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PART 710—PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER AND SPECIAL NUCLEAR MATERIAL OR ELIGIBILITY TO HOLD A SENSITIVE POSITION

Subpart A—General Provisions

Sec.
710.1 Purpose.
710.2 Scope.
710.3 [Reserved]
710.4 Policy.
710.5 Definitions.

Subpart B—Eligibility for Access to Classified Matter or Special Nuclear Material

710.6 Cooperation by the individual.
710.7 Application of the National Security Adjudicative Guidelines.
710.8 Action on derogatory information.
710.9 Suspension of access authorization.

Subpart C—Administrative Review

710.20 Purpose of administrative review.
710.21 Notice to the individual.
710.22 Initial decision process.
710.23 Extensions of time by the manager.
710.24 Appointment of DOE Counsel.
710.25 Appointment of Administrative Judge; prehearing conference; commencement of hearings.
710.26 Conduct of hearings.
710.27 Administrative Judge's decision.
710.28 Action on the Administrative Judge's decision.
710.29 Final appeal process.
710.30 Action by the Secretary.
710.31 Reconsideration of access eligibility.

Subpart D—Miscellaneous

710.32 Terminations.
710.33 Time frames.
710.34 Acting officials.

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SOURCE: 81 FR 71335, Oct. 17, 2016, unless otherwise noted.

Subpart A—General Provisions

§ 710.1 Purpose.

(a) This part establishes the procedures for determining the eligibility of individuals described in § 710.2 for access to classified matter or special nuclear material, pursuant to the Atomic Energy Act of 1954, or for access to national security information in accordance with E.O. 13526 (Classified National Security Information), or eligibility to hold a sensitive position pursuant to E.O. 13467 (Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information).

(b) This part implements: E.O. 12968, 60 FR 40245 (August 2, 1995), as amended; E.O. 13526, 75 FR 707 (January 5, 2010) as amended; E.O. 10865, 25 FR 1583 (February 24, 1960), as amended; E.O. 13467, 73 FR 38103 (June 30, 2008) as amended; and the National Security Adjudicative Guidelines, issued as SEAD 4, by the Director of National Intelligence on December 10, 2016, or successor directive.

[89 FR 59595, July 23, 2024]

§ 710.2 Scope.

(a) The procedures outlined in this part apply to determinations of eligibility for access authorization or eligibility to hold a sensitive position for:

(1) Employees (including consultants) of, and applicants for employment with, contractors and agents of the DOE;

(2) Access permittees of the DOE and their employees (including consultants) and applicants for employment;

(3) Employees (including consultants) of, and applicants for employment with, the DOE; and

(4) Other persons designated by the Secretary of Energy.

(b) To the extent the procedures in this part apply to determinations of eligibility for access to classified information or special nuclear material, they shall also apply to determinations of eligibility to hold a sensitive position, except as specifically noted.

[89 FR 59595, July 23, 2024]

§ 710.3 [Reserved]

§ 710.4 Policy.

(a) It is the policy of DOE to provide for the security of its programs in a manner consistent with traditional

American concepts of justice and fairness. To this end, the Secretary has established procedures that will afford those individuals described in §710.2 the opportunity for administrative review of questions concerning their eligibility for access authorization or eligibility to hold a sensitive position.

(b) It is also the policy of DOE that none of the procedures established for determining eligibility for access authorization or eligibility to hold a sensitive position shall be used for an improper purpose, including any attempt to coerce, restrain, threaten, intimidate, or retaliate against individuals for exercising their rights under any statute, regulation or DOE directive. Any DOE officer or employee violating, or causing the violation of this policy, shall be subject to appropriate disciplinary action.

[89 FR 59595, July 23, 2024]

§ 710.5 Definitions.

(a) As used in this part:

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.

Administrative Judge means a DOE attorney appointed by the Director, Office of Hearings and Appeals, pursuant to §710.25 of this part. An Administrative Judge shall be a U.S. citizen and shall hold a Q access authorization.

Classified matter means the material of thought or expression that is classified pursuant to statute or Executive Order.

Continuous vetting means reviewing the background of an individual described in §710.2(a)(1) through (4) at any time to determine whether that individual continues to meet applicable requirements for access authorization or a sensitive position.

Director means the Director, DOE Office of Departmental Personnel Security.

DOE Counsel means a DOE attorney assigned to represent DOE in proceedings under this part. DOE Counsel shall be a U.S. citizen and shall hold a Q access authorization.

Local Director of Security means the individual with primary responsibility for safeguards and security at the Idaho Operations Office; for the Office of Environmental Management (EM), the individual(s) designated in writing by the Senior Advisor, or delegee; for the Office of Science (SC), the individual designated in writing by the Deputy Director for Operations; for Naval Reactors, the individual(s) designated under the authority of the Director, Security Naval Nuclear Propulsion Program; for the National Nuclear Security Administration (NNSA), the individual(s) designated in writing by the Chief, Defense Nuclear Security; and for DOE Headquarters cases the Director, Office of Headquarters Personnel Security Operations.

Manager means the senior Federal official at the Idaho, Richland (to include the Office of River Protection) Operations Offices; for the Office of Environmental Management, the individual(s) designated in writing by the Senior Advisor, or delegee; for the Office of Science (SC), the individual designated in writing by the Deputy Director for Operations; for Naval Reactors, the individual designated under the authority of the Director, Security Naval Nuclear Propulsion Program; for the NNSA, the individual designated in writing by the NNSA Administrator or Deputy Administrator; and for DOE Headquarters cases, the Director, Office of Headquarters Security Vetting.

