

IF YOU ARE ASKED TO TAKE A POLYGRAPH EXAMINATION
A GUIDE FOR EMPLOYEES AT LLNL
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Polygraph Examinations – Generally

Polygraph examinations required for UC employees at the national laboratories are generally governed by federal regulations. (See title 10, Code of Federal Regulations, Parts 709-711.)²

The use of polygraph examinations remains a hotly debated issue. In 1998, the U.S. Supreme Court decided a case entitled *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), in which a member of the military wanted to use the results of a polygraph examination to show he did *not* use drugs.³ The military court had a rule excluding the results of polygraph examinations. The Supreme Court upheld the rule, stating: “[T]here is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques.” (See 523 U.S. at 309, citing several studies.) The Court went on to say that: “Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, *there is simply no way to know in a particular case whether a polygraph examiner’s conclusion is accurate*, because certain doubts and uncertainties plague even the best polygraph exams.” (*Id.* at 312; emp. added.)

Despite this conclusion, the Court went on to implicitly endorse the use of polygraph examinations for employees such as LLNL employees with security clearances. The plaintiff in *Scheffer* argued that the government *must* consider polygraph examinations reliable *because they are used so extensively by the government*. The Court

¹ This summary is not legal advice and should not be relied upon by the reader without consulting an attorney about individual situations.

² There is an important exception. The regulations do *not* apply to individuals on medication that DOE determines “would preclude the individual from being tested.” (10 C.F.R. § 709.4(b)) Although DOE makes the final determination, it would normally be incumbent on the employee to present evidence from a physician indicating medication could skew the results of a polygraph examination.

³ The DOE regulations allow employees to request an “exculpatory” polygraph examination. Such examinations may be given at the request of an employee as evidence the employee is telling the truth about a particular matter.

answered this point as follows: “Governmental use of polygraph tests . . . is primarily in the field of personnel screening, and to a lesser extent as a tool in criminal and intelligence investigations, but not as evidence at trials... *Such limited, out of court uses of polygraph techniques obviously differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in a criminal trial.* They do not establish the reliability of polygraphs as trial evidence, and they do not invalidate reliability as a valid concern...” (*Id.* at 312, fn. 8; emp. added.) In other words, a polygraph examination *may* be used to deny a security clearance, and thus deny employment requiring a security clearance, but may *not* be used as evidence in a criminal trial.

Counterintelligence-scope Polygraph Examinations

There are two types of polygraph examinations. “Counterintelligence-scope polygraph examinations” are generally concerned with “information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.” (See § 709.3, *Definitions*) On the other hand, “exculpatory polygraph examinations,” as noted above, are requested *by the employee or applicant for employment* “in order to respond to questions that have arisen in the context of counterintelligence investigations or personnel security issues.” (709.4(a)(10)) This summary does not address exculpatory polygraph examinations.

Rights of Employees Required to Take a Polygraph Examination

The regulations are clear in stating that “DOE may not administer a polygraph examination unless DOE has: (a) Notified the individual of the polygraph examination in writing in accordance with § 709.21; and (b) Obtained written consent from the individual.” (709.23; see also 709.5(a).) So, an employee or applicant for employment cannot be forced to take a polygraph examination against his or her will. However, there may be consequences if the individual refused.

There are certain procedural requirements which the government must follow. Section 709.21 requires that DOE “notify the individual, in writing, of the date, time, and place of the polygraph examination,” and this must be done “*at least ten days, excluding weekend days and holidays, before the time of the examination.*” (§ 709.21; emp. added.)

There is an exception “when the individual *waives* the advance notice provision.” (See § 709.21; emp. added.) *However, in our view, it would be inconsistent with the regulations to require an individual to waive the “advance notice provision.”*⁴

DOE is required to notify the individual of the “right to obtain and consult with legal counsel or to secure another representative prior to the examination.” A copy of “this part” (meaning, presumably, Part 709 of title 10) must be provided to the individual at the time the notice of examination is given. There are certain specific requirements concerning polygraph examinations that must also be provided.⁵

The standard DOE form entitled “Polygraph Examination Packet / Examination Waiver” states: “I, _____, hereby waive my rights to the ten-day notification for the polygraph examination as stated in 10 C.F.R. Part 709, Polygraph Examination: Final Rule, section 709.21.”

Employees asked to take a polygraph examination may be asked to sign this form. Signing it may appear to be a routine, and employees may be told that “everybody signs it.” *However, no one who is asked to take a polygraph examination can be required to sign this form. No one should sign the form without consulting an attorney.*

⁴ There is also an exception “when good cause is shown.” (See § 709.21.) It is not clear what constitutes “good cause.” It seems self-evident that it must be more than a simple assertion by the government that there is a good reason to forego the notice requirements that otherwise apply. Any assertion there is “good cause” should be subject to challenge by the individual asked to take the examination.

⁵ DOE must “(a) Inform the individual of the use of audio and video recording devices and other observation devices, such as two-way mirrors and observation rooms; (b) Explain to the individual the characteristics and nature of the polygraph instrument and examination; (c) Explain the physical operation of the instrument and the procedures to be followed during the examination; (d) Review with the individual the control questions and relevant questions to be asked during the examination; (e) Advise the individual of the individual’s privilege against self-incrimination; and (f) Provide the individual with a pre-addressed envelope addressed to the D/OCI in Washington, D.C., which may be used to submit comments or complaints concerning the examination.” (709.24) These are be very significant rights. In particular, advising the individual of the privilege against self-incrimination *may allow the government to make use of statements made during the polygraph examination in subsequent administrative, civil and/or criminal proceedings!*

The Right to Counsel

The regulations explicitly state that DOE must inform the individual of the “right to obtain and consult with legal counsel or to secure another representative prior to the examination.” (709.21) The right to consult legal counsel is “at the individual’s own expense.” (709.22) Presumably, an employee organization like SPSE constitutes “another representative.” However, *the attorney-client privilege may not apply to consultations with SPSE.*

Legal counsel “may not be present during the polygraph examination.” In fact, no one other than “the individual and the examiner may be present,” so it would seem that representatives of the Laboratory or DOE, