



Australian Government

Defence Honours and Awards Appeals Tribunal

Glen Palmer and the Department of Defence [2014] DHAAT 5 (7 March 2014)

File Number 2012/024

Re **Glen Robert Palmer**
 APPLICANT

And **Department of Defence**
 RESPONDENT

Tribunal Brigadier G. Bornholt AM, CSC (Retd) (Presiding Member)
 Air Commodore M. Lax OAM, CSM (Retd)

Hearing Dates 27 June and 28 November 2013

DECISION

On 7 March 2014 the Tribunal decided to affirm the decision of the Department of Defence that Mr Glen Robert Palmer is not eligible for the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.

CATCHWORDS

DEFENCE AWARD – the Australian Service Medal with Clasp 'SPECIAL OPS'

LEGISLATION

Defence Act 1903 – ss110T, 110V(1)(a)(ii), 110VB(2)
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Service Medal Regulations 1988
Australian Service Medal Regulations 2001
Veterans' Entitlements Act 1986

REASONS FOR DECISION

Introduction

1. In 2008, Mr Glen Robert Palmer (Mr Palmer), a former member of the Australian Regular Army (ARA), applied to the Directorate of Honours and Awards of the Department of Defence (the Directorate) to be awarded the Australian Service Medal with Clasp 'SPECIAL OPS' (ASM with Clasp 'SPECIAL OPS') in recognition of his previous service with 660 Signal Troop, 126 Signal Squadron. The Directorate wrote to Mr Palmer on 1 December 2008 advising him to redirect his application to the Chief of Army (CA).
2. Mr Palmer then wrote to the CA on 25 November 2011, applying to have his service recognised with the award of the ASM with Clasp 'SPECIAL OPS'. CA replied on 4 May 2012 that '... I am best placed to consider and make a recommendation to the CDF on your past service. In consultation with Special Operations Command, (I) do not support your application'. Mr Palmer was also advised of his right to appeal the decision to refuse his application.
3. Mr Palmer applied to the Tribunal on 20 September 2012 to review the CA's refusal to recommend him for the award.

The Tribunal's jurisdiction

4. There is no dispute that the Tribunal has jurisdiction to hear and determine Mr Palmer'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 Defence Department is the correct and preferred decision having regard to the applicable law and the relevant facts.

Steps taken in the conduct of this review

5. On 27 September 2012, in accordance with the Tribunal's Procedural Rules, the Chair of the Tribunal, Mr Alan Rose, wrote to the Secretary of the Department of Defence advising of Mr Palmer's application for review and invited Defence to make submissions and provide the Tribunal with any material on which it sought to rely. The Defence Department (Defence) responded on 5 December 2012. Mr Palmer was provided a copy of the Defence submission in a letter dated 18 December 2012. He responded on 2 January 2013. On 14 March 2013, Mr Rose wrote to the Secretary requesting additional information. Defence responded on 16 April 2013.
6. During its preparation for this review, the Tribunal found that an error was apparent in the process used by Defence to reach its decision. In accordance with the ASM Regulations, CDF has the sole responsibility for specifying which activities will be declared as prescribed operations for the purposes of awarding the ASM with Clasp 'SPECIAL OPS'. In Mr Palmer's case, CA decided to refuse the application in the first instance however there is no delegated power for this action. CA should instead have forwarded a recommendation to the CDF for his decision.

7. The Tribunal scheduled a hearing on 27 June 2013 at which Defence was represented and Mr Palmer participated by telephone. At that hearing, after taking oral submissions, the Tribunal questioned Defence on the apparent error in the process. It was determined that due to the error, the decision to refuse was null and void and as such, it was recommended and Mr Palmer agreed to set aside the CA's decision and the 5 December 2012 Defence submission. Mr Palmer's original application was returned to Defence to be properly considered by CDF. Mr Rose wrote to the Secretary on 28 June 2013 to confirm this course of action.

8. On 6 September 2013, after considering the application, CDF wrote to Mr Palmer refusing his application and informing him that he was not eligible for the award of the ASM with Clasp 'SPECIAL OPS'. This advice was also sent to the Tribunal on 9 September 2013. On 13 September 2013 the Tribunal requested Mr Palmer's comments on the CDF's advice. He responded on 4 October 2013.