Secretary means the Secretary of Energy, as provided by section 201 of the Department of Energy Organization Act.

Sensitive position means any position within or in support of a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security, regardless of whether the occupant has access to classified information, and regardless of whether the occupant is an employee, a military service member, or a contractor. Sensitive positions for the purpose of this part only include individuals designated by DOE in non-critical sensitive, critical sensitive or special sensitive positions.

Special nuclear material means plutonium, uranium enriched in the isotope 233, or in the isotope 235, and any other

material which, pursuant to the provisions of section 51 of the Atomic Energy Act of 1954, has been determined to be special nuclear material, but does not include source material; or any material artificially enriched by any of the foregoing, not including source material.

(b) [Reserved]

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59595, July 23, 2024]

Subpart B—Eligibility for Access to Classified Matter or Special Nuclear Material

§ 710.6 Cooperation by the individual.

(a)(1) It is the responsibility of the individual to provide full, frank, and truthful answers to DOE's relevant and material questions, and when requested, to furnish or authorize others to furnish information that the DOE deems pertinent to the individual's eligibility for access authorization. This obligation to cooperate applies when completing security forms, during the course of a personnel security background investigation, reinvestigation or continuous vetting, and at any stage of DOE's processing of the individual's access authorization request, including but not limited to, personnel security consultations, DOE-sponsored mental health evaluations, and other authorized DOE actions under this part. The individual may elect not to cooperate; however, such refusal may prevent DOE from reaching an affirmative finding required for granting or continuing the access authorization. In this event, for incumbents any access authorization then in effect may be administratively withdrawn or, for applicants, further processing may be administratively terminated.

(2) It is the responsibility of an individual subject to 10 CFR 709.3(d) to consent to and take a polygraph examination required by part 709. A refusal to consent to or take such an examination may prevent DOE from reaching an affirmative finding required for continuing access authorization. In this event, any access authorization then in effect may be administratively withdrawn.

(b) If the individual believes that the provisions of paragraph (a) of this section have been inappropriately applied, the individual may file a written appeal of the action with the Director within 30 calendar days of the date the individual was notified of the action.

(c) Upon receipt of the written appeal, the Director shall conduct an inquiry as to the circumstances involved in the action and shall, within 30 calendar days of receipt of the written appeal, notify the individual, in writing, of their decision. If the Director determines that the action was inappropriate, the Director shall notify the Manager that access authorization must be reinstated or, for applicants, that the individual must continue to be processed for access authorization. If the Director determines the action was appropriate, the Director shall notify the individual of this fact in writing. The Director's decision is final and not subject to further review or appeal.

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59596, July 23, 2024]

§ 710.7 Application of the National Security Adjudicative Guidelines.

(a) The decision on an access authorization request is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.

(b) All such determinations shall be based upon the application of the National Security Adjudicative Guidelines (Adjudicative Guidelines), or any successor national standard issued under authority of the President.

(c) Each Adjudicative Guideline sets forth a series of concerns that may create a doubt regarding an individual's eligibility for access authorization. In resolving these concerns, all DOE officials involved in the decision-making process shall consider: The nature, extent, and seriousness of the conduct; the circumstances surrounding the

conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

(d) If the investigative results report of an individual or other reliable information tend to establish the validity and significance of one or more areas of concern as set forth in the Adjudicative Guidelines, such information shall be regarded as derogatory and create a question as to the individual's access authorization eligibility. Absent any derogatory information, a favorable determination will be made as to access authorization eligibility.

[81 FR 71335, Oct. 17, 2016, as amended at 82 FR 57107, Dec. 4, 2017; 89 FR 59596, July 23, 2024]

§ 710.8 Action on derogatory information.

(a) If a question arises as to the individual's access authorization eligibility, the Local Director of Security shall authorize the conduct of a consultation with the individual, or other appropriate actions and, on the basis of the results of such consultation or actions, may authorize the granting of the individual's access authorization. If, in the opinion of the Local Director of Security, the question as to the individual's access authorization eligibility has not been favorably resolved, the Local Director of Security shall submit the matter to the Manager with a recommendation that authority be obtained to process the individual's case under administrative review procedures set forth in this part.

(b) If the Manager agrees that unresolved derogatory information is present and that appropriate attempts to resolve such derogatory information have been unsuccessful, the Manager shall notify the Director of the proposal to conduct an administrative review proceeding, accompanied by an explanation of the security concerns and a duplicate Personnel Security File. If the Manager believes that the derogatory information has been favorably resolved, the Manager shall direct that access authorization be granted for the individual. The Manager may also direct the Local Director of Security to obtain additional information prior to deciding whether to grant the individual access authorization or to submit a request for authority to conduct an administrative review proceeding. A decision in the matter shall be rendered by the Manager within 10 calendar days of its receipt.

(c) Upon receipt of the Manager's notification, the Director shall review the matter and confer with the Manager on:

(1) The institution of administrative review proceedings set forth in §§ 710.20 through 710.30;

(2) The granting of access authorization; or

(3) Other actions as the Director deems appropriate.

(d) The Director shall act pursuant to one of these options within 30 calendar days of receipt of the Manager's notification unless an extension is granted by the Deputy Director for Security, Office of Environment, Health, Safety and Security.

