



Australian Government

Defence Honours and Awards Appeals Tribunal

Hulse and the Department of Defence re: Hughes, Johnson and Walker - DHAAT 04 (10 May 2021)

File Number(s)

Re: Lieutenant Colonel George Hulse, OAM (Retd) on behalf of Mr Edward Hughes, Mr John Johnson and Mr Denis Walker
Applicant

And: Department of Defence
Respondent

Tribunal

Air Vice-Marshal John Quaife, AM (Retd) Presiding Member
Major General Simone Wilkie, AO (Retd)
Mr Graham Mowbray

Hearing Date 24 February 2021

DECISION

On 10 May 2021 the Tribunal recommended to the Minister for Defence that the decision by the Chief of Army to not support the awarding of the Commendation for Distinguished Service to Messrs Hughes, Johnson and Walker be affirmed. Although recommending that Lieutenant General Burr's decision be affirmed, the Tribunal does not agree with the reasons put forward by Chief of Army, but makes this recommendation on its assessment of the merits of the application of Lieutenant Colonel Hulse.

Noting the hierarchy of operational awards available in the current context and outside of the Australian honours and awards system and the actions of Messrs Hughes, Johnson and Walker were commendable, the Tribunal also recommends to the Minister for Defence that the Chief of Joint Operations be asked to consider awarding a Joint Operations Command commendation to Messrs Hughes, Johnson and Walker in recognition of their personal courage and initiative in executing the mortar resupply task on the night of 15/16 May 1968.

CATCHWORDS

DEFENCE HONOUR – *Distinguished Service Decorations – Commendation for Distinguished Service – Gallantry Decorations – Joint Operations Command Commendation - eligibility criteria – Fire Support Base Coral – Mortar Platoon - South Vietnam*

LEGISLATION

Defence Act 1903 – Part VIIC - Sections 110T, 110V(1), 110VB(1) 110VB(6).

Defence Regulation 2016, Section 35.

Commonwealth of Australia Gazette No S25 – Distinguished Service Decorations Regulations – dated 4 February 1991.

Commonwealth of Australia Gazette No S25 – Gallantry Decorations Regulations – dated 4 February 1991.

Commonwealth of Australia Gazette No S18 – Amendment of the Distinguished Service Decorations Regulations – dated 22 February 2012.

REASONS FOR DECISION

Introduction

1. The applicant, Lieutenant Colonel George Hulse OAM (Retd) seeks review of a decision of the Chief of Army, Lieutenant General Rick Burr AO DSC MVO, of 9 April 2020 to not support the retrospective awarding of the Commendation for Distinguished Service to Privates Hughes, Johnson¹ and Walker for their service on the night of 15/16 May 1968 at the Battle of Fire Support Base Coral.

2. On 30 June 2017, the applicant wrote to the then Chief of Army seeking decorations for nine Army personnel who, in his view, *‘contributed service to the Army in a manner which was above and beyond that expected of soldiers in combat’*. On 22 June 2018, having received no response to his initial letter, Lieutenant Colonel Hulse wrote to the Tribunal seeking a review of what he deemed to be an *‘unwritten rejection’* of his application. The Tribunal has no power to review a matter that has not been the subject of decision on an application for an honour or award.

3. On 3 July 2018, Brigadier Leigh Wilton AM, Director General of Personnel - Army, wrote to Lieutenant Colonel Hulse seeking clarification of the award sought for each member. On 23 November 2018 Lieutenant Colonel Hulse replied to Brigadier Wilton advising that he sought the Commendation for Distinguished Service for Privates Hughes, Johnson and Walker to recognise *‘the personal courage and devotion to duty they displayed in combat on 16 May 1968.’* On 9 April 2020, Lieutenant General Burr responded to Lieutenant Colonel Hulse stating that, given there was no evidence of maladministration nor any new evidence provided by the applicant which would not have been available to decision makers responsible for awards at the time, he did not support the awards sought.

4. On 30 April 2020, Lieutenant Colonel Hulse applied to the Tribunal seeking review of Lieutenant General Burr’s decision. Lieutenant Colonel Hulse provided additional information on 28 May 2020 which was subsequently provided to Defence.

Tribunal jurisdiction and decision under review

5. Pursuant to s110VB(1) of the *Defence Act 1903* (the 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 Defence Force to refuse to recommend a person for an honour or award in response to an application. Part 6 of the *Defence Regulation 2016* defines defence honours as being those set out in Section 35 of the Regulation. Included in the defence honours at Item 29 is the Commendation for Distinguished Service.

