



Australian Government

Defence Honours and Awards Appeals Tribunal

Patterson and the Department of Defence [2020] DHAAT 13 (30 July 2020)

File Number(s) 2020/003

Re **Lieutenant Colonel R.M.C. Patterson, OAM, RFD (Retd)**
Applicant

And **Department of Defence**
Respondent

Tribunal Brigadier M. Bornholt, AM (Retd) (Presiding Member)
Ms J. Schwager, AO

Hearing Date 3 July 2020

DECISION

On 30 July 2020 the Tribunal decided to set aside the decision of the Directorate of Honours and Awards of the Department of Defence that Lieutenant Colonel R.M.C. Patterson is not eligible for the Australian Service Medal with Clasp ‘BOUGAINVILLE’ and substitute its decision that Lieutenant Colonel R.M.C. Patterson is eligible for the Australian Service Medal with Clasp ‘BOUGAINVILLE’ and directs that the award be issued.

CATCHWORDS

DEFENCE AWARD – Australian Service Medal - Bougainville

LEGISLATION

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

Defence Regulation 2016 - S36

Commonwealth of Australia Gazette No. S336, Australian Service Medal Regulations dated 2 November 1988

Commonwealth of Australia Gazette No, S21, Declaration and Determination under the Australian Service Medal Regulations dated 29 January 2004

REASONS FOR DECISION

Introduction

1. The applicant, Lieutenant Colonel Robert Patterson, OAM, RFD (Retd), seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) dated 16 December 2019 that he is not eligible for the award of the Australian Service Medal (ASM) with Clasp 'BOUGAINVILLE'.¹

2. Lieutenant Colonel Patterson was assigned for duty in Bougainville with the Truce and Peace Monitoring Groups from 14 to 29 May 1998. This period of 16 days is not in dispute. He returned to Bougainville in August 1998. His service record indicates that this period of service was for a total of 12 days from 10 to 21 August 1998. Lieutenant Colonel Patterson claims that this second period of service was for 14 days thus providing the requisite 30 days accumulated service to qualify for the ASM with Clasp 'BOUGAINVILLE'.²

Tribunal Jurisdiction

3. 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) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence award in response to an application. Section 36 of the *Defence Regulation 2016* specifies defence awards for the purposes of s110T of the Defence Act. Included in the defence awards at Item 26 is the ASM. Therefore, the Tribunal has jurisdiction to review the decision.

Steps taken in the conduct of the review

4. In accordance with its Procedural Rules, on 13 February 2020 the Tribunal wrote to the Secretary of the Department of Defence informing him of Lieutenant Colonel Patterson's application for review and requesting that he provide a report.³ On 1 April 2020 the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence Submission.⁴ In the submission, the Directorate confirmed that:

*an examination of your service records has been unable to confirm the exact dates of arrival and departure from Bougainville*⁵

¹ DH&A – BN11904570 letter to Lieutenant Colonel Patterson dated 19 December 2019

² Submission by Lieutenant Colonel Patterson to the Tribunal dated 19 January 2020

³ DHAAT/OUT/2020/037 letter to the Secretary of Defence dated 13 February 2020

⁴ DH&A/OUT/2020/0023 letter to the Tribunal – *The Defence Submission* dated 1 April 2020

⁵ Ibid. Para 13.

5. Despite this statement, the submission confirmed that Lieutenant Colonel Patterson had only completed a total of 28 days service in aggregate and did not qualify for the ASM with Clasp 'BOUGAINVILLE'.

6. On 2 April 2020 the Tribunal forwarded a copy of the Defence Submission to Lieutenant Colonel Patterson for comment.⁶ The Tribunal heard oral evidence from Lieutenant Colonel Patterson by telephone on 3 July 2020. The hearing was also attended by the Respondent, represented by Ms Jo Callaghan and Mr Wayne Parker from the Directorate. The hearing was adjourned to allow Defence to search for aircraft log books and records relating to Lieutenant Colonel Patterson's assertion that he left Bougainville on a date after 21 August 1998.

7. On 23 July 2020 the Directorate provided the relevant information.⁷

Australia Service Medal

8. The ASM was established 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 military operations.⁸

9. The ASM Regulations govern the award of the medal. Conditions for award of the medal are:

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 the 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.