[81 FR 71335, Oct. 17, 2016, as amended at 88 FR 41292, June 26, 2023; 89 FR 59596, July 23, 2024]

§ 710.9 Suspension of access authorization.

(a) If derogatory information is received, the Local Director of Security shall authorize action(s), to be taken on an expedited basis, to resolve the question pursuant to § 710.8(a). If the question as to the individual's continued access authorization eligibility is not resolved in favor of the individual, the Local Director of Security shall submit the matter to the Manager with the recommendation that the individual's access authorization be suspended pending the final determination resulting from the procedures set forth in this part.

(b) If the information received is determined to represent an immediate threat to national security or to the safety or security of a DOE facility or

employee, or is determined to be so serious in nature that action(s) to resolve the matter as set forth in §710.8(b) are not practical or advisable, the Local Director of Security shall immediately submit the matter to the Manager with a recommendation that the individual's access authorization be suspended pending the final determination resulting from the procedures set forth in this part. The Manager shall either authorize the immediate suspension of access authorization, or shall direct the Local Director of Security to take action(s) as set forth in §710.8(b), in an expedited manner, to resolve the matter.

(c) The Manager shall, within two working days of receipt of the recommendation from the Local Director of Security to suspend the individual's DOE access authorization:

(1) Approve the suspension of access authorization; or

(2) Direct the continuation of access authorization, or

(3) Take or direct other such action(s) as the Manager deems appropriate.

(d) Upon suspension of an individual's access authorization pursuant to paragraph (c)(1) of this section, the individual, the individual's employer, any other DOE office or program having an access authorization interest in the individual, and, if known, any other government agency where the individual holds an access authorization, security clearance, or access approval, or to which the DOE has certified the individual's DOE access authorization, shall be notified immediately in writing. The appropriate DOE database for tracking access authorizations and related actions shall also be updated. Notification to the individual shall reflect, in general terms, the reason(s) why the suspension has been affected. Pending final determination of the individual's eligibility for access authorization from the operation of the procedures set forth in this part, the individual shall not be afforded access to classified matter, special nuclear material, or unescorted access to security areas that require the individual to possess a DOE access authorization.

(e) Written notification to the individual shall include notification that if the individual believes that the action to suspend their access authorization was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information,* or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part. If the individual receives an adverse final agency determination in response to such request, the individual may submit an appeal of that decision to the Director of National Intelligence, in accordance with the Security Executive Agent Directive 9, Appellate Review of Retaliation Regarding Security Clearances and Access Determinations, or to the Inspector General of the Intelligence Community, in accordance with Intelligence Community Directive 120, Intelligence Community Whistleblower Protection.

(f) Following the decision to suspend an individual's DOE access authorization pursuant to paragraph (c)(1) of this section, the Manager shall immediately notify the Director in writing of the action and the reason(s) therefor. In addition, the Manager, within 10 calendar days of the date of suspension (unless an extension of time is approved by the Director), shall notify the Director in writing of their proposal to conduct an administrative review proceeding, accompanied by an explanation of its basis and a duplicate Personnel Security File.

(g) Upon receipt of the Manager's notification, the Director shall review the matter and confer with the Manager on:

(1) The institution of administrative review procedures set forth in §§710.20 through 710.30; or

(2) The reinstatement of access authorization; or

(3) Other actions as the Director deems appropriate.

(h) The Director shall act pursuant to one of these options within 30 calendar days of the receipt of the Manager's notification unless an extension is granted by the Deputy Director for Security, Office of Environment, Health, Safety and Security.

[81 FR 71335, Oct. 17, 2016, as amended at 88 FR 41292, June 26, 2023; 89 FR 59596, July 23, 2024]

Subpart C—Administrative Review

§ 710.20 Purpose of administrative review.

These procedures govern the conduct of the administrative review of questions concerning an individual's eligibility for access authorization when it is determined that such questions cannot be favorably resolved by consultation or other action.

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59596, July 23, 2024]

§ 710.21 Notice to the individual.

(a) Unless an extension is authorized in writing by the Director, within 30 calendar days of receipt of authority to institute administrative review procedures, the Manager shall prepare and deliver to the individual a notification letter approved by the local Office of Chief Counsel, or the Office of the General Counsel for Headquarters cases. Where practicable, the letter shall be delivered to the individual in person.

(b) The letter shall state:

(1) That reliable information in the possession of DOE has created a substantial doubt concerning the individual's eligibility for access authorization.

(2) The information which creates a substantial doubt regarding the individual's access authorization eligibility (which shall be as comprehensive and detailed as the national security permits) and why that information creates such doubt.

(3) That the individual has the option to have the substantial doubt regarding eligibility for access authorization resolved in one of two ways:

(i) By the Manager, without a hearing, on the basis of the existing information in the case; or

(ii) By personal appearance before an Administrative Judge (a ''hearing'').

(4) That, if the individual desires a hearing, the individual must, within 20 calendar days of the date of receipt of the notification letter, make a written request for a hearing to the Manager from whom the letter was received.

(5) That the individual may also file with the Manager the individual's written answer to the reported information which raises the question of the individual's eligibility for access authorization, and that, if the individual requests a hearing without filing a written answer, the request shall be deemed a general denial of all of the reported information.

(6) That, if the individual so requests, a hearing shall be scheduled before an Administrative Judge, with due regard for the convenience and necessity of the parties or their representatives, for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization. The Administrative Judge shall decide whether the hearing will be conducted via video teleconferencing.

