



Australian Government

Defence Honours and Awards Appeals Tribunal

Muhling and the Department of Defence [2023] DHAAT 9 (8 June 2023)

File Number(s)	2022/007
Re	Mr Paul Muhling Applicant
And	The Department of Defence Respondent
Tribunal	Ms Anne Trengove (Presiding Member) Air-Vice Marshal Tracy Smart AO (Retd) Commodore Vicki McConachie CSC RAN (Retd)
Hearing Date	25 May 2023
Attendances	Mr Paul Muhling Applicant Ms Jo Callaghan Assistant Director Veterans and Families, Directorate of Honours and Awards, Department of Defence Mr Wayne Parker Manager Veterans and Families, Directorate of Honours and Awards Department of Defence For the Respondent

DECISION

On 8 June 2023, the Tribunal decided to affirm the decision of 4 February 2019 of the Directorate of Honours and Awards of the Department of Defence that Mr Paul Muhling should not be recommended for the award of the Australian Defence Medal for his service in the Australian Army Reserve between 1983 and 1984.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – Army Reserve service - eligibility criteria – initial enlistment conditions not met – reasons for cessation – limited exceptions to mandatory period of efficient service – no discretion - affirm.

LEGISLATION

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

Defence Regulation 2016, Regulation 36

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

Australian Defence Medal Regulations 2006, Chief of the Defence Force Determination dated 6 February 2013

REASONS FOR DECISION

Introduction

1. The Applicant, Mr Paul Muhling, seeks review of a decision of the acting Assessments Manager, Mr Frank Pulciani, in the 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 23 October 2018, Mr Muhling applied to the Directorate for an assessment of his eligibility for the ADM. On 4 February 2019, Mr Pulciani advised Mr Muhling that he was ineligible for that award, for the following reasons:

“The decision to not recommend you for the ADM was made for the following reasons:

- *There is no evidence to show that you completed a initial requirement of three years’ or served for periods not less than four years;*
- *Additionally, there is no evidence to show that the reason for your discharge was as a result of being medically unfit due to a compensable impairment or due to a prevailing discriminatory Defence policy.”*²

3. On 11 October 2022, Mr Muhling made application to the Tribunal seeking review of the above decision.³

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 Muhling’s service

5. Mr Muhling enlisted in the Australian Army Reserve (ARES) on 18 April 1983 for a period of three years and was discharged on 14 August 1984 under AMR 176(1)(A) ‘*At own request*’. Mr Muhling served for a total of one year, three months and 28 days.

6. Mr Muhling has not been issued any awards for his ARES service.⁴

¹ Letter, Mr Frank Pulciani to Mr Paul Muhling, 4 February 2019.

² Ibid.

³ Application for review, Mr Muhling, 11 October 2022.

⁴ Directorate of Honours and Awards, Tribunal Assessment Working Paper.

The Australian Defence Medal

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

8. The eligibility criteria for awarding the ADM is contained in paragraph 4(1) of the ADM Regulations which, at the time of making the reviewable decision (4 February 2019) stated:

“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 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 subregulation (1), the Chief of the Defence Force or his or her delegate may determine that a period of the member's qualifying service is efficient service.*
- (3) *The other conditions for the award are as determined by the Governor-General on the recommendation of the Minister.*⁵

9. For subparagraph 4(1)(d)(iii) of the Regulations, policies relating to the following topics that were in effect before the specified dates are determined to be prevailing discriminatory Defence policies:

- a) *Transgender - before 1 June 2010.*
- b) *Homosexuality - before 24 November 1992.*
- c) *Pregnancy (female) - before 7 January 1975.*

⁵ *Australian Defence Medal Regulations, 2006 Commonwealth of Australia Gazette, S48* dated 30 March 2006, Folio 22. The Regulations were amended on 13 July 2020 to amend the provisions of subparagraphs 4(1)(d)(ii) and 4(1)(iii) and to add a new subparagraph 4(1)(iv) to include a provision for award of the ADM where 'mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant contributing factor'.

