



## Australian Government

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### Defence Honours and Awards Appeals Tribunal

## **Anthony Gerd Frischling and the Department of Defence [2014] DHAAT 14 (17 April 2014)**

**File Number(s)** 2012/23

**Re** **Anthony Gerd Frischling**  
APPLICANT

**And** **Department of Defence**  
RESPONDENT

**Tribunal** Mr John Jones AM (Presiding Member)  
Mr Kevin Woods CSC, OAM

**Hearing Dates** 26 March 2013, 17 May, 30 August 2013 and  
14 February 2014

### **DECISION**

On 17 April 2014 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Anthony Gerd Frischling is not eligible for the award of the Australian Defence Medal

### **CATCHWORDS**

*DEFENCE AWARD – refusal to recommend the award of the Australian Defence Medal to Mr Anthony Gerd Frischling.*

### **LEGISLATION**

*Defence Act 1903 – ss 40(1), 110T, 110V(1)(a)(ii), 110VB(2), 110VB(6)*  
*Defence Force Regulations 1952 - reg 93C and Schd 3*  
*Australian Defence Medal Regulations 2006*

## **REASONS FOR DECISION**

### **Introduction**

1. The applicant, Mr Anthony Gerd Frischling (Mr Frischling), 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 Australian Defence Medal (ADM). Mr Frischling lodged an application for the award of the ADM on 20 January 2012. His application was based on his service in the Australian Army Reserve (ARES) from 11 November 1980 to 10 December 1982.
2. The Directorate wrote to Mr Frischling, on 27 August 2012, and informed him of its decision. In that letter the Directorate explained that Mr Frischling was not eligible for the award as his period of service did not meet the eligibility criteria for the award of the medal as prescribed in Regulation 4 of the *Australian Defence Medal Regulations 2006* (the ADM Regulations).
3. Mr Frischling lodged his application for review with the Tribunal on 3 September 2012. In his application for review, Mr Frischling explained that he was discharged medically from the ARES and not discharged at his own request.

### **Tribunal Jurisdiction**

4. The Tribunal has jurisdiction to review the Directorate's decision in regard to Mr Frischling's application for the award of the ADM - see subsection 110V(1) and 110T of the *Defence Act 1903* and regulation 93C and Schedule 3 of the *Defence Force Regulations 1952*.

### **Steps taken in the conduct of the review**

5. On 27 September 2012, in accordance with the Tribunal's Procedural Rules, the Chair of the Tribunal wrote to the Secretary of the Department of Defence advising him of Mr Frischling's application for review and invited the Department to make submissions and provide the Tribunal with any material on which it sought to rely. A written submission was received from the Directorate on 17 October 2012.
6. On 12 November 2012, Mr Frischling was provided with a copy of the Directorate's written submissions and he was invited to respond to these and submit any further material he may have in support of his claim for the award of the ADM. Mr Frischling provided a written response to the Directorate's submissions on 11 February 2013. Mr Frischling was invited to give oral evidence to the Tribunal by telephone.
7. The Tribunal met on 26 March 2013. During its meeting the Tribunal heard oral evidence from Mr Frischling and considered the material provided by Mr Frischling and the Directorate.

8. The Tribunal sought further relevant information and documentation from Defence and from Mr Frischling as well as from Dr Hurst, who performed the surgery on Mr Frischling's ear while he (Mr Frischling) was serving and from Frankston Community Hospital where the surgery was performed.

9. After consideration of the additional information received a further telephone interview with Mr Frischling was held on 17 May 2013. Two further telephone interviews with Mr Frischling were held on 30 August 2013 and 14 February 2014.

### **Establishment of the Australian Defence Medal (ADM) and Eligibility Criteria**

10. On 26 June 2004, the Minister Assisting the Minister for Defence announced that the Government would introduce a new service medal, the ADM. The main features of the ADM were to be as follows:

- it would be retrospective to service from the end of World War Two;
- it would be awarded for six years service;
- it was a medal for both regular and reserve personnel of the Australian Defence Force (ie volunteers); and
- it would not be available to former National Service personnel unless they had completed the requisite six years volunteer service after the completion of their National Service

11. The impetus behind the ADM<sup>1</sup> was to recognise a shorter period of service by volunteer members of the ADF than that which was required for other awards such as the Defence Long Service Medal (DLSM) and the Defence Force Service Medal (DFSM) (ie 15 years of service). The six years service had been selected because:

- this represented an actual commitment to serve (ie a period of two years service above the general four year initial enlistment period for most services) and;
- it reflected a length of time that would make it reasonably certain that most people would have completed the requisite training and experience in the Regular or Reserve Forces to be considered fully deployable should they be called upon.

