



Australian Government

Defence Honours and Awards Appeals Tribunal

Moloney and the Department of Defence [2022] DHAAT 15 (4 November 2022)

File Number(s)	2021/021
Re	Mr Peter Moloney Applicant
And	The Department of Defence Respondent
Tribunal	Ms Karen Fryar AM (Presiding Member) Air Commodore Anthony Grady AM (Retd)
Hearing Date	6 September 2022
Attendances	Mr Peter Moloney (via videoconference) Ms Jo Callaghan, Assistant Director, Service and Campaign Awards Directorate of Honours and Awards, Defence Mr Wayne Parker, Manager Veterans and Families, Directorate of Honours and Awards, Defence

DECISION

On 4 November 2022, the Tribunal decided to affirm the decision that Mr Peter Moloney not be recommended for the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – eligibility criteria – initial enlistment period not met – reasons for cessation – retention not in the interest of the military forces - limited exceptions to mandatory period of efficient service – no discretion.

LEGISLATION

Defence Act 1903 – Part VIIIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)

Defence Regulation 2016, Regulation 36

Commonwealth of Australia Gazette S48, Australian Defence Medal Regulations Letters Patent, dated 30 March 2006

Commonwealth of Australia Gazette G00629, Australian Defence Medal Regulations Amendments of Letters Patent dated 5 August 2020

Australian Defence Medal Determination 2021 dated 16 March 2021

Australian Defence Medal Regulations 2006 CDF Instrument of Delegation dated 23 September 2018

Australian Military Regulations 1927 with amendments compiled as at 2004

Introduction

1. The Applicant, Mr Peter Moloney, seeks review of a decision dated 7 December 2021, of Mr Wayne Parker, Manager Veterans and Families, Directorate of Honours and Awards of the Department of Defence (the Directorate), to refuse to recommend him for the Australian Defence Medal (ADM).¹

Decision under review

2. On 29 April 2021 and on 14 September 2021, Mr Moloney applied to the Directorate for an assessment of his eligibility for the ADM. On 7 December 2021, in response to the applications Mr Parker wrote to Mr Moloney stating that as a result of an assessment, Mr Moloney could not be recommended for that award. Mr Parker gave the following reasons:

‘There is no evidence to show that you completed your enlistment period of three years, or served for a period, or periods that totalled not less than a minimum of four years.

Additionally, there is no evidence to show that the reason for your discharge was due to the any of the exceptions at paragraph 4(1)(d) of the Regulations.’²

3. On 22 December 2021, Mr Moloney made application to the Tribunal seeking review of the above decision.

Tribunal jurisdiction

4. Pursuant to s110VB(2) of the *Defence Act 1903* 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. Regulation 36 of the *Defence Regulation 2016* lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 is the ADM. Therefore, the Tribunal has jurisdiction to review decisions in relation to this award.

Mr Moloney’s service

5. Mr Moloney enlisted in the Australian Regular Army Supplement (ARAS) (O) on 24 August 1966 for a period of three years, and was discharged on 10 April 1968, under Australian Military Regulation (AMR) 176(1)(n) – *“That the retention of the soldier in the Military Forces is not in the interest of those Forces.”*³

6. In total, Mr Moloney served for a period of one year, seven months and 18 days. He has not been awarded any defence awards for this service.⁴

¹ Letter to Mr Moloney from Mr Parker dated 7 December 2021.

² Ibid.

³ Interim Discharge Certificate, Private P Moloney, Record of Service.

⁴ Letter from Ms Petrina Cole, Director of Honours and Awards to the Tribunal, dated 1 March 2022.

Events leading to Mr Moloney's discharge

7. A newspaper clipping from the Armidale Express of 8 December 1967, included on Mr Moloney's service record, stated that Mr Moloney and another soldier, Mr Gary John Bullock, were each fined \$100 on three charges of unlawful assault upon three youths in Armidale on 6 December 1967. The clipping records that the assault took place after the three youths overtook a car occupied by Mr Bullock and Mr Moloney and while doing so made a derogatory comment about South Australia (the car had South Australian registration plates).⁵

8. On 28 December 1967, the Officer Commanding Eastern Command Provost Company, wrote to Mr Moloney's unit, 2 Base Ordnance Depot (2 BOD) and other addressees, including Headquarters Eastern Command, advising that on 7 December 1967, Mr Moloney had been convicted of three counts of common assault.⁶

9. A charge and offence report, also dated 28 December 1967, records that Mr Moloney was charged with being absent without leave from 0740 hours on 4 December 1967 until 1600 hours on 8 December 1967.⁷ The absence is recorded as being involuntarily certified under AMR 295(1)(i), which is defined as:

'The pay or allowances of an officer or soldier shall not be stopped under D.A. 119 in respect of any other involuntary absence certified by his C.O. not to have been occasioned by the neglect or improper conduct of the officer or soldier.'

