



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

█  
Docket No. 9977-23  
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 16 April 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 8 January 2024 advisory opinion (AO) furnished by the Navy Office of Legal Counsel (PERS-00J) and your response to the AO.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to review the withdrawal of your promotion to Commander (CDR/O-5). The Board considered your contentions that the Special Selection Review Board (SSRB) was presented with an inaccurate description of the incident. You also contend:

(1) The summary of the incident presented to the board stated that █ Child Protection Service (CPS) “referred the case to [your] command for further action,” when, in fact, the report conclusion stated that the investigation did not find a basis or evidence of child abuse, recommended no further action, and was closed. The █ County CPS investigation did not find evidence to substantiate physical abuse under █ law.

(2) The Family Advocacy Program (FAP) substantiation of “mild physical abuse” was made in plain error. The definition of “Physical Abuse,” under FAP’s own instruction (OPNAVINST 1752.2C page C-8) explicitly excludes, “discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner, and moderate in degree and otherwise does not constitute cruelty.” An open hand slap to a child’s buttocks or spanking by a parent for disciplinary purposes is not “physical abuse,” but legal parental discipline.

(3) It was inappropriate for the board to deny your promotion on the basis of this incident. You have dedicated your entire professional career to the Navy and have always strived to lead in an exemplary manner. As evidence, you furnished excerpts of policy regarding parental discipline.

In response to the AO, you contend the AO does not contest the legality of the conduct in question. Given that the conduct alleged was legal parental discipline, the FAP should never have substantiated a case against you. The SSRB should not have considered legal parental discipline as “information of an adverse nature,” when reviewing your promotion selection. The presumption of regularity does not attach when there is clear evidence of irregularity. Per OPNAVINST 1752.2C “a commander may not take administrative or disciplinary action in regards to a Service member based solely upon the IDC’s substantiation of an act of domestic or child abuse.” Further, no government entity, military or civilian, took administrative or disciplinary action against you regarding this finding, until the removal of promotion selection by the SSRB. You assert that your selection for promotion by the Fiscal Year (FY) 2023 selection board is the clearest evidence that you were among the “best and fully qualified officers” in the pool of eligible O-4s.

The Board noted that the Department of Family and Children's Services received a report alleging physical abuse of a two-year-old child by the father. The report noted the child had a dark red handprint on the left buttocks area going down to his thigh and the child reported that his father hit him. The report also noted that you admitted to using an open hand slap to the child's backside, but did not intend to leave any marks or bruising. The child was kicking his legs wildly while being dressed and when you attempted to spank him, the child kicked, and you swatted his leg. The Department of Family and Children's Services determined the allegation of physical abuse, as defined by Penal Code 11165.4, on the child, by you, was concluded as inconclusive and the case was closed with no further involvement from the Department. The Board also noted that according to the Commander, Navy Personnel Command (CNPC) withhold notice, on 7 March 2022, NPC was notified that you were the subject of a base incident report. Specifically, on 28 March 2018, the Naval Support Activity █ Police Department apprehended you for alleged assault of your dependent son and, on 15 March 2022, the FAP substantiated an allegation of mild physical abuse of a child against you in May 2018.

The Board substantially concurred with the AO that the findings of the SSRB are valid. In this regard, the Board noted the NPC notification that the FAP information was not available to the promotion selection board (PSB); therefore, a SSRB must be convened to review and make a recommendation whether the PSB’s recommendation for your promotion should be sustained. You were properly notified of the opportunity to review the adverse information, to submit a statement during the SSRB process, and that the promotion recommendation package will be routed to the Secretary of the Navy (SECNAV) for adjudication if the information is determined to be reportable.

Concerning the FAP finding, mild physical abuse of a child, the Board noted that according to the Navy FAP Instruction, non-accidental use of physical force includes slapping and injuries might include bruises or welts. It states, “[a]n injury does not have to be visible for physical abuse to have occurred. Does not include discipline administered by a parent or legal guardian to his or her child provided it is *reasonable in manner*, [emphasis added] and moderate in degree and otherwise does not constitute cruelty.” The Board considered that FAP professionals would have had the opportunity to review all related evidence, statements, photos, and your statement prior to making a determination. The Board found no evidence that the FAP’s finding was in error when determining the discipline you administered to your two year old was not reasonable in manner, not moderate in degree, and met the criteria for mild physical abuse of a child. The Board also noted that the ██████████ County CPS finding was inconclusive. Moreover, the ██████████ County CPS investigation report noted that according to your statement, the incident occurred around 7:30 am; however, when the child was seen by daycare staff at 10 am the child still had a hand print shaped discoloration on his leg, which shows the child was hit with enough force to leave a mark. Based on this evidence alone, the Board found that the FAP finding was appropriate. Further, the Board determined that the ██████████ County CPS closure of your case did not constitute a definitive finding that no abuse occurred. The Board also determined that the closure of your CPS case had no bearing on the FAP determination and does not demonstrate that the FAP determination was in error.

Concerning the SSRB’s consideration of adverse or reportable information, the Department of Defense (DoD) Instruction for Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation, requires the SECNAV to ensure officers whose names are forwarded continue to remain qualified for promotion or appointment and meet the exemplary conduct provisions. As advised in the withhold notice, the SECNAV is required to review and consider any adverse information concerning officers selected for promotion. Thus, your apprehension by the Naval Support Activity ██████████ Police Department for alleged assault of your son and subsequent FAP determination, constitutes adverse information subject to review by SECNAV. The DoD Instruction defines adverse information as “any substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual.”

The Board determined that the SSRB was convened properly and according to regulations. The SSRB also properly considered the “legal parental discipline” you imposed upon your then two-year-old son as “information of an adverse nature,” when reviewing your promotion selection. In this regard, according to 10 U.S.C. section 14502a, if the Secretary of the military department concerned determines that a person recommended by a promotion board for promotion to a grade at or below the grade rear admiral in the Navy is the subject of credible information of an adverse nature and that was not furnished to the promotion board during its consideration of the person for promotion, the Secretary shall convene a SSRB to review the person and recommend whether the recommendation for promotion of the person should be sustained. The SSRB was convened to consider your record and the aforementioned information. The Board also determined, there is sufficient evidence you were afforded due process, the information to be considered by the SSRB

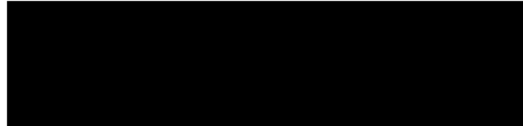
was made available to you and you were afforded a reasonable opportunity to submit comments on the information to the SSRB. Moreover, the SSRB acted within their discretionary authority and according to the applicable precepts when determining that your promotion recommendation was not sustained.

The Board 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. The Board found your evidence insufficient to overcome this presumption and thus concluded that there is no probable material error, substantive inaccuracy, or injustice warranting a change to the SSRB decision. 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,

4/29/2024

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Executive Director

Signed by: 