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an act of retaliation occurred, the decision may order the contractor to provide you with appropriate interim relief (including reinstatement) pending the outcome of any request for review of the decision by the OHA Director. Such interim relief will not include payment of any money.

§ 708.37 Will an employee whose complaint is denied by a final agency decision be reimbursed for costs and expenses incurred in pursuing the complaint?

No. If your complaint is denied by a final agency decision, you may not be reimbursed for the costs and expenses you incurred in pursuing the complaint.

§ 708.38 How is a final agency decision implemented?

(a) The Head of Field Element having jurisdiction over the contract under which you were employed when the alleged retaliation occurred, or EC Director, will implement a final agency decision by forwarding the decision and order to the contractor, or subcontractor, involved.

(b) A contractor's failure or refusal to comply with a final agency decision and order under this regulation may result in a contracting officer's decision to disallow certain costs or terminate the contract for default. In the event of a contracting officer's decision to disallow costs or terminate a contract for default, the contractor may file a claim under the disputes procedures of the contract.

§ 708.39 Is a decision and order implemented under this regulation considered a claim by the government against a contractor or a decision by the contracting officer under sections 6 and 7 of the Contract Disputes Act?

No. A final agency decision and order issued pursuant to this regulation is not considered a claim by the government against a contractor or "a decision by the contracting officer" under sections 6 and 7 of the Contract Disputes Act (41 U.S.C. 605 and 606).

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§ 708.40 Are contractors required to inform their employees about this program?

Yes. Contractors who are covered by this part must inform their employees about these regulations by posting notices in conspicuous places at the work site. These notices must include the name and address of the DOE office where you can file a complaint under this part.

[64 FR 37397, July 12, 1999]

§ 708.41 Will DOE ever refer a complaint filed under this part to another agency for investigation and a decision?

Notwithstanding the provisions of this part, the Secretary of Energy retains the right to request that a complaint filed under this part be accepted by another Federal agency for investigation and factual determinations.

[64 FR 37397, July 12, 1999]

§ 708.42 May the deadlines established by this part be extended by any DOE official?

Yes. The Secretary of Energy (or the Secretary's designee) may approve the extension of any deadline established by this part, and the OHA Director may approve the extension of any deadline under § 708.22 through § 708.34 of this subpart (relating to the investigation, hearing, and OHA appeal process).

[64 FR 37397, July 12, 1999]

§ 708.43 Does this rule impose an affirmative duty on DOE contractors not to retaliate?

Yes. DOE contractors may not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in §§ 708.5(a)-(c).

[65 FR 6319, Feb. 9, 2000; 65 FR 9201, Feb. 24, 2000]

PART 709—POLYGRAPH EXAMINATION REGULATIONS

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AUTHORITY: 42 U.S.C. 2011, *et seq.*, 42 U.S.C. 7101, *et seq.*, 42 U.S.C. 7383h.

SOURCE: 64 FR 70975, Dec. 17, 1999, unless otherwise noted.

Subpart A—General Provisions

§ 709.1 What is the purpose of this part?

This part:

(a) Describes the categories of individuals who are eligible for counterintelligence-scope polygraph testing; and

(b) Provides guidelines for the use of counterintelligence-scope polygraph examinations and for the use of exculpatory polygraph examinations, upon the request of an individual, in order to resolve counterintelligence investigations and personnel security issues; and

(c) Provides guidelines for protecting the rights of individual DOE, and DOE contractor, and employees subject to this rule.

§ 709.2 What is the scope of this part?

This part includes:

(a) A description of the conditions under which DOE may administer and use polygraph examinations;

(b) A description of the positions which DOE may subject to polygraph examination;

(c) Controls on the use of polygraph examinations; and

(d) Safeguards to prevent unwarranted intrusion into the privacy of individuals.

§ 709.3 What are the definitions of the terms used in this part?