10. On 8 January 1968, the Assistant Adjutant General (AAG), Headquarters Eastern Command, Lieutenant Colonel R.S. Garland, wrote to the Admin Commander of the Liverpool area seeking a recommendation on whether Private Moloney should be retained or discharged from the Army, in light of his civil conviction.⁸ In reply, on 18 January 1968, the Commanding Officer of 2 BOD, Colonel R.A. Ellis, wrote to Headquarters Liverpool area and advised that Private Moloney had recently been found guilty of two further military charges, relating to causing barrack damage and creating a disturbance in the "Partridge Club". Colonel Ellis stated that *'it is doubtful if he will make a good soldier and it is recommended he be discharged under AMR 176(1)(l)'*.⁹ The military offences are recorded as having taken place on 16 January 1968.¹⁰

11. On 26 January 1968, the Admin Commander of the Liverpool Area, Lieutenant Colonel N.W. Latchford, recorded his concurrence with the recommendation that Private Moloney be discharged.¹¹ On 28 March 1968, an order was made under AMR 176(1)(n), for Private Moloney's discharge, effective on 10 April 1968.¹²

⁵ Article, *Soldiers Fined for Assault*, *The Armidale Express*, 8 December 1967, Record of Service.

⁶ Minute, Notification of Civil Convictions, dated 28 December 1967, Record of Service.

⁷ Charge and Offence Report, dated 28 December 1967, Record of Service.

⁸ Minute, *Civil Offence*, 2412540, Private P Moloney 2 BOD, dated 8 January 1968, Record of Service.

⁹ Minute, *Civil Offence*, 2412540 PTE P Moloney – 2 BOD, dated 18 January 1968, Record of Service.

¹⁰ *Charge and Offence Report*, dated 17 January 1968, Record of Service.

¹¹ Minute, *Civil Offence - 2412540 PTE P Moloney – 2 BOD*, dated 26 January 1968, Record of Service.

¹² Minute, *E COMD Order for Discharge No. 321/68/ 2412540 PTE P. Moloney – RAAAC*, dated 28 March 1968, Record of Service.

12. In 1982, some 14 years after his discharge, Mr Moloney made application for re-enlistment in the Army, however this was not approved due to his age and the quality of his previous service.¹³

The Australian Defence Medal

13. In accordance with the *Australian Defence Medal Regulations 2006* (the ADM Regulations), as amended, in order to be eligible for the ADM, a member or former member of the Defence Force after 3 September 1945 must have rendered the minimum annual qualifying service that is efficient service by completing an initial enlistment or appointment period, or a period of or totalling not less than four years' service.

14. The eligibility criteria for awarding the ADM is contained in paragraph 4(1) of the *ADM Regulations 2006*¹⁴ as amended in 2020,¹⁵ which states:

'4 Award of the Medal

- (1) The Medal may be awarded to a member, or former member, of the Australian Defence Force who after 3 September 1945 has given qualifying service that is efficient service:*
 - (a) by completing an initial enlistment or appointment 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:*
 - (i) the death of the member during service;*
 - (ii) the discharge or termination of the member as medically unfit;*
 - (iii) the discharge or termination of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force;*
 - (iv) the member ceased service in the Permanent Force or Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant factor. "[...]*

Mr Moloney's application to the Tribunal

15. In his application to the Tribunal, Mr Moloney stated that:

*'In December 1968, whilst on leave in Armidale NSW, I was involved in an incident involving a legal process, requiring my court attendance, which prevented me from returning to base on time. I now acknowledge that I needed to make contact with my superior officer to explain my circumstances, but at that time I failed to do so.'*¹⁶

¹³ *Relist Data Sheet*, dated 18 October 1982, Record of Service.

