Publication of Department of Defense Personnel Security Clearance Board Final Decisions

By

Leon J.Schachter[1]

Executive Order 12968, *Access to Classified Information*, dated August 4, 1995 grants persons who have had their eligibility for access to classified information adversely adjudicated, the right to appeal to a three-person panel. The Department of Defense (DoD) maintains nine of these panels, commonly refereed to as Personnel Security Appeals Boards. There is one each for the Navy, Army, Air Force, Washington Headquarters Services, Defense Intelligence Agency, National Security Agency, National Geospatial – Intelligence Agency, National Reconnaissance Office, and DOHA.

There is no administrative appeal from a PSAB decision and the courts have declined to take jurisdiction of security clearance cases. *Department of the Navy v. Egan*, 484 U.S. 518 (1988). Therefore, PSAB decisions are the final adjudication of security clearance cases.

The Freedom of Information Act (FOIA) mandates that Federal organizations with authority to render final decisions in the adjudication of cases must publish those decisions by making them electronically available for public access. 5 USC 552(a)(2)(E). Congress believed that this requirement would be a most efficient way to inform the public about how Government conducted the adjudication of cases.

DOHA[2] stands alone as the only final decision authority that has satisfied its FOIA obligation to publish its redacted final decisions in electronic form. It has done so since 1996 in accordance with adoption of the Electronic Freedom Information Act Amendments of 1996. DOHA thereby met its legal obligation and the underlying premise that public interest would be best served by the transparency provided, which ensures

---

[1] Mr. Schachter was progressively a trial counsel, Hearing Examiner, and then Chief Hearing Examiner at the Defense Office of Hearings and Appeals (DOHA) before being appointed as its Director in 1990. He was responsible for changing the title Hearing Examiner to Administrative Judge to better reflect their quasi-judicial duties, and for the supervision of DOHA Administrative Judges, trial attorneys, security specialists, and support staff. Mr. Schachter was most recently a consultant to the current Director of DOHA. He is currently in private practice as Senior Counsel to the law firm of Bigley, Ranish L.L.P. specializing in the denial or revocation of cases requiring a security clearance or a CAC. The opinions expressed in this Article by Mr. Schachter reflect his personal views, and are not those of the Department of Defense or DOHA.

[2] DOHA is the largest component of DLSA. The Director of DLSA is also the General Counsel of the Department of Defense.

adherence to the National Adjudication Guidelines and other law. This in turn promotes consistency, accountability and ultimately fairness, which is central tenant of the DOHA mission.

The reasons why the other PSABs have not followed suit is unknown. What is clear is that any argument that only final decisions that spring from formal hearings or that serve, as precedent must be published would be inconsistent with judicial case law rejecting both propositions. *National Prison Project of the American Civil Liberties Union Foundation v. Sigler, 390 F. Supp 789 (D.D.C.* 1975).[3] The court clearly rejected the claim that final decisions adjudicating prisoner applications for parole did not have to be published if they had no value as precedent by explaining that:

> The fact that an agency may not utilize an order as precedent unless it is published and indexed does not compel the conclusion that only orders having precedential potential are subject to the requirements of subsection (a) (2) (A). The wording of this latter provision is too straightforward and unambiguous to be diluted by defendants' proposed construction. Nor is resort to the legislative history necessary when the statutory language is clear and unequivocal. Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917).[7] A recent attempt to raise the same argument that only agency orders used as precedent need be published was rejected by Judge Robinson of this Court in Tax Analysts and Advocates v. I. R. S., 362 F. Supp. 1298 (D.D.C.1973), aff'd 505 F.2d 350 (D.C.Cir. 1974).[8] The court fully concurs in the analysis of the statute and legislative history presented in that case.
>
> Defendants further fail in their contention that the statement of reasons denying parole have no precedential effect. Although a specific decision is not cited as precedent for a subsequent denial of parole, the decisions are apparently compiled and studied in order to develop coherent policy guidelines. These guidelines appear to provide the foundation from which the individual decisions derive their consistency. In this light the statements of reasons do have an indirect precedential impact on subsequent proceedings.

---

[3] Similarly there is no military function exclusion from publication of final adjudicatory decisions as there is with respect to the Administrative Procedure Act rulemaking requirements.

Study of published DOHA final adjudicatory decisions, like resolution of parole applications at issue in National Prison Project of the American Civil Liberties Union Foundation *v.* Sigler, *supra*, facilitates the development of public policy. The Personnel Security Research Center (PERSEREC) has used DOHA's electronic decisions available to all on the Internet to research the application and effectiveness of the National Adjudication Guidelines and make recommendations based on that research for development of various policies impacting the Department's personnel security program. Others can do the same. As a result the public interest in the electronic availability of such decisions is far broader than any limited value they may or may not have as precedent for resolving cases.

There is also no privacy concern to rationalize not publishing PSAB final adjudicatory security clearance determinations. Any personal information should and could be easily redacted before publication just as DOHA has been doing since 1996. Thus, there is no foundation for considering privacy bases exceptions such as for personnel records

Similarly, publication of final adjudicatory decisions based on an application for a security clearance cannot be excused under the exemption for internal rules. The National Adjudication Guidelines that are adjudicated in the final PSB decisions apply equally to contractor personnel, military members and civilian Government employees and are openly published for public consumption. There is thus nothing internal about these final adjudicatory decisions.

Finally, the cost of publishing final adjudication decisions by all the PSABs would seem to provide no significant concern. The combined number of cases the PSABS would need to publish is far fewer in number than the Administrative Judge and Appeal Board decisions published for many years by DOHA. Indeed, the PSABs could rely on DOHA's expertise in accomplishing this task. As for the necessary redaction to prevent disclosure of information protected by the Privacy Act, the PSAB decisions are already created by electronic means and are summary in fashion so as to contain very little personal information that would need to be redacted out of the published versions.

This author consequently believes that the PSABs must begin making their final adjudicative decisions available for public review and access on the Internet or otherwise electronically available for public review and access both as a matter of law and as sound public policy.