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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) An employer'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 The Contract Disputes Act.

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 41 U.S.C. 606).

§ 708.40 Notice of program requirements.

Employers 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, address, telephone number, and website or email address of the DOE office where employees can file complaints under this part.

§ 708.41 Referral to another agency.

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.

§ 708.42 Extension of deadlines.

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). Failure by the DOE to comply with timing requirements does not create a substantive right for any party to overturn a DOE decision on a complaint.

§ 708.43 Affirmative duty not to retaliate.

DOE contractors will 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) through (c).

PART 709—COUNTERINTELLIGENCE EVALUATION PROGRAM

Subpart A—General Provisions

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AUTHORITY: 42 U.S.C. 2011, *et seq.*, 7101, *et seq.*, 7144b, *et seq.*, 7383h–1; 50 U.S.C. 2401, *et seq.*

SOURCE: 71 FR 57392, Sept. 29, 2006, unless otherwise noted.

Subpart A—General Provisions

§ 709.1 Purpose.

This part:

(a) Describes the categories of individuals who are subject for counterintelligence evaluation processing;

(b) Provides guidelines for the counterintelligence evaluation process, including the use of counterintelligence-scope polygraph examinations, and for the use of event-specific polygraph examinations; and

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

§ 709.2 Definitions.

For purposes of this part:

Access authorization means an administrative determination under the Atomic Energy Act of 1954, Executive Order 12968, or 10 CFR part 710 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 any industrial, educational, commercial, or other entity, assistance recipient, or licensee, including an individual who has executed an agreement with DOE for the purpose of performing under a contract, license, or other agreement, and including any subcontractors of any tier.

Counterintelligence or CI means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.

Counterintelligence evaluation or CI evaluation means the process, possibly including a counterintelligence scope polygraph examination, used to make recommendations as to whether certain employees should have access to information or materials protected by this part.

Counterintelligence program office means the Office of Counterintelligence in the Office of Intelligence and Counterintelligence (and any successor office to which that office's duties and authorities may be reassigned).

Counterintelligence-scope or CI-scope polygraph examination means a polygraph examination using questions reasonably calculated to obtain counterintelligence information, including questions relating to espionage, sabotage, terrorism, unauthorized disclosure of classified information, deliberate damage to or malicious misuse of a United States Government information or defense system, and unauthorized contact with foreign nationals.

Covered person means an applicant for employment with DOE or a DOE contractor, a DOE employee, a DOE contractor employee, and an assignee or detailee to DOE from another agency.

DOE means the Department of Energy including the National Nuclear Security Administration (NNSA).

Foreign nexus means specific indications that a covered person is or may be engaged in clandestine or unreported relationships with foreign powers, organizations or persons, or international terrorists; contacts with foreign intelligence services; or other hostile activities directed against DOE facilities, property, personnel, programs

or contractors by or on behalf of foreign powers, organizations or persons, or international terrorists.

Human Reliability Program means the program under 10 CFR part 712.

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.

Materials means any ''nuclear explosive'' as defined in 10 CFR 712.3, and any ''special nuclear material,'' hazardous ''source material,'' and hazardous ''byproduct material'' as those terms are defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014).

National security information means information that has been determined pursuant to Executive Order 12958, as amended by Executive Order 13292, or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

NNSA means DOE's National Nuclear Security Administration.

No opinion means an evaluation of a polygraph test by a polygraph examiner in which the polygraph examiner cannot render an opinion.

Polygraph examination means all activities that take place between a Polygraph Examiner and an examinee (person taking the test) during a specific series of interactions, including the pretest interview, the use of the polygraph instrument to collect physiological data from the examinee while 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 instrument means a diagnostic instrument used during a polygraph examination, which is capable of monitoring, recording and/or measuring at a minimum, respiratory, electrodermal, and cardiovascular activity as a response to verbal or visual stimuli.

Polygraph report means a document that may contain identifying data of the examinee, a synopsis of the basis for which the examination was conducted, the relevant questions utilized, and the examiner's conclusion.

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

Program Manager means a DOE official designated by the Secretary or the Head of a DOE Element to make an access determination under this part.

Random means a statistical process whereby eligible employees have an equal probability of selection for a CI evaluation each time the selection process occurs.

Regular and routine means access by individuals without further permission more than two times per calendar quarter.

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

Restricted data means all data concerning the design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but does not include data declassified or removed from the restricted data category pursuant to section 142 of the Atomic Energy Act of 1954.