9. A further hearing was held on 28 November 2013 in Canberra, attended by Defence and Mr Palmer by telephone. At the hearing, further information was requested of Defence. A response from Defence was received by the Tribunal on 5 December 2013. Mr Palmer also made a further written submission dated 29 November 2013.

Mr Palmer's Service

10. Mr Palmer enlisted in the Australian Army Reserve on 3 December 1974. He was discharged on 18 June 1975 to enlist in the ARA on 23 June 1975. He was allocated to the Royal Australian Signals Corps. He served in 660 Signal Troop, a sub-unit of 126 Signal Squadron, from 1980 to 1983. During that time, as he described in his submission, he was involved in support to sensitive operations and participated in sensitive training activities with other government agencies. While none of these activities were recognised with a Defence award, Mr Palmer has claimed that the service met the eligibility criteria for the ASM with Clasp 'SPECIAL OPS'. Mr Palmer was discharged on 22 June 1984. During the ARA period of his service, Mr Palmer qualified for the award ASM with Clasp 'SE ASIA'.

Medal Regulations and Eligibility Criteria

11. The Australian Service Medal was instituted by Letters Patent on 13 September 1988 for the purpose of 'according recognition to members of the Defence Force and certain other persons who render service in certain non-warlike operations'.¹ The Regulations set out the general requirements for the ASM and state:

The Governor-General on the recommendation of the Minister may 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 purposes of these Regulations.

¹ *Commonwealth of Australia Gazette*, S 335, 2 November 1988.

12. Since 1988, a number of Clasps have been declared by the Governor-General, including the Clasp 'SPECIAL OPS'.

13. The ASM with Clasp 'SPECIAL OPS' was established in 1997 following discussions between the 1993/94 Committee of Inquiry into Defence and Defence Related Awards (CIDA) and the then CDF. The discussions were based on a submission made to CIDA that certain aspects of submarine service warranted special recognition with a unique medal. In considering the matter, the CDF recognised that there were broader issues involved than just submarine service and recommended to the Government that a Special Operations Clasp be established for the ASM. In March 1996, CDF provided advice to the Minister and sought approval:

... for special Australian Defence Force activities of a sensitive and hazardous nature (being non-warlike operations) to be prescribed operations for the purposes of the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.

The Minister agreed, with the proposal but the words 'of a sensitive and hazardous nature' did not carry forward into the subsequent Regulations.

14. The most recent Declaration and Determination for the ASM with Clasp 'SPECIAL OPS' were made under the Regulations by the Governor-General effective from 8 June 2001 and set out in the *Commonwealth of Australia Gazette* S 230 of 29 June 2001. Previous Declarations and Determinations were revoked. These new Regulations came into effect on 8 June 2001. In Declaration 1 (b), the Governor-General declared that:

... each special Australian Defence Force activity (being non-warlike operations) occurring on or after 14 February 1975 as is specified by the Chief of the Defence Force for the purposes of this declaration to be a prescribed operation for the purposes of those Regulations.

15. Furthermore, Determination 1(c) (ii) in part states that:

... the Medal may be awarded to a person who rendered service as part of the Australian element of the *prescribed operation* which is not less than the minimum qualifying period specified by the Chief of the Defence (*sic*) in relation to the operation ...

16. In accordance with the ASM Regulations, the CDF has the sole responsibility to specify which activities will be declared as prescribed operations for the purposes of awarding the Clasp 'SPECIAL OPS'. Only ADF members assigned to that prescribed operation, as declared by the CDF, and who fulfil the minimum qualifying period are eligible for the award. In considering an award of the ASM with Clasp 'SPECIAL OPS', the normal 30 days eligibility period may be waived and an alternative minimum qualifying period substituted at the discretion of CDF.

17. The Clasp 'SPECIAL OPS' was not established to be a 'default' award for personnel who do not qualify for an ASM under the normal conditions that relate to a declared operation. Additionally, it is not awarded with the Australian Active Service Medal or for 'warlike' service.