(7) That, if a hearing is requested, the individual will have the right to appear personally before an Administrative Judge or, at the discretion of the Administrative Judge, via video teleconferencing; to present evidence in their own behalf, through witnesses, or by documents, or both; and, subject to the limitations set forth in §710.26(g), to be present during the entire hearing and be accompanied, represented, and advised by counsel or other representative of the individual's choosing and at the individual's own expense at every stage of the proceedings. Such representative or counsel, if applicable, shall be identified in writing to the Administrative Judge and DOE Counsel and authorized by the individual to receive all correspondence, transcripts and other documents pertaining to the proceedings under this part.

(8) That the individual's failure to file a timely written request for a hearing before an Administrative Judge in accordance with paragraph (b)(4) of this section, unless time deadlines are

extended for good cause, shall be considered as a relinquishment by the individual of the right to a hearing provided in this part, and that in such event a final decision to deny or revoke the individual's access authorization shall be made by the Manager.

(9) That in any proceedings under this subpart DOE Counsel will participate on behalf of and representing DOE and that any statements made by the individual to DOE Counsel may be used in subsequent proceedings;

(10) The individual's access authorization status until further notice;

(11) The name and telephone number of the designated DOE official to contact for any further information desired concerning the proceedings, including an explanation of the individual's rights under the Freedom of Information Act and Privacy Act;

(12) If applicable, that if the individual is currently the subject of criminal charges for a felony offense or an offense punishable by imprisonment of one year or more, the individual must elect either to continue with the Administrative Review process and have the substantial doubt regarding eligibility for access authorization resolved by the Manager or by a hearing, or to withdraw from the Administrative Review process.

(i) If the individual elects to continue with the Administrative Review process a determination as to the individual's access authorization shall be made by the Manager or by an Administrative Judge via a hearing. The individual will be expected to participate fully in the process. Any refusal to cooperate, answer all questions, or provide requested information may prevent DOE from reaching an affirmative finding required for granting or continuing access authorization.

(ii) If the individual elects to withdraw from the Administrative Review process, the individual's access authorization shall be administratively withdrawn. Such action shall be taken in accordance with applicable procedures set forth in pertinent Departmental directives. Any future requests for access authorization for the individual must be accompanied by documentary evidence of resolution of the criminal charges.

(iii) The individual must, within 20 calendar days of receipt of the notification letter, indicate in writing their decision to continue or to withdraw from the Administrative Review process. Such notification must be made to the Manager from whom the notification letter was received.

(c) The notification letter referenced in paragraph (b) of this section shall also:

(1) Include a copy of this part and SEAD 4, *National Security Adjudicative Guidelines*, or successor directive; and

(2) Indicate that if the individual believes that the action to process the individual under this part was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information*, or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part. If the individual receives an adverse final agency determination in response to such request, the individual may submit an appeal of that decision to the Director of National Intelligence, in accordance with the SEAD 9, *Appellate Review of Retaliation Regarding Security Clearances and Access Determinations*, or to the Inspector General of the Intelligence Community, in accordance with *Intelligence Community Directive 120*, Intelligence Community Whistleblower Protection.

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59596, July 23, 2024]

§ 710.22 Initial decision process.

(a) The Manager shall make an initial decision as to the individual's access authorization eligibility based on the existing information in the case if:

(1) The individual fails to respond to the notification letter by filing a timely written request for a hearing before an Administrative Judge or fails to respond to the notification letter after requesting an extension of time to do so;

(2) The individual's response to the notification letter does not request a hearing before an Administrative Judge; or

(3) The Administrative Judge refers the individual's case to the Manager in accordance with § 710.25(e) or § 710.26(b).

(b) Unless an extension of time is granted by the Director, the Manager's initial decision as to the individual's access authorization eligibility shall be made within 15 calendar days of the date of receipt of the information in paragraph (a) of this section. The Manager shall either grant or deny, or reinstate or revoke, the individual's access authorization.

(c) A letter reflecting the Manager's initial decision shall be signed by the Manager and delivered to the individual within 15 calendar days of the date of the Manager's decision unless an extension of time is granted by the Director. If the Manager's initial decision is unfavorable to the individual, the individual shall be advised:

(1) Of the Manager's unfavorable decision and the reason(s) therefor;

(2) That within 30 calendar days from the date of receipt of the letter, the individual may file a written request for a review of the Manager's initial decision, through the Director, to the DOE Headquarters Appeal Panel (Appeal Panel);

(3) That the Director may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a review of the case by the Appeal Panel; and

(4) That if the written request for a review of the Manager's initial decision by the Appeal Panel is not filed within 30 calendar days of the individual's receipt of the Manager's letter, or by the date to which the Director has granted an extension, the Manager's initial decision in the case shall be final and not subject to further review or appeal.

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59596, July 23, 2024]

§ 710.23 Extensions of time by the manager.

The Manager may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a hearing, and/or the time for filing a written answer to the matters contained in the notification letter. The Manager shall notify the Director, in writing, when such extensions have been approved.

§ 710.24 Appointment of DOE Counsel.

(a) Upon receipt from the individual of a written request for a hearing, a DOE attorney shall forthwith be assigned by the Manager to act as DOE Counsel.