6. The Tribunal was satisfied that Lieutenant Colonel Hulse’s request of 30 June 2017 constituted an application as required by s110V(1)(c) of the Act. The Tribunal was satisfied that the Chief of Army’s response of 9 April 2020 constituted a refusal to recommend the award, thus satisfying the requirements of s110V(1)(a) and (b) of the Act and constituting the *reviewable decision*.

¹ Private Johnson was promoted to Lance Corporal on 28 November 1968.

7. The Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision in 2020, as required by s110VB (6) of the Act. In accordance with s110VB (1) of the Act, as the applicant seeks a defence honour, the Tribunal does not have the power to affirm or set aside the decision but may make recommendations regarding the decision to the Minister.

Conduct of the review

8. On 14 May 2020, in accordance with the Tribunal's Procedural Rules, the Chair wrote to the Secretary of the Department of Defence seeking a report, including a merits-based assessment of Privates Hughes, Johnson and Walker's actions against the eligibility criteria for the Commendation for Distinguished Service, and other germane material. On 12 August 2020, Ms Petrina Cole, Director of Honours and Awards in the Department of Defence (the Directorate) provided a report on the making of the reviewable decision in each case. Lieutenant Colonel Hulse provided his written response to the Defence Report on 9 September 2020.

9. A public hearing was conducted in Canberra on 24 February 2021. Lieutenant Colonel Hulse, Lieutenant Colonel Tony Jensen MG and Mr Johnson were present and gave evidence. The Tribunal was unable to establish an effective video connection, but Mr Alan 'Jack' Parr and Mr Denis Walker were able to give evidence via telephone. The respondent was represented at the hearing by Ms Petrina Cole (Director, Honours and Awards). Colonel Bronwyn Johnstone (Director Personnel Policy, Army) and Ms Melissa Jones (Defence People Group Special Counsel) also represented Defence.

Actions on 15/16 May 1968

10. Privates Hughes, Johnson and Walker were assigned as reinforcements to the 1 RAR Mortar Platoon defending Fire Support Base (FSB) Coral in Vietnam. The Mortar Platoon had been overrun by the enemy and suffered casualties during the night of 12/13 May 1968. On the night of 15/16 May 1968, during continued fighting at the Fire Support Base, the three soldiers were ordered by the 2IC Mortar Platoon, Lieutenant Jensen, to resupply the mortar position from the ammunition point within the Fire Support Base. Neither the men nor Lieutenant Jensen knew the precise location of the ammunition point.

11. According to the applicant's submission, the urgent demand for mortar ammunition to suppress high intensity, extended duration and widely dispersed enemy attack meant the mortar platoon could not afford to wait for the Fire Support Base resupply system to deliver the required ammunition. Following the orders of Lieutenant Jensen, the men located the resupply point where they realised that the limited number of heavy boxes that they could carry by hand would not be adequate. Given the urgency of their task, the men ignored the paperwork demands of the officer-in-charge of the ammunition point and, using a 'borrowed' Land Rover, transported as many boxes of ammunition as they could fit onto the vehicle back to the mortar platoon position. The applicant has stated that the men repeated this replenishment effort *'at least two times despite the clear and present danger of being hit by high explosive enemy ordnance, shrapnel or bullets'*.

Lieutenant Colonel Hulse's written submissions

12. Lieutenant Colonel Hulse, then a junior Royal Australian Engineer officer, commanded the 1st Field Troop of the 1st Field Squadron on the ground at FSB Coral. He did not witness the actions of Privates Hughes, Johnson and Walker. However, he is of the view that *'their action was significant in the continuing defence of FSB 'Coral' during the largest and most intense set of battles experienced by IATF(FWD) during the entire 26-day Operation'*. To support his application, Lieutenant Colonel Hulse provided the Tribunal with written accounts from Mr Jack Parr, the Mortar Platoon radio operator, Lieutenant Tony Jensen, the officer commanding the 1 RAR mortar line, as well as from Messrs Hughes, Johnson and Walker. With the exception of Mr Hughes, each of these witnesses also presented evidence to the Tribunal at the hearing.

13. In his written account, Mr Hughes recalls that he was acting as 'number two' to Private Russell Stanford as they operated their mortar from a firing position established inside an Armoured Personnel Carrier (APC). He recalls *'wandering around'* looking for mortar rounds to replenish their stock. He does not recall clearly who ordered him to secure additional rounds, but states that he always thought it to be Private Stanford.