¹⁴ Commonwealth of Australia Gazette, S48, *Australian Defence Medal Regulations*, dated 30 March 2006.

¹⁵ Commonwealth of Australia Gazette, G00629, *Australian Defence Medal Regulations*, dated 4 August 2020.

¹⁶ Application to Tribunal by Mr Moloney.

16. Mr Moloney further stated:

*'I acknowledge the issues experienced during my term in the Australian Army, compounded by failing to return to barracks on time resulting in being declared AWOL. I ask for consideration of a review of the decision to withhold my service medals.'*¹⁷

Defence Report

17. The Defence Report confirmed that Mr Moloney rendered one year, seven months and 18 days service with ARAS(O) and was discharged under AMR 176 (1)(n) – '*Retention in the Military forces not being in the interest of those forces.*' Defence stated that as such, Mr Moloney did not complete the minimum period of eligibility for the ADM, which in his case is three years, being his enlistment period.¹⁸

18. Defence went on to state that during the review Mr Moloney's medical record was examined and found that Mr Moloney was assessed as 'FE' (Fit Everywhere) at the time of his discharge. Defence state that neither his Record of Service nor Medical Record held any other evidence to suggest Mr Moloney could have been considered unfit at the time of his discharge.¹⁹

19. Defence also stated in regard to Mr Moloney's contention that his medals were withheld (a submission the Tribunal accepts):

*'For clarity, the term 'withhold medals' applies to a decision to not issue medals due to particular circumstances or events when qualifying service has been rendered and an entitlement to the medals exists. In this case Mr Moloney did not meet the conditions for the ADM, therefore the medal is not being withheld from him.'*²⁰

20. Defence's review confirmed its position that Mr Moloney is not eligible for the ADM.

Mr Moloney's comments on the Defence report

21. On 2 March 2022, Mr Moloney was provided with a copy of the Defence Report and asked to provide his comments on that report. His response dated 15 March 2022, includes the following comments:

'After the offence took place on the 07/12/1967 in Armidale NSW. I was apprehended by police and taken into custody. I was offered no Defence. Police accepted the word of three University students, after being fined in Court I had to raise bail for the offence. Not having any money I wasn't able to phone my unit 2 BOD. Moorebank NSW.

I hitched hiked back to my unit not realising I was AWL. Eastern Command recommended I be discharged. After having interview with my CO he advised

¹⁷ Ibid.

¹⁸ Letter from Ms Petrina Cole, Director of Honours and Awards to the Tribunal, dated 1 March 2022.

¹⁹ Ibid.

²⁰ Ibid.

*that there was nothing he could do. Considering my age at the time of the offence and the seriousness of the charge published in the local newspaper saying my accomplice was driving the vehicle. I was the driver of my friend's car who was on final leave to Vietnam.*²¹

Matters for the Tribunal

22. It is not in contention that Mr Moloney did not complete his enlistment period of three years. As a result of his discharge, Mr Moloney served just over half of his three year enlistment period. The provisions of Regulation 4(1)(b) or (c), are also not relevant in this case given that Mr Moloney's initial period of enlistment was three years. As a consequence, the only means by which Mr Moloney could be entitled to an ADM is to meet one or more of the eligibility criteria in Regulation 4(1)(d).

23. With respect to the exemptions listed in Regulation 4(1)(d)(i) and (ii), clearly Mr Moloney did not die during his service. Similarly, the Defence position is that Mr Moloney was medically fit at discharge, having been assessed as Fit Everywhere (FE), and indeed Mr Moloney is not claiming that he was discharged on medical grounds.²²

24. With respect to the applicability of subparagraph 4(1)(d)(iii) of the Regulations, the *Australian Defence Medal Determination 2021*, dated 16 March 2021, lists the prevailing five discriminatory policies that Defence accept were in place, as follows (listed by year of effect):

Marriage (female) - before 1 January 1970.

Pregnancy (female) - before 7 January 1975.

Retention after marriage (female) - before 21 March 1984.

Homosexuality - before 24 November 1992.

Transgender - before 1 June 2010.

Three of the five policies relate exclusively to females, and are therefore irrelevant to this case. Further, Mr Moloney does not contend and is not seeking a finding by the Tribunal that the remaining two policies in subparagraph 4(1)(d)(iii) apply to his case.