10. On 21 January 2004, the Governor General made a Declaration and Determination under the ASM Regulations relating to the activities of the Truce and Peace Monitoring Groups in Bougainville⁹:

⁶ DHAAT/OUT/2020/100 letter to Lieutenant Colonel Patterson dated 2 April 2020

⁷ DH&A/OUT/2020/045 BN18453788 letter to the Tribunal dated 23 July 2020.

⁸ *Commonwealth of Australia Gazette* No, S336 dated 2 November 1988

⁹ *Commonwealth of Australia Gazette* No, S21 dated 29 January 2004

- (a) **revoke** the Declaration and Determination made on 4 February 1998 under regulation 3 and subregulation 4(2) respectively of the Regulations;
- (b) **declare**, under regulation 3 of the Regulations, the activities of the Truce and Peace Monitoring Groups in Bougainville that commenced on 20 November 1997 and ended 26 August 2003 to be a prescribed operation for the purposes of the Regulations; and
- (c) **determine**, under Subregulation 4(2) of the Regulations, that the conditions for award of the Australian Service Medal with Clasp 'BOUGAINVILLE' for that prescribed operation are:
 - (i) the Medal may be awarded to a member of the Australian Defence Force who rendered service as such a member while posted to or serving as a member of the Australian element of the prescribed operation for a period of 30 days, or for periods amounting in the aggregate to 30 days;
 - (ii) the Medal may be awarded to a member of the Australian Defence Force who rendered service as such a member for a period of 30 days, or for periods amounting in the aggregate to 30 days, as part of the contribution of a foreign Defence Force to the prescribed operation while on secondment or exchange with the foreign Defence Force;
 - (iii) the Medal may be awarded to a member of the Australian Defence Force who rendered service as such a member for a period of 30 days, or for periods amounting in the aggregate to 30 days, for official visits, inspections or other occurrences of a temporary nature while assigned for duty with the military contribution in the prescribed operation;
 - (iv) the Medal may be awarded to a person who rendered service as part of the Australian element of the prescribed operation for a period of 30 days or more, or for periods amounting in the aggregate to 30 days or more, and who, in accordance with a determination made by the Minister under paragraph 4(4)(b) of the Regulations, is in a class of persons who may be awarded the Medal;

...

Lieutenant Colonel Patterson's Service

11. Lieutenant Colonel Patterson enlisted initially into the National Service Scheme on 14 July 1970 as an Army Reservist. Lieutenant Colonel Patterson was commissioned on 11 February 1973 and served in the Royal Australian Infantry Corps. He later transferred to the Royal Australian Army Medical Corps as a specialist in environmental health. At the time of his deployment to Bougainville he was the Commanding Officer

of 10th Field Ambulance. Lieutenant Colonel Patterson was assigned for duty in Bougainville in 1998 to utilise his expertise in waste water management.

12. Lieutenant Colonel Patterson has received the following awards for his service with the Army Reserve:

- Australian Active Service Medal with Clasp 'EAST TIMOR',
- International Force in East Timor (INTERFET) Medal,
- Reserve Force Decoration with five clasps,
- Australian Defence Medal, and
- Anniversary of National Service 1951-1972 Medal.

13. In 2019 Lieutenant Colonel Patterson was awarded the Medal of the Order of Australia in the General Division for service to science, particularly the environment and health. He was discharged from the Army on 20 January 2019 having reached compulsory retirement age.

Lieutenant Colonel Patterson's Case

14. Lieutenant Colonel Patterson submitted that the date he left Bougainville after his second deployment was 26 August 1998.¹⁰ He said that the date that was relied upon by the Directorate of 21 August 1998 was 'wrong'. He said that his first deployment from 14 to 29 May 1998 was to review environmental matters associated with the deployment to ensure compliance with Australian standards. He said that his inspections revealed a number of issues with unsafe water which were reported, however his recommendations to facilitate clean/safe water were not actioned by the Force and a significant number of viral casualties were reported in late July. This required an urgent second deployment in August which he agreed to support as he was recognised as a civilian water and waste water design specialist. The Land Headquarters Task Order dated 6 August 1998 authorised this deployment of himself and two others to complete the task.¹¹

15. Lieutenant Colonel Patterson claimed that he arrived in Bougainville on 10 August 1998 on a Royal Australian Air Force (RAAF) courier with Sergeant Bowyer and Sapper Raabe.¹² He said that there were no arrangements in place to facilitate their arrival and there was no transport to get from the airfield. He said that no accommodation had been organised. He said they did not go to the Force Headquarters at Loloho on arrival but went straight to Arawa to address the water problem. He said that at no stage did he see any administrative personnel from the Force Headquarters nor speak to the Force Commander, which he had done on his previous deployment in May.

