



necessary to the offense. If the accused had an honest and mistaken belief that the alleged victim consented to the act of sexual intercourse, the accused is not guilty of rape if the accused's belief was reasonable. You further argued that the probable cause standard requires the titling authority to consider the totality of the circumstances. The evidence demonstrates that you had a clear mistake of fact as to the consent defense to this allegation. You also contend that the totality of circumstances shows that the victim either consented to all of the alleged sexual encounter and/or you had a reasonable belief that the complainant granted the consent to do so. You claim that there is absolutely no corroborating evidence to support the titling action for rape. The rape charge was ultimately withdrawn, and dismissed. You further contend that the NCIS denial was mostly a regurgitation of the same irrelevant facts as those contained in the original NCIS ROI that was used to reaffirm its decision to title you. In rebuttal to the AO, you contend that the AO failed to address any of the substantive facts or legal issues in this case, thus the opinions and recommends provided are useless and should be disregarded.

The Board, however, substantially concurred with the AO and NCIS determination that your name was properly titled and indexed in accordance with Department of Defense Instruction (DoDI) 5505.07. In this regard, DoDI 5505.07 directs DoD Law Enforcement Agencies (LEAs) to "title subjects of criminal investigations in DoD LEA reports and index them in DCII as soon as there is *credible information* [emphasis added] that they committed a criminal offense." DoDI 5505.07 defines credible information as, "[i]nformation disclosed or obtained by a criminal investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained criminal investigator to presume that the fact or facts in question are true." The Board determined that the credible information standard for DoD LEA titling is still applicable according to the current version of DoD Instruction 5505.07.

The Board took into consideration probable cause and other factors required by law, and determined that probable cause still exists to believe that you violated Article 120, Uniform Code of Military Justice. In this regard, while the Board noted that the Manual for Courts Martial (MCM) (2005 edition) provides that the elements for Article 120 include: "(a) [t]hat the accused committed an act of sexual intercourse; and (b) [t]hat the act of sexual intercourse was done by force and without consent." The Board found sufficient evidence and you did not argue that sexual intercourse occurred. The Board also found sufficient evidence that the sexual intercourse was done by force and without consent. Although there is a lack of evidence regarding physical force, the Board concurred with the NCIS denial and determined that constructive force in the form of intimidation, threats, and abuse of authority did occur. In this case, the evidence supports a finding that you offered the victim an ultimatum, threatened to submit the video to the chain of command, you were senior in rank to the victim and in a position of authority as her Leading Chief Petty Officer, and you were physically larger in stature. The MCM goes on to provide that, "[c]onsent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm . . ." Moreover, "[a]ll the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm."

Based on a totality of the evidence, the Board determined that the victim did not give consent and failed to resist only because she feared grievous bodily harm and the threat of your stated consequences if she did resist. The Board found nothing in your petition that outweighs the evidence of your misconduct, credibility of the NCIS ROI, or probable cause standard. The Board found that the fact that the charge of rape was ultimately dismissed subsequent to a pretrial agreement is not dispositive of the evidence that the rape occurred. Moreover, according to DoDI 5505.07, “[o]nce the subject of a criminal investigation is indexed in DCII, the information will remain in DCII, even if they are found not guilty, unless the DoD LEA head or designated expungement official grants expungement.” The Board thus concluded that there is no probable material error, substantive inaccuracy, or injustice warranting expungement of the NCIS Incident Report and DCII. 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,

1/16/2024

