



Australian Government

Defence Honours and Awards Appeals Tribunal

McPherson and the Department of Defence [2023] DHAAT 19 (3 November 2023)

File Number(s)	2023/003
Re	Mr Daniel Graeme McPherson Applicant
And	The Department of Defence Respondent
Tribunal	Commodore Vicki McConachie CSC RAN (Retd) (Presiding Member) Brigadier Dianne Gallasch AM CSC (Retd)
Hearing Date	10 October 2023
Attendances	Mr Daniel McPherson, Applicant Mrs Catherine Morris Directorate of Honours and Awards, Department of Defence Ms Florence Finel Directorate of Honours and Awards, Department of Defence

DECISION

On 3 November 2023, the Tribunal decided to affirm the decision that Mr Daniel McPherson not be recommended for the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – eligibility criteria – initial enlistment conditions not met – initial enlistment period, discharge then re-enlistment – calculation of years – definition of ‘year’ and ‘day’- no discretion.

LEGISLATION

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

Defence Regulation 2016, Regulation 36

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

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

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

Australian Defence Medal Regulations Determination 2021 dated 16 March 2021

Introduction

1. The Applicant, Mr Daniel McPherson,¹ seeks review of a decision dated 1 March 2023, of the Current Recognition Acting Manager ADM/LS, Miss Mel Rushby, of the Directorate of Honours and Awards in the Department of Defence (the Directorate), to refuse to recommend him for the Australian Defence Medal (ADM).²

Decision under review

2. On 3 November 2019, Mr McPherson submitted an online application to the Directorate for an assessment of his eligibility for the ADM. On 12 December 2019, the Directorate wrote to Mr McPherson via email to advise him he was not yet entitled to the ADM having only accumulated three years of eligible service towards the award of the medal.

3. On 26 October 2021, Mr McPherson applied to the Directorate for a re-assessment of his eligibility for the ADM, citing his views that the Directorate had incorrectly calculated his service during the original assessment. In response to the application, Miss Rushby wrote to Mr McPherson on 1 March 2023 advising that he could not be recommended for the award. Miss Rushby gave the following reasons:

A thorough examination of your application, service record and ADF pay record data, shows that although you served longer than four years, you did not meet the minimum annual requirement in each year of service.

Your current medallic assessment indicates that you have completed 3 qualifying years of service towards the Australian Defence Medal.

*Additionally, there is no evidence to show that you have discharged from the Australian Army Reserves for any reason and as such have the capacity to continue rendering Active service.*³

4. Miss Rushby provided Mr McPherson with a range of supporting documents, including a copy of a Determination made under the Defence Long Service Medal Regulations. Defence later advised that this Determination had been provided in error.

¹ Mr McPherson was serving as an Army reservist at the rank of Private at the time that he submitted his application but discharged on 17 May 2023

² Letter, Miss Rushby to Private McPherson dated 1 March 2023

³ Ibid

5. On 6 March 2023, Mr McPherson made application to the Tribunal seeking review of the above decision.⁴

Tribunal jurisdiction

6. 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 McPherson's service

7. Mr McPherson enlisted in the Australian Regular Army on 11 May 2004, with an enlistment period of four years. On 23 June 2004, Mr McPherson transferred to the Australian Army Reserve until he was discharged on 26 July 2004. He later re-enlisted in the Army Reserve on 16 February 2009 and served as a reservist until 17 May 2023.

8. Defence advised that Mr McPherson had not been issued with any defence awards for his service in the Australian Army. On 2 December 2022 Mr McPherson was issued a National Medal for his service with the New South Wales SES, New South Wales Rural Fire Service, Australian Regular Army, Australian Army Reserves, New South Wales Parks and Wildlife Service and New South Wales Fire & Rescue, recognising an accumulated 15 years of service between 27 August 1997 and 28 May 2019. Defence advised that the award of the National Medal is not relevant to Mr McPherson's eligibility for the ADM.⁵

⁴ Application to the Tribunal, Private McPherson dated 6 March 2023

⁵ Letter, Mr Ian Heldon to the Tribunal dated 23 April 2023

The Australian Defence Medal

7. 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 who served 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.

