

## Department of Energy

## § 710.26

90 calendar days from the date the request for hearing is received by the Office of Hearings and Appeals shall be approved by the Director, Office of Hearings and Appeals.

### § 710.26 Conduct of hearings.

(a) In all hearings conducted under this subpart, the individual shall have the right to be represented by a person of his own choosing. The individual is responsible for producing witnesses in his own behalf, including requesting the issuance of subpoenas, if necessary, or presenting other proof before the Hearing Officer to support his defense to the allegations contained in the notification letter. With the exception of procedural or scheduling matters, the Hearing Officer is prohibited from initiating or otherwise engaging *in extempore* discussions about the case during the pendency of proceedings under this part.

(b) Unless the Hearing Officer finds good cause for granting a waiver of this paragraph or granting an extension of time, in the event that the individual unduly delays the hearing, such as by failure to meet deadlines set by the Hearing Officer, the record shall be closed, and a final decision shall be made by the Manager on the basis of the record in the case.

(c) Hearings shall be open only to DOE Counsel, duly authorized representatives of the staff of DOE, the individual and his counsel or other representatives, and such other persons as may be authorized by the Hearing Officer. Unless otherwise ordered by the Hearing Officer, witnesses shall testify in the presence of the individual but not in the presence of other witnesses.

(d) DOE Counsel shall assist the Hearing Officer in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Hearing Officer. The individual shall be afforded the opportunity of presenting evidence, including testimony by the individual in the individual's own behalf. The proponent of a witness shall conduct the direct examination of that witness. All witnesses shall be subject to cross-examination, if possible. Whenever rea-

sonably possible, testimony shall be given in person.

(e) The Hearing Officer may ask the witnesses any questions which the Hearing Officer deems appropriate to assure the fullest possible disclosure of relevant and material facts.

(f) During the course of the hearing, the Hearing Officer shall rule on all questions presented to the Hearing Officer for the Hearing Officer's determination.

(g) In the event it appears during the course of the hearing that Restricted Data or national security information may be disclosed, it shall be the duty of the Hearing Officer to assure that disclosure is not made to persons who are not authorized to receive it.

(h) Formal rules of evidence shall not apply, but the Federal Rules of Evidence may be used as a guide for procedures and principles designed to assure production of the most probative evidence available. The Hearing Officer shall admit into evidence any matters, either oral or written, which are material, relevant, and competent in determining issues involved, including the testimony of responsible persons concerning the integrity of the individual. In making such determinations, the utmost latitude shall be permitted with respect to relevancy, materiality, and competency. The Hearing Officer may also exclude evidence which is incompetent, immaterial, irrelevant, or unduly repetitious. Every reasonable effort shall be made to obtain the best evidence available. Subject to §§ 710.26(1), 710.26(m), 710.26(n), 710.26(o), hearsay evidence may in the discretion of the Hearing Officer and for good cause shown be admitted without strict adherence to technical rules of admissibility and shall be accorded such weight as the circumstances warrant.

(i) Testimony of the individual and witnesses shall be given under oath or affirmation. Attention of the individual and each witness shall be directed to 18 U.S.C. 1001 and 18 U.S.C. 1621.

(j) The Hearing Officer shall endeavor to obtain all the facts that are reasonably available in order to arrive at findings. If, prior to or during the proceedings, in the opinion of the Hearing

Officer, the allegations in the notification letter are not sufficient to cover all matters into which inquiry should be directed, the Hearing Officer shall recommend to the Manager concerned that, in order to give more adequate notice to the individual, the notification letter should be amended. Any amendment shall be made with the concurrence of the local Office of Chief Counsel or the Office of General Counsel in Headquarters cases. If, in the opinion of the Hearing Officer, the circumstances of such amendment may involve undue hardships to the individual because of limited time to answer the new allegations in the notification letter, an appropriate adjournment shall be granted upon the request of the individual.

(k) A written or oral statement of a person relating to the characterization in the notification letter of any organization or person other than the individual may be received and considered by the Hearing Officer without affording the individual an opportunity to cross-examine the person making the statement on matters relating to the characterization of such organization or person, provided the individual is given notice that it has been received and may be considered by the Hearing Officer, and is informed of its contents provided such is not prohibited by paragraph (g) of this section.