Recognition of ADF Service by awarding the ASM with Clasp ‘SPECIAL OPS’

18. Since its inception, 1674 ASMs with Clasp ‘SPECIAL OPS’ have been awarded.² These include awards for the following special activities:

- prescribed submarine operations (ongoing);
- explosive device demolition operations (ongoing);
- Operation Spitfire; East Timor (1999); and
- RAAF evacuation of NZ Embassy personnel from Tehran (1979).

In each case, the CDF determined, in accordance with the Regulations, that the above mentioned operations were non-warlike and involved special activities that were both sensitive and hazardous in nature.

EVIDENCE AND ARGUMENTS

The Arguments of Mr Palmer

19. The essence of Mr Palmer’s written and oral submissions is that the activities in which he participated met the eligibility criteria for the ASM with Clasp ‘SPECIAL OPS’ and as such that service should be recognised. He submitted that the activities constituting the special operations included, strategic communications to four overseas locations, and training and communications support to other Government agencies in Australia. As such, while an operation was not prescribed by Defence, Mr Palmer argued that a Prime Ministerial Charter from the 1950s permitted an operational relationship between 126 Signal Squadron and other Government agencies, thereby creating a prescribed operation.

20. In his submission, Mr Palmer cited as a precedent the *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-1975* which had recommended the ASM with Clasp ‘SPECIAL OPS’ be awarded to four soldiers of 201 Signal Squadron who had operated radio links from the Embassy in Vientiane to Australia. He claimed that his service was very similar to those activities.

21. Mr Palmer claimed that at different times during his service he was in real-time operational communications during several overseas crises. He also participated in support of training activities in Australia while being armed and wearing civilian clothing.

22. Further, Mr Palmer stated in his response to CDF’s decision that the term ‘sensitive’ used as an operational descriptor had not been used previously in respect of the ASM with Clasp ‘SPECIAL OPS’ or the Regulations. It is not included in Defence’s definition of ‘non-warlike’ operations. Mr Palmer further advised the Tribunal that ‘the word sensitive is used within the CDF minute of 1996 and it is critical to my submission for recognition’. He further stated that ‘nowhere in the minute or the minister's letter does it say, as Defence suggests, “that the member perform service on a non-warlike operation that was both sensitive and hazardous”’.

² Directorate of Honours and Awards correspondence to the Tribunal Secretariat, 20 February 2013.

Mr Palmer said that the CDF minute and the Minister's letter to the Governor-General 'actually allows for the CDF to declare special operations of a sensitive nature to also be declared as hazardous.' He says that 'the onus is *not* upon the member to satisfy the non-warlike descriptors associated with hazardous' and 'there is freedom to move and the CDF can recognise the sensitive service and declare the activity as hazardous and in doing so, satisfies the specific requirements for the non-warlike criteria to be met'. In the letter to Mr Palmer dated 13 September 2013 the CDF said 'it is envisaged that, when the need arises, special operations of a sensitive nature would be declared as hazardous by the Chief of the Defence Force based on an intelligence assessment'. Mr Palmer's interpretation is:

- 'that some special operations are not as cut and dry (sic) as to satisfy the ASM non-warlike criteria';
- 'To allow the ASM non-warlike criteria to be met CDF could declare the operations as hazardous'; and
- 'The medal is in fact being awarded for secret, discreet, covert or using the CDFs (sic) words, "sensitive operations".'

23. Mr Palmer further refuted the Defence position saying that 'the thrust of the Defence argument against the ASM with Clasp 'SPECIAL OPS' recognition hinges upon me not being exposed to hazards.'

24. Since a nature of service assessment was not completed, Mr Palmer contended that the advice of the Director of the Nature of Service contained in the Defence submission should be disregarded because it can only amount to a personal opinion.