14. Mr Hughes vaguely recalls an altercation *'with a bloke'* as he was about to *'steal'* his Land Rover. He recalls additional altercations at the ammunition depot, but no details. He does recall driving the acquired ammunition back to their lines using the Land Rover and the vehicle picking up and dragging some barbed wire along the way. His final recollection is of a *'bloke'* talking with Lieutenant Jensen the following morning who he discovered later wanted him charged *'for presumably stealing his Land Rover'*. Mr Hughes states that nothing came of this. Although his statement does admit his memories of Vietnam are *'almost gone'*, he does not recall anyone being with him during the re-supply. Mr Hughes states that he does not consider his actions to have been *'remarkable in the least'* and that they *'certainly don't deserve any more attention'*.

Lieutenant Colonel Hulse's evidence at hearing

15. At the hearing, Lieutenant Colonel Hulse told the Tribunal that he would not reiterate the actions of Privates Hughes, Johnson and Walker that he had described in his application, but instead he spoke to his motivation for his submission, being the overall significance and experience of the battles at Fire Support Base Coral. He told the Tribunal that it was Mr Parr who alerted him to the actions of Privates Hughes, Johnson and Walker. He told the Tribunal that Privates Hughes, Johnson and Walker were National Servicemen who had only been on the position for two days, did not know one another, and *'didn't even want to be in the Army'*. He spoke to their tasking being *'very questionable'* with respect to the location of the resupply point, and the danger and uncertainty of moving around the Fire Support Base.

16. Lieutenant Colonel Hulse said he regarded the actions of the three soldiers as remarkable given their status as National Servicemen and the absence of any supervisor guiding their actions. He outlined a scenario where he thought the men might have chosen to shelter from danger in *'a hole somewhere out of sight'* and then reported

being unable to find the ammunition point leaving the platoon to rely on the normal resupply system which he noted was not keeping up with demand. Rather, he opined that the men put *'their duty before their own safety'* which he regarded as *'inspirational'* and *'exemplary conduct'* in demonstrating *'what it takes to do something that is not part of the normal job description of a soldier'*.

17. Lieutenant Colonel Hulse told the Tribunal that, having been requested by Defence to nominate which particular award he thought should be awarded to Privates Hughes, Johnson and Walker, he had reviewed the Letters Patent and Regulations and decided that the Commendation for Distinguished Service provided the *'best fit'*.

18. In response to a question from the Tribunal, Lieutenant Colonel Hulse outlined the normal re-supply system that should have provided ammunition re-supply on request, meaning the men of the mortar platoon were not trained and would not normally be required to participate in re-supply tasks. He said that the number of mortar rounds that had been fired and the magnitude of the re-supply problem was such that the normal system failed to deliver to the mortar platoon. Lieutenant Colonel Hulse explained that, although over-stretched, re-supply priorities were considered by the Company Quartermaster Sergeant with the highest priority being given to rifle and M16 ammunition re-supply. He stated that there was a lot of re-supply movement occurring across the Fire Support Base.

19. When asked to outline his consideration of why Privates Hughes, Johnson and Walker's actions represented distinguished performance of duties as per the conditions for the award, Lieutenant Colonel Hulse said that the soldiers' actions were *'above and beyond what you would ask three infantry privates to do'*. He felt this *'distinguished them from any other soldiers he had come across'*. He felt their actions were distinguished – not just *'above the average'*. They *'stood out'*. When asked to consider Defence advice which claimed Headquarters Joint Operations Command consider the award to represent distinguished service across the duration of a tour of duty rather than an individual action, Lieutenant Colonel Hulse said that he did not accept that interpretation as it does not appear within the regulations governing the award.

20. When asked to consider the gallantry of Privates Hughes, Johnson and Walker's actions, he stated that he would not argue against a gallantry award, although the concept of their actions being distinguished is what steered him to propose the Commendation for Distinguished Service.

Lieutenant Colonel Jensen's evidence

21. Lieutenant Colonel Jensen outlined the situation on the night of 15/16 May 1968. He recalls checking with his section commanders during the battle and deciding that he needed to initiate resupply from the ammunition point. Despite not knowing the precise location of the ammunition point, he ordered Private Hughes to *'get a couple of mates, go to the Echelon area, find the ammo dump and bring back as much as he could get.'* He also suggested that if they could get a vehicle, they should do so. Lieutenant Colonel Jensen confirmed that the following morning he was approached by an ordnance corps Lieutenant who came to collect his vehicle. The Lieutenant said he wanted to charge and court martial Private Hughes for being rude, refusing to sign paperwork and stealing the vehicle. Jensen dismissed the Lieutenant's request with

the advice that he should take it up with the mortar platoon commander. He heard no more of the matter.

