



**DEPARTMENT OF THE NAVY**  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE ROAD, SUITE 1001  
ARLINGTON, VA 22204-2490

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Docket No. 9522-23  
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 5 March 2024. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations, and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, as well as the 15 December 2023 advisory opinion (AO) furnished by the Navy Office of Legal Counsel █ and your response to the AO.

The Board carefully considered your request to expunge your name and information from any law enforcement or criminal investigative report including the Defense Central Index of Investigation (DCII) or any other system of record subject to the National Defense Authorization Act for FY 2021. The Board considered your contention that the Naval Criminal Investigative Service (NCIS) investigation was deficient and the agents became obsessed with wanted to solve a crime that did not happen. You claim that you were read your rights and told you were not a suspect. NCIS gathered bedsheets from your room to obtain evidence three-months after you discussed having consensual sex with the victim. You also claim there was sufficient time for the NCIS supervisors to conclude there was a failure to conduct an objective investigation because an offense could not be established by any standard.

You also contend the NCIS denial of your expungement request considered non-dispositive factors; however, this does not represent an accurate factual or legal statement of the evidence and applicable law. You claim the chain of command did not impose any disciplinary action and recognized the NCIS investigation for what it was, a rush to judgment replete with misconduct

on their part, beginning with the basic violation of his Article 31b rights. You also claim that according to Department of Defense Instruction (DoDI) 5505.07, the standard applied by the body reviewing the request for removal must be “probable cause” not “credible information” or any lesser standard. This body must also consider whether there is an adequate basis now for someone’s name and personally identifying information to remain in the report or index. The reviewing authority must make an independent determination under the standard of probable cause—as of the time of the review. You further contend there is no probable cause to believe you committed a criminal offense. The evidence of mistake of fact as to consent is of the same quality as the evidence supporting a finding that the female sailor was incapacitated, meaning there was no criminal intent. Sympathy for the accusing witness does not require condemning you in contradiction of valid legal analysis. The investigation findings support the conclusion that the victim was intoxicated and possibly drugged, to a greater degree than was known to you. A prima facie case for sexual assault requires mens rea, and there is no evidence of mens rea.

In response to the AO, you contend that legally, there is no corroboration of evidence of a criminal act committed by you. The alleged victim has no recollection of the events of the night in question and no idea if sexual relations with her were performed, with or without her consent or by whom. She refused for reasons that you can only speculate forensic examination, which would have established beyond a doubt what transpired. You also contend that the AO glosses over the fact that when the victim went to your room, she was cognizant of the fact that she was accompanying you to have a sexual liaison and the NCIS investigators never pursued this point. Clearly, she was able to give consent and only changed/shaded a description of her overall condition at a later date to serve her own purposes. You further contend that it was incumbent upon the Office of Legal Counsel to obtain the reasoning for failure of the case to go forward if it believes the NCIS case is at all credible. NCIS pursued an allegation unsupported by evidence, and in absence of such evidence embarked on a course of conduct involving improperly obtaining a statement from you in an attempt to make a case where one did not exist.

The Board, however, substantially concurred with the NCIS response to your expungement request and the AO that your name was properly titled and indexed in accordance with DoDI 5505.07. In this regard, the Board noted the circumstances leading to your titling by NCIS in the Report of Investigation and index in the DCII. The Board also noted that 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.” Concerning your contention that the standard applied by the body reviewing the request for removal must be “probable cause” not “credible information” or any lesser standard, the Board determined that the credible information standard for DoD LEA titling is still a valid standard when LEA’s are determining whether a criminal offense was committed.