For purposes of this part:

Accelerated Access Authorization Program or AAAP means the program for granting interim access to classified matter and special nuclear material based on a drug test, a National Agency Check, a psychological assessment, and a counterintelligence-scope polygraph examination consistent with this part.

Access means the admission of DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE to the eight categories of positions identified in § 709.4(a)(1)–(8).

Access authorization means an administrative determination that an individual is eligible for access to classified

matter or is eligible for access to, or control over, special nuclear material.

Adverse personnel action means

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. Chapter 75; or

(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

Contractor means a DOE contractor or a subcontractor at any tier.

Control questions means questions used during a polygraph examination that are designed to produce a physiological response, which may be compared to the physiological responses to the relevant questions.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.

Deception indicated means an opinion that indicates that an analysis of the polygraph charts reveal physiological responses to the relevant questions that were indicative of evasion.

DOE means the Department of Energy.

Eligibility evaluation means the process employed by the Office of Counterintelligence to determine whether DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE will be recommended for access or continued access to the eight categories of positions identified in § 709.4(a)(1)–(8).

Intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons.

Local commuting area means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live

and can reasonably be expected to travel back and forth daily to their usual employment.

No deception indicated means an opinion that indicates that an analysis of the polygraph charts revealed the physiological responses to the relevant questions were not indicative of evasion.

No opinion refers to an evaluation of a polygraph test in which the polygraph examiner cannot render an opinion based upon the physiological data on the polygraph charts.

Personnel Assurance Program or PAP means the human reliability program set forth under 10 CFR part 711 designed to ensure that individuals assigned to nuclear explosive duties do not have emotional, mental or physical incapacities that could result in a threat to nuclear explosive safety.

Personnel Security Assurance Program or PSAP means the program in subpart B of 10 CFR part 710.

Personnel security clearance means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Polygraph means an instrument that

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

Polygraph examination means a process that encompasses all activities that take place between a polygraph examiner and individual during a specific series of interactions, including the pre-test interview, the use of the polygraph instrument to collect physiological data from the individual while the polygraph examiner is presenting a series of tests, the test data analysis phase, and the post-test phase.

Polygraph examination records means all records of the polygraph examination, including the polygraph report, audio-video recording, and the polygraph consent form.

Polygraph report refers to a polygraph document that may contain identifying

data of the individual, a synopsis of the basis for which the examination was conducted, the relevant questions utilized and the polygraph examiner's conclusions.

Polygraph test means that portion of the polygraph examination during which the polygraph instrument collects physiological data based upon the individual's responses to test questions from the examiner.

Relevant questions are those questions used during the polygraph examination that pertain directly to the issues for which the examination is being conducted.

Special Access Program or SAP means a program established under Executive Order 12958 for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

Unresolved issues refers to an opinion which indicates that the analysis of the polygraph charts revealed consistent, significant, timely physiological responses to the relevant questions in personnel screening.

§ 709.4 To whom does the polygraph examination requirement under this part apply?

(a) Except as provided in paragraph (b) of this section, this part applies to DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE, who are in:

(1) Positions that DOE has determined include counterintelligence activities or access to counterintelligence sources and methods;

(2) Positions that DOE has determined include intelligence activities or access to intelligence sources and methods;

(3) Positions requiring access to information that is protected within a non-intelligence special access program (SAP) designated by the Secretary of Energy;

(4) Positions that are subject to the Personnel Security Assurance Program (PSAP);

(5) Positions that are subject to the Personnel Assurance Program (PAP);

(6) Positions that DOE has determined have a need-to-know or access to information specifically designated by the Secretary regarding the design and operation of nuclear weapons and associated use control features;

(7) Positions within the Office of Independent Oversight and Performance Assurance, or any successor thereto, involved in inspection and assessment of safeguards and security functions, including cyber security, of the Department;

(8) Positions within the Office of Security and Emergency Operations, or any successor thereto;

(9) The Accelerated Access Authorization Program (AAAP); and

(10) Positions where the applicant or incumbent has requested a polygraph examination in order to respond to questions that have arisen in the context of counterintelligence investigations or personnel security issues. These examinations are referred to in this part as exculpatory polygraph examinations.

