD convened an honours and awards board (called a 'HARD Board') and after due deliberation, refused the application on 10 December 2012. Mr McCann was found not eligible for the award as his service with No. 5 Squadron did not meet the minimum criteria of 60 days continuous service in a Tactical Assault Group or Recovery Force. SOCOMD advised the Directorate which in turn advised Mr McCann affirming its determination (decision) on 17 January 2013. It is this decision for which Mr McCann seeks review. On 28 February 2013, Mr McCann lodged his application for review with the Tribunal to appeal the Directorate's refusal to award him the ASM with Clasp 'CT/SR'.

3. There is no dispute that the Tribunal has jurisdiction to hear and determine Mr McCann's application for review (see ss 110V, 110VA and 110VB(2) of the *Defence Act 1903* and reg 93C of the *Defence Force Regulations 1952*). 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.

4. In accordance with its *Procedural Rules 2011*, on 14 March 2013, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr McCann's application for review and requesting that he provide a report. On 19 April 2013, the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report, the Directorate confirmed its position that Mr McCann's service did not meet the eligibility criteria for the award he sought. On 22 April 2013, a copy of the report of the Directorate was forwarded to Mr McCann for comment. A written response was received on 5 May 2013.

5. The Tribunal met on 1 October 2013. During its meeting the Tribunal considered the material provided by Mr McCann and the Directorate. It also heard oral evidence from Mr McCann who agreed to be available by telephone that day.

6. The Tribunal later sought a submission from Mr McCann's commanding officer at the time he was with No. 5 Squadron, and this was received on 3 January 2014. Mr McCann was provided the opportunity to comment which he did on 10 January 2014.

Eligibility criteria for the award of the Australian Service Medal

7. The ASM was established on 13 September 1988 by Letters Patent. The medal was introduced to recognise members of the Australian Defence Force (ADF) and certain other persons who render service in certain ‘non-warlike military operations’ since 14 February 1975. The award of the ASM is governed by the *Australian Service Medal Regulations* 1988 (ASM Regulations).

8. Regulation 4 of the ASM Regulations sets out the conditions for the award of the ASM. That regulation is in the following terms:

Conditions for award of the Medal

4. (1) The Medal may be awarded for service in or in connection with a prescribed operation.

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

(3) Any subsequent award of the Medal to the same person shall be made in the form of a further clasp to the Medal.

(4) The persons to whom the Medal may be awarded are –

(a) persons who served in a prescribed operation as members of the Defence Force; and

(b) persons included in a class of persons determined by the Minister, for the purposes of this regulation.

(5) The Medal may not be awarded except to a person who fulfils the conditions for the award of the Medal.

9. The term ‘a prescribed operation’ is defined in Regulation 2 to mean ‘an operation in respect of which a declaration has been made under regulation 3’. Regulation 3 vests the Governor-General with the power to ‘declare a non-warlike operation, in which members of the Defence Force are, or have been on or after 14 February 1975, engaged, to be a prescribed operation’ for the purpose of the ASM Regulations. However, the exercise of that power is subject to a recommendation having been received from the Minister.

10. The Governor-General has made a number of declarations, under regulation 3, declaring specific operations as being a non-warlike operation for the purpose of the ASM Regulations. The Declaration made on 30 March 2011 for the ASM with Clasp ‘CT/SR’, is the one applicable to Mr McCann’s case.

The ASM with clasp ‘CT/SR’

11. The Clasp ‘CT/SR’ to the ASM was established by the Governor-General on

24 March 2011 after the Government agreed to the recommendations made by the Defence Honours and Awards Tribunal (the old Tribunal) in its *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties* in December 2009.¹ The Regulations were published in the *Commonwealth of Australia Gazette* in March 2011.²

12. Under the Regulations for the award of the ASM with Clasp ‘CT/SR’, the applicable conditions are at sub-paragraph (b) such:

- (i) the Medal may be awarded to a member of the Australian Defence Force who rendered service as such a member of the *prescribed operation* for a *prescribed period*;
- (ii) ... [this sub-paragraph only relates to foreign forces];
- (iii) in this paragraph “*prescribed period*” means in relation to the activities described at subparagraph (a)(i) and (a)(ii) a period of not less than 60 days continuous;

PROVIDED THAT where a member does not complete the *prescribed period* required by sub paragraph (b)(iii) owing to his or her death, illness, injury or other physical disability due to service in the *prescribed operation*, the member will be deemed to have completed that *prescribed period*.