(b) DOE Counsel is authorized to consult directly with the individual if he/she is not represented by counsel, or with the individual's counsel or other representative if so represented, to clarify issues and reach stipulations with respect to testimony and contents of documents and physical evidence. Such stipulations shall be binding upon the individual and the DOE Counsel for the purposes of this part.

§ 710.25 Appointment of Administrative Judge; prehearing conference; commencement of hearings.

(a) Upon receipt of a request for a hearing, the Manager shall in a timely manner transmit that request to the Office of Hearings and Appeals, and identify the DOE Counsel. The Manager shall at the same time transmit a copy of the notification letter and the individual's response to the Office of Hearings and Appeals.

(b) Upon receipt of the hearing request from the Manager, the Director, Office of Hearings and Appeals, shall appoint, as soon as practicable, an Administrative Judge.

(c) Immediately upon appointment, the Administrative Judge shall notify the individual and DOE Counsel of their identity and the address to which all further correspondence should be sent.

(d) The Administrative Judge shall have all powers necessary to regulate the conduct of proceedings under this part, including, but not limited to, establishing a list of persons to receive service of papers, issuing subpoenas for witnesses to attend the hearing or for the production of specific documents or physical evidence, administering oaths and affirmations, ruling upon motions, receiving evidence, regulating the course of the hearing, disposing of procedural requests or similar matters,

and taking other actions consistent with the regulations in this part. Requests for subpoenas shall be liberally granted except where the Administrative Judge finds that the issuance of subpoenas would result in evidence or testimony that is repetitious, incompetent, irrelevant, or immaterial to the issues in the case. The Administrative Judge may take sworn testimony, sequester witnesses, and control the dissemination or reproduction of any record or testimony taken pursuant to this part, including correspondence, or other relevant records or physical evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(e) The Administrative Judge shall determine the day, time, and place for the hearing and shall decide whether the hearing will be conducted via video teleconferencing. In the event the individual fails to appear at the time and place specified, without good cause shown, the record in the case shall be closed and returned to the Manager, who shall then make an initial determination regarding the eligibility of the individual for DOE access authorization in accordance with §710.22(a)(3).

(f) At least 7 calendar days prior to the date scheduled for the hearing, the Administrative Judge shall convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference may be conducted by telephone, video teleconference, or other means as directed by the Administrative Judge.

(g) Hearings shall commence within 60 calendar days from the date the individual's request for a hearing is received by the Office of Hearings and Appeals. Any extension of the hearing date past 60 calendar days from the date the request for a hearing is received by the Office of Hearings and Appeals shall be decided by the Director, Office of Hearings and Appeals.

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59596, July 23, 2024]

§710.26 Conduct of hearings.

(a) In all hearings conducted under this part, the individual shall have the right to be represented by a person of their own choosing, at the individual's own expense. The individual is responsible for producing witnesses in their own behalf, including requesting the issuance of subpoenas, if necessary, or presenting testimonial, documentary, or physical evidence before the Administrative Judge to support the individual's defense to the derogatory information contained in the notification letter. With the exception of procedural or scheduling matters, the Administrative Judge is prohibited from initiating or otherwise engaging in *ex parte* discussions about the case during the pendency of proceedings under this part.

(b) Unless the Administrative Judge finds good cause for deferring issuance of a decision, in the event that the individual unduly delays the hearing, such as by failure to meet deadlines set by the Administrative Judge, the record shall be closed, and an initial decision shall be made by the Manager on the basis of the record in the case per §710.22(a)(3).

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

(d) DOE Counsel shall assist the Administrative Judge 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 Administrative Judge. The individual shall be afforded the opportunity of presenting testimonial, documentary, and physical evidence, including testimony by the individual in the individual's own behalf. All witnesses shall be subject to cross-examination, if possible.

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

(f) During the course of the hearing, the Administrative Judge shall rule on all objections raised.

(g) In the event it appears during the course of the hearing that classified matter may be disclosed, it shall be the duty of the Administrative Judge to assure that disclosure is not made to persons who are not authorized to receive it, and take other appropriate measures.

(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 Administrative Judge 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 Administrative Judge 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(l), 710.26(m), 710.26(n) and 710.26(o), hearsay evidence may, at the discretion of the Administrative Judge and for good cause show, be admitted without strict adherence to technical rules of admissibility and shall be accorded such weight as the Administrative Judge deems appropriate.

(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 Administrative Judge shall endeavor to obtain all the facts that are reasonably available in order to arrive at a decision. If, prior to or during the proceedings, in the opinion of the Administrative Judge, the derogatory information in the notification letter is not sufficient to address all matters into which inquiry should be directed, the Administrative Judge may 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 the General Counsel in Headquarters cases. If, in the opinion of the Administrative Judge, the circumstances of such amendment may involve undue hardship to the individual because of limited time to respond to the new derogatory information 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 Administrative Judge 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 such a statement has been received and may be considered by the Administrative Judge, and is informed of the contents of the statement, provided such notice is not prohibited by paragraph (g) of this section.

(l) Any oral or written statement adverse to the individual relating to a controverted issue may be received and considered by the Administrative Judge 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 the Secretary's 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 Administrative Judge to receive and consider such statement would, in view of the access sought to classified matter 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 Secretary to be good and sufficient.

(m) Whenever procedures under paragraph (l) 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 evidence other than investigative reports obtained by DOE, may be received and considered by the Administrative Judge 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 classified matter or special nuclear material.

