

## § 709.21

(6) If the Program Manager denies or revokes the access for an individual applying for a DOE access authorization or already holding a DOE access authorization, DOE may initiate an administrative review of the individual's clearance eligibility under the DOE regulations governing eligibility for a security clearance at 10 CFR part 710.

(7) For cases involving a question of loyalty to the United States, DOE may refer the matter to the FBI as required by section 145d of the AEA.

(e) DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions within DOE whose access to the categories described in § 709.4(a)(1)–(8) is denied or revoked may request reconsideration by the relevant head of the departmental element, as identified in the notice of denial or revocation. Individuals who decline to take the counterintelligence scope polygraph examination will not be afforded these reconsideration rights.

(f) Utilizing the DOE security criteria used to grant or deny access to classified information, OCI will make a determination whether an individual completing a counterintelligence polygraph examination has made disclosures that warrant referral, as appropriate, to the Office of Security and Emergency Operations or the Manager of the applicable Operations Office. OCI will not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance.

### **Subpart C—Safeguarding Privacy and Employee Rights**

#### **§ 709.21 When is an individual notified that a polygraph examination is scheduled?**

When a polygraph examination is scheduled, DOE must notify the individual, in writing, of the date, time, and place of the polygraph examination, and the individual's right to obtain and consult with legal counsel or to secure another representative prior to the examination. DOE must provide a copy of this part to the individual. The individual must receive the notification at least ten days, excluding

## 10 CFR Ch. III (1–1–05 Edition)

weekend days and holidays, before the time of the examination except when good cause is shown or when the individual waives the advance notice provision.

#### **§ 709.22 What rights to counsel or other representation does an individual have?**

(a) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative prior to the polygraph examination. The counsel or representative may not be present during the polygraph examination. No one other than the individual and the examiner may be present in the examination room during the polygraph examination.

(b) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative at any time during an interview conducted in accordance with § 709.15(c).

#### **§ 709.23 How does DOE obtain an individual's consent to a polygraph examination?**

DOE may not administer a polygraph examination unless DOE has:

(a) Notified the individual of the polygraph examination in writing in accordance with § 709.21; and

(b) Obtained written consent from the individual.

#### **§ 709.24 What other information is provided to the individual prior to a polygraph examination?**

Before administering the polygraph examination, the examiner must:

(a) Inform the individual of the use of audio and video recording devices and other observation devices, such as two-way mirrors and observation rooms;

(b) Explain to the individual the characteristics and nature of the polygraph instrument and examination;

(c) Explain the physical operation of the instrument and the procedures to be followed during the examination;

(d) Review with the individual the control questions and relevant questions to be asked during the examination;

(e) Advise the individual of the individual's privilege against self-incrimination; and

## Department of Energy

## § 709.31

(f) Provide the individual with a pre-addressed envelope addressed to the D/OCI in Washington, D.C., which may be used to submit comments or complaints concerning the examination.

### **§ 709.25 Are there limits on use of polygraph examination results that reflect “deception indicated” or “no opinion”?**

(a) DOE or its contractors may not:

(1) Take an adverse personnel action against an individual solely on the basis of a polygraph examination result of “deception indicated” or “no opinion”; or

(2) Use a polygraph examination that reflects “deception indicated” or “no opinion” as a substitute for any other required investigation.

(b) The Secretary or the D/OCI may suspend an individual’s access based upon a written determination that the individual’s admission of involvement in one or more of the activities covered by the counterintelligence polygraph, when considered in the context of the individual’s access to one or more of the high risk programs identified in § 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. In such cases, DOE will investigate the matter immediately and make a determination of whether to revoke the individual’s access.

### **§ 709.26 How does DOE protect the confidentiality of polygraph examination records?**

(a) DOE owns all polygraph examination records and reports.

(b) Except as provided in paragraph (c) of this section, the Office of Counterintelligence maintains all polygraph examination records and reports in a system of records established under the Privacy Act of 1974, 5 U.S.C. 552a.

(c) The Office of Intelligence also may maintain polygraph examination reports generated with respect to individuals identified in § 709.4(a)(2) in a system of records established under the Privacy Act.

(d) Polygraph examination records and reports used to make AAAP determinations or generated as a result of an exculpatory personnel security polygraph examination are maintained in a system of records established under the Privacy Act of 1974.

(e) DOE must afford the full privacy protection provided by law to information regarding an employee’s refusal to take a polygraph examination.

(f) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the eligibility evaluation is completed, provided that a favorable recommendation has been made to grant or continue the access to the position. If a recommendation is made to deny or revoke access to the information or involvement in the activities that justified conducting the polygraph examination, then all the records are retained at least until the final resolution of any request for reconsideration by the individual or the completion of any ongoing investigation.

## **Subpart D—Polygraph Examination and Examiner Standards**

### **§ 709.31 What are the DOE standards for polygraph examinations and polygraph examiners?**

(a) DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE administers only DODPI approved testing formats.

(b) A polygraph examiner may administer no more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which an individual voluntarily terminates an examination prior to the actual testing phase.

(c) The polygraph examiner must be certified to conduct polygraph examinations under this part by the DOE Psychophysiological Detection of Deception/Polygraph Program Quality Control Official.

(d) To be certified under paragraph (c) of this section, an examiner must have the following minimum qualifications:

(1) The examiner must be an experienced counterintelligence or criminal investigator with extensive additional training in using computerized instrumentation in Psychophysiological Detection of Deception and in psychology, physiology, interviewing, and interrogation.