¹⁰ Submission by Lieutenant Colonel Patterson to the Tribunal dated 19 January 2020

¹¹ LHQOPS I8A dated 060650Z Aug 98 – *Water Supply to Op BELISI – HQ LSF Tasking*

¹² Lieutenant Colonel Patterson, Oral evidence, Public hearing, Canberra, 3 July 2020

16. Lieutenant Colonel Patterson said that the team got straight to work on arrival at Arawa, rectifying drainage and procuring local materials to enable the construction of guttering and filtration. He said that there were significant delays in this process and it took several days to get properly established and acquire appropriate tools for the task. He said that there was scepticism amongst some of the International staff who were wary of the viral threat and 'didn't want people up there'. He said that he was conscious that the Task Order only allowed him 14 days to complete the task and he was disappointed that he had to depart after the 14 days as the job had not been completed.

17. Lieutenant Colonel Patterson said that he could not recall the exact date that he departed but thought it was 26 August 1998. He said that he left on a RAAF flight and he did not recall other passengers being on the aircraft. He confirmed that Sergeant Bowyer and Sapper Raabe were not on the flight and had stayed to finish the job and test the system. The Operation BELISI roll book records Sergeant Bowyer and Sapper Raabe leaving Bougainville on Thursday 27 August with four others. He said that he did not report into the Force Headquarters on departure.

18. Lieutenant Colonel Patterson acknowledged that the roll book records him as leaving on Friday 21 August 1998 but he says this is incorrect and the Force Headquarters would not have been aware of his departure. He acknowledged that the roll book records five officers including himself departing on 21 August but he reiterated that to the best of his knowledge there were no other passengers on the flight with him.

19. In support of the contention that he left after 21 August 1998, Lieutenant Colonel Patterson said that it was not logical that he would voluntarily return two days short of qualifying for the ASM given it was rare for individuals to receive this award in the 1990s. He also asserted that there were problems with the administration of Reservists on Continuous Full Time Service (CFTS) at that time, particularly for operational deployments. He said this was made more confusing as his own unit was in the process of being redesignated from 10th Field Ambulance, a health unit, to 2nd Force Support Battalion (2 FSB), a logistic support unit. He said that his unit's advice that he ceased CFTS on 21 August 1998 had been provided some three weeks after the deployment and could not be relied upon.¹³ He also provided a copy of his annual appraisal for 1998 wherein the Reporting Officer indicated that Lieutenant Colonel Patterson had visited Bougainville twice for a total of 30 days.¹⁴

20. The Tribunal was satisfied that Lieutenant Colonel Patterson's evidence was credible, reliable and truthful.

¹³ 2 FSB 030 dated 180200Z Sep 98

¹⁴ EDRO dated 9 March 1999

The Defence Submission

21. In its written submission to the Tribunal, Defence stated that it had re-assessed Lieutenant Colonel Patterson's eligibility after his application for review was received. Defence found that the first period of deployment of 16 days in May 1998 was not disputed. Defence said that after considering the roll book markings, it had applied a 'balance of probability' that he had arrived for the second deployment on 11 August 1998.¹⁵ Relying on the same roll book entries, it had also determined that he had departed Bougainville on 21 August 1998 and he had therefore completed 11 days of qualifying service on his second deployment. Defence indicated that these dates correlated to the Land Headquarters Task Order¹⁶ and the 2 FSB cessation of CFTS signal.¹⁷ Defence concluded that:

Lieutenant Colonel Patterson was found to have rendered an aggregate of 28 days service towards the requisite qualifying service of 30 days for the ASM with Clasp 'BOUGAINVILLE'

22. The submission indicated that Defence had been unable to source RAAF flight records for August 1998 due to closures of relevant archives and record storage facilities.

23. At hearing Defence indicated that it had information relating to when RAAF flights arrived and departed Bougainville but not records of manifests or passenger lists. The Tribunal asked Defence to produce that information by 1 August 2020.

