



Australian Government

Defence Honours and Awards Appeals Tribunal

David Jenkins and the Department of Defence [2014] DHAAT 22 (28 May 2014)

File Number(s) 2013/013
Re **David Jenkins**
Applicant

And **Department of Defence**
Respondent

Tribunal Air Commodore M. Lax OAM, CSM (Retd) (Presiding Member)
Vice Admiral D. Chalmers AO (Retd)

Hearing Dates 23 April 2014

DECISION

On 28 May 2014 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr David Jenkins is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal

LEGISLATION

Defence Act 1903 – ss 110T, 110V, 110VA, 110VB(2)
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Defence Medal Regulations 2006

REASONS FOR DECISION

Introduction

1. The applicant, Mr David Jenkins (Mr Jenkins), a former member of the Australian Army Reserve (ARES), 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 Australian Defence Medal (ADM). Mr Jenkins' application for the award had been made on the basis of his service in the ARES between 2004 and 2008.
2. Mr Jenkins lodged an application with the Directorate for the ADM on 8 September 2012. On 25 March 2013, the Directorate refused his application. On 6 April 2013, Mr Jenkins lodged an application for review with the Defence Honours and Awards Appeals Tribunal (the Tribunal) to review the decision of the Directorate to refuse to recommend him for the ADM.

Jurisdiction

3. There is no dispute that the Tribunal has jurisdiction to hear and determine Mr Jenkins' 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.

Steps taken in the conduct of the review

4. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011 (No.1)*, on 8 May 2013, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Jenkins' application for review and requesting that he provide a report. On 5 June 2013, the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report, the Directorate confirmed its position that Mr Jenkins' service did not meet the eligibility criteria for the award he sought. On 18 June 2013, a copy of the report of the Directorate was forwarded to Mr Jenkins for comment. On 10 December 2013, after a further letter from the Tribunal Secretariat seeking his comments, Mr Jenkins advised the Tribunal by way of email that he 'didn't have any objections to the hearing going through as is and (he didn't) have anything to add.'
5. The Tribunal first met on 12 March 2014 to consider the material provided by Mr Jenkins and the Directorate. The Tribunal scheduled a hearing with Mr Jenkins and the Directorate on 14 April 2014, but Mr Jenkins failed to appear at the scheduled time and the hearing was deferred. The Tribunal scheduled a further hearing for 23 April 2014. At that hearing, the Tribunal heard oral evidence from Mr Jenkins. The nominated representatives of the Directorate were unable to appear at that time, and requested that any questions for the Directorate arising from the hearing (of which there were none) be put to the Directorate in writing.

Eligibility Criteria for the Award of the ADM

6. On 26 June 2004, the Minister Assisting the Minister for Defence announced that the government would introduce a new service medal, the Australian Defence Medal. The 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 ADF (i.e. volunteers);
- 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.

7. On 8 September 2005, Her Majesty Queen Elizabeth instituted the ADM by Letters Patent, but these were never formally gazetted.

Changes to the Regulations

8. There was considerable criticism of the eligibility criteria for the ADM, particularly the six years' service requirement. It was pointed out that there were servicemen and women, including Vietnam veterans, who had enlisted for a shorter period and had completed their period of service.

9. Following representations relating to these concerns and other matters, the Government decided to revise the six year qualifying period of service for the ADM to 'satisfactory completion of an individual's initial enlistment period or four years, whichever is the lesser'. At the same time the Government decided that the award would also be available to National Servicemen.

10. On 20 March 2006, pursuant to further Letters Patent, Her Majesty revoked the 2005 Regulations and declared that the ADM was to be governed by the *Australian Defence Medal Regulations 2006* ('the 2006 Regulations').¹

The 2006 Regulations

11. The medal was thus implemented in 2006 with the proposed changes to the eligibility criteria now adopted. Revised Regulation 4 provides:

The Medal may be awarded to a member, or 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

¹ *Commonwealth of Australia Gazette* No. S 48, dated 30 March 2006 – Australian Defence Medal Regulations 2006.

- (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;
 - (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.

12. The eligibility criteria for the medal therefore specified a length of service (commitment) being the completion of the shorter of four years or initial enlistment period and for efficient service (productivity). Both elements were required to be demonstrated.

The 2008 Defence Honours and Awards Tribunal Inquiry

13. Following further representations to the Government from the public, on 29 August 2008, the Parliamentary Secretary for Defence Support requested the Defence Honours and Awards Tribunal (the old Tribunal) to inquire into the eligibility criteria for the award of the ADM.² However, the old Tribunal did not recommend any changes to the length of service criteria.

14. The Australian Government accepted the recommendation that a discretionary exception be introduced, on a case by case basis, where a member has been discharged as medically unfit for service due to a non-compensable impairment or illness.

15. In the course of its 2009 Inquiry, the old Tribunal also recommended that CDF develop and publish guidelines on the matters relevant to the exercise of this discretion. These would include the length and quality of the member's service prior to discharge, the nature of the injury or disease leading to discharge, the circumstances in which it was sustained, medical reports, and the recommendation of the member's Commanding Officer. To date, these guidelines have not been developed or published.

Definition of Efficient Service and Enlistment Year

16. The Defence Honours and Awards Manual (DHAM) defines 'efficient service' at paragraph 28.4.b as:³

² The report is available at <http://defence-honours-tribunal.gov.au/inquiries/completed-inquiries/australian-defence-medal/>.

³ The DHAM is available at www.defence.gov.au/medals under the General Information tab.

Efficient service-means any service in the Permanent or Reserve Forces of the ADF as determined by the Chief of the Defence Force (CDF) or a Service chief.