22. Lieutenant Colonel Jensen is of the view that the three soldiers displayed great initiative and courage. He believes their initiative, courage and determination contributed significantly to 1 RAR Mortar Platoon successfully helping to repulse the enemy attack on Fire Support Base Coral. He felt that the men's exposure to enemy fire during their re-supply efforts demonstrated gallantry. Lieutenant Colonel Jensen did not regard his order to be unreasonable and there was no doubt in his mind that the men would do what he had asked of them. He also regarded Private Hughes as one of the more experienced men in his platoon who was likely to manage the task well. Lieutenant Colonel Jensen said that the men were not 'written up' at the time, but that he had discussed the significance of their actions and his confrontation with the Ordnance Lieutenant with Captain Hugh McNally, the mortar platoon commander. Other than acknowledging he would look after the matter; Lieutenant Colonel Jensen has no idea whether Captain McNally took any further action.

23. In his written statement that was included with Lieutenant Colonel Hulse's submission, Lieutenant Colonel Jensen recalled that his three soldiers were '*not the only ones "out and about"*'. He stated that he '*could clearly see other re-supply Land Rovers and APCs moving to A Coy*'.

Mr Parr's evidence

24. Mr Parr described activity in his command post that night as being 'frenetic'. He described the demand on the mortar platoon being particularly high and their operations in general being 'abnormal'. Mr Parr described the real fear that they may be overrun during the enemy attack and spoke of the platoon firing a lot of rounds defending a gap in the perimeter. Mr Parr recalls mortar tubes being so hot that he could clearly see the cooler rounds as they dropped through the overheated (red-hot) tubes.

Mr Johnson and Mr Walker's evidence

25. Mr Walker explained that he had not met either Private Hughes or Johnson before coming into the platoon on the afternoon of 15 May 1968 as a reinforcement. He knows that they headed off together to get ammunition, and he remembers working as a group at the ammunition dump, but his recollections are mostly of his personal experience. Mr Johnson recalls following Private Hughes to the ammunition dump with Private Hughes calling on other soldiers not to shoot as they were Australians. Both men recall their first trip being made without the benefit of the Land Rover and being limited to an inadequate number of the heavy ammunition boxes.

26. Mr Johnson and Mr Walker described their sense of urgency arising from being nearly out of ammunition and spoke of their exposure to enemy fire. Mr Johnson described small arms fire passing over their heads as '*putting the wind up you a bit*' but being more concerned with incoming mortar rounds and rockets. Mr Johnson was concerned that, being crouched down and running towards the ammunition point, he was silhouetted against the light of the battle and could easily have been mistaken for

the enemy. In his written submission, he described thinking there was more chance of being killed by his own soldiers than by the enemy.

27. When Private Hughes appeared with a Land Rover for their next effort, all the men simply loaded up the vehicle with as many boxes as they could physically lift. Mr Walker recalls making at least two runs with the Land Rover. As a new reinforcement to the platoon and being under fire for the first time, Mr Walker found himself doing things that he had not expected and that were well outside his training. He was '*bloody frightened*' and thought he was going to get shot, but given the intensity and the urgency of their situation he did not question the order.

Defence submissions

28. The Defence report submitted to the Tribunal states that 'the actions of Privates Hughes, Johnson and Walker are not in question'. Unfortunately, the submission also confirms that Lieutenant Colonel Hulse's application has not been considered on the merits of those actions. Rather, the report signals that Defence only reviewed the matter looking for evidence of maladministration or compelling new evidence and having found neither, decided the matter could not be referred for a 'merits review'. When reviewing the matter for maladministration, Defence has considered only whether some earlier nomination was managed in accordance with the usual Defence process of the time. Having found no previous nomination, Defence concluded there could be no maladministration.

29. Although Defence did not conduct a review of Lieutenant Colonel Hulse's application on the merits of the men's actions, the Defence report does provide some insight as to how such an assessment may have proceeded. In the first instance, the Defence report includes advice from the secretariat of the Headquarters Joint Operations Command, Operational Honours and Awards Board that nominations for distinguished service decorations are normally considered with respect to the nominee's entire deployment/rotation rather than the actions of a single action/battle. The Defence report suggests that Lieutenant Colonel Hulse's application would be rejected as it did not conform with this advice.

30. Secondly, the Defence report states that Defence failed to identify any evidence that Messrs Hughes, Johnson or Walker demonstrated distinguished performance of their duties in warlike operations. The basis for this judgment was said to be that '*there is insufficient evidence to indicate if their actions were of a higher standard than others in the Mortar Platoon when it would be reasonable to conclude that ammunition resupply during the battle was a regular occurrence.*' At the hearing, and after hearing evidence that the resupply of ammunition was not a normal or regular occurrence for the men of the platoon, Ms Cole stated that Defence would no longer stand by this conclusion.