8. The eligibility criteria for awarding the ADM is contained in paragraph 4(1) of the *ADM Regulations 2006*⁶ as amended in 2020,⁷ 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."*[...]

⁶ *Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette, S48, dated 30 March 2006*

⁷ *Australian Defence Medal Regulations, Commonwealth of Australia Gazette, G00629, dated 4 August 2020*

9. On 13 July 2020, the Regulations were amended to provide a definition of year, being:

*Year means the 12 month period ending on the anniversary of the member's enlistment or appointment.*⁸

10. The *Australian Defence Medal Determination 2021* (the Determination) dated 16 March 2021, provides specific details of prevailing discriminatory policy for the purpose of subparagraph 4(1)(d)(iii) of the Regulations. During the hearing, Mr McPherson confirmed that the prevailing discriminatory policies did not apply to his circumstances.

11. The Determination confirms in Schedule 1 *Minimum periods of annual qualifying service* that the minimum required period is 20 days service from 20 April 2000 inclusive per enlistment year.⁹

Mr McPherson's application to the Tribunal

12. In his application to the Tribunal, Mr McPherson disputed Defence's assertion of his ineligibility for the ADM based on Defence's definition of his yearly service. He stated:

I enlisted in the Australian Regular Army on 11 May 2004; the year for the purposes of qualifying period 11 May 2004 to 10 May 2005. I was discharged on 26 July 2004. My period of service was 76 days.

I re-enlisted in the Australian Army Reserve on 16 February 2009. A year for the purpose of qualifying period is 16 February to 15 February 2010. Between 20 March 2009 and 18 April 2009 I completed my Reserve Recruit Training Course. This was 30 days of service. During the year I completed further additional days that would count towards the qualifying period.

13. In relation to each year of his service Mr McPherson stated:.

11 May 2004 – 10 May 2005

I enlisted in the Australian Regular Army on 11 May 2004.¹⁰ I was discharged on 26 July 2004.¹¹ My period of service was 76 days.

⁸ Australian Defence Medal Regulations, Commonwealth of Australia Gazette, G00629, dated 4 August 2020

⁹ The Australian Defence Medal Determination 2021, dated 16 March 2021

¹⁰ Certificate of Enlistment for Mr Daniel Graeme McPherson dated 11 May 2004

¹¹ ADO Service Record Mr Daniel Graeme McPherson dated 14 April 2022

16 February 2009 – 15 February 2010

I re-enlisted in the Australian Army Reserve on 16 February 2009.¹² A year for the purposes of the qualifying period 16 February 2009 – 15 February 2010. Between 20 March 2009 and 18 April 2009 I completed my Reserve Recruit training course.¹³ This was 30 days of service. During this period I completed further additional days which would count towards the qualifying period.

16 February 2010 – 15 February 2011

Between 30 May 2010 and 13 June 2010 I completed the Basic Combat Engineer (IET Phase 4).¹⁴ This was 15 days of service. Between 14 August 2010 and 22 August 2010 I completed the Conduct Reserve Response Force Operations.¹⁵ This was 9 days of service. These two courses total 24 days of service. During the year I completed further additional days that would count towards the qualifying period.

16 February 2019 – 15 February 2020

Between July and September 2019 I worked at Special Operations Training and Education Centre (SOTEC) on a fulltime service. This was in excess of 20 days. During the year I completed further additional days that would count towards the qualifying period.