12. The ADM was formally established on 8 September 2005, pursuant to Letters Patent, by Her Majesty, Queen Elizabeth the Second. In the Letters Patent, Her Majesty declared the ADM be governed by the *Australian Defence Medal Regulations 2005*.

13. The eligibility criteria for the ADM were set out in Regulation 4(1) of the 2005 Regulations. In essence they provided that any member, or former member, of the Defence Force who after 3 September 1945 had 'given qualifying service that is efficient service, otherwise than as a result of being conscripted' for a period of at least six years or periods that totalled six years, was eligible for the medal.

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<sup>1</sup> Report of the Defence Honours and Awards Tribunal, *Inquiry into eligibility criteria for the Australian Defence Medal*, paragraphs 90-91.

14. Further consideration was given to the eligibility criteria and on 20 March 2006, pursuant to another Letters Patent, Her Majesty revoked the 2005 Regulations and declared that the ADM was to be governed by the *Australian Defence Medal Regulations 2006*<sup>2</sup>. In line with the Government's decision to change the eligibility criteria Regulation 4 provided:

Award of the Medal

- (1) The Medal may be awarded to a member, or a former member, of the Defence Force, who after 3 September 1945 has given qualifying service that is efficient service:
  - a. by completing an initial enlistment period; or
  - b. for a period of not less than 4 years service; or
  - c. for periods that total not less than 4 years; or
  - d. for a period or periods that totals less than 4 years, being service that the member was unable to continue for one or more of the following reasons:
    - i. the death of the member during service;
    - ii. the discharge of the member as medically unfit due to a compensable impairment; or
    - iii. the discharge of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force or his or her delegate

15. On 29 August 2008, the then Parliamentary Secretary for Defence Support directed the Defence Honours and Awards Tribunal (the old Tribunal) to inquire into the eligibility criteria for the award of the ADM. The Terms of Reference included a category dealing with Defence Force personnel who were discharged:

- with a non-compensable illness or injury;
- as a result of the application of a discriminatory policy;
- on compassionate grounds

16. The old Tribunal received a large number of submissions including from those 'that argued that a serviceman or woman who is discharged on medical grounds, whether or not the illness or injury resulting in the discharge is compensable, should be eligible for the ADM. It was said that in such cases the member was prevented from meeting their service obligation by reasons beyond their control. They did not elect to terminate their service' and 'Examples before the Tribunal covered the spectrum of members who were injured shortly before completing their period of service to others whose disabling injury or illness became apparent only days after commencing service.'<sup>3</sup>

17. In its submission to the old Tribunal, Defence said that it was 'sympathetic to those members who were discharged, without compensation, due to illness or injury that was not service-related and would like to have the capacity to review these on a case-by-case basis.'

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<sup>2</sup> *Commonwealth of Australia Gazette* S48 dated 30 March 2006 – Australian Defence Medal Regulations 2006.

<sup>3</sup> Report of the Defence Honours and Awards Tribunal, *Inquiry into eligibility criteria for the Australian Defence Medal*, paragraph 93.

18. In 2009 the old Tribunal made recommendations including a change to the eligibility criteria for the ADM to include the exercise of a discretionary exception in respect to the consideration of members who were discharged as medically unfit due to a non-compensable impairment. It was recommended that the 'CDF make a determination under Regulation 4 (2) of the Australian Defence Medal Regulations 2006 that where a member or former member was discharged as being medically unfit to serve due to a non-compensable injury or disease and the period of service of that member or former member is less than that prescribed under regulations 4(1) (a) to (c), that lesser period may, subject to the individual circumstances, be considered as being effective service.'<sup>4</sup> The Directorate has developed a medically unfit policy to align with the Chief of the Defence Force's determination of 8 November 2009 reflecting the Tribunal's recommendation.

19. The Tribunal notes that the eligibility criteria in clause 4(1) of the ADM Regulations contain a commitment component (i.e. completing the prescribed period of service, namely serving the shorter of four years or the initial enlistment period) and a productivity component (i.e. the service that was rendered was efficient service). Both components must be satisfied.