31. At the hearing Ms Cole spoke of an 'evolving' process and indicated that, since the Defence report had been raised, the actions of Privates Hughes, Johnson and Walker had been considered more broadly including consideration of gallantry. When pressed by the Tribunal, however Ms Cole stated that the actions of Privates Hughes Johnson and Walker had not been reviewed against the eligibility criteria for the Australian Gallantry Decorations.

Tribunal consideration

32. **General.** The Tribunal is required to review decisions ‘on the merits’ and this requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review or the process leading to it. The merits review necessitates consideration of the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the original decision-maker. In making its decision, the Tribunal considers afresh the relevant facts, law and policy. 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. The Tribunal is bound to make what it regards as the ‘correct or preferable’ decision.

33. **The Defence submissions.** The Tribunal noted that, despite the suggestion made at the hearing that internal Defence processes were ‘evolving’, Defence had not conducted a merits-based review with respect to the criteria of the Australian Honours and Awards system despite being specifically requested to do so in the Tribunal’s letter to the Secretary of 14 May 2020. Defence’s failure to provide a merits-based assessment of Privates Hughes, Johnson and Walker’s actions against the relevant criteria is a breach of its statutory obligations both as a model litigant under the *Legal Services Directions 2017* and under the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011*. Rule 14 requires the Defence Secretary to ‘use his ... best endeavours to assist the Tribunal in relation to the review.’ Rule 7 requires the report from the Secretary to include its ‘findings on material questions of fact’.

34. The Tribunal is concerned by the approach adopted by Defence in this matter, both in making the decisions under review, and in defending those decisions before the Tribunal. The Defence submissions contain a number of points which suggest that there had been some consideration of the actions of these three men by their commanders in 1968:

32. *In accordance with the Chief of Defence Force requirement, if there is neither maladministration nor compelling new evidence, then the nomination is not to proceed **and the Commander’s decision at the time is to be upheld.***

37. *Defence will review an application and where the evidence does not meet its thresholds of maladministration or compelling new evidence, **the decision of the commanders of the day will be upheld.***

39. *.... if the original decision-maker(s) made a **conscious** decision not to make an award, **Defence is being asked to overturn that decision.** if Defence wished to recommend a revised award, it would need to overturn the original decision. **Defence considers it inappropriate and unwise to overthrow a judgement made by a competent authority that had a much greater understanding of the events than Defence could more than 50 years later.***

35. However, as Defence accepted at the hearing, this is not a case where there were any original or prior decisions around the time of the actions in question. There is no evidence of any original or prior decisions concerning the actions of these three men. The evidence goes no further than revealing that Lieutenant Jensen discussed the

significance of their actions with his superior, Captain McInally. There is no evidence of anything further or of any conscious decisions. What Defence has now done is to in effect create fictional original decisions and apply their thresholds of maladministration and no compelling new evidence to these fictional decisions. In doing so Defence has denied the cases of these men merits assessment by the appropriate authorities in that Department and has then failed to properly assist this Tribunal conduct a merits review. It has thereby abdicated its legal responsibilities, both in considering the applications made to it and in its submissions to this Tribunal.

36. **Maladministration.** In considering the Defence Report, the Tribunal noted that the Defence submission rested on a series of three individual research reports prepared by the Policy and Tribunal Team of the Directorate. Each of these reports include seven identical discussion points, summarised as observations. At the hearing, the Tribunal reviewed each of these points with the Defence representatives seeking to understand what relevance or bearing each had on the matter.

37. **Observation 1:** *CDF has stated his focus is to identify whether there has been mal-administration or compelling new evidence which would not have been available to the chain of command at the time of the actions If there is neither, then the nomination is not to proceed If there is either mal-administration or compelling new evidence the nomination is to go to the Historical Honours Review Board for review.*

Observation 1 points to the internal (and informal) Defence process that was used to rule the application ineligible for merits review. However, it is inconsistent with the Tribunal's statutory role, and Defence's responsibilities in assisting it, and irrelevant if there was no historical decision.

38. **Observation 2:** *The Tribunal recently awarded the UCG (Unit Citation for Gallantry) to all members of 1 ATF for service during the period 12 May 1968 and 6 June 1968.*

The UCG was not awarded by the Tribunal but by the Governor-General after a recommendation by the Tribunal to the Government following an Inquiry. The UCG award has little relevance to a merits review of the actions of these three particular men.