14. Mr McPherson further stated that he had submitted an FOI request to Defence for his payslips to support his service at SOTEC. He stated: *The evidence is that I have completed four years of efficient service. Those years are 2004-2005; 2009-2010; 2010-2011 and 2019-2020.*¹⁶

Defence Report

15. Defence stated that in response to the appeal, it reviewed the original decision from 12 November 2019 and the subsequent correspondence dated 17 February 2023 and re-assessed Mr McPherson's eligibility for the ADM. The re-assessment supported the original decision to not recommend Mr McPherson for the ADM.¹⁷

16. Defence stated that based on his application to the Tribunal, it understood that

¹² Certificate of Enlistment for Mr Daniel Graeme McPherson dated 16 February 2009

¹³ Record of Attainment for Reserve Recruit Training Course for Mr Daniel Graeme McPherson dated 18 April 2009

¹⁴ Record of Attainment for Basic Combat Engineer (IET Phase 4) for Mr Daniel Graeme McPherson dated 13 June 2010

¹⁵ Record of Attainment for Conduct Reserve Response Operations for Mr Daniel Graeme McPherson dated 22 August 2010

¹⁶ Application to the Tribunal, Private McPherson dated 6 March 2023

¹⁷ Letter, Mr Heldon to the Tribunal dated 23 April 2023

Mr McPherson's argument was that his first period of service in 2004 counted as one qualifying year and that, based on his re-enlistment date of 16 February 2009 and subsequent 12 month periods, he had completed three more qualifying years for a total of four years. Defence submitted that Mr McPherson's initial enlistment period of 11 May 2004 to 26 July 2004 was not a completed 12-month period of service and was therefore not eligible service for the purpose of the ADM.

17. Using the re-enlistment date of 16 February 2009 as the qualifying commencement date, Defence contended that Mr McPherson had only completed the full 12-months' service and met the minimum annual requirement in three periods, those being:

1. 16 February 2009 - 15 February 2010
2. 16 February 2010 - 15 February 2011
3. 16 February 2019 – 15 February 2020.¹⁸

18. Defence further stated that in circumstances where an individual had a prior period of service of less than a full 12 months (an incomplete year), which would not be considered eligible service for the ADM, and then commenced a new period of service, that it conducted a calculation to determine a new qualifying date. The prior period of service was aggregated with the re-enlistment period to re-establish a consistent 12 month period. This aggregation method was used by Defence to favour individuals whose previous periods of service might otherwise be discounted and not contribute to the qualifying conditions for the award.

19. Defence stated that the calculation for Mr McPherson's first qualifying year for the award included the residual aggregated service from his earlier 2004 permanent service, and that there was then a break in service of four years and 205 days, from 26 July 2004 to 16 February 2009, when he reenlisted in the Army Reserve. Using the aggregation method, the calculation of Mr McPherson's new qualifying date moved his original date of rehire from 16 February 2009 to 1 December 2009 by subtracting the initial period of permanent service of 77 days from 365 days (being a full qualifying year), which equaled 288 days. The 288 days was added to the rehire date of 16 February 2009, making the new qualifying period 1 December 2009 and every 12 months from thereon

¹⁸ Ibid

while the member remained serving.

20. Defence concluded its report by stating that if Mr McPherson's initial period of service was discounted, and the date of 16 February 2009 used as the qualifying commencement date, or if it was included via the aggregation method detailed above, he had only completed three qualifying years of service for the purpose of his eligibility for the award of the ADM.

Mr McPherson's comments on the Defence report

21. In his comments on the Defence Report, Mr McPherson submitted that:

The issue in dispute before the Tribunal is what is meant by a year of service for the purpose of the award... Schedule 1 of the Australian Defence Medal Determination of 16 March 2021, states:

The following table specifies the minimum annual periods of service to be completed by a member for a year of qualifying service.

[...]

All members ... 20 days ... from 20 April 2000.

22. Mr McPherson also stated that *there is no requirement for the award that they be serving on their anniversary date. Further, that the requirement for a year of service is that they complete the minimum annual periods of service for a year of qualifying service as set out in the relevant determination within a year of their annual enlistment date.*

23. Mr McPherson also made reference to Regulation 4 which states:

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:

[...]

(c) for periods of not less than 4 years.

24. Mr McPherson said that he accepted that the word 'year' for the purpose of the award was defined as:

... the twelve month period ending on the anniversary of the Member's enlistment or appointment.