Secret means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

Secretary means the Secretary of Energy or the Secretary's designee.

Significant response means an opinion that the analysis of the polygraph charts reveals consistent, significant, timely physiological responses to the relevant questions.

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.

Suspend means temporarily to withdraw an employee's access to information or materials protected under § 709.3 of this part.

System Administrator means any individual who has privileged system, data, or software access that permits that individual to exceed the authorization of a normal system user and thereby override, alter, or negate integrity verification and accountability procedures or other automated and/or technical safeguards provided by the systems security assets for normal users.

Top Secret means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

Unresolved issues means an opinion by a CI evaluator that the analysis of the information developed during a CI evaluation remains inconclusive and needs further clarification before a CI access recommendation can be made.

§ 709.3 Covered persons subject to a CI evaluation and polygraph.

(a) *Mandatory CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, a CI evaluation, which may include a CI-scope polygraph examination, is required for any covered person in any category under paragraph (b) of this section who will have or has access to classified information or materials protected under this paragraph. Such an evaluation is required for covered persons who are incumbent employees at least once every five years. DOE, in its sole discretion, may require a CI-scope polygraph examination:

(1) If the CI evaluation reveals foreign nexus issues;

(2) If a covered person who is an incumbent employee is to be assigned within DOE to activities involving another agency and a polygraph examination is required as a condition of access to the activities by the other agency; or

(3) If a covered person who is an incumbent employee is proposed to be assigned or detailed to another agency and the receiving agency requests DOE to administer a polygraph examination as a condition of the assignment or detail.

(b) Paragraph (a) of this section applies to covered persons:

(1) In an intelligence or counterintelligence program office (or with programmatic reporting responsibility to an intelligence or counterintelligence program office) because of access to classified intelligence information, or sources, or methods;

(2) With access to Sensitive Compartmented Information;

(3) With access to information that is protected within a non-intelligence Special Access Program (SAP) designated by the Secretary;

(4) With regular and routine access to Top Secret Restricted Data;

(5) With regular and routine access to Top Secret National Security Information; and

(6) Designated, with approval of the Secretary, on the basis of a risk assessment consistent with paragraphs (e) and (f) of this section, by a Program Manager for the following DOE offices and programs (and any successors to those offices and programs): The Office of the Secretary; the Human Reliability Program; the National Nuclear Security Administration (including the Office of Emergency Operations); and the Office of Health, Safety and Security.

(c) *Random CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, DOE may require a CI evaluation, including a CI-scope polygraph examination, of covered persons who are incumbent employees selected on a random basis from the following:

(1) All covered persons identified in § 709.3(b);

(2) All employees in the Office of Independent Oversight (or any successor office) within the Office of Health, Safety and Security because of access to classified information regarding the inspection and assessment of

safeguards and security functions, including cyber security, of the DOE;

(3) All employees in other elements of the Office of Health, Safety and Security (or any successor office) because of their access to classified information;

(4) All employees in the NNSA Office of Emergency Operations (OEO or any successor office) including DOE field offices or contractors who support OEO because of their access to classified information;

(5) All employees with regular and routine access to classified information concerning: The design and function of nuclear weapons use control systems, features, and their components (currently designated as Sigma 15); vulnerability of nuclear weapons to deliberate unauthorized nuclear detonation (currently designated as Sigma 14); and improvised nuclear device concepts or designs; and

(6) Any system administrator with access to a system containing classified information, as identified by the DOE or NNSA Chief Information Officer.

(d) *Specific incident polygraph examinations.* In response to specific facts or circumstances with potential counterintelligence implications with a defined foreign nexus, the Director of the Office of Intelligence and Counterintelligence (or, in the case of a covered person in NNSA, the Administrator of NNSA, after consideration of the recommendation of the Director, Office of Intelligence and Counterintelligence) may require a covered person with access to DOE classified information or materials to consent to and take an event-specific polygraph examination. Except as otherwise determined by the Secretary, on the recommendation of the appropriate Program Manager, if a covered person with access to DOE classified information or materials refuses to consent to or take a polygraph examination under this paragraph, then the Director of the Office of Intelligence and Counterintelligence (or, in the case of a covered person in NNSA, the Administrator of NNSA, after consideration of the recommendation of the Director, Office of Intelligence and Counterintelligence) shall direct the denial of access (if any) to classified information and materials protected under paragraphs (b) and (c) of this section, and shall refer the matter to the Office of Health, Safety and Security for a review of access authorization eligibility under 10 CFR part 710. In addition, in the circumstances described in this paragraph, any covered person with access to DOE classified information or material may request a polygraph examination.