25. Mr Palmer claimed that he satisfied all of the requirements for recognition of his service with the award of the ASM with Clasp 'SPECIAL OPS' because:

- the activities were directed by the government;
- they were of a special and deeply sensitive nature;
- they involved Defence Force Aid to the Civil Power;
- they were sensitive and hazardous;
- while the service was within Australia there is no requirement for overseas deployment and the precedent has been set with the ASM with Clasp 'SPECIAL OPS' awarded for domestic explosive device demolition operations;
- the activities were far beyond normal peacetime service;
- the 1996 CDF letter to the Minister specifically states that 'special operations of a sensitive nature be declared as hazardous by the CDF based on intelligence assessment'; and
- the CDF found my service to be 'considered sensitive'.

26. In this review, Mr Palmer is seeking to have his service recognised with an award of the ASM with Clasp 'SPECIAL OPS', or alternatively with an honour, the Conspicuous Service Medal. If neither is awarded then he requested that an 'inquiry into the recognition of service with 660 Signal Troop 1966 to 2000' be undertaken.

The Arguments of the Department of Defence

27. The basis of Defence's case is that Mr Palmer is not eligible for the ASM with Clasp 'SPECIAL OPS' because he did not render hazardous service in line with the eligibility criteria for the medal. In his letter to Mr Palmer, the CDF outlined the criteria he used to determine eligibility. This 'requires a member to provide non-warlike service that is both sensitive and hazardous in nature'. Further, the CDF noted that he is 'cognizant of differentiating whether an activity is actually hazardous to the individual, or if the hazard relates to sensitivities resulting from the exposure of an activity, which do not favour the award of the medal'. CDF acknowledged that Mr Palmer's service was 'unique, demanding and sensitive', (but CDF did not) assess it as meeting the hazardous element required for awarding the ASM with Clasp 'SPECIAL OPS', (because) 'there was not a significant increase in personal risk to you beyond that of normal peacetime service'.

28. Defence noted that Mr Palmer's involvement in the activities he had cited, 'was limited to providing support from Australia'. He did not deploy overseas.

29. In a transcript of an interview conducted by Defence, Mr Michael Clifford³, said that he 'did not believe that (the service) was sufficiently hazardous for it to be classified as "non-warlike service" ... although ... it was certainly stressful and very different from 'normal' roles'.

TRIBUNAL'S CONSIDERATION

30. The Tribunal's consideration focused on the eligibility criteria of the ASM, the Declarations and Determinations made under the Regulations and whether Defence's actions were consistent with those Regulations.

Mr Palmer's Submissions and Arguments

31. Mr Palmer claims that his service had met the eligibility criteria of the award because of the sensitive nature of the activities in which he was involved. Mr Palmer relies on the 1996 advisory minute from CDF (see paragraph 13) to the Minister to give weight to his arguments, specifically that the Defence 'argument hinges upon (Mr Palmer) not being exposed to hazards'. He said that the 1996 advice did not require the nature of service on a non-warlike operation to be both sensitive and hazardous.

32. The Tribunal's view is that CDF is not bound by his predecessor's 1996 advice but can use his discretion to apply elements of that advice namely, that 'activities of a *sensitive and hazardous nature* be prescribed operations for the purposes of the award'. It is clear that the CDF must act consistently with the ASM Regulations and the Declarations and Determinations that are made under those Regulations. The Tribunal considers that declaration 1(b) provides discretion to the CDF, by the phrase 'as is specified by the Chief of the Defence Force ... for the purposes of this declaration', to decide which, if any, special activities are to be

³ Mr Michael Clifford had been the Troop Commander of 660 Signal Troop in 1980-81 during Mr Palmer's service with the sub unit.

declared as prescribed operations for the purposes of the Regulations. The CDF's use of 'sensitive' to describe the nature of the 'special activity' is also considered by the Tribunal to be consistent with the Declaration and is in keeping with long-standing use of that description since it was used by his predecessor in 1996.