25. Mr McPherson also questioned Defence's reliance on a Determination made under the Defence Long Service Medal Regulations that was provided to him under cover of the reviewable decision. In doing so, he argued that the relevant determination for the ADM was dated 16 March 2021 and submitted that this misunderstanding resulted in Defence's failure to grant the award to him.

26. Mr McPherson reiterated that *the relevant determination provides that once the applicant completed the minimum period of service within the annual period, it is deemed to be a year of qualifying service for the purposes of the award.* He stressed that *there is no requirement in the award that the applicant still be serving at the anniversary date of their enlistment. The regulation provides that the minimum service as a minimum the applicant must complete periods that total not less than 4 years of qualifying service, that is efficient service.*¹⁹

27. Mr McPherson conceded that *if the Tribunal does not accept that by completing the minimum 20 days in 2004, but not serving on the anniversary date, is considered a year of service for the purpose of the award, (his) argument fails, and (he is) not entitled to the award.*²⁰

Hearing

28. During the hearing, Mr McPherson said the issue was what was meant by a year of qualifying service based on the *Australian Defence Medal Determination 2021*. He pointed to the difference between the 2021 Determination and the *Australian Defence Medal Determination 2013*. He noted that the 2013 Determination said *the minimum periods of qualifying service required under these Regulations for each year served are provided in the table below.* He then contrasted this with the 2021 Determination, which states *...the minimum annual periods of service to be completed by a member for a year of qualifying service is provided under Schedule 1.*

¹⁹ Correspondence - Private McPherson Comments on Defence Report, provided on 9 May 2023

29. Mr McPherson contended that the 2021 Determination was a deeming provision and that it was the smallest amount of the year that gave a member a year of qualifying service. When citing the 2021 Determination, Mr McPherson inserted the word ‘*deemed*’ between ‘*a*’ and ‘*year*’ in the determination; that is he said that ...*the minimum annual periods of service to be completed by a member for a [deemed] year of qualifying service...*

30. Mr McPherson submitted that he did not have to meet the definition of a year and that rather Defence needed to prove that he still had to remain enlisted on his anniversary of enlistment.

31. Defence’s position at the hearing was that the Regulations were amended to include a definition of a year so that it did not have to be included in the 2021 Determination. Defence submitted that, in line with the determination and the Regulations, a member must be enlisted for a full year and have the qualifying service during that year. They noted that in applying the regulations and determination together, paragraph 4(1)b of the Regulations, which took precedence over the determination, required a member to serve for a period of not less than four years. A year being a 12-month period ending on the 12-month anniversary of the member’s enlistment.

Post-hearing submissions

32. At the hearing, Mr McPherson was given leave to make a further written submission to address an issue raised by the Tribunal in relation to the meaning of *qualifying service that is efficient service*. The Tribunal had asked Mr McPherson to address whether there were two parts to test for award of the ADM, those being requiring a person to have qualifying service and then to also have efficient service within the qualifying year. Mr McPherson’s further submission reflected his previous application and the arguments put by him at the hearing. It stated in relation to the particular question:

The Applicant submits that if they complete the minimum 20 days qualifying service, which is deemed in accordance with regulation 4(2)(a) a efficient service, this is deemed a year of service for the purpose of the Award in accordance with the 2021 determination.

Inter alia any qualifying service is efficient service in accordance with regulation 4(2)(a) and the 2021 determination.

If the Tribunal forms a view that there is an inconsistency between the 2021 determination and the definition of a year, that the Chief of Defence's 2021 determination must prevail.

33. Defence was given the opportunity to respond. Defence maintained its previous position.

34. The Tribunal noted that the *Australian Defence Medal Regulations 2006 – Amendments of 2020* provide that *efficient service means any service in the Permanent Force or the Reserves of the Defence Force as determined under paragraph 4(2)(a)*. Paragraph (2)(a) provides that the Chief of the Defence Force may determine ...*that a period of the member's qualifying service is efficient service*. Paragraph (2)(b) permits the Chief of the Defence Force to determine the *minimum annual period of service to be completed by a member for each year of qualifying service*. The Chief of the Defence Force had made a determination under paragraph 4(2)(b) in respect of qualifying service but had not made a determination under paragraph 4(2)(a) concerning efficient service.