39. **Observation 3:** *There were a number of awards presented to 1 RAR and 3 RAR personnel as a result of the Battles of Coral and Balmoral The CO of 1 RAR, LTCOL Bennett would have been fully aware of those nominations*

Observation 3 comprises irrelevant statements of fact that are unhelpful and have no bearing on the matter.

40. **Observation 3:**² *LTCOL Hulse was not in (Hughes, Johnson and Walker) direct chain-of-command.*

² There are two Observations numbered '3'.

The observation made regarding the chain-of-command is a relevant fact of which the Tribunal is aware. However, it is not something to which the Tribunal should give significant or over-riding weight given the other clear first-hand evidence before it.

41. **Observation(s) 4:** *There is no evidence that (these men were) previously nominated for an award for actions on the morning of 16 May 1968. In addition, there is neither mal-administration nor compelling new evidence*

These observations, as noted earlier, are unhelpful and have no bearing on the matter before the Tribunal.

42. **Observation 5:** *More than 50 years have passed since the Vietnam War. There has been sufficient time and opportunity, including the End of War List in 1968, to recognise specific actions during the Vietnam War.*

Observation 5 is completely irrelevant to the task facing the Tribunal and provides no assistance to it.

43. The observations made in these individual research reports do not address the merits of the actions of Messrs Hughes, Johnson and Walker in any substantive way. If, as the Defence submission suggests, the observations provide the basis underpinning the rejection of Lieutenant Colonel Hulse's application, the Tribunal can only conclude that there has been defective administration in Defence's consideration of the applications for recognition of the service of these three men during May 1968.

44. **The issue.** There is no dispute regarding Privates Hughes, Johnson and Walker's actions on the night of 16 May 1968. The issue for the Tribunal is whether or not these actions meet the eligibility criteria for recognition.

45. **Distinguished Service or Gallantry.** The Tribunal noted that Lieutenant Colonel Hulse's original application requested '*decorations for nine Army personnel who, in my opinion, contributed service to the Army in a manner which was above and beyond that expected of soldiers at war*'. It was only at the insistence of Defence that Lieutenant Colonel Hulse decided to nominate Messrs Hughes, Johnson and Walker for the Commendation for Distinguished Service. Lieutenant Colonel Hulse stated at the hearing that he regarded the Defence requirement to nominate a particular award to be unfair. He stated his position that '*it's not up to me to decide that, it should be up to the military to determine that and that, to me, should come from a merits review*'. Defence's failure to properly deal with these applications by not considering whether the men's actions warranted any grant of an honour or award can only be regarded as neglect in its duty to lawfully process written applications made to it.

46. Noting that the original application sought '*decorations*' and having considered all of the evidence, the Tribunal decided it would first consider Messrs Hughes, Johnson and Walker's actions against the gallantry regulations. The Tribunal decided that if it were to find that the actions did not merit recognition by a gallantry award, it would then move to an assessment of whether their service was distinguished.

Gallantry assessment

47. **Contemporary gallantry awards.** Australian service personnel received honours and awards under the Imperial system until February 1975 when the Government introduced the Australian system. The two systems – the Imperial and the Australian; then operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards. This means that only contemporary decorations may be considered. The eligibility criteria for gallantry awards in the Australian system, other than those for the Victoria Cross, are governed by the *Australian Gallantry Decorations Regulations*.

48. **Gallantry decorations.** The Star of Gallantry, the Medal for Gallantry and the Commendation for Gallantry were established as gallantry decorations by Letters Patent on 15 January 1991 for the purpose of:

‘... according recognition to members of the Defence Force and certain other persons who perform acts of gallantry in action.’

49. The honours are governed by Regulations set out in the Schedule, as amended in 1996:

Conditions for the award of the decorations

3. (1) *The Star of Gallantry shall be awarded only for acts of great heroism or conspicuous gallantry in circumstances of great peril.*
(2) *The Medal for Gallantry shall be awarded only for acts of gallantry in action in hazardous circumstances.*
(3) *The Commendation for Gallantry may be awarded for other acts of gallantry in action that are considered worthy of recognition.*³

50. Noting that the Regulations do not define gallantry and that Defence has no policy or guidance to assist in defining the concept, the Tribunal has developed a position which it has used for several years to assist in this regard.

51. **What is Gallantry?** The Tribunal noted that all the gallantry decorations accord recognition for individuals ‘who perform acts of gallantry in action’. Whilst ‘in action’ is a relatively straight forward concept, ‘gallantry’ is an abstract term, which is not defined in the Regulations. Various dictionary definitions such as ‘dashing courage; heroic bravery’;⁴ and ‘courageous behaviour, especially in battle’;⁵ are largely circuitous and unhelpful. Some countries have attempted to differentiate between ‘bravery’ and ‘gallantry’; defining the latter as recognition of military personnel who carry out acts which put their lives at risk while involved in operational service, whilst ‘bravery’ is defined as saving or attempting to save the life of another person in the course of which they place their own life at risk.⁶ Again this is largely unhelpful in defining gallantry in the context of the Australian Honours and Awards system.