13. To be eligible for the ASM with Clasp ‘CT/SR’, the member has to satisfy both the ASM and the ASM with Clasp ‘CT/SR’ Regulations. In addition, under Regulation (c) to the ASM Clasp ‘CT/SR’ Regulations, the member is not eligible for the award for service:

- (i) during the same period in which that member renders service attracting a separate award of the AASM or ASM; or
- (ii) During the same period in which a separate award of the ASM Clasp ‘SPECIAL OPS’ has been awarded.

Previous Consideration of the ASM with Clasp ‘CT/SR’

14. In December 2009, the old Tribunal undertook an *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*. Among its Terms of Reference, the old Tribunal was tasked to consider the appropriateness of establishing recognition for CT and SR military service. This inquiry led to the establishment of the ASM with Clasp ‘CT/SR’.³

¹ *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, Defence Honours & Awards Tribunal, 22 December 2009.

² *Commonwealth of Australia Gazette*, S 50, 30 March 2011.

³ *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, Defence Honours & Awards Tribunal, 22 December 2009.

15. In making its findings, the old Tribunal looked closely at the period of time spent on operations and the commencement date for the proposed Clasp 'CT/SR'. The old Tribunal decided on very specific criteria to qualify for the award and these are discussed in the Report and are covered by the ASM Regulations. In summary the reasons were:

- Under the Regulations, the ASM is not awarded for training even if such training was exceptionally hazardous;
- The unit had to be 'operational'. That is, it had to have completed its training, be on notice to move orders, and be ready to go;
- The element had to be under a Chief of the Defence Force (CDF) or Chief of Service Directive or Operational Order; and
- The time period had to be 60 days continuous.

16. The old Tribunal recommended that the date of 31 August 1979 be the commencement date for the Award of the ASM with Clasp 'CT/SR' as this was the first time a Tactical Assault Group (TAG) had completed its training and was placed under an operational order by the Chief of Army. The Government accepted the recommendations of the old Tribunal on 15 July 2010.

Mr McCann's Service Record

17. Mr McCann joined the RAAF on 30 January 1979 as a clerk trainee. In 1984, he applied for the Airman Aircrew training scheme and after completing loadmaster training, was posted to No. 5 Squadron at RAAF Fairbairn to fly the UH-1 Iroquois helicopter. He became one of the first loadmasters to undertake Night Vision Goggle (NVG) conversion and became a loadmaster instructor. As a Flight Sergeant, Mr McCann assisted with the introduction of a NVG capability to the Squadron. At that time, this equipment was new and No 5 Squadron became the first ADF unit to have this capability. For this work, he was awarded a Medal of the Order of Australia in the Military Division on Australia Day 1990.

18. Following the transfer of the RAAF helicopters to the Australian Army in 1989, Mr McCann applied for and was granted a commission as an Administrative Officer. He left the RAAF in 1994 and joined the NSW Police Force where he undertook a number of overseas deployments before discharging due to injury.

19. For his RAAF service, Mr McCann was awarded the OAM, the ASM with Clasp 'SINAI', the Defence Force Service Medal, the Australian Defence Medal, the Multinational Force and Observers Medal and the United Nations Mission in East Timor (UNAMET) Medal.

Mr McCann's Case

20. Mr McCann seeks recognition for service between 1986 and 1989 that he (and other members) of No. 5 Squadron provided to support the ADF's Tactical Assault Group for its CT/SR operations. He claims the work commenced after the

Commanding Officer (then Wing Commander Mick Haxell) received a Chief of the Air Staff Directive to introduce a CT/SR capability using NVGs into the squadron. This involved training and exercises with the SAS between late 1986 until late 1989 at which time the helicopter fleet was transferred to the Army.

21. During interview, Mr McCann stated the training and exercises only involved RAAF personnel until the 'last six to eight months' when Army members were filtered in. At the end of 1989, No 5 Squadron was disbanded and the role taken over by the ADF Helicopter Training School which eventually moved to Oakey Army Base in Queensland.

22. Mr McCann stated that now the CT/SR role is a dedicated function performed by a special Army team, but back in the late 1980s, this was not the case. He stated that 'No 5 Squadron members were left in no doubt that they were there to support the SAS in CT and SR operations'. He further stated that CT training was ongoing as all crews had to maintain their categorisation and qualifications to be able undertake such operations at short notice.⁴

23. When asked as to why this was not reflected in his logbook, he stated that all NVG training was directed solely toward CT operations and although the logbook did not show 60 days continuous, because they were required to be trained, remain current in CT procedures and be ready to go, this was equivalent to the Special Forces being on standby. Under squadron local orders which had to be read and signed each month, trained crew were required to keep the squadron informed of their whereabouts at all times and 'had restrictions placed upon us'.