17. Exceptions are also covered in the DHAM. They include periods of leave or suspension without pay as well as any period where a member has received a formal warning because of inefficiency concerns, or a period of service for another Australian Government body. Also a member may not be efficient if they are absent without leave for longer than 24 hours or for periods of detention.

18. Certain categories of service have a requirement to complete periods of compulsory continuous training to be classified as efficient and such are usually noted on the member's service records.

19. The enlistment year is defined in the DHAM at paragraph 28.f. as 'the 12-month period ending on the anniversary of the date of enlistment or appointment'.

CDF's Determination Regarding Efficient Service

20. The power to determine that a member of the ADF has given qualifying service that is efficient service is vested in the Chief of the Defence Force by Regulation 4(2) of the ADM Regulations 2006 which reads:

(2) For subregulation (1), the Chief of the Defence Force or his or her delegate may determine that a period of the member's qualifying service is efficient service.

21. This power has been used by the CDF to determine a period of a member's qualifying service for both Permanent and Reserve Forces. On 6 February 2013, the CDF determined that:

The minimum annual periods of service to be completed by members to be those shown in the attached schedule:

<i>Army Reserve</i>	<i>20 Days</i>	<i>From 20 April 2000</i>
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This determination remains extant and is consistent with periods previously published in Defence Instructions.

Mr Jenkins' Service Record

22. Mr Jenkins enlisted in the ARES on 9 March 2004. As a member of the Reserves, he had no initial enlistment period. Mr Jenkins completed his initial training and was posted to the 5/6 Battalion, Royal Victorian Regiment as a rifleman. On 28 April 2008, he requested discharge for personal reasons and this was accepted on 17 June 2008. Mr Jenkins served for a period of four years, three months and 19 days.

23. At the hearing, Mr Jenkins advised that he also had previous service with the New Zealand Territorial Forces and had received the New Zealand Defence Service Medal.

Arguments of Mr Jenkins

24. Mr Jenkins seeks recognition for his service and while he freely admits he did not complete four years in the Army Reserve that was deemed efficient, he seeks Tribunal consideration on compassionate grounds. Mr Jenkins agreed that he served three years efficient service as confirmed by his pay records but that he was unable to complete a fourth year due to the pressure of his regular work with the Metropolitan Ambulance Service. He was also studying at University at the time and was suffering a medical condition. He reapplied to the Army in 2012, but was rejected. He also stated that ‘a *considerable* part of my identity has and will continue to be closely linked to the Australian Army’ (italics in original).

25. At interview he reiterated that he wanted to complete his Army Reserve service, but was unable due to his medical condition. This condition also prevented him from re-joining the ARES in 2012. He had fond memories of his time with the ARES and was pleased to be able to present his case to the Tribunal in person.

Arguments of the Directorate

26. In its written submission to the Tribunal, the Directorate responded to Mr Jenkins’ claim for the ADM. The Directorate advised that Mr Jenkins does not qualify for the ADM because he elected discharge at own request before completing four years efficient service. Mr Jenkins service as determined by the Directorate from Mr Jenkins’ pay records is shown in Table 1.

Date From	Date to	No of Days Served	No of Days Required	Type of Service
9 March 2004	8 March 2005	102.83	20	Efficient
15 March 2005	7 March 2006	58.00	20	Efficient
10 March 2006	27 February 2007	31.50	20	Efficient
13 March 2007	5 September 2007	12.50	20	Non Efficient
25 March 2008	27 June 2008	3.00	20	Incomplete Year due to discharge

Table 1 – Mr Jenkins’ Army Reserve Service

Tribunal Consideration

27. The Tribunal carefully considered all the material before it and considered the criteria for the ADM.

28. There is no dispute about Mr Jenkins’ service record and his subsequent discharge at own request after four years, three months and 19 days. The Tribunal took note to acknowledge Mr Jenkins service at the hearing.

29. The ADM Regulations require that Mr Jenkins’ service is for four years or aggregate four years and that each year be deemed efficient service. To be deemed efficient, Mr Jenkins had to have completed 20 days or more in each reserve year and be deemed efficient by his commanding officer. The Tribunal found that while

Mr Jenkins completed four years, three months and 19 days in the ARES, only three of those years were deemed efficient.

30. Mr Jenkins argued that he had to elect discharge from the ARES due to the pressure of his Ambulance work and that he tried to re-apply to the Army in 2012, but was rejected. He acknowledges that he did not complete four years efficient service but that he felt the Tribunal might 'show some leniency' in his case.

31. The Tribunal noted that medallic recognition is conditional on prerogative instruments such as Letters Patent and the subsequent Regulations that flow from them. As such, it is not possible for the Tribunal to overlook the ADM medal regulations as they are the law. This means that the Tribunal must consider and abide by the criteria for the award. In this case the criteria require that to be awarded the ADM, a member must have served for four years and be deemed efficient in each of those years.

32. The Presiding Member explained to Mr Jenkins the service criteria for the ADM and that he did not qualify for the award. He further explained that the Tribunal had no discretionary powers in this instance regardless of how compelling the compassionate case. The Tribunal has to abide by the ADM Regulations as they are the law. Mr Jenkins stated he understood and accepted this explanation.

33. As Mr Jenkins did not complete an aggregate of four years or more efficient service, and as his discharge was at own request and not because of a discriminatory policy or due to a medical condition, Mr Jenkins does not qualify for the ADM.

DECISION

34. The Tribunal has decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Jenkins is not eligible for the award of the Australian Defence Medal.