(1) Any oral or written statement adverse to the individual relating to a controverted issue may be received and considered by the Hearing Officer without affording an opportunity for cross-examination in either of the following circumstances:

(1) The head of the agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of the informant's identity would be substantially harmful to the national interest;

(2) The Secretary or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency as to the reliability of the person and the accuracy of the statement concerned, that:

(i) The statement concerned appears to be reliable and material; and

(ii) Failure of the Hearing Officer to receive and consider such statement would, in view of the access sought to Restricted Data, national security information, or special nuclear material, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify

(A) Due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the individual, or

(B) Due to some other specified cause determined by the head of the agency to be good and sufficient.

(m) Whenever procedures under paragraph (1) of this section are used:

(1) The individual shall be given a summary or description of the information which shall be as comprehensive and detailed as the national interest permits, and

(2) Appropriate consideration shall be accorded to the fact that the individual did not have an opportunity to cross-examine such person(s).

(n) Records compiled in the regular course of business, or other physical evidence other than investigative reports obtained by DOE, may be received and considered subject to rebuttal without authenticating witnesses provided that such information has been furnished to DOE by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary to safeguard Restricted Data, national security information, or special nuclear material.

(o) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the individual, may be received and considered provided that:

(1) The Secretary or his special designee for that particular purpose has made a preliminary determination that such physical evidence appears to be material;

(2) The Secretary or his special designee for that particular purpose has made a determination that failure to

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receive and consider such physical evidence would, in view of the access sought to Restricted Data, national security information, or special nuclear material sought, be substantially harmful to the national security; and

(3) To the extent that national security permits, a summary or description of such physical evidence is made available to the individual. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency shall be considered.

(p) The Hearing Officer may request the Local Director of Security to arrange for additional investigation on any points which are material to the deliberations of the Hearing Officer and which the Hearing Officer believes need further investigation or clarification. In this event, the Hearing Officer shall set forth in writing those issues upon which more evidence is requested, identifying where possible persons or sources from which the evidence should be sought. The Local Director of Security shall make every effort through appropriate sources to obtain additional information upon the matters indicated by the Hearing Officer.

(q) A written transcript of the entire proceedings shall be made and, except for portions containing Restricted Data or national security information, a copy of such transcript shall be furnished the individual without cost.

(r) Whenever information is made a part of the record under the exceptions authorized by paragraphs (l) or (o) of this section, the record shall contain certificates evidencing that the determinations required therein have been made.

[59 FR 35185, July 8, 1994, as amended at 71 FR 68730, Nov. 28, 2006]

### § 710.27 Hearing Officer's decision.

(a) The Hearing Officer shall carefully consider the record in view of the standards set forth herein and shall render a decision as to whether the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest. In resolving a question concerning the eligibility of an individual for access authorization

under these procedures, the Hearing Officer shall consider the factors stated in paragraph 710.7(c) to determine whether the findings will be adverse or favorable.

(b) In reaching the findings, the Hearing Officer shall consider the demeanor of the witnesses who have testified at the hearing, the probability or likelihood of the truth of their testimony, their credibility, and the authenticity and accuracy of documentary evidence, or lack of evidence on any material points in issue. If the individual is, or may be, handicapped by the non-disclosure to the individual of confidential information or by lack of opportunity to cross-examine confidential informants, the Hearing Officer shall take that fact into consideration. Possible impact of the loss of the individual's access authorization upon the DOE program shall not be considered by the Hearing Officer.

(c) The Hearing Officer shall make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter and the significance which the Hearing Officer attaches to such valid allegations. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings.

(d) The Hearing Officer's decision shall be based on the Hearing Officer's findings of fact. If, after considering all of the factors in light of the criteria set forth in this subpart, the Hearing Officer is of the opinion that it will not endanger the common defense and security and will be clearly consistent with the national interest to grant or reinstate access authorization for the individual, the Hearing Officer shall render a favorable decision; otherwise, the Hearing Officer shall render an unfavorable decision. Within 15 calendar days of the Hearing Officer's written decision, the Hearing Officer shall provide copies of the decision and the administrative record to the Manager and the Director, Office of Personnel Security, DOE Headquarters.

[59 FR 35185, July 8, 1994, as amended at 66 FR 47065, Sept. 11, 2001; 71 FR 68730, Nov. 28, 2006]