24. On 23 July 2020 the Directorate advised that relevant flight record extracts confirmed that a C130 aircraft from 37 Squadron originating in Richmond had flown three separate sorties into Bougainville to Kieta airfield on 11, 12 and 13 August 1998 via Townsville in support of Operation BELISI.¹⁸ The advice also indicated that an aircraft from 36 Squadron had two hours on the ground at Kieta on 24 August 1998 as part of a UH1H rotation via Townsville and an aircraft from 37 Squadron rotated Army personnel as 'part of a changeover of personnel' on 25 and 26 August 1998 into and out of Kieta via Townsville.

Tribunal Consideration

25. **General.** The Tribunal is required to review decisions 'on the merits'. This requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.¹⁹ The merits review revolves around the evidence and

¹⁵ The Defence Submission, Para 18.

¹⁶ LHQOPS I8A dated 060650Z Aug 98 – *Water Supply to Op BELISI – HQ LSF Tasking*

¹⁷ 2 FSB 030 dated 180200Z Sep 98

¹⁸ DH&A/OUT/2020/045 BN18453788 letter to the Tribunal dated 23 July 2020.

¹⁹ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2

accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the decision-maker.

26. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.²⁰ The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof, and there is no presumption that the decision was correct.²¹ The Tribunal is bound to make what it regards as the ‘correct and preferable’ decision and must reach a decision that is legally and factually correct.

27. **Lieutenant Colonel Patterson’s Qualifying Service.** There is no dispute that Lieutenant Colonel Patterson was assigned for duty with the Peace and Truce Monitoring Groups in Bougainville. There is also no dispute that he completed 16 days of qualifying service as defined in the Regulations from 14 to 29 May 1998. The issue for the Tribunal to decide is when in August 1998 Lieutenant Colonel Patterson arrived in, and departed from, Bougainville.

28. **When did Lieutenant Colonel Patterson Arrive in Bougainville?** The Tribunal notes that Land Headquarters initiated the second assignment by Task Order dated 6 August 1998.²² The Task Order identifies that a team of three – Lieutenant Colonel Patterson, a health senior non-commissioned officer and a plumber be deployed to Bougainville by RAAF Scheduled Courier on or around 11 August 1998 ‘for an initial period of 14 days’ to improve the quality of potable water.

29. The redacted copy of the Operation BELISI roll book indicates that the team, including Lieutenant Colonel Patterson were present in Bougainville on 11 August 1998.²³ The remainder of the team were named as Sergeant Bowyer and Sapper Raabe by Lieutenant Colonel Patterson at the hearing. There is some doubt about when the team arrived. The roll book marks 11 August 1998 as ‘*’ which is defined in the roll book legend as ‘indicates a member yet to march in or has marched out’. Defence said that it had applied a ‘balance of probability’ that Lieutenant Colonel Patterson had arrived on 11 August 1998.²⁴

30. Material subsequently provided by Defence indicates that the RAAF Scheduled Courier for the operation departed Richmond on 11 August 1998 and arrived in Kieta via Townsville, presumably on the same day. The aircraft then travelled to Honiara before returning to Kieta the next day, then to Townsville before returning to Richmond on 14 August 1998.

²⁰ Pearson, Linda, “Merit Review Tribunals”, in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68

²¹ *McDonald v Director-General of Social Security* (1984) 1 FCR 354

²² LHQOPS I8A dated 060650Z Aug 98 – *Water Supply to Op BELISI – HQ LSF Tasking*

²³ Operation BELISI roll book dated August 1998

²⁴ The Defence Submission, Para 18.

31. The Tribunal noted that an Officer Career Management message had approved CFTS for Lieutenant Colonel Patterson from 10 to 26 August 1998. Lieutenant Colonel Patterson claimed this was evidence that he had arrived in Bougainville on 10 August 1998. The Tribunal does not accept this claim. The approval of CFTS is a mechanism to allocate funding for salary purposes and enable access to associated conditions of service. It is not the authority for commencement and cessation of service, this is done by posting order or task order and supported by appropriate attendance records and reports.

32. Having considered all of the material and giving significant weight to the aircraft flight schedule and the roll book markings, the Tribunal is reasonably satisfied that Lieutenant Colonel Patterson arrived in Bougainville on Tuesday 11 August 1998.