³ *Commonwealth of Australia Gazette No S25 – Gallantry Decorations Regulations* – dated 4 February 1991.

⁴ The Macquarie Dictionary on-line accessed 20 October 2017.

⁵ The Oxford Dictionary on-line accessed 20 October 2017.

⁶ <http://medals.nzdf.mil.nz/category/d/index.html>.

52. The Tribunal considered that there is an expectation that all soldiers in battle conducting themselves in accordance with their training, will be acting bravely. The Tribunal considered that gallantry requires a higher standard of conduct than bravery and usually a special and additional element of courage, fearlessness, daring or heroism will have been demonstrated. What amounts to an 'act of gallantry', necessarily varies according to the individual circumstances of each action, and depends on many factors, including the level of threat, the person's training, role and responsibility, the risk to the individual and/or the group, and the consequences of undertaking, or not undertaking, the particular act.

53. The Tribunal considered that the concept of gallantry is greater than collective or individual acts of bravery and above and beyond what was expected of an individual or group who were bravely doing what they were trained to do or expected to do as part of a role, rank or responsibility.

54. The Tribunal carefully considered the proposition that by conducting their own ammunition resupply, Privates Hughes, Johnson and Walker were acting outside of their training as members of the mortar platoon. The Tribunal took the view that while ammunition resupply was not an expected task, the absence of specific training in the role had little bearing on their ability to complete the task. The Tribunal placed weight on Lieutenant Colonel Jensen's confidence in the ability of his men to complete the assigned task.

55. The Tribunal has no doubt that Privates Hughes, Johnson and Walker were acting bravely in their efforts to solve the absence of resupply in the face of what they viewed to be a desperate shortage of ammunition, but did not consider their actions to be above and beyond the expectations of their commanding officer. The Tribunal decided that the men's actions were commendable but did not meet the required conditions of gallantry. The Tribunal then moved to an assessment of whether the service was distinguished.

Assessment of distinguished service

56. **Distinguished Service Decorations.** The Distinguished Service Cross, the Distinguished Service Medal and the Commendation for Distinguished Service were established by Letters Patent on 15 January 1991 in the Commonwealth of Australia Gazette S25 dated 4 February 1991 for the purpose of:

'... according recognition to members of the Defence Force and certain other persons for distinguished command and leadership in action or distinguished leadership in action or distinguished performance of their duties in warlike operations.'

The honours are governed by Regulations set out in the Schedule, as amended in 2011:⁷

Conditions for award of decorations

3. (1) *The Distinguished Service Cross shall be awarded only for distinguished command and leadership in warlike operations;*
(2) *The Distinguished Service Medal shall be awarded only for distinguished leadership in warlike operations;*
(3) *The Commendation for Distinguished Service may be awarded for distinguished performance of duties in warlike operations.*

57. The Tribunal notes that Defence does not have guidance as to what constitutes distinguished service and could only assist the Tribunal by pointing to informal advice from the Secretariat of the Headquarters Joint Operations Command, Operational Honours and Awards Board that nominations for distinguished service decorations are normally considered with respect to the nominee's entire deployment/rotation rather than the actions of a single action/battle. Neither the Tribunal nor the Directorate have been able to establish any basis for this advice other than informal (email) advice from the Directorate to the Tribunal that *'SOI Honours and Awards, Headquarters Joint Operations Command has stated that there is no specific document or procedure that requires the Board to use these definitions, however they defer to the military prowess of the Board members as they are all senior ADF officers with a full comprehension of what the definitions mean in both a doctrinal and practical sense'*.⁸

58. The Tribunal noted that distinguished service decorations accord recognition to members of the Defence Force and certain other persons in a hierarchy of distinguished command and leadership, distinguished leadership, and distinguished performance of duties, in warlike operations. Given that hierarchy, the Tribunal considered Privates Hughes, Johnson and Walker could only be considered against the eligibility criteria for the Commendation for Distinguished Service.

59. As there is no doubt regarding the warlike nature of the events of 15/16 May 1968, the Tribunal must consider whether the performance of duties by Privates Hughes, Walker and Johnson during this service was distinguished. The first step in determining whether service is distinguished is to define what was that service. While the Tribunal considers that 'service' in warlike operations *may* relate to an individual's appointment, role or posting, in the absence of any guidance to the contrary the Tribunal does not consider that there is any requirement under the regulations to restrict the concept of 'service' in this manner.