25. Therefore, the only remaining issue for the Tribunal to determine is whether Mr Moloney "*ceased service in the Permanent Force or the Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant contributing factor*" pursuant to sub-regulation 4(1)(d)(iv).

²¹ Mr Moloney's comments on the Defence Report dated 1 March 2022.

²² Result of Medical Reclassification or Medical Board, "NON-MEDICAL DISCHARGE. PES: FE", dated 10 May 1968, Record of Service.

The meaning of ‘mistreatment’

26. In a recent case where mistreatment under Regulation 4(1)(d)(iv) became relevant,²³ Defence provided, and the Tribunal accepted, submissions on the meaning of the term ‘mistreatment’ in the ADM Regulations.

27. At paragraph 65 in the reasons for decision in *Mallett* the Tribunal stated:

“Mr Davidson did not argue that it conveyed any technical or ‘trade’ meaning in the Defence context, and agreed that it should be given its usual meaning in ordinary English usage. He said it would clearly cover bullying, physical or psychological abuse and similar, but argued that it would not be apposite to describe reasonable management or command action taken in relation to the employment of a serving military member. He said that, read in context, it was addressed to wrongful conduct that unfairly deprived a member of the opportunity to serve and thereby qualify for the award of the ADM. He said that it could apply not only to discharge initiated by the service itself, but also to discharge sought by the member provided that such was sought because of conduct by an ADF member or a departmental officer that met a threshold of seriousness which made it unfair for the member to be deprived of the opportunity to qualify for award of the ADM. He said that the concept was not confined to ‘chronic treatment’.”

28. The Tribunal adopted these submissions for the purpose of that review. Likewise the Tribunal accepts this meaning also applies to the current application for review.

The Application for Tribunal Review

29. Mr Moloney’s Application for Tribunal Review contains both a covering letter and a Statutory Declaration. Both documents suggest that Mr Moloney is strongly of the view that his discharge was principally (perhaps even exclusively) the result of having been AWOL from Moorebank in late 1967.

30. In the letter Mr Moloney stated:

“In December 1968²⁴ whilst on leave in Armidale NSW, I was involved in an incident involving a legal process, requiring my court attendance, which prevented me from returning to base on time.

I now acknowledge that I needed to make contact with my superior officer to explain my circumstances, but at the time, I failed to do so.

The subsequent events are detailed in my attached Statutory Declaration.”²⁵

31. The Statutory Declaration provides the following explanation:

“In December 1967 I was granted leave and returned to Armidale with a friend and Army colleague. During our leave we were involved in a dispute with local

²³ Newton and the Department of Defence re: Mallett [2022] DHAAT 2

²⁴ This is clearly a typographical error, given that the member was discharged from the Army in April 1968. This section of text should be read as December 1967.

²⁵ Letter, Mr Moloney to the Tribunal, undated, included with Application for Review dated 22 December 2021.

youths requiring our court attendance on the Monday that I was due back in base at Moorebank. After the court appearance I endeavoured to return to Sydney. Without any finances I hitch hiked to Sydney arriving at base on Wednesday to be advised that I AWOL and it had been recommended that I be discharged. I requested an interview with the CO but the original decision was maintained.I had previously had incidents with a couple of Privates and my record was noted that I was not considered worthy of the Army. At the time of the incident I was 19 years of age and immature in relation to the consequences of failing to return to duty on time. I request a review of the withholding of my military medals.”²⁶

The timeline of events

32. Mr Moloney also gave evidence at the hearing before the Tribunal. His recollection of the timeline of events seems to be at odds with the facts presented in various other sources including Police Reports, Army records (including Charge sheets) and newspaper clippings. Accordingly the Tribunal finds that the actual timeline is :

- a. The civil assault took place in Armidale on the evening of Wednesday 6 December 1967.
- b. Both Mr Moloney and Mr Bullock were held in custody at the Armidale Police station from around 2300hrs on 6 December until their case was heard at or around 1200hrs on Thursday 7 December 1967.
- c. Although an account of the incident, including the verdicts and the punishments, were reported in the local newspaper on Friday 8 December 1967, it is not entirely clear when Mr Moloney arrived back at 2 BOD at Moorebank.