(o) Records compiled in the regular course of business, or other 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 by the Administrative Judge, provided that:

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

(2) The Secretary or the Secretary's special designee for that particular purpose has made a determination that failure to receive and consider such evidence would, in view of the access sought to classified matter or special nuclear material, be substantially harmful to the national security; and

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

(p) The Administrative Judge may request the Local Director of Security to arrange for additional investigation on any points which are material to the deliberations of the Administrative Judge and which the Administrative Judge believes need further investigation or clarification. In this event, the Administrative Judge 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 Administrative Judge.

(q) A written transcript of the entire hearing shall be made and, except for portions containing classified matter, a copy of such transcript shall be furnished to 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.

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59597, July 23, 2024]

§ 710.27 Administrative Judge's decision.

(a) The Administrative Judge shall carefully consider the entire record of the proceeding and shall render a decision, within 30 calendar days of the receipt of the hearing transcript, as to whether granting or restoring the individual's access authorization 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 Administrative Judge shall consider the factors

stated in §710.7(c) to determine whether the findings will be favorable or unfavorable.

(b) In reaching the findings, the Administrative Judge 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, prejudiced by the non-disclosure to the individual of undisclosed information or by lack of opportunity to cross-examine confidential informants, the Administrative Judge shall take that fact into consideration. The possible adverse impact of the loss of the individual's access authorization upon the DOE program in which the individual works shall not be considered by the Administrative Judge.

(c) The Administrative Judge shall make specific findings based upon the record as to the validity of each instance of derogatory information contained in the notification letter and the significance which the Administrative Judge attaches to it. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings.

(d) The Administrative Judge's decision shall be based on the Administrative Judge's findings of fact. If, after considering all of the factors set forth in §710.7(c) in light of the Adjudicative Guidelines, the Administrative Judge 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 Administrative Judge shall render a favorable decision; otherwise, the Administrative Judge shall render an unfavorable decision. Within 15 calendar days of the Administrative Judge's written decision, the Administrative Judge shall provide copies of the decision and the administrative record to the Manager and the Director.

[81 FR 71335, Oct. 17, 2016, as amended at 89 FR 59597, July 23, 2024]

§710.28 Action on the Administrative Judge's decision.

(a) Within 10 calendar days of receipt of the decision and the administrative record, unless an extension of time is granted by the Director, the Manager shall:

(1) Notify the individual in writing of the Administrative Judge's decision;

(2) Advise the individual in writing of the appeal procedures available to the individual in paragraph (b) of this section if the decision is unfavorable to the individual;

(3) Advise the individual in writing of the appeal procedures available to the Manager and the Director in paragraph (c) of this section if the decision is favorable to the individual; and

(4) Provide the individual and/or their counsel or other representative a copy of the Administrative Judge's decision and the administrative record.

(b) If the Administrative Judge's decision is unfavorable to the individual:

(1) The individual may file with the Director a written request for further review of the decision by the Appeal Panel along with a statement required by paragraph (e) of this section within 30 calendar days of the individual's receipt of the Manager's notice;

(2) The Director may, for good cause shown, extend the time for filing a request for further review of the decision by the Appeal Panel at the written request of the individual, provided the request for an extension of time is filed by the individual within 30 calendar days of receipt of the Manager's notice;

(3) The Administrative Judge's decision shall be final and not subject to review or appeal if the individual does not:

(i) File a written request for a review of the decision by the Appeal Panel or for an extension of time to file a written request for review of the decision by the Appeal Panel in accordance with paragraphs (b)(1) or (b)(2) of this section, or

(ii) File a written request for review of the decision by the Appeal Panel after having been granted an extension of time to do so.

(c) If the Administrative Judge's decision is favorable to the individual:

(1) The Manager, with the concurrence of the Director, shall grant or reinstate the individual's access authorization within 30 calendar days of the Administrative Judge's decision becoming final, or

(2) The Manager or the Director may file a written request with the Deputy Director for Security, Office of Environment, Health, Safety and Security for review of the decision by the Appeal Panel, along with statement required by paragraph (e) of this section, within 30 calendar days of the individual's receipt of the Manager's notice.

(3) The Deputy Director for Security, Office of Environment, Health, Safety and Security may, for good cause shown, extend the time for filing a request for review of the decision by the Appeal Panel at the request of the Manager or Director, provided the request for an extension of time is filed by the Manager or Director within 30 calendar days of the receipt of the Manager's notice;

(4) The Administrative Judge's decision shall constitute final action, and not be subject to review or appeal, if the Manager or Director does not:

(i) File a written request for review of the decision by the Appeal Panel or for an extension of time to file a written request for review of the decision by the Appeal Panel in accordance with paragraphs (c)(2) or (c)(3) of this section, or

(ii) File a written request for a review of the decision by the Appeal Panel after having been granted an extension of time to do so.

(d) A copy of any request for review of the individual's case by the Appeal Panel filed by the Manager or the Director shall be provided to the individual by the Manager.

(e) The party filing a request for review by the Appeal Panel shall include with the request a statement identifying the issues upon which the appeal is based. A copy of the request and statement shall be served on the other party, who may file a response with the Appeal Panel within 20 calendar days of receipt of the statement.

[81 FR 71335, Oct. 17, 2016, as amended at 88 FR 41292, June 26, 2023; 89 FR 59597, July 23, 2024]

§ 710.29 Final appeal process.