- d) *Marriage (female) - before 1 January 1970.*
e) *Retention after marriage (female) - before 21 March 1984.*

ARES service and qualification for the ADM

10. Further eligibility criteria for the ADM, contained in a Determination by the Chief of the Defence Force dated 6 February 2013 and made pursuant to Regulation 4(2)⁶ stated:

Service Category	Minimum Qualifying Period	Effective Dates	Comments
Australian Army			
Army Reserve	26 days, including such periods of continuous training and home training as directed by the proper military authority	Until 30 June 1993	
	14 days	From 1 July 1993 to 20 April 2000	
Special Conditions Units	26 continuous service	Until 30 June 1993	From 1 July 1993 as for Army Reserve
All members	20 days	From 20 April 2000	

11. Similar periods were set out in earlier determinations by the Chief of the Defence Force. The periods set out in the 2013 Determination remained in force until 16 March 2021. The 2013 Determination applied to Mr Muhling's application and in summary sets out that the minimum required period is 26 days service in the ARES per enlistment year.

Mr Muhling's application to the Tribunal

12. In his application to the Tribunal, Mr Muhling stated that at the time of his enlistment in the ARES he was unemployed and in receipt of unemployment benefits. He then gained employment with Thiess Pty Ltd as a contractor where he worked for over 20 years. Mr Muhling further indicated that had he rejected the offer of employment with Theiss, his unemployment benefits would have been 'cut off'. Mr Muhling indicated that the demands of his civilian employment were essentially incompatible with his Reserve service and he expressed surprise that his discharge papers did not state that he discharged 'for work reasons'.

The Defence Report

13. In its report, Defence reaffirmed the reasons for its original decision that Mr Muhling was not eligible for the ADM because he did not complete his enlistment period or served for a total of not less than four years, nor did he discharge under provisions contained in subparagraphs 4(1)(d)(i-iii) of the Regulations. While not directly relevant to the review of the reviewable decision, Defence also stated that there was no evidence or information that mistreatment was a significant contributing factor to Mr Muhling ceasing service.⁷

⁶ *Australian Defence Medal Regulations Chief of the Defence Force Determination* dated 6 February 2013.

⁷ Letter, Mr Ian Heldon to Tribunal, dated 28 November 2022.

14. Defence acknowledged Mr Muhling's personal circumstances, as set out in his application to the Tribunal, and his explanation as to why he decided to secure full-time civilian employment with Thiess. The report went on to state that while Defence appreciated the reason for Mr Muhling's request for discharge, the ADM Regulations did not provide for granting of the award where civilian employment potentially prevented the continuation of ARES service prior to completing an enlistment period.⁸

15. In his comments on the Defence report, Mr Muhling largely reiterated the reasons set out in his application. He emphasised that life in the 1980s was a very different time to today and provided further detail on the work demands that precluded his continued service with the ARES.⁹

Tribunal consideration

16. Mr Muhling gave evidence at the hearing, reiterating the reasons for his decision to take on full time work and how that full time work did not allow him to perform the ARES service he would have liked to have done. He said that he really enjoyed his varied ARES service and would have ideally performed ARES service as well as full time employment. However, Thiess required Mr Muhling to work for weeks in remote parts of Queensland, which did not allow for ARES parade nights or working weekends. Mr Muhling accepted that he had only served 1 year, 3 months and 28 days.

17. The Tribunal explained to Mr Muhling that it was bound by the eligibility criteria that govern the award of the ADM. Mr Muhling accepted that as he had not completed his enlistment period or four years of service, he must satisfy one of the limited exceptions in the Regulations, which were death, medical discharge or discharge due to a prevailing discriminatory policy, as defined. Mr Muhling accepted that those limited exceptions did not apply to his case.

18. Having reviewed Mr Muhling's service file and the material before it, the Tribunal was also satisfied that none of the exceptions applied in Mr Muhling's case.

19. The Tribunal did not have any discretion in applying the statutory and regulatory eligibility criteria. Mr Muhling candidly acknowledged that the Tribunal had no discretion in his case.

Finding

20. For the above reasons the Tribunal found that Mr Muhling does not meet the eligibility criteria for the ADM.

DECISION

21. The Tribunal affirms the decision of 4 February 2019 of the Directorate of Honours and Awards of the Department of Defence that Mr Paul Muhling should not be recommended for the award of the Australian Defence Medal for his service in the Australian Army Reserve between 1983 and 1984.

⁸ Ibid.

⁹ Mr Muhling's comments on the Defence Report.