The reasons for Mr Moloney’s discharge

33. Although Mr Moloney claims that he was granted leave to travel to Armidale, there is no record of his being granted annual recreational leave (or any other type of leave) by the Army.²⁷ The Tribunal accepts, however, that it is entirely possible for Mr Moloney to have been granted leave via some unit or sub-unit mechanism that was not documented in his service records. In any case, Mr Moloney initially explained during the hearing that his presence in Armidale was the result of being granted sick leave following the removal of a sebaceous cyst from his thigh. Although he did not initially recall seeing a doctor in Armidale, his medical records clearly indicate that Mr Moloney did in fact obtain a Medical Certificate from an Armidale General Practitioner on Monday 4 December 1967. The medical certificate indicates that he presented with gastroenteritis (reasons unknown) and that he was not required to return to work until Friday 8 December 1967.²⁸

34. Although Mr Moloney did actually have a sebaceous cyst removed from his thigh, this procedure did not occur until 18 January 1968,²⁹ well after the Armidale assaults, raising the possibility that, quite understandably given that the incident occurred almost 55 years ago, Mr Moloney has conflated several different timelines and events.

²⁶ Statutory Declaration, dated 18 December 2021.

²⁷ Leave Record, Record of Service.

²⁸ Medical Certificate from Dr J.R. Corry, No. 206, Record of Service.

²⁹ In/Out Patient Reference Sheet, dated 18 January 1968, Record of Service.

35. Mr Moloney could not recall whether he had advised his unit of this illness or the fact that, by virtue of being on sick leave with gastroenteritis, he would necessarily be absent from the workplace until Friday. Regardless, the sequence of events which unfolded immediately after his arrival back at Moorebank suggests that Army were likely not informed, given that on Monday 11 December 1967 (potentially his first full working day back), charges against Moloney were preferred by the WO2 Preece per the following:

“ABSENTING HIMSELF WITHOUT LEAVE in that he at MOOREBANK absented himself without leave from 0740 hrs on 4 Dec 67 until 1600 hrs on 8 Dec 67.”³⁰

36. The charge was heard by the Unit Commanding Officer (CO) on 22 December 1967, and the then Private Moloney was found Not Guilty. No fines or other punishments were imposed, ostensibly on the basis that Mr Moloney’s absence was found to be ‘involuntary’ under the provisions of the then relevant Australian Military Regulation (AMR) 295(i). In correspondence in January 1968 to higher headquarters in relation to the assaults, the Unit CO confirmed that the *“Member was on sick leave at time of the offence, leave to terminate 8 Dec 67.”*³¹

37. Importantly, Mr Moloney himself suggested at the hearing that he may have ‘manufactured’ the need for a Medical Certificate in Armidale to prevent being declared AWOL in the first instance. That Mr Moloney was involved in a violent physical encounter less than two days after having obtained a Medical Certificate for gastroenteritis speaks emphatically to the possibility that ‘manufacture’ may have been the case. Notwithstanding the seriousness with which AWOL is regarded within the ADF, the evidence seems to suggest that the Chain of Command was nevertheless prepared to accept the Armidale Medical Certificate as being *bona fide*, and that they were prepared to overlook the potential that Mr Moloney left Moorebank without any sort of approval.

38. Accordingly, it seems clear that being AWOL did not form any part of the decision making process within Army and did not feature in the reasons for Mr Moloney’s dismissal.

39. This observation is reinforced by the content of the correspondence in early January 1968 discussing the potential for Mr Moloney’s termination. The Minute from the AAG to the Commanding Officer of 2 BOD seeking a recommendation for retention or discharge appears to be firmly anchored around issues associated with the civil convictions:

*“In view of the **member’s civil conviction** (emphasis added) would you please forward your recommendation as to whether the member should be retained or discharged from the Army.”³²*

The 2 BOD response of 18 January (roughly six weeks post assault) reads:

“in light of two additional military charges for which the member had been found guilty, it is doubtful if he will make a good soldier and it is recommended he be discharged under AMR 176 (1)(l).”³³

³⁰ Charge and Offence Report, dated 22 December 1967, Record of Service.

³¹ Minute, Notification of Civil Conviction, 2 BOD Liverpool, 8 January 1968, Record of Service.

³² Minute, Civil Offence 2412540 PTE P. MOLONEY 2 BOD, HQ Eastern Command, 18 Jan 1968, Record of Service.