24. Mr McCann provided a written statement to the Tribunal in rebuttal of Defence's rejection of the award. In summary, Mr McCann felt the assessment 'failed to fully comprehend the demanding service in support of the TAG and SASR performed by myself and my fellow aircrew'. In his written submission, Mr McCann states that:

- a. The Delegate has erred in his assessment of qualifying service as he has not taken into account the full time commitment to CT Operations made by members of No. 5 Squadron RAAF between 1987 and 1989; and
- b. The decision does not recognise the fact that to be eligible to fly on CT operations, the aircrew are required to maintain their flying/NVG qualifications throughout the year despite not being on an operation; and
- c. The Delegate was only able to find evidence of my participation in OP GOLD [ADF support to the Sydney Olympic Games in 2000] despite me supplying my log book entries which supported other CT training between 5 Squadron and SASR.

He reiterated this position at interview.

⁴ Categorisation is a scheme whereby aircrew members are required to demonstrate a level of capability in a number of roles. Tests are conducted at regular intervals to ensure currency.

25. Mr McCann stated that he was not after the ASM for himself as he already had the award, but wanted ‘the work they did in the squadron to be recognised’.

26. In a supplementary submission dated 12 November 2013, Mr McCann refuted the arguments put forward by Defence in their submission to the Tribunal. In particular, he stated:

I would argue that by demonstrating that by maintaining my qualification over a period of two months (60 days) during my posting that the qualification has been met, based upon the type of flying conducted at 5 Squadron during that period.

The Directorate’s Case

27. In its written submission to the Tribunal, the Directorate responded to Mr McCann’s claims. The Directorate advised that Mr McCann does not qualify for the ASM with Clasp ‘CT/SR’ for the following reasons:

- a. a member must serve for a prescribed period within a prescribed operation. Mr McCann did not; and
- b. while acknowledging Mr McCann’s time on exercises with the SAS, these comprised ‘eight activities ranging from three days to two weeks in duration and spread over a three year period’. Mr McCann therefore did not do 60 days or more continuous operational service with the TAG; and
- c. NVG formation flying and assault formation techniques undertaken by Mr McCann were not all dedicated to support the TAG.

Air Commodore Sawade’s Written Submission in 2009

28. The Tribunal was also provided a recording of an oral submission from Air Commodore Christopher Sawade that was made in 2009 to the old Tribunal during its *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*. Air Commodore Sawade was No. 5 Squadron Standardisation Flight Commander between January 1987 and December 1988.

29. Air Commodore Sawade stated he had been involved with CT training from the earliest days after the Commanding Officer received a Chief of the Air Staff (CAS)⁵ Directive for the Squadron to support the SASR. He stated that the tactics were developed by the SAS and they ‘developed four or five different training scenarios’ which the Squadron regularly practised. He added that ‘the tasks flowing from the directive required considerable effort from all personnel in the squadron ...’ and that ‘crews were placed on very short notice to move standby and recall for specific periods’.

⁵ In the late 1980s, the Chief of Air Force title was Chief of the Air Staff.

Group Captain Michael Haxell's Submission

30. The Tribunal sought a submission from Group Captain Michael Haxell DFC (Retd), former Commanding Officer of No. 5 Squadron at the time of Mr McCann's service, to ascertain if he recalled such a Directive. Group Captain Haxell responded on 3 January 2014 by e-mail and Mr McCann was sent a copy for comment.

31. Group Captain Haxell advised that from his recollection, the squadron was tasked with a project to undertake the development of operational procedures with the aim of 'greatly expanding the effectiveness of the night operational environment for CT operations'. This was a major task and the work included technical modifications to the aircraft. He recalled that a CAS Directive was issued with normal tasking then coming from Air Headquarters (the tasking authority) for involvement in specific exercises/operations with the Special Forces. Because of the security classification, only he and a few Squadron executives knew its content.

32. As the project developed, Group Captain Haxell stated that:

... numerous operations with SF/SAS were conducted to review and revise operational procedures. These operations included both overland and overwater operations including landing and rappelling, rappelling onto roof tops of high rise buildings, rappelling onto the wings and landing/hovering close to large airline aircraft seconded for the CT operation.

