



Australian Government

Defence Honours and Awards Appeals Tribunal

Martin and the Department of Defence [2020] DHAAT 20 (20 November 2020)

File Number	2020/009
Re	Mr Daryl Joseph Martin Applicant
And	The Department of Defence Respondent
Tribunal	Mr Graham Mowbray (Presiding Member) Ms Anne Trengove
Appearances	Mr Daryl Martin Ms Jo Callaghan, Directorate of Honours and Awards, Department of Defence Mr Wayne Parker, Directorate of Honours and Awards, Department of Defence
Hearing Date	2 September 2020 (Hearing by telephone)

DECISION

On 20 November 2020 the Tribunal affirmed the decision of the Department of Defence of 12 June 2018 that Mr Daryl Martin is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – initial enlistment period not met – four years service not met – limited exceptions to service requirement – no discretion

LEGISLATION

*Defence Act 1903 – Part V111C – Subsections 110VB(2), 110VB(6)
Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette
No. S48, 30 March 2006*

REASONS FOR DECISION

Introduction

1. Mr Daryl Joseph Martin seeks review of the decision of 12 June 2018 of Mr M Jordan, Assessments Manager of the Department of Defence, that he is not entitled to the Australian Defence Medal (ADM) for his service in the Australian Regular Army.¹
2. Mr Martin's service, commencing with enlistment in the Australian Regular Army Supplement National Service (ARAS NS) on 19 April 1972 until his discharge on grounds of exceptional hardship on 25 January 1973, consisted of nine months and seven days. His initial enlistment period was 18 months.
3. It is this period of service from 19 April 1972 to 25 January 1973, and the circumstances surrounding his discharge, with which this review is concerned.
4. Mr Martin has been awarded the Anniversary of National Service 1951-1972 Medal for his service with the Australian Defence Force.

The Australian Defence Medal

5. The ADM was instituted by Queen Elizabeth the Second by Letters Patent on 8 September 2005, 'for the purpose of according recognition to Australian Defence Force personnel who have served for a minimum of six years since the end of World War II.'
6. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.^{2 3} As a result of that amendment the minimum period of service became the initial enlistment period or four years. Regulation 4 of the amended Regulations states:

'(1) 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

(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 total less than 4 years, being service that the member was unable to continue for one or more of the following reasons:

¹ This review also encompasses further unsuccessful assessments of Mr Martin's eligibility for the ADM from Mr Robert Curtin, Chief of Staff to the Minister for Defence Personnel, on 17 December 2018, and by Ms J Callaghan of Defence on 24 April 2020.

² *Australian Defence Medal Regulations 2006*, Commonwealth of Australia Gazette No. S48, 30 March 2006.

³ These Regulations were further amended on 13 July 2020. However because of section 110VB(6) of the Defence Act, these recent amendments do not apply to Mr Martin's review.

(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;

*(2) For sub regulation (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.'*⁴

Agreed Facts

7. At the hearing the Tribunal obtained the agreement of both Mr Martin and the representatives of Defence to a number of salient facts which are not contested. These are:

- Mr Martin enlisted as a National Serviceman in the ARAS NS on 19 April 1972
- the duration of the initial enlistment period was 18 months
- Mr Martin was discharged on 25 January 1973
- the reason for his discharge was 'NSA 35B(5A) on grounds of exceptional hardship'⁵
- Mr Martin's service extended for nine months and seven days.

The Issues

8. The issues for the Tribunal are:

- did Mr Martin complete either his initial enlistment period or four years in the ARAS NS
- was Mr Martin unable to complete four years service for any of the reasons set out in paragraph 4(1)(d) of the Regulations
- does the Tribunal have the power or discretion to disregard the ADM Regulations and to award the ADM.

⁴ Ibid.

⁵ *National Service Act 1951-1973*, subsection 35B(5A). Interim Discharge Certificate for D J Martin, 25 January 1973.

Did Mr Martin complete an initial enlistment period or four years service

9. Normally for a person to be eligible for the ADM that person must have completed their initial enlistment period or for at least a total of four years.⁶

10. As set out in the Agreed Facts above, Mr Martin's initial enlistment period was 18 months. He accepts, however, that he did not complete this period by serving nine months and seven days from 19 April 1972 to 25 January 1973. It follows that he also did not complete four years service.

11. Clearly therefore he cannot qualify for the ADM under paragraphs 4(1)(a), (b) or (c) of the Regulations.

Does Mr Martin meet any of the other eligibility criteria

12. Paragraph 4(1)(d) of the Regulations provides three exceptions to the rule that a person must normally serve for the initial enlistment period or four years:

- death during service
- discharge if medically unfit due to a compensable impairment
- discharge due to a discriminatory defence policy as determined by the Chief of the Defence Force.

13. Neither death nor medical impairment brought Mr Martin's service to an end.

14. The discriminatory policies accepted by the Chief of the Defence Force and included in the third exception, such as marriage, pregnancy and homosexuality, were explained to Mr Martin at the hearing. He agreed that none were relevant to him ceasing service.

15. Again it is clear that none of the exceptions in paragraph 4(1)(d) of the Regulations can be used to award Mr Martin the ADM.