#### **Defence records of Mr Frischling's service**

20. Defence records of Mr Frischling's service show that he enlisted in the ARES on 11 November 1980 for a three year enlistment period. On his enlistment Mr Frischling was allocated to the Royal Australian Artillery Corps and served with 2<sup>nd</sup>/15<sup>th</sup> Field Regiment.

21. According to Mr Frischling's service record he was 17 years of age at the time of his enlistment. However, Mr Frischling informed the Tribunal he was actually 16 years of age when he enlisted into the ARES because his real date of birth is 18 June 1964 not 18 June 1963 as stated in his service record. Mr Frischling explained he was advised by a member of the enlisting unit that if he wanted to enlist at that time he would need to falsify his date of birth. In his application to the Tribunal, Mr Frischling states that he asked his father to sign a 'Certificate of Parent or Guardian' stating that his son's date of birth was one year earlier, to enable him to enlist. He enlisted under the name of Gerd Frischling using the date of birth as 18 June 1963.

22. Mr Frischling was discharged from the ARES on 10 December 1982 after serving two years and one month of his enlistment period. Mr Frischling's records show that the order recording his discharge is dated 25 January 1983. The order states the reason for discharge as being *DA40(1)*<sup>5</sup> *at own request*.

23. Mr Frischling's service records do not indicate that he was medically discharged from the ARES.

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<sup>4</sup> Report of the Defence Honours and Awards Tribunal, *Inquiry into eligibility criteria for the Australian Defence Medal*.

<sup>5</sup> Defence Act 1903, section 40(1) allows that a 'voluntarily enlisted soldier of the Active Citizen Military Forces may claim his discharge before the expiration of the period of service for which he is engaged, if he has given not less than three months' notice in writing to his commanding officer of his intention to claim his discharge.' DA40(1) is the name of the application form used for discharge.

## **Summary of the Arguments of Mr Frischling**

24. In his written submission Mr Frischling said:

*As I have just received a notification stating I do not qualify as I did not serve my full term. Which is correct, but the reason for discharge was not at my own request, as stated in the letter but the reason was. That after my blown ear drum, I was told that I now was not medically fit to serve. Then after being discharged I had several operations to repair the damage to my ear. After which I tried to rejoin no less than five times, but each time failed the hearing test. I was told that as I was discharged for medical reasons that I am still eligible for the ADM.*

25. The essence of Mr Frischling's written and oral submissions is that he was led to believe and still believes that he was medically discharged from the Army because his hearing was below standard.

26. In his oral evidence Mr Frischling said he had a pre-existing ear problem when he enlisted into the ARES.

27. Mr Frischling explained that some of his friends had advised him that because he was medically discharged from the ARES he would be entitled to the award of the ADM.

28. Mr Frischling complained that the records of his service held by Defence are unreliable. In his written submissions, he stated:

*The ADF documents regarding my service have different enlistment dates. Even my discharge date seems to be scribbled in as an afterthought. And I do not believe all the information in my service record is correct. Just to add I believe there must be a problem with records held by the ADF and ADFC [cadets] in my case. As I also still serve in the ADFC and there (sic) records show my service as 8 years longer than I have actually serviced (sic).*

## **Summary of the Arguments of the Directorate**

29. In its written submissions, the Directorate reiterated what it had said in its decision - that Mr Frischling did not complete four years service or his initial term of enlistment, which was a period of three years and, accordingly, Mr Frischling is not eligible for the ADM because his service does not meet the eligibility criteria specified under Regulation 4(1) of the ADM Regulations.

30. The Directorate also recommended that if Mr Frischling wishes to have the reason for his discharge from the Australian Army Reserve reviewed, he may do so by writing to:

Commander Career Management – Army  
Department of Defence  
PO Box 7980  
Canberra BC ACT 2610

### **Considerations of the Tribunal**

31. The critical issue in determining Mr Frischling's eligibility for the ADM is the reason for his discharge. There is no dispute that he did not serve for four years and did not complete his initial engagement.

32. Defence has produced no evidence to support the single record on which it relies in this issue. On the other hand, Mr Frischling has not produced any evidence to support his version of events.