The Board also considered the probable cause standard and other factors required by law and determined that probable cause existed during 2019, and still exists, to believe that you sexually assaulted the victim in violation of Article 120, Uniform Code of Military Justice (UCMJ). In

this regard, the Board noted that sexual assault is a general and not a specific intent crime; therefore, mens rea is not a defense. According to the *Manual for Courts Martial* (2019 ed.) A person is guilty of sexual assault who, “commits a sexual act upon another person; the person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or when the other person is incapable of consenting to the sexual act due to—impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person.” “Incapable of consenting” is further defined “the person is—incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.” Additionally, “[a] sleeping, *unconscious*, or incompetent person cannot consent. The Board determined there is sufficient evidence that the sexual intercourse was committed without the victim’s consent. When making this decision, the Board considered the victim’s statements regarding feelings of “fuzziness” after having drinks in another sailor’s room, her complete lack of memory of the sexual encounter or anything that happened after leaving the other sailor’s room, the fact when the victim woke-up she had no idea where she was, and that she noticed that her vaginal area was bruised and bleeding. The Board also considered that the victim asked you, the morning after the assault, if you raped her, expressed her concerns to friend, showed the friend her bruises, and was escorted to the Naval Hospital where she consented to a Sexual Assault Forensic Examination (SAFE). Despite your assertion that someone else assaulted her, the SAFE confirmed the presence of your Deoxyribonucleic acid (DNA) and confirmed the vaginal bruising. The Board also noted that the victim questioned you about whether you wore a condom and if you had a sexually transmitted disease (STD). Additionally, you admitted to having knowledge of her level of impairment, acknowledged that she was “in and out,” had sex with her without using a condom, and did so knowing you had a STD. The Board opined that this interaction demonstrates that if the victim had consented to sexual intercourse, she would have required you to wear a condom and would have asked about STD’s. The Board also determined that the victims’ statement and physical condition were not consistent with consensual sex.

Concerning the command’s imposition of disciplinary action, the Board determined that your claim that the command recognized the NCIS investigation as a rush to judgment replete with misconduct is conjecture and not supported by evidence. The Board noted that on two occasions Trial Counsel opined that there was probable cause, a Preliminary Hearing Officer found probable cause, and the Convening Authority (CA) determined that probable cause existed to initiated a court-martial. Although the CA subsequently withdrew and dismissed the charges without prejudice for reasons unknown to the Board, it does not diminish the fact that numerous fact-finding bodies found probable cause. Moreover, the Board concluded a decision whether to expunge your name does not hinge on whether you faced the jeopardy of a conviction for the crime. Concerning your argument that it was incumbent upon the Office of Legal Counsel to obtain the reasoning for the failure of the case to go forward, the Board determined that according to SECNAVINST 5420.193, “It is the applicant's responsibility to procure such evidence not contained in the official records of the Department of the Navy as he/she desires to present in support of his/her case.” Thus, the Board was not persuaded by your argument. Ultimately, the Board determined that the final disposition of a criminal case is within the CA’s discretion and does not imply that a crime did not occur or you are innocent of violating Article 120, UCMJ.

Based on a totality of the evidence, the Board determined that the victim did not and was unable to give consent. The Board found that your claim that the victim went to your room cognizant of the fact that she was accompanying you to have a sexual liaison is not supported by sufficient evidence. The evidence indicates that you attempted to communicate with the victim; however, the victim did not have a record of any purported phone call, and she only became aware of your text messages the following day after the sexual assault. Additionally, your claim that the victim refused a forensic examination and only changed/shaded a description of her overall condition at a later date to serve her own purposes is also not support by the evidence. As previously, noted, the victim completed a SAFE, on 4 February 2019, following the alleged sexual assault. The victim was assigned a Victim Advocate and she filed a restricted report. The SAFE forensic evidence confirmed that your DNA was present.

The Board found no evidence in your petition that outweighs the evidence of your misconduct, credibility of the NCIS investigation, or probable cause standard. The fact that the CA dismissed the charges against you is not dispositive of whether a sexual assault 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 is not an investigative body. Its function is to consider applications properly before it for the purpose or determining the existence of error or injustice in the naval records of current and former members of the Navy and Marine Corps. The Board also relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. In your case, the Board determined that your evidence was insufficient to overcoming the presumption of regularity. The Board thus concluded that there is no probable material error, substantive inaccuracy, or injustice warranting expungement of your name. 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,

3/21/2024