Does the Tribunal have the power or discretion to disregard the ADM Regulations and to award the ADM

16. Both in his written submissions to the Tribunal and in his oral evidence Mr Martin expressed considerable concern about the circumstances of his discharge, in particular the failure of the Army and the Department of Defence to properly inform him before his discharge of the options and entitlements which were available to him. In his written material before the Tribunal Mr Martin said:

- when the Whitlam Government got in *we were told to be on the parade ground (at Puckapunyal Barracks, Victoria) on Sunday morning. Our Colonel (I. R. Bird) told us in his own words all you Nashos collect your leave and pay and fuck-off (apology for swear word). You don't want to be here anyway. ... He (the Colonel) did not ask did anyone have any questions.*

⁶ Paragraphs 4(1)(a), (b) and (c) of the Regulations.

*He just went back to his office. ... Why was the Regiment not taken to the rec hall, tank hanger, and had our discharge explained to us.*⁷

- *I thought at the time this is the end! off my Army service and was discharged in Sydney in early 1973. The contentious issue here is completion off service for medal entitlement.*⁸
- *How can any one complete an 18 month enlistment when your commanding officer tells you to go, no questions asked.*⁹
- *Had the CO of Armoured Centre (Lt Col I. R. Bird informed me of my entitlements (eg. Qualifying for Defence Services Home Loan) upon completion of tenure of service, and not told me in no uncertain terms to leave, my decision to take discharge would not have occurred.*¹⁰
- the option to continue to serve was never mentioned.¹¹

17. Mr Martin's oral evidence reaffirmed these points:

- after the Whitlam victory he had not asked to go, but was told by his Colonel 'to go'
- he was never given the option to stay on as had National Servicemen at Bandiana Barracks
- he would have been happy to stay on if given the option
- there was no counselling as suggested on the *Pro Forma for Election*¹²
- although this *Pro Forma for Election* included the words *I have been counselled as to the conditions under which I may continue to serve and the benefits of doing so*, he just signed it as a matter of course with no such counselling
- no mention was made of benefits such as housing loans.

18. Defence pointed out that Mr Martin did sign the *Pro Forma for Election* which contained options for continuing to serve or accepting a discharge on grounds of exceptional hardship.¹³ Defence was unable to comment on the content or quality of any counselling Mr Martin received at the time. It noted 'No advice as to his

⁷ D J Martin, letter to Tribunal in response to Defence Report, 14 May 2020.

⁸ D J Martin, letter to the Hon Darren Chester M.P., Minister for Veterans Affairs, 25 October 2018.

⁹ Ibid.

¹⁰ D J Martin, Submission with Application for Review, 20 August 2019.

¹¹ Annotation by Mr Martin to 17 December 2018 letter from Mr Robert Curtin, Chief of Staff to the Minister for Defence Personnel.

¹² Pro Forma for Election signed by Mr Martin on 11 December 1972.

¹³ Discharge on grounds of exceptional hardship was the expedient administrative reason relied upon to allow National Servicemen to leave the Army if they wished at the earliest possible date after the election of the Whitlam Government – Defence Submission 8 May 2020, paragraph 13.

entitlement to the ADM can have been included in the counselling as the award was not introduced until 2006 (*sic*).¹⁴

19. We largely accept Mr Martin's account of what happened at Puckapunyal on the day after the Whitlam election victory in December 1972 and the circumstances surrounding his discharge. In our view, because of the events at that particular time, it is very likely that there was no counselling on his options and any possible benefits. His account was not challenged by Defence. But of course we cannot be certain about the surrounding circumstances as asserted, nor is it pertinent to the decision we are required to make.

20. The question for the Tribunal is whether it can disregard the rules set out in the Regulations that govern the award of the ADM. Section 110VB(6) of the Defence Act requires that, in reviewing a reviewable decision, the Tribunal is bound by the eligibility criteria that applied in the making of the reviewable decision. The reviewable decision in this case is that of Mr Jordan on 12 June 2018 and the eligibility criteria are those set out in the ADM Regulations at paragraph 6 above.

21. Clearly therefore the Tribunal does not have any general power to ignore the rules for the ADM laid down in the Regulations, nor any broad discretion to award the ADM.

Finding : Mr Martin is not entitled to the ADM

22. For the reasons given above, in particular that Mr Martin having served nine months and seven days in the ARAS NS in 1972 to 1973 and thus failing to meet the eligibility criteria, we find that Mr Martin is not entitled to the Australian Defence Medal.

23. We are aware that Mr Martin has suffered from serious medical conditions for many years, including cancer, and greatly appreciate his assistance to the Tribunal in this matter, both in his written material and at the telephone hearing on 2 September 2020. However, we have no general power to ignore the eligibility criteria and award the medal.

24. Nevertheless, we acknowledge Mr Martin's contribution through his service as a National Serviceman in the Regular Army Supplement National Service.

TRIBUNAL DECISION

25. The Tribunal affirms the decision of the Department of Defence of 12 June 2018 that Mr Daryl Martin is not eligible for the award of the Australian Defence Medal.

¹⁴ The ADM was in fact created on 8 September 2005.