(b) This part does not apply to:

(1) Any individual for whom the Director of the Office of Counterintelligence (D/OCI), gives a waiver, based upon certification from another Federal agency that the individual has successfully completed a full scope or counterintelligence-scope polygraph examination administered within the last five years;

(2) Any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested; or

(3) Any individual for whom the Secretary of Energy gives a written waiver in the interest of national security.

(c) The Program Manager responsible for each program with positions identified in paragraphs (a)(1)-(8) of this section identifies in the first instance, in order of priority, those specific positions that will be polygraphed.

(d) The Program Manager submits positions identified under paragraph (c) of this section to the D/OCI for review and concurrence. The D/OCI forwards the positions, with suggested additions

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or deletions, to the Secretary for approval.

§ 709.5 How will an individual know if his or her position will be eligible for a polygraph examination?

(a) All positions in the programs described in § 709.4(a)(1)–(8) are eligible for polygraph examination. When a polygraph examination is scheduled, DOE must notify the individual, in accordance with § 709.21.

(b) Any job announcement or posting with respect to any position in those programs must indicate that the selection of an individual for the position may be conditioned upon his or her successful completion of a counterintelligence-scope polygraph examination.

§ 709.6 How often will an individual be subject to polygraph examination?

Positions identified in § 709.4(a)(1)–(8) are subject to a five year periodic, as well as an aperiodic, reinvestigation polygraph.

Subpart B—Polygraph Examination Protocols and Protection of National Security

§ 709.11 What types of topics are within the scope of a polygraph examination?

(a) DOE may ask questions that are appropriate to a counterintelligence-scope examination or that are relevant to the matter at issue in an exculpatory examination.

(b) A counterintelligence-scope polygraph examination is limited to topics concerning the individual's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign contacts, and deliberate damage to or malicious misuse of a U.S. government information or defense system.

(c) DOE may not ask questions that:

- (1) Probe a person's thoughts or beliefs;
- (2) Concern conduct that has no counterintelligence implication; or
- (3) concern conduct that has no direct relevance to an investigation.

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§ 709.12 How does DOE determine the wording of questions?

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the individual, the individual's understanding of the questions, and other input from the individual.

§ 709.13 May an individual refuse to take a polygraph examination?

(a) Yes. An individual may refuse to take a counterintelligence-scope or exculpatory polygraph examination, and an individual being examined may terminate the examination at any time.

(b) If an individual terminates a counterintelligence-scope or exculpatory polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to take a polygraph examination under § 709.14.

§ 709.14 What are the consequences of a refusal to take a polygraph examination?

(a) If an individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8), and the individual refuses to take a counterintelligence polygraph examination required by statute as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail the individual to the identified position.

(b) If the individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8) and the individual refuses to take a counterintelligence polygraph examination otherwise required by this part, DOE and its contractors may refuse to employ, assign, or detail the individual to the identified position.

(c) If an individual is an incumbent in a position described in § 709.4(a)(1)–(8) and the individual refuses to take a counterintelligence polygraph examination required by statute as a condition of continued access, DOE and its contractors must deny the individual access to the information or involvement in the activities that justified conducting the examination, consistent with § 709.15. If the individual is a DOE employee, DOE may reassign or

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realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access.

(d) If the individual is an incumbent in a position described in § 709.4(a)(1)-(8), and the individual refuses to take a counterintelligence polygraph examination as required by this part, DOE and its contractors may deny that individual access to the information or involvement in the activities that justified conducting the examination, consistent with § 709.15. If the individual is a DOE employee, DOE may reassign or realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access.

(e) If the individual is a DOE employee whose current position does not require a counterintelligence polygraph examination and is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)-(8), the individual's refusal to take a polygraph examination will not affect the individual's current employment status.