Tribunal analysis

35. The *Australian Defence Medal Regulations 2006* specify that:

The Medal may be awarded to a member, or former member of the Defence Force who has given qualifying service that is efficient service...by completing an initial enlistment period; or for a period of not less than 4 years service; or for periods of that total not less than 4 years....

36. In 2020 those Regulations were amended to provide, among other matters, that:
Efficient service means any service in the Permanent Force or the Reserves of the Defence Force as determined under paragraph 4(2)(a).

37. The amendment also substituted the following paragraph 4(2):

(2) For subregulation (1), the Chief of the Defence Force may determine the following:
(a) that a period of the member's qualifying service is efficient service;
(b) the minimum annual period of service to be completed by the member for each year of qualifying service

38. The amendment also inserted a definition of ‘Year’ being:

Year means the 12 month period ending on the anniversary of the member’s enlistment or appointment.

39. On 16 March 2021, the Chief of the Defence Force made the *Australian Defence Medal Determination 2021* which determined that:

For paragraph 4(2)(b) of the Regulations, the minimum annual period of service to be completed by a member for a year of qualifying service is provided under Schedule 1.

40. Schedule 1 states the following table specifies the minimum annual periods of service to be completed by a member for a year of qualifying service... for service after 20 April 2000 is 20 days.

41. As noted, Mr McPherson submitted that the effect of the 2021 Determination was that once a member had completed 20 days’ service during a year they were deemed to have completed a year of qualifying service, whether or not they had continued to serve for the entire year. Mr McPherson’s submission rested on the phrase *to be completed by a member for a year of qualifying service*. His interpretation rested on the definition of the word ‘for’ being interpreted as *in order to obtain*²¹ or *in consideration of, or in return for*,²² rather than *with regard or respect to*²³ or *during the continuance of*.²⁴ Mr McPherson’s approach also did not deal with language in paragraph 4(1) of the Regulations, which provide for the giving of *qualifying service... for a period of not less than 4 years service*.

42. The Regulations provide the basis for the Chief of the Defence Force to make a determination in accordance with paragraph 4(2)(b) of the Regulations. Pursuant to that Regulation, the Chief of the Defence Force made the *Australian Defence Medal Determination 2021* on 16 March 2021. Contrary to Mr McPherson’s submission, the Determination should be read so as to be consistent with the Regulations. Any inconsistency would be *ultra vires* the power for the Chief of the Defence Force to make the Determination.

²¹ The Macquarie Dictionary online, accessed 27 October 2023, definition of the word ‘for’, point 3

²² Ibid, point 6

²³ Ibid, point 8

²⁴ Ibid, point 9

43. To ascertain what was intended, the Determination must be looked at in the scheme of the Regulations. The Regulations relevantly require that a person must have *given qualifying service that is efficient service for ...a period of not less than four years' service*. In this context, a year is *the 12 month period ending on the anniversary of the member's enlistment or appointment*.

44. This means that in order to qualify for the ADM, a person must have *given qualifying service* [the minimum annual period of which is 20 days] *that is efficient service* [not defined and takes its ordinary meaning of *adequate in operation or performance; having and using the requisite knowledge, skill, and industry; competent; capable*]²⁵ *for ...a period of not less than four years* [four of the 12 month periods ending on the anniversary of the member's enlistment or appointment] *service* [note that this is not qualifying service, but simply service].

45. While Mr McPherson had given qualifying service in four separate years, being 11 May 2004 until 26 July 2004 and three years between 16 February 2009 and 15 February 2020, he had not provided a period or periods that totalled not less than four years' service as required by the Regulations and the relevant Determination.

Decision

46. For this reason, the Tribunal decided to affirm the decision under review.

²⁵ Ibid, point 2