(a) The Appeal Panel shall be convened by the Deputy Director for Security, Office of Environment, Health, Safety and Security to review and render a final decision in access authorization eligibility cases referred by the individual, the Manager, or the Director in accordance with §§ 710.22 or 710.28.

(b) The Appeal Panel shall consist of three members, each of whom shall be a DOE Headquarters employee, a United States citizen, and hold a DOE Q access authorization. The Deputy Director for Security, Office of Environment, Health, Safety and Security shall serve as a permanent member of the Appeal Panel and as the Appeal Panel Chair. The second member of the Appeal Panel shall be a DOE attorney designated by the General Counsel. The head of the DOE Headquarters element which has cognizance over the individual whose access authorization eligibility is being considered may designate an employee to act as the third member on the Appeal Panel; otherwise, the third member shall be designated by the Chair. Only one member of the Appeal Panel shall be from the security field.

(c) In filing a written request for a review by the Appeal Panel in accordance with §§ 710.22 and 710.28, the individual, or their counsel or other representative, shall identify the issues upon which the appeal is based. The written request, and any response, shall be made a part of the administrative record. The Director shall provide staff support to the Appeal Panel as requested by the Chair.

(d) Within 15 calendar days of the receipt of the request for review of a case by the Appeal Panel, the Chair shall arrange for the Appeal Panel members to convene and review the administrative record or provide a copy of the administrative record to the Appeal Panel members for their independent review.

(e) The Appeal Panel shall consider only that evidence and information in the administrative record at the time of the Manager's or the Administrative Judge's initial decision.

(f) Within 45 calendar days of receipt of the administrative record, the Appeal Panel shall render a final decision in the case. If a majority of the Appeal Panel members determine that it will not endanger the common defense and security and will be clearly consistent with the national interest, the Chair shall grant or reinstate the individual's access authorization; otherwise, the Chair shall deny or revoke the individual's access authorization. The Appeal Panel's written decision shall be made a part of the administrative record and is not subject to further review or appeal.

(g) The Chair, through the Director, shall inform the individual in writing, as well as the individual's counsel or other representative, of the Appeal Panel's final decision. A copy of the correspondence shall also be provided to the other panel members and the Manager.

[81 FR 71335, Oct. 17, 2016, as amended at 88 FR 41292, June 26, 2023; 89 FR 59597, July 23, 2024]

§ 710.30 Action by the Secretary.

(a) Whenever an individual has not been afforded an opportunity to cross-examine witnesses who have furnished information adverse to the individual under the provisions of §§ 710.26(l) or (o), the Secretary may issue a final decision to deny or revoke access authorization for the individual after personally reviewing the administrative record and any additional material provided by the Chair. The Secretary's authority may, in accordance with applicable provisions of Executive Order 12968, be delegated to the Deputy Secretary where the effected individual is a Federal employee. The Secretary's authority, in accordance with applicable provisions of Executive Order 10865, may not be delegated where the effected individual is a contractor employee. This authority may be exercised only when the Secretary determines that the circumstances described in § 710.26(l) or (o) are present, and such determination shall be final and not subject to review or appeal.

(b) Whenever the Secretary issues a final decision as to an individual's access authorization eligibility, the individual and other concerned parties shall be notified in writing by the Chair of that decision and of the Secretary's findings with respect to each instance of derogatory information contained in the notification letter and each substantial issue identified in the statement in support of the request for review to the extent allowed by the national security.

(c) Nothing contained in these procedures shall be deemed to limit or affect the responsibility and powers of the Secretary to issue subpoenas or to deny or revoke access to classified matter or special nuclear material.

§ 710.31 Reconsideration of access eligibility.

(a) If, pursuant to the procedures set forth in §§ 710.20 through 710.30, the Manager, Administrative Judge, Appeal Panel, or the Secretary has made a decision granting or reinstating an individual's access authorization, eligibility shall be reconsidered as a new administrative review under the procedures set forth in this part when previously unconsidered derogatory information is identified, or the individual violates a commitment upon which the DOE previously relied to favorably resolve an issue of access authorization eligibility.

(b) If, pursuant to the procedures set forth in §§ 710.20 through 710.31, the Manager, Administrative Judge, Appeal Panel, or the Secretary has made a decision denying or revoking the individual's access authorization, eligibility may be reconsidered only when the individual so requests in writing, when there is a bona fide offer of employment requiring access authorization, and when there is either material and relevant new evidence which the individual and the individual's representatives were without fault in failing to present earlier, or convincing evidence of rehabilitation or reformation.

(1) A request for reconsideration shall be accepted when a minimum of one year has elapsed since the date of the Manager's, Administrative Judge's, Appeal Panel's or Secretary's final decision, or of a previous denial of reconsideration. Requests must be submitted in writing to the Deputy Director for Security, Office of Environment,

Health, Safety and Security, and must include an affidavit setting forth in detail the new evidence or evidence of rehabilitation or reformation.

(2) If the Deputy Director for Security, Office of Environment, Health, Safety and Security approves the request for reconsideration of an individual's access authorization eligibility, he/she shall so notify the individual, and shall direct the Manager to take appropriate actions to determine whether the individual is eligible for access authorization.

(3) If the Deputy Director for Security, Office of Environment, Health, Safety and Security denies the request for reconsideration of an individual's access authorization eligibility, he/she shall so notify the individual in writing. Such a denial is final and not subject to review or appeal.

(4) If, pursuant to the provisions of paragraph (b)(2) of this section, the Manager determines the individual is eligible for access authorization, the Manager shall grant access authorization.