33. In addition, the Tribunal considers that the CDF also needs to be satisfied under the Declaration that the 'special activity' comprises elements of a 'non-warlike operation'. The Regulations do not define 'non-warlike operation'. It is the Tribunal's view that the absence of such a definition could lead to inconsistency of application which would not meet the intent of the underlying Regulations. To avoid that inconsistency and promote the purposes of the Regulations, the meaning of the term 'non-warlike operation' can be found in the long-standing guidelines that were introduced, for the conditions of service for ADF members deployed overseas, for the purposes of entitlements under the *Veterans' Entitlement Act 1986* as agreed by Cabinet in 1993. At that time, Cabinet also agreed to the alignment of the definitions contained in those guidelines to the award of medals including the ASM. That agreement, subsequently adopted by Defence and now articulated in Chapter 17 of the *Pay and Conditions Manual*⁴, defined 'non-warlike operations' to be 'those activities short of warlike operations where there is risk associated with the assigned tasks and where the application of force is limited to self-defence. Casualties could occur but are not expected'. These operations were said to in part encompass but were not limited to 'Hazardous operations - activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty'.⁵

34. The Tribunal accepts that the use of both 'sensitive activity' and 'hazardous service' the nature of which are determined by the CDF are the two conditions to be met for the award of the ASM with Clasp 'SPECIAL OPS'. This is consistent with the Declarations and Determinations made under the ASM Regulations.

35. Mr Palmer's use of precedent (see paragraph 20) to support his eligibility was considered by the Tribunal to be only partly correct. While CIDA did recommend an award to those soldiers who had operated radio links from the Australian Embassy in Vientiane, they did not qualify for the ASM with Clasp 'SPECIAL OPS', but were instead awarded the ASM with Clasp 'SE ASIA'.

36. Mr Palmer also submitted that a Prime Ministerial Charter in the 1950s created the circumstances for a prescribed operation. The Tribunal is not persuaded by this proposition. The Declaration and Determination made under the ASM Regulations is unambiguous in that a prescribed operation, for the purposes of the Declaration, can only arise as a result of a special Australian Defence Force activity being specified by the CDF.

37. Mr Palmer submitted 'that some special operations are not as cut and dry (sic) as to satisfy the ASM non-warlike criteria' and that 'the medal is in fact being

⁴ *Pay and Conditions Manual*, Chapter 17, Division 1, Introduction to Deployment, 2012.

⁵ The Tribunal was informed in a previous Inquiry that the policy was agreed to on 28 June 2001, by the then Minister Assisting the Minister for Defence, the Hon Bruce Scott MP. See Tribunal '*Inquiry into recognition of Task Group Medical Support Element One during 1990-91 (Gulf War)*' 19 June 2012.

awarded for secret, discreet, covert or using the CDFs (sic) words, sensitive operations'. It is the Tribunal's view that while this may be correct, it does not follow that an ASM should be awarded. The Declaration is clear in its requirement that the activity must be special and prescribed and a non-warlike operation. Mr Palmer's interpretation that 'to allow the ASM non-warlike criteria to be met, the CDF would declare the operation as hazardous' is correct, but Mr Palmer seems to not appreciate that discretion is provided to the CDF by the Regulations to specify which if any special activities meet the criteria. It does not follow that the Regulations obligate the CDF to specify that all 'special activities' by default must be specified as prescribed operations. The Regulations provide the CDF with the sole responsibility to decide. In reaching a decision in this instance, he has reasonably used that discretion to determine that 'special activities' must as a minimum be sensitive and hazardous in nature. He also has the discretion, in arriving at his decision, to receive recommendations from Service Chiefs, to consider intelligence assessments and to receive advice regarding the nature of the service rendered.

38. Mr Palmer cited special activities that included strategic communications support. There is no argument about the strategic communications activities having occurred and they are deemed by Defence to be sensitive in nature. Mr Palmer also cited his participation in training activities in Australia on which he was armed and wearing civilian clothing. In acting consistently with the Regulations to determine eligibility, the CDF must determine that the 'degree of hazard (of those activities is) above and beyond that of normal peacetime duty'. The Tribunal examined the circumstances of the other awards made for the ASM with Clasp 'SPECIAL OPS' (see paragraph 18) and found that in all cases there had been an element of hazard above that expected in peacetime operations. The Tribunal was not able to find any instances in which the ASM with Clasp 'SPECIAL OPS' had ever been awarded for training activities, which of themselves could not meet the conditions of the award set out in the Regulations. From the material before it, the Tribunal does not accept that training activities can be considered as 'special activities' or 'non-warlike operations' for the purposes of the Regulations.