33. The Tribunal found that Group Captain Haxell's recollections tallied with the type of sorties flown by Mr McCann.

Mr McCann's Response to GPCAPT Haxell's Submission

34. The Tribunal provided a copy of Group Captain Haxell's submission to Mr McCann for comment and received a response on 10 January 2014. Mr McCann stated that he believed that Group Captain Haxell's submission supported his claim. He went further to state that he believed that the way the Army assesses eligibility for the award of the ASM with Clasp 'CT/SR' was 'one of the main stumbling blocks' to the success of his claim and that the Army applied 'double standards' regarding their aircrew *vis-a-vis* those of the RAAF.

35. In addition, Mr McCann suggested amending the ASM with Clasp 'CT/SR' award criteria to make them clearer, and thus allow recognition of No. 5 Squadron aircrew on proof of their CT/SR related duties.

Tribunal Consideration

36. The Tribunal carefully considered all the material before it and considered the criteria for the ASM with Clasp 'CT/SR'.

37. There is no dispute about Mr McCann's service record and his posting to No. 5 Squadron as a loadmaster during the period 1986 to 1989, nor that he conducted NVG training and exercises with the SAS from time-to-time. The Tribunal examined Mr McCann's Service Records, but these did not provide any additional information.

38. The Tribunal gave consideration to the statement by Mr McCann that the training conducted by No. 5 Squadron was ‘a significant and important part of Air Force history’ and that ‘those air and ground crews involved should be deserving of appropriate recognition’. However, in the opinion of the Tribunal, historical recognition of a unit’s activities should be recognised by a unit citation or an appropriate Unit History and not by a medallic award. The Tribunal regarded this as a matter for the RAAF to further pursue.

39. Next, the Tribunal requested Defence provide a copy of any CAF Directive to the CO of No. 5 Squadron regarding CT operations and any further supplementary material. The Tribunal also sought any CDF directive regarding CT/SR activities that included No. 5 Squadron between September 1986 and December 1989. However, after an extensive search of the records held by Defence for a Directive or Operations Order issued by CDF, CAF or the Air Officer Commanding Operational Command, none could be found.

40. The Tribunal accepted Group Captain Haxell’s statement that No. 5 Squadron received a CAS Directive for ‘a project to develop NVG operational procedures with elements of the Special Forces’. It noted that this Directive did not include tasking of long periods of operational standby, operational CT/SR activities or operational deployment in support of the TAG. The tasking was for technical and procedural development, airborne trials, procedural evaluation with the SAS, and for initial or familiarisation training.

41. The Tribunal further noted that the ASM and the ASM with Clasp ‘CT/SR’ is not awarded for any type of training, even if that training was exceptionally long, stressful or hazardous, but that the member has to be on a *prescribed operation* and fulfil other specific criteria to meet the requirements for an award. Such a prescribed operation is declared by the Minister on advice from CDF after which an operational directive is raised. While Mr McCann may have been tasked under a CAS Directive, this was not a prescribed operation for operational purposes.

42. Consequently, the Tribunal found that there is no evidence that between September 1986 and December 1989 that No. 5 Squadron was on a *prescribed operation* for CT/SR duties as directed by the CDF. The Tribunal was therefore not convinced that Mr McCann was on a *prescribed operation* as required by the Regulations for the award of the ASM.

43. The Tribunal next examined records provided by Mr McCann in support of his claim and as discussed in his oral submission. Records included copies of his aircrew log book between September 1986 and September 1989 and limited extracts of No. 5 Squadron’s Unit History Sheets (RAAF Form PH 357). Although these were not certified true copies, the Tribunal accepted them as a true and accurate record. Table 1 lists dates and activities as shown on these records as provided by Mr McCann.

44. Mr McCann’s claim that he met the 60 days criteria by ‘maintaining my qualification during my posting’ does not mean that he was actively employed on CT/SR duties for a continuous 60 day period, but merely that he had completed all the categorisation tests to keep him current as specified in Defence Instructions.