(5) If, pursuant to the provisions of paragraph (b)(2) of this section, the Manager determines the individual remains ineligible for access authorization, the Manager shall so notify the Director in writing. If the Director concurs, the Director shall notify the individual in writing. This decision is final and not subject to review or appeal. If the Director does not concur, the Director shall confer with the Manager on further actions.

(6) Determinations as to eligibility for access authorization pursuant to paragraph (b)(4) or (5) of this section may be based solely upon the mitigation of derogatory information which was relied upon in a final decision to deny or to revoke access authorization. If, pursuant to the procedures set forth in paragraph (b)(2) of this section, previously unconsidered derogatory information is identified, a determination as to eligibility for access authorization must be subject to a new Administrative Review proceeding.

[81 FR 71335, Oct. 17, 2016, as amended at 88 FR 41292, June 26, 2023; 89 FR 59597, July 23, 2024]

Subpart D—Miscellaneous

§ 710.32 Terminations.

(a) If the individual is no longer an applicant for access authorization or no longer requires access authorization, the procedures of this part shall be terminated without a final decision as to the individual's access authorization eligibility, unless a final decision has been rendered prior to the DOE being notified of the change in the individual's pending access authorization status. Where the procedures of this part have been terminated pursuant to this paragraph after an unfavorable initial agency decision as to the individual's access authorization eligibility has been rendered, any subsequent request for access authorization for the individual will be processed as a request for a review of the initial agency decision by the Appeal Panel and a final agency decision will be rendered pursuant to § 710.29, unless a minimum of one year has elapsed since the date of the initial agency decision.

(b) With regard to applicants (individuals for whom DOE has not yet approved access authorization), DOE may administratively terminate processing an application for access authorization under the following circumstances:

(1) If the applicant is currently the subject of criminal proceedings for a felony offense or an offense that is punishable by a term of imprisonment of one year or longer, or is awaiting or serving a form of probation, suspended or deferred sentencing, or parole. Once all judicial proceedings on the criminal charges have been finally resolved, and the term (if any) of imprisonment, probation, or parole has been completed, DOE processing of a request for access authorization shall resume upon receipt by DOE of a written request therefor, provided that the individual has a bona fide offer of employment requiring access authorization.

(2) If sufficient information about the individual's background cannot be obtained to meet the investigative scope and extent requirements for the access authorization requested.

(c) If an individual believes that the provisions of paragraph (b) of this section have been inappropriately applied, a written appeal may be filed with the

Director within 30 calendar days of the date the individual was notified of the action. The Director shall act on the written appeal as described in §710.6(c).

§710.33 Time frames.

Statements of time established for processing aspects of a case under this part are the agency's desired time frames in implementing the procedures set forth in this part. However, failure to meet the time frames shall have no impact upon the final disposition of an access authorization by a Manager, Administrative Judge, the Appeal Panel, or the Secretary, and shall confer no procedural or substantive rights upon an individual whose access authorization eligibility is being considered.

§710.34 Acting officials.

Except for the Secretary, the responsibilities and authorities conferred in this part may be exercised by persons who have been designated in writing as acting for, or in the temporary capacity of, the following DOE positions: The Local Director of Security; the Manager; the Director, or the General Counsel. The responsibilities and authorities of the Deputy Director for Security, Office of Environment, Health, Safety and Security may be exercised by persons in senior security-related positions within the Office of Environment, Health, Safety and Security who have been designated in writing as acting for, or in the temporary capacity of, the Deputy Director for Security, Office of Environment, Health, Safety and Security, with the approval of the Director, Office of Environment, Health, Safety and Security.

[81 FR 71335, Oct. 17, 2016, as amended at 88 FR 41292, June 26, 2023]

PART 712—HUMAN RELIABILITY PROGRAM

Subpart A—Establishment of and Procedures for the Human Reliability Program

GENERAL PROVISIONS

Sec.
712.1 Purpose.
712.2 Applicability.
712.3 Definitions.
712.4 Exemptions.

PROCEDURES

712.10 Designation of HRP positions.
712.11 General requirements for HRP certification.
712.12 HRP implementation.
712.13 Supervisory review.
712.14 Medical assessment.
712.15 Management evaluation.
712.16 Security review.
712.17 Instructional requirements.
712.18 Transferring HRP certification.
712.19 Actions related to removal, revocation and/or reinstatement.
712.20 Request for reconsideration or certification review hearing.
712.21 Appointment of DOE counsel.
712.22 Office of Hearings and Appeals.
712.23 Administrative Judge's decision.
712.24 Final decision by DOE Under Secretary.
712.25 Cooperation by the individual.

Subpart B—Medical Standards

712.30 Applicability.
712.31 Purpose.
712.32 Designated Physician.
712.33 Designated Psychologist.
712.34 Site Occupational Medical Director.
712.35 Director, Office of Environment, Health, Safety and Security.
712.36 Medical assessment process.
712.37 Evaluation for hallucinogen use.
712.38 Maintenance of medical records.

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SOURCE: 69 FR 3223, Jan. 23, 2004, unless otherwise noted.

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Subpart A—Establishment of and Procedures for the Human Reliability Program

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GENERAL PROVISIONS

§712.1 Purpose.

This part establishes the policies and procedures for a Human Reliability Program (HRP) in the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA). The HRP is a security and safety reliability program designed to