(e) *Risk assessment.* For the purpose of deciding whether to designate or remove employees for mandatory CI evaluations under paragraph (b)(6) of this section, Program Managers may consider:

(1) Access on a non-regular and non-routine basis to Top Secret Restricted Data or Top Secret National Security Information or the nature and extent of access to other classified information;

(2) Unescorted or unrestricted access to significant quantities or forms of special nuclear materials; and

(3) Any other factors concerning the employee's responsibilities that are relevant to determining risk of unauthorized disclosure of classified information or materials.

(f) Based on the risk assessments conducted under paragraph (e) of this section and in consultation with the Director of the Office of Intelligence and Counterintelligence, the Program Manager shall provide recommendations as to positions to be designated or removed under paragraph (b)(6) of this section for approval by the Secretary. Recommendations shall include a summary of the basis for designation or removal of the positions and of the views of the Director of the Office of Intelligence and Counterintelligence as to the recommendations.

(g) Not less than once every calendar year quarter, the responsible Program Manager must provide a list of all incumbent employees who are covered persons under paragraphs (b) and (c) of this section to the Director of the Office of Intelligence and Counterintelligence.

§ 709.4 Notification of a CI evaluation.

(a) If a polygraph examination is scheduled, DOE must notify the covered person, in accordance with § 709.21 of this part.

(b) Any job announcement or posting with respect to any position with access to classified information or materials protected under § 709.3(b) and (c) of this part should indicate that DOE may condition the selection of an individual for the position (709.3(b)) or retention in that position (709.3(b) and (c)) upon his or her successful completion of a CI evaluation, including a CI-scope polygraph examination.

(c) Advance notice will be provided to the affected Program Manager and laboratory/site/facility director of the covered persons who are included in any random examinations that are administered in accordance with provisions at § 709.3(c).

§ 709.5 Waiver of polygraph examination requirements.

(a) *General.* Upon a waiver request submitted under paragraph (b) of this section, DOE may waive the CI-scope polygraph examination under § 709.3 of this part for:

(1) Any covered person based upon certification from another Federal agency that the covered person has successfully completed a full scope or CI-scope polygraph examination administered within the previous five years;

(2) Any covered person who is being treated for a medical or psychological condition that, based upon consultation with the covered person and appropriate medical personnel, would preclude the covered person from being tested; or

(3) Any covered person in the interest of national security.

(b) *Submission of Waiver Requests.* A covered person may submit a request for waiver under this section, and the request shall assert the basis for the waiver sought and shall be submitted, in writing, to the Director, Office of Intelligence and Counterintelligence, at the following address: U.S. Department of Energy, Attn: Director, Office of Intelligence and Counterintelligence, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Disposition of Waiver Requests.* The Director, Office of Intelligence and Counterintelligence, shall issue a written decision on a request for waiver prior to the administration of a polygraph examination. The Director shall obtain the concurrence of the Secretary in his or her decision on a request for waiver under § 709.5(a)(3) and shall obtain the concurrence of the Administrator of NNSA in a decision on a waiver request from an NNSA covered person under § 709.5(a)(1) and § 709.5(a)(2). Notification of approval of a waiver request will contain information regarding the duration of the waiver and any other relevant information. Notification of the denial of a waiver request will state the basis for the denial and state that the covered person may request reconsideration of the denial by the Secretary under § 709.5(d).

(d) *Reconsideration Rights.* If a waiver is denied, the covered person may file with the Secretary a request for reconsideration of the denial within 30 days of receipt of the decision, and the Secretary's decision will be issued prior to the administration of a polygraph examination.

Subpart B—CI Evaluation Protocols and Protection of National Security

§ 709.10 Scope of a counterintelligence evaluation.

A counterintelligence evaluation consists of a counterintelligence-based review of the covered person's personnel security file and review of other relevant information available to DOE in accordance with applicable guidelines and authorities. As provided in § 709.3(b), DOE also may require a CI-scope polygraph examination. As provided for in § 709.3(c), a CI evaluation, if conducted on a random basis, will include a CI-scope polygraph examination. As set forth in § 709.15(b) and (c) of this part, a counterintelligence evaluation may also include other pertinent measures to address and resolve counterintelligence issues in accordance with Executive Order 12333, the DOE ''Procedures for Intelligence Activities,'' and other relevant laws, guidelines and authorities, as applicable.

§ 709.11 Topics within the scope of a polygraph examination.