³³ Ibid.

40. Finally, the recommendation that was put to the AAG, in addition to providing a brief summary of events and repeating CO 2 BOD's recommendation that he be discharged, states:

*"In view of 5 offences relating to **behaviour** (emphasis added) it seems that the soldier is doing nothing to enhance the Army's image. Recommend discharge, retention not in interest."*³⁴

Importantly there is no reference to the AWOL charges in the initial question posed to CO 2 BOD, in the CO's response or in the final framing of the recommendation to the AAG. All of the discharge considerations appear to be firmly linked to the civil convictions, the subsequent military convictions and the behavioural issues implicit in them.

Was there any mistreatment that was a significant contributing factor to the discharge?

41. Mr Moloney seems to contend that the decision to discharge him was made without procedural fairness. The three main elements of procedural fairness involve the right to be heard, the right to be treated without bias, and the decision being based on relevant evidence.

Was the treatment of Mr Moloney biased?

42. In contrast to Mr Moloney's view that, upon arrival at Moorebank, he was "*advised that (he) was AWOL and it had been recommended that (he) be discharged*", the first documented correspondence discussing the potential for termination occurs in a Minute to CO 2 BOD from AAG dated 8 January 1968 (roughly a month after the assaults).

43. That Mr Moloney's discharge was not the result of being AWOL has already been noted above. Whether there was any likelihood that a recommendation for discharge existed at, or immediately after, his arrival back at Moorebank in early December 1967 is important because any indication that the wheels of dismissal were in motion prior to, or immediately upon, his arrival at Moorebank, or that somehow this outcome was preordained, might suggest the presence of bias. However, given that the first formal documentation that seeks the chain of command's position in relation to retention is dated 8 January 1968, roughly one month after the assaults, the Tribunal considers that it is highly unlikely that Mr Moloney could have been informed on arrival at Moorebank that he was to be dismissed. Further, the fact that the recommendation for discharge was 1) centred exclusively on behavioural performance and that 2) the process appeared to have taken the time to consciously deliberate upon the consequences of these actions, speaks more to the absence of bias than it does to bias.

44. In addition, the Tribunal is prepared to accept that the decision to find Mr Moloney Not Guilty of being AWOL, is an indication that there was no enduring or systemic bias against Mr Moloney in play. The timeline described indicates that the dismissal was not automatic, that the outcome was not preordained and that the system was taking the time to put in place a reasonable approach to consider the facts on their merits as they became available.

³⁴ Routing slip, 68-EM-5, recommendation dated 12 February 1968, Record of Service.

45. However, to further compound issues, Mr Moloney, in the period between arriving back at Moorebank and the initiation of the question from the AAG, had been found guilty of two additional military charges. The combination of the five charges, in relatively quick succession, prompted the recommendation from CO 2 BOD that: *“in light of two additional military charges for which the member had been found guilty, it is doubtful if he will make a good soldier and it is recommended he be discharged under AMR 176 (1)(l).”*³⁵

Opportunity to be heard

46. Mr Moloney did in fact secure an interview with the CO, Lieutenant Colonel Ellis, to discuss dismissal although it is not entirely clear when that interview took place. This does indicate that he was given an opportunity to express his views on relevant matters.

Was the decision for discharge flawed?

47. As to whether the decision to recommend discharge of Mr Moloney was so fundamentally in error that it might be seen to constitute mistreatment, the Tribunal firstly sought to understand the likely outcome in identical circumstances in the ADF today. At the hearing Defence took the following question on notice:

“Noting current ADF disciplinary behavioural standards and behavioural expectations, is it likely that three civilian convictions for common assault (on the same facts that occurred in this matter), followed shortly after by 2 convictions for relatively minor damage to the barracks and for creating a disturbance in the barracks after excessive alcohol intake, would be grounds for automatic dismissal from the ADF of a junior soldier?”

48. In response, Defence offered the view that:

“At the time of Mr Moloney’s service, Australian Military Regulations (AMR) allowed a specified authority to order the discharge of a soldier who was not meeting behavioural standards or expectations. In Mr Moloney’s case he was discharged under AMR 176 (1)(n) that an authority is satisfied that the retention of the soldier in the Military Forces is not in the interests of those Forces. The behavioural standards and expectations of members serving in the Australian Defence Force today are no different than those in place at the time that Mr Moloney was separated.