(f) If an individual refuses to take a polygraph examination as part of the Accelerated Access Authorization Program, DOE must terminate the accelerated authorization process and the individual may continue to be processed for access authorization under the standard DOE personnel security process.

(g) Since an exculpatory polygraph examination is administered at the request of an individual, DOE and its contractors may not take any adverse personnel action against an individual for refusing to request or take an exculpatory polygraph examination. DOE and its contractors may not record an individual's refusal to take an exculpatory polygraph examination in the individual's personnel security file, or any investigative file. DOE also may not record the fact of that refusal in a DOE employee's personnel file.

(h) If a DOE employee refuses to take a counterintelligence polygraph examination, DOE may not record the fact of that refusal in the employee's personnel file.

§ 709.15 How does DOE use polygraph examination results?

(a) If, following the completion of the polygraph test, there are any unresolved issues, the polygraph examiner must conduct an in-depth interview of the individual to address those unresolved issues.

(b) If, after the polygraph examination, there are remaining unresolved issues that raise significant questions relevant to the individual's access to the information or involvement in the activities that justified the polygraph examination, DOE must so advise the individual and provide an opportunity for the individual to undergo an additional polygraph examination. If the additional polygraph examination is not sufficient to resolve the matter, DOE must undertake a comprehensive investigation of the individual, using the polygraph examination as an investigative lead.

(c) The Office of Counterintelligence (OCI) will conduct an eligibility evaluation that considers examination results, the individual's personnel security file, and other pertinent information. If unresolved issues remain at the time of the eligibility evaluation, DOE will interview the individual if it is determined that a personal interview will assist in resolving the issue. No denial or revocation of access will occur until the eligibility evaluation is completed.

(d) Following the eligibility evaluation, D/OCI must recommend, in writing, to the Program Manager responsible for the access that the individual's access be approved or retained, or denied or revoked.

(1) If the Program Manager agrees with the recommendation, the Program Manager will notify the individual, in writing, that the individual's access has been approved or retained, or denied or revoked.

(2) If the Program Manager disagrees with the D/OCI's recommendation the matter will be referred to the Secretary for a final decision.

(3) If the Program Manager denies or revokes the individual's access, and the individual is a DOE employee, DOE may reassign the individual or realign the individual's duties within the local commuting area or take other actions consistent with the denial of access.

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(4) If the Program Manager denies the individual's access and the individual is an applicant for employment, assignment, or detail to one of the positions described in 709.4(a)(1)-(8), DOE and its contractors may refuse to employ, assign or detail the individual to the identified position.

(5) If the Program Manager revokes the access of an individual assigned or detailed to DOE, DOE may remove the individual from access to the information that justified the polygraph examination and return the individual to the agency of origin.

(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.

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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 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.

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§ 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
- (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

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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.

(2) The examiner must have a favorably adjudicated single-scope background investigation, complete a counterintelligence-scope polygraph examination, and must hold a "Q" access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, he or she must have been granted SCI access approval.

(3) The examiner must receive basic Forensic Psychophysiological Detection of Deception training from the DODPI.

(4) The examiner must be certified by DOE to conduct the following tests:

- (i) Test for Espionage, Sabotage, and Terrorism;
- (ii) Counterintelligence-Scope Polygraph Tests;
- (iii) Zone Comparison Tests;
- (iv) Modified General Question Tests;
- (v) Peak of Tension Tests; and,
- (vi) Relevant and Irrelevant and Directed Lie Control Tests.

§ 709.32 What are the training requirements for polygraph examiners?

(a) Examiners must complete an initial training course of thirteen weeks, or longer, in conformance with the procedures and standards established by DODPI.

(b) Examiners must undergo annual continuing education for a minimum of forty hours training within the discipline of Forensic

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Psychophysiological Detection of Deception.

(c) The following organizations provide acceptable curricula to meet the training requirement of paragraph (b) of this section:

- (1) American Polygraph Association,
- (2) American Association of Police Polygraphists, and
- (3) Department of Defense Polygraph Institute.

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL

Subpart A—General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material

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