



The Board also considered your contention the case should have “concluded with a ‘Report of No Misconduct’” so there “should not be any record of the disposition of this case in [your] OMPF.” Lastly, the Board considered your contention that you did not review the actual contents of the NCIS investigation which were an enclosure to the Report of Misconduct, and which you acknowledged receiving on 29 November 2018. However, you assert you only became aware of the NCIS information, and specifically the contended errors, after a Freedom of Information Act (FOIA) request in January 2023.

The Board noted Commanding Officer (CO), [REDACTED], stated in the Report of Misconduct there was “probable cause to prefer charges of sexual assault” but “charges were not recommended due to lack of victim participation and the likely success of an affirmative defense of mistake of fact as to consent.” Further, the CO stated that during the “course of the investigation, [you] admitted that [you] had sexual intercourse with someone other than [your] wife.” The Board noted the NCIS Investigative Action of 27 April 2018 but determined the document was insufficient to establish that you never made a statement of admission, and only reflects that, on the 26th of April, you did not make a statement to NCIS. Based on the available evidence, the Board determined there is insufficient evidence to overcome the presumption of regularity that attaches to your CO’s determination you committed misconduct and his documentation of that misconduct in a Report of Misconduct as required by regulation.

The Board further noted that, on 29 November 2018, you acknowledged receipt, elected not to submit a statement, and by your signature, expressed understanding the derogatory material would be included in your OMPF if Deputy Commandant (Manpower and Reserve Affairs) (DC (M&RA) elected to include the adverse material. Given the opportunity to refute the determination you committed misconduct by admitting to sexual intercourse with someone other than your wife, the Board noted you elected to forego the opportunity. The Board further determined the alleged recent receipt of the “erroneous reports” through the FOIA process does not negate your decision, at the time, to not make a statement since the Report of Misconduct put you on notice of the misconduct the CO determined was established by a preponderance of the evidence.

By definition in Department of Defense Instruction 1320.04, adverse information can be derived from “credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence.” The instruction further states the DC (M&RA) has the “sole authority to include adverse material in an officer’s OMPF.” The Board concluded all requirements for including the adverse material in your OMPF have been satisfied and no action has been taken that is contrary to law. Therefore, the Report of Misconduct, with its endorsements and the associated follow-on documentation, and the other documents listed in your statement are authorized to be filed in your OMPF. The Board thus concluded there is insufficient evidence of material error or injustice warranting the removal of the derogatory information in your OMPF. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not

previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5/28/2023