Defence's Submission and Arguments

39. The arguments put forward by Defence proceeded on the basis that Mr Palmer is not eligible for the award because he did not render hazardous service in line with the eligibility criteria.

40. Defence submitted that the activities cited by Mr Palmer involved him providing support from within Australia and was therefore considered routine tasking, and he did not deploy overseas. The Tribunal does not accept this proposition because there is no evidence before the Tribunal that supports a requirement, for the purposes of the Regulations, that non-warlike or hazardous service can only be rendered outside Australia. There is no such restriction in the ASM Regulations or Declarations and Determinations made under the Regulations. The ASM with Clasp 'SPECIAL OPS' has been awarded previously for special activities of a hazardous nature conducted within Australia, including explosive device demolition operations.

THE TRIBUNAL'S FINDINGS

41. There is no compelling material before the Tribunal that would lead to a conclusion that the activities described by Mr Palmer were of such a nature that they should be declared as prescribed operations for the purposes of the ASM Regulations.

42. From the material before it, the Tribunal is satisfied that CDF has acted consistently with the Regulations. He has used the discretion provided to him by the Regulations to decide not to specify the activities involving Mr Palmer as prescribed operations. In doing so, the Tribunal is satisfied that the CDF has used appropriate criteria to determine which special activities he will specify as prescribed operations, namely that the nature of the special activity is both sensitive and hazardous.

43. The Tribunal also found that although the term 'non-warlike operations' is not defined by the Regulations, it is appropriate, to avoid ambiguity, to read down the term by including the element of risk associated with the hazardous nature of an activity. 'Hazardous operations' have been a part the definition of 'non-warlike operations' adopted by Defence in 2001. The Tribunal also noted that the 1996 Ministerial advice to the Governor-General in establishing the Clasp clearly specified 'special activities of a sensitive and hazardous nature'. The Tribunal found that it was reasonable to conclude therefore that both elements, i.e. sensitive and hazardous should be present before a special activity would be specified as a prescribed operation by the CDF. Further, in keeping with the principle of maintaining the integrity of the Australian Honours and Awards System and ensuring the standing of those awards already made, the Tribunal considered that an element of hazard 'above and beyond that of normal peacetime duty' was inherent to the long-standing conditions for the award.

44. In conclusion, for the reasons set out above, the Tribunal found that the Defence decision should be affirmed because:

- it is consistent with the ASM Regulations, and Declarations and Determinations made under those Regulations; and
- the activities undertaken by Mr Palmer while being sensitive, did not include the elements of hazard and risk that would be associated with the nature of non-warlike operations intended to be recognised for the purposes of the ASM Regulations.

Conspicuous Service Medal

45. Mr Palmer also sought consideration for the award of the Conspicuous Service Medal should his claim be unsuccessful for the ASM with Clasp 'SPECIAL OPS'. In respect of this request, Mr Palmer would need to be nominated for the Conspicuous Service Medal using the process outlined on the Department of Defence Honours and Awards web site: www.defence.gov.au/medals. Should Defence refuse to recommend Mr Palmer for an honour on the basis of that nomination, he can then make an application to the Tribunal to review the decision made by Defence. If an application is properly made, the Tribunal could review the Defence decision and make recommendations to the Minister. The Tribunal is therefore unable to proceed with Mr Palmer's request until an application has been properly made.

An Inquiry into Recognition of Service with 660 Signal Troop

46. Mr Palmer also sought an Inquiry into the recognition of service by 660 Signal Troop. Initiating an Inquiry cannot be done on the Tribunal's own initiative. In accordance with section 110W of the *Defence Act 1903*, the Tribunal can be directed by the Minister to hold an Inquiry into a specified matter concerning honours and awards or eligible service. In order to have an Inquiry initiated, Mr Palmer would need to communicate his request, along with appropriate supporting material, to the Minister for further consideration.

DECISION

47. The Tribunal has decided to affirm the decision of the Department of Defence that Mr Glen Robert Palmer is not eligible for the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.