33. In making its decision that Mr Frischling is not eligible for the ADM, the Directorate relied on Defence's record of his service. These show his discharge as being under the provisions of DA 40(1), that is 'at own request'. In its submission in response to Mr Frischling's application for review of that decision, the Directorate has relied again on that entry in the service record.

34. The reliability of the Record of Service is central to the Tribunal's consideration of Mr Frischling's application for review of the Directorate's decision.

35. Mr Frischling contests that element of his service record. He asserted in his written submission, and repeatedly during his telephone hearings, that he did not request discharge but was told by a senior member of the unit that he had to leave because of the problems with his hearing.

36. In response to requests from the Tribunal, Defence has not been able to provide a copy of Mr Frischling's request for discharge or any evidence that it ever existed.

37. A document certifying that Mr Frischling was 'fit for enlistment in the ARES' dated 28 October 1980 and apparently signed by the Regimental Medical Officer of 2/15 Field Regiment was included in the Defence submission. No record has been found that any other medical examination of Mr Frischling was carried out during his service.

38. One of the documents provided by Defence as part of its submission to the Tribunal is a 'Platoon Commander's Assessment' which reports on Mr Frischling's performance during his attendance at a course. The dates '7-22 Feb 81' are written at the top of the first page of the report. The report indicates that Mr Frischling was a member of 7 Platoon and the Platoon Commander is named as Lieutenant Palmer.

39. There is no reference to this course in Mr Frischling's Record of Service. Enquiries made by the Tribunal produced the information from Frankston Community Hospital that Mr Frischling was admitted on 9 February 1981 and discharged on

12 February 1981. The hospital advised from their records that the operation was 'exploration of right ear & modified radical mastoidectomy' by Dr Hurst.

40. Mr Frischling's attendance, for general duties rather than as a student, at a recruit course at Puckapunyal from 19 September 1981 to 3 October 1981 is recorded in the Record of Service. Nothing is recorded in Mr Frischling's Record of Service between that course and Mr Frischling's discharge which occurred more than 14 months later.

41. The records held by Defence relating to the service of Mr Frischling are incomplete and several aspects of the unit administration relating to his service are clearly flawed, making them unreliable.

### **The Tribunal's Findings**

42. By reason of subsection 110VB(6) of the *Defence Act 1903*, in conducting this review, the Tribunal is bound by the eligibility criteria that govern the award of the ADM. These criteria are found in regulation 4(1) of the ADM Regulations. Accordingly, in order for Mr Frischling to be eligible for the award of the ADM it must be established that his period of service met the prescribed minimum period of service (in the case of Mr Frischling this is three years), or the reason for his discharge fell within one of the prescribed exceptions.

43. There is no dispute that Mr Frischling's period of service failed to meet the prescribed minimum period of service.

44. Mr Frischling's discharge does not fall within one of the exceptions contained in paragraph 4(1)(c) of the ADM Regulations.

45. Accordingly, the only remaining issue is whether Mr Frischling was discharged for a non-compensable injury.

46. As Mr Frischling's service record does not record his discharge being due to a non-compensable injury, the Tribunal cannot take Mr Frischling's submissions in this regard any further. His service record clearly evidences that his discharge was at his own request, although the Tribunal is concerned that there is no documentation to support this element of his record. Considering the clear evidence of poor unit administration, including record keeping, in relation to Mr Frischling's service, it is quite possible that his version of events is substantially correct. It is not within the jurisdiction of the Tribunal to amend Mr Frischling's service record but the Tribunal agrees with the Directorate's advice to him which recommended, that if he wishes to pursue this matter he should write to the Commander Career Management – Army at the address mentioned in paragraph [30] above.

47. The exception of discharge for a non-compensable injury has no application to the circumstances in which Mr Frischling was discharged.

48. Accordingly, Mr Frischling's application for the award of the ADM must be determined on the basis of his period of service in the ARES. As this period of

service was not for a period of three years, there can be no finding, other than a finding that his period of service does not meet the eligibility criteria for the award of the ADM. For these reasons, the Tribunal finds that the decision of the Directorate is the correct and preferred decision and should be affirmed. This finding does not in any way diminish the contribution Mr Frischling made to his country for the period he did serve.

## **DECISION**

49. The Tribunal affirmed the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Anthony Gerd Freschling is not eligible for the award of the Australian Defence Medal.