45. In his submission and during interview, Mr McCann did not mention any time spent specifically on standby for CT operations or whether he was on specific notice to move orders, so the Tribunal concluded that he was only on CT related activities when recorded in his flying log book. From his records, the Tribunal found that at no time did Mr McCann appear to be involved in CT related training or exercises for a period of 60 days or more continuous. In fact, his log book clearly denotes a variety of flying tasks *inter alia*; local flying, navigation exercises to other locations, area familiarisation flights, transit flights between capital cities and country locations, Defence Academy and Army support, hoisting, practice search and rescue tasks, and many others. This indicated to the Tribunal that he was not on regular or continuous CT standby or very short notice to move orders. The Tribunal noted that much of this flying activity was on other non-CT related tasks and was often at various remote locations. The Tribunal determined that Mr McCann was not on a prescribed operation and was not on CT operations for 60 days or more continuous.

46. For these reasons, Mr McCann does not meet the criteria for the award of the ASM with Clasp 'CT/SR'.

47. In regards to Mr McCann's suggestion that the ASM with Clasp 'CT/SR' Regulations be amended to include personnel of No. 5 Squadron who undertook CT/SR trials, procedural development and other training between 1986 and 1989, the Tribunal is not able to amend regulations on its own behalf. Furthermore, the Tribunal was not persuaded to recommend to Government such a change to include the work done by No. 5 Squadron aircrew.

DECISION

48. The decision of the Directorate not to award Mr McCann the ASM with Clasp 'CT/SR' is affirmed.

Month	Log Book CT related activity	Log Days	Unit History Sheet CT related activity	Days	Type of CT Related Activity
Sep 86	9-17	9	8-30	22	NVG Course
Oct 86	6-8, 10-15	11	5-16	11	NVG training, SAS Training
Nov 86	12, 18-21, 27	6	18-21, 27-28 inclusive	6	SAS EXERCISE REDFIN – East Sale, Vic
Dec 86	No log sheet	-	No sheet	-	-
1987					
Jan 87	19, 20-21	3	No sheet	-	NVG Training
Feb 87	1, 3, 25	3	No sheet	-	NVG Ops, NVG Famil
Mar 87	17, 18, 23, 24	4	No sheet	-	NVG Famil
Apr 87	23	1	No sheet	-	NVG Training
May 87	4-11, 20, 21	14	No sheet	-	NVG Training
Jun 87	1-3	3	1-5 inclusive	6	SAS EXERCISE DROP KICK – Laverton, Vic
Jul 87	No log sheet	-	No sheet	-	-
Aug 87	10, 11, 12	3	No sheet	-	NVG Training
Sep 87	No log sheet	-	No sheet	-	-
Oct 87	12-15, 22	5	No sheet		NVG Training
Nov 87	22-25	4	No sheet	-	EXERCISE HIGH GAIN – Holsworthy, NSW
Dec 87	No log sheet	-	No sheet	-	-
1988					
Jan 88	No log sheet	-	No sheet	-	-
Feb 88	2, 29	2	No sheet		NVG Training
Mar 88	15, 16, 22	3	22-26	4	SAS EXERCISE BRASS TACK- Brisbane, Qld
Apr 88	27	1	No sheet	-	NVG Ops
May 88	19	1	No sheet	-	NVG GF
Jun 88	15, 16, 17, 18	4	No sheet	-	CT Training
Jul 88	No log sheet	-	No sheet	-	-
Aug 88	No log sheet	-	No sheet	-	-
Sep 88	No log sheet	-	No sheet	-	-
Oct 88	3, 11	2	No sheet		NVG GF
Nov 88	3, 8, 9, 10, 14, 15, 17, 21-25	12	No sheet	-	EXERCISE ROTORBLADE NVG Ops, NVG Training
Dec 88	6, 13, 14	3	No sheet	-	NVG GF
1989					
Jan 89	23, 24, 25, 30	4	No sheet	-	NVG GF
Feb 89	7, 8, 27, 28	4	No sheet	-	NVG Form, CT Form, NVG Course
Mar 89	1, 14	2	No sheet	-	NVG GF
Apr 89	6, 10, 11, 27	4	No sheet	-	NVG GF, AFP Support
May 89	7, 8, 15, 18, 19, 20	6	No sheet		NVG GF, SAS Support
Jun 89	5, 6, 10-14	7	No sheet	-	EXERCISE SPLASHDOWN – Jervis Bay, ACT
Jul 89	4, 5	2	No sheet	-	EXERCISE ROTORBLADE
Aug 89	29	1	No sheet	-	NVG Form
Sep 89	25, 26, 27	3	No sheet	-	NVG Form

CT activity has been taken to include NVG work and work with the SAS. GF - General Flying. Form – Formation Flying

Table 1 – McCann’s Log Book and No. 5 Squadron Unit History Sheets Entries