33. **When did Lieutenant Colonel Patterson depart Bougainville?** The Tribunal notes that the roll book recorded a series of departures occurring on 21 August 1998 when five individuals, including Lieutenant Colonel Patterson, are recorded as having departed. Significantly, the material provided by Defence does not indicate the presence of any RAAF aircraft in Bougainville on 21 August 1998. The evidence suggests that there may have been one on the ground on 20 August and again on 24 August but this is not clear from the schedules provided.

34. Significantly, the roll book records two Army personnel arriving on 25 August 1998, a Corporal and a Major; and the flight schedule indicates that an aircraft from 37 Squadron originated in Richmond on 25 August 1998 and flew to Kieta via Townsville. This same aircraft returned to Kieta from Townsville on 26 August 1998 and returned to Richmond on 27 August 1998 via Townsville. The roll book records that six Army personnel departed Bougainville on 27 August 1998 including Sergeant Bowyer and Sapper Raabe. The tasking for this flight states:

This task carried fresh rations and supplies from Townsville to Kieta. Army personnel were also taken to and from Kieta as part of a change over for Operation BELISI.

35. The Tribunal notes that Lieutenant Colonel Patterson gave sworn evidence that he completed 14 days service in Bougainville in August 1998. The Task Order specified 14 days service and Lieutenant Colonel Patterson was adamant that he completed 14 days of service. Having found that he arrived on 11 August 1998, the Tribunal noted that 14 days service would see him departing on 24 August 1998.

36. Lieutenant Colonel Patterson gave evidence that he did not visit the Force Headquarters and no administrative staff were present when he arrived or departed. The Tribunal noted that the Force Headquarters was located at Loloho wharf, the remediation task was conducted at Arawa approximately seven kilometres southeast of Loloho and Kieta airfield was a further seven kilometres to the southeast of Arawa. Having

considered these geographical dispositions, the Tribunal was reasonably satisfied that Lieutenant Colonel Patterson's assertion that he did not visit the Headquarters and they therefore would not have been aware with any certainty of his movements, was a credible contention.

37. Giving weight to Lieutenant Colonel Patterson's evidence that he could not recall others being on the aircraft when he departed, and noting that the an RAAF aircraft was on the ground on 25 August 1998 before returning to Townsville, the Tribunal was reasonably satisfied that Lieutenant Colonel Patterson departed Bougainville on that aircraft on 25 August 1998 and remained in Townsville on 26 August 1998 before returning to Richmond on 27 August 1998.

38. The Tribunal gave weight to Lieutenant Colonel Patterson's claim that he would not willingly have departed two days short of qualifying for the ASM. The Tribunal was reasonably satisfied that this was the case as in the 1990's very few servicemen and women had been on operational service and medals such as the ASM were keenly sought. This was particularly the case for the Reserve.

39. Having considered all of the material, the Tribunal was reasonably satisfied that Lieutenant Colonel Patterson's claim that the roll book was incorrect had merit. The Tribunal accepted that it was unlikely that the appropriate Force administrative staff would have been aware of the exact date of Lieutenant Colonel Patterson's departure as they were physically dislocated from the Kieta airfield and the Arawa work site. Most significantly, the aircraft schedules confirm that no aircraft departed Bougainville on 21 August 1998 and there is clear evidence that there was an aircraft involved in rotating Army personnel on 25 and 26 August 1998.

40. For the reasons given above, the Tribunal is reasonably satisfied that Lieutenant Colonel Patterson departed Bougainville on 25 August 1998 by RAAF aircraft having completed 14 days of service as tasked by Land Headquarters.

Finding

41. The Tribunal finds that Lieutenant Colonel Patterson completed qualifying service from 14 to 29 May 1998 and from 11 to 25 August 1998 in Bougainville. Lieutenant Colonel Patterson was assigned for duty and rendered service in the prescribed operation for periods amounting in the aggregate to 31 days. He is therefore eligible for the ASM with Clasp 'BOUGAINVILLE'.

DECISION

42. The Tribunal decided to set aside the decision of the Directorate of Honours and Awards of the Department of Defence that Lieutenant Colonel R.M.C. Patterson is not eligible for the ASM with Clasp 'BOUGAINVILLE' and substitute its decision that he is eligible for the ASM with Clasp 'BOUGAINVILLE' and directs that the award be issued.