(a) DOE may ask questions in a specific incident polygraph examination that are appropriate for a CI-scope examination or that are relevant to the counterintelligence concerns with a defined foreign nexus raised by the specific incident.

(b) A CI-scope polygraph examination is limited to topics concerning the covered person'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 covered person's thoughts or beliefs;

(2) Concern conduct that has no CI implication with a defined foreign nexus; or

(3) Concern conduct that has no direct relevance to a CI evaluation.

§ 709.12 Defining polygraph examination questions.

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the covered person, the covered person's understanding of the questions, established test question procedures from the Department of Defense Polygraph Institute, and other input from the covered person.

§ 709.13 Implications of refusal to take a polygraph examination.

(a) Subject to § 709.14 of this part, a covered person may refuse to take a polygraph examination pursuant to § 709.3 of this part, and a covered person being examined may terminate the examination at any time.

(b) If a covered person terminates a polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to complete a CI evaluation under § 709.14 of this part.

§ 709.14 Consequences of a refusal to complete a CI evaluation including a polygraph examination.

(a) If a covered person is an applicant for employment or assignment or a potential detailee or assignee with regard to an identified position and the covered person refuses to complete a CI evaluation including a polygraph examination required by this part as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail that covered person with regard to the identified position.

(b) If a covered person is an incumbent employee in an identified position subject to a CI evaluation including a polygraph examination under § 709.3(b), (c), or (d), and the covered person refuses to complete a CI evaluation, DOE and its contractors must deny that covered person access to classified information and materials protected under § 709.3(b) and (c) and may take other actions consistent with the denial of access, including administrative review of access authorization under 10 CFR part 710. If the covered person is a DOE employee, DOE may reassign or realign the DOE employee's duties, or take other action, consistent with that denial of access and applicable personnel regulations.

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

§ 709.15 Processing counterintelligence evaluation results.

(a) If the reviews under § 709.10 or a polygraph examination present unresolved foreign nexus issues that raise significant questions about the covered person's access to classified information or materials protected under § 709.3 of this part that justified the counterintelligence evaluation, DOE may undertake a more comprehensive CI evaluation that, in appropriate circumstances, may include evaluation of financial, credit, travel, and other relevant information to resolve any identified issues. Participation by Office of Intelligence and Counterintelligence personnel in any such evaluation is subject to Executive Order 12333, the DOE ''Procedures for Intelligence Activities,'' and other relevant laws, guidelines, and authorities as may be applicable with respect to such matters.

(b) The Office of Intelligence and Counterintelligence, in coordination

with NNSA with regard to issues concerning a NNSA covered person, may conduct an in-depth interview with the covered person, may request relevant information from the covered person, and may arrange for the covered person to undergo an additional polygraph examination.

(c) Whenever information is developed by the Office of Health, Safety and Security indicating counterintelligence issues, the Director of that Office shall notify the Director, Office of Intelligence and Counterintelligence.

(d) If, in carrying out a comprehensive CI evaluation of a covered person under this section, there are significant unresolved issues, not exclusively related to polygraph examination results, indicating counterintelligence issues, then the Director, Office of Intelligence and Counterintelligence shall notify the DOE national laboratory director (if applicable), plant manager (if applicable) and program manager(s) for whom the individual works that the covered person is undergoing a CI evaluation pursuant to this part and that the evaluation is not yet complete.

(e) Utilizing the DOE security criteria in 10 CFR part 710, the Director, Office of Intelligence and Counterintelligence, makes a determination whether a covered person completing a CI evaluation has made disclosures that warrant referral, as appropriate, to the Office of Health, Safety and Security or the Manager of the applicable DOE/NNSA Site, Operations Office or Service Center.

§ 709.16 Application of Counterintelligence Evaluation Review Boards in reaching conclusions regarding CI evaluations.

(a) *General.* If the results of a counterintelligence evaluation are not dispositive, the Director of the Office of Intelligence and Counterintelligence may convene a Counterintelligence Evaluation Review Board to obtain the individual views of each member as assistance in resolving counterintelligence issues identified during a counterintelligence evaluation.

(b) *Composition.* A Counterintelligence Evaluation Review Board is chaired by the Director of the Office of Intelligence and Counterintelligence (or his/her designee) and includes representation from the appropriate line Program Managers, lab/site/facility management (if a contractor employee is involved), NNSA, if the unresolved issues involve an NNSA covered person, the DOE Office of Health, Safety and Security and security directors for the DOE or NNSA site or operations office.