60. In this particular application, the Tribunal regards the conduct of resupply as the service rendered. In considering whether that service could be regarded as 'distinguished' the Tribunal had regard as to whether the men discharged duties that were superior to those normally pertaining to their rank and appointment. Was performance of their duties by these men demonstrably superior?

⁷ Commonwealth of Australia Gazette No S18 – Amendment of the Distinguished Service Decorations Regulations – dated 22 February 2012.

⁸ Email from Mr Grant Robertson, Policy and Review Manager, Directorate of Honours and Awards to Mr Jay Kopplemann, DHAAT, dated 19 February 2021.

61. There is no doubt that the resupply of mortar rounds to the mortar platoon made a significant contribution to the platoon's ability to 'stay in the fight'. The Tribunal could make no judgement as to the criticality of that contribution to the battle but accepts that the normal resupply procedure was under stress and not delivering to the mortar platoon. Although the Tribunal accepts that ammunition resupply would not normally be a task conducted by the mortar crews, it did not consider that it was a task demanding any particular additional or superior abilities and preferred to accept the evidence of Lieutenant Colonel Jensen that he had full confidence in his men's ability to complete the task.

62. No evidence was presented and the Tribunal was unable to make any assessment as to whether the normal resupply had broken down or whether the 'triage' process used by the Company Quartermaster Sergeant had simply relegated mortar ammunition a priority lower than other tasks. Evidence presented to the Tribunal suggests that resupply was a difficult and consuming task across the Fire Support Base. Both Lieutenant Colonel Hulse and Lieutenant Colonel Jensen spoke of resupply activity occurring through the battle with many others moving about in Land Rovers and APCs.

63. It could be the case that the resupply effort of Privates Hughes, Johnson and Walker was distinguished from other soldiers moving about the Fire Support Base by the fact that they were on foot. Even when a Land Rover had been secured to assist their effort, so much ammunition had been placed on the vehicle that the men moved on foot. The Tribunal accepts that moving around the Fire Support Patrol Base increased the risk of being fired upon by their fellow soldiers and the Tribunal accepts Mr Johnson's evidence in this regard.

64. Lieutenant Colonel Hulse initially suggested that the three men had executed their task in a manner above and beyond that expected of National Servicemen. While he later qualified his comments to reflect his view that the actions were above and beyond that expected of *any* private soldier, he nonetheless used the men's status as conscripted soldiers to highlight their commitment being indistinguishable from regular soldiers. The Tribunal accepted this interpretation and therefore drew no distinction based on Privates Hughes, Johnson and Walker being National Servicemen.

65. Finally, the initiative shown by the men in securing a vehicle to support their urgent task and in resisting what they saw as an unreasonable demand for paperwork demonstrates a willingness to step outside of normal behaviour in order to get the job done. Seen in the context of the mortar platoon's ammunition state, the men's initiative was highly commendable.

Conclusion

66. The Tribunal finds that Privates Hughes, Johnson and Walker's actions in responding to the low ammunition state of the mortar platoon and acting with initiative under the direct instructions of the officer commanding the mortar line were highly commendable. Their ability to act decisively to complete their assigned task under enemy fire, while exposed to the additional risk of engagement by their fellow soldiers, demonstrates their personal courage and an admirable devotion to duty. However, the Tribunal did not consider the actions to merit recognition under the gallantry awards.

The Tribunal also determined that the men's actions were not so demonstrably superior to others of similar rank or appointment to meet the conditions for award of the Commendation for Distinguished Service.

TRIBUNAL DECISION

67. The Tribunal thus recommends to the Minister for Defence that the decision by the Chief of Army to not support the awarding of the Commendation for Distinguished Service to Messrs Hughes, Johnson and Walker be affirmed. Although recommending Lieutenant General Burr's decision be affirmed, the Tribunal does not agree with the reasons put forward by the Chief of Army but makes this recommendation on its assessment of the merits of the application of Lieutenant Colonel Hulse.

68. Nevertheless, noting the hierarchy of operational awards available in the current context and outside of the Australian Honours and Awards system and its view that the actions of Messrs Hughes, Johnson and Walker are commendable, the Tribunal recommends to the Minister for Defence that the Chief of Joint Operations be asked to consider awarding a Joint Operations Command commendation to Messrs Hughes, Johnson and Walker in recognition of their personal courage and initiative in executing the mortar resupply task on the night of 15/16 May 1968.