*“While no ‘automatic grounds’ for dismissal from the Australian Defence Force are currently applied, the Chief of the Defence Force has the authority under Defence Regulations 2016 to consider cases and, if appropriate, cease the service of a member for specified reasons, including those under subsection 24 (1) (c) that retention of the member’s service is not in the interests of the Defence Force. Defence Regulations 2016 subsection 6 (2) specifies reasons for something being or not being in the interests of the Defence Force; including subsection 6 (2) (b) a member’s behaviour (including any convictions for criminal or service offences).”*³⁶

³⁵ Minute, Civil Offence 2412540 PTE P. MOLONEY 2 BOD, HQ Eastern Command, 18 Jan 1968, Record of Service.

³⁶ Letter, Mr Ian Heldon to the Tribunal, dated 20 September 2022.

49. On that basis the Defence view is that a serving member of the Australian Defence Force who was found guilty of multiple civilian convictions for assault, and further military offences, is likely to be considered for separation under the *Defence Regulation 2016*, subsection 24(1)(c).

50. Mr Moloney was discharged under Australian Military Regulation (AMR) 176(1)(n) – “*That the retention of the soldier in the Military Forces is not in the interest of those Forces.*” Although, unlike the current Defence Regulation, the AMRs did not provide a list of reasons for something being or not being in the interests of the Defence Force. The Tribunal is of the view that the current Defence Regulation’s reasons—which include a member’s performance, behaviour or suitability to serve, the morale, welfare and discipline of the Defence Force and the reputation and community standing of the Defence Force—are timeless. Although not available in the AMRs, the Tribunal considers that it is likely that commanders in the past would have relied on similar rationale to support their decisions, and that this rationale would have been defensible and reasonable. Importantly, although the AMRs did not provide a list of outcomes that by definition were not in the force’s interests, other criteria allowing for dismissal could also have been used to justify Mr Moloney’s discharge. AMR 176 (1)(l): *that an authority is satisfied that the soldier is not suited to be a soldier*³⁷ and 176(1)(r): *that the soldier has been guilty of misconduct* are cases in point, and the Tribunal has little doubt that the five convictions in short order would have allowed a discharge under any of these provisions.

51. The Tribunal notes as an aside that as each matter is dealt with on its own facts and merits, any consequent treatment by the Army of Mr Moloney’s accomplice in the civilian assaults is not a matter relevant in this review.

52. The Tribunal is accordingly satisfied that there was no mistreatment by a member of the ADF or an employee in the Department of Defence that significantly contributed to Mr Moloney’s discharge. Rather Mr Moloney was discharged from the Army principally on the basis of his behaviour, and the Tribunal is broadly of the view that this decision:

- a) was lawful in the sense that provisions for the discharge of members who, in the opinion of the chain of command, failed to meet performance or behavioural expectations existed in the Regulations of the day,
- b) appears, at face value, to be unrushed and to take into account the relevant facts,
- c) was based upon reasonable grounds, these being the three civilian assault convictions, followed in quick succession by two military convictions, and therefore reflects a reasonable command and management stance in relation to sub-optimal behavioural standards of a serving member,
- d) was the result of significant errors of judgement by Mr Moloney, as opposed to any significant systemic issues, and
- e) is broadly consistent with the decision that would likely be taken today.

³⁷ In fact, CO 2 BOD recommended that Mr Moloney be discharged under 176(1)(l); this was overturned in favour of 176(1)(n).

Conclusion

53. It is clear from the above that Mr Moloney did not complete the required minimum period of enlistment, nor was the manner of his discharge able to be subject to any adverse finding. Accordingly, the Tribunal determines that Mr Moloney does not meet the eligibility requirements for the award of the Australian Defence Medal.

54. The Tribunal affirms the decision that Mr Moloney not be recommended for the Australian Defence Medal.

Acknowledgment of service

55. The Tribunal notes that in retrospect, and when measured against Mr Moloney's achievements in his later years, the Armidale incidents perhaps appear completely out of character for someone who subsequently has so selflessly and commendably served various communities and groups. Sadly, the Tribunal cannot use these later events in any way in its determination of the review. However the Tribunal would like to take the opportunity to acknowledge Mr Moloney's service to the community both in Australia and abroad and wish him well for the future.