(c) *Process.* When making a final recommendation under §709.17 of this part, to a Program Manager, the Director of Intelligence and Counterintelligence shall report on the Counterintelligence Evaluation Review Board's views, including any consensus recommendation, or if the members are divided, a summary of majority and dissenting views.

§ 709.17 Final disposition of CI evaluation findings and recommendations.

(a) Following completion of a CI evaluation, the Director of the Office of Intelligence and Counterintelligence must recommend, in writing, to the appropriate Program Manager that the covered person's access be approved or retained, or denied or revoked.

(b) If the Program Manager agrees with the recommendation, the Program Manager notifies the covered person that the covered person's access has been approved or retained, or denied or revoked.

(c) If the Program Manager disagrees with the recommendation of the Director, Office of Intelligence and Counterintelligence, the matter is referred to the Secretary for a final decision.

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

(e) If the Program Manager revokes the access of a covered person assigned or detailed to DOE, DOE may remove the assignee or detailee from access to the information that justified the CI evaluation and return the assignee or detailee to the agency of origin.

(f) Covered persons whose access is denied or revoked may request reconsideration by the head of the relevant DOE element.

(g) For cases involving a question of loyalty to the United States, the Director of the Office of Intelligence and Counterintelligence may refer the matter to the FBI as required by section 145d of the Atomic Energy Act of 1954. For cases indicating that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power, DOE is required by 50 U.S.C. 402a(e) to refer the matter to the Federal Bureau of Investigation.

Subpart C—Safeguarding Privacy and Employee Rights

§ 709.21 Requirements for notification of a polygraph examination.

When a polygraph examination is scheduled, the DOE must notify the covered person, in writing, of the date, time, and place of the polygraph examination, the provisions for a medical waiver, and the covered person'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 covered person. The covered person 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 covered person waives the advance notice provision.

§ 709.22 Right to counsel or other representation.

(a) At the covered person's own expense, a covered person has the right to obtain and consult with legal counsel or another representative. However, the counsel or representative may not be present during the polygraph examination. Except for interpreters and signers, no one other than the covered person and the examiner may be present in the examination room during the polygraph examination.

(b) A covered person has the right to consult with legal counsel or another representative at any time during an interview conducted in accordance with § 709.15 of this part.

§ 709.23 Obtaining consent to a polygraph examination.

DOE may not administer a polygraph examination unless DOE:

(a) Notifies the covered person of the polygraph examination in writing in accordance with § 709.21 of this part; and

(b) Obtains written consent from the covered person prior to the polygraph examination.

§ 709.24 Other information provided to a covered person prior to a polygraph examination.

Before administering the polygraph examination, the examiner must:

(a) Inform the covered person that audio and video recording of each polygraph examination session will be made, and that other observation devices, such as two-way mirrors and observation rooms, also may be employed;

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

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

(d) Review with the covered person the relevant questions to be asked during the examination;

(e) Advise the covered person of the covered person right against self-incrimination; and

(f) Provide the covered person with a pre-addressed envelope, which may be used to submit a quality assurance questionnaire, comments or complaints concerning the examination.

§ 709.25 Limits on use of polygraph examination results that reflect "Significant Response" or "No Opinion".

DOE or its contractors may not:

(a) Take an adverse personnel action against a covered person or make an adverse access recommendation solely on the basis of a polygraph examination result of ''significant response'' or ''no opinion''; or

(b) Use a polygraph examination that reflects ''significant response'' or ''no opinion'' as a substitute for any other required investigation.

§ 709.26 Protection of confidentiality of CI evaluation records to include polygraph examination records and other pertinent documentation.

(a) DOE owns all CI evaluation records, including polygraph examination records and reports and other evaluation documentation.

(b) DOE maintains all CI evaluation records, including polygraph examination records and other pertinent documentation acquired in conjunction with a counterintelligence evaluation, in a system of records established under the Privacy Act of 1974 (5 U.S.C. 552a).

(c) DOE must afford the full privacy protection provided by law to information regarding a covered person's refusal to participate in a CI evaluation to include a polygraph examination and the completion of other pertinent documentation.

(d) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the CI 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 CI evaluation, then all of the polygraph examination records are retained until the final resolution of any request for reconsideration by the covered person or the completion of any ongoing investigation.

Subpart D—Polygraph Examination and Examiner Standards

§ 709.31 DOE standards for polygraph examiners and polygraph examinations.

(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 a covered person 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 CI 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 CI-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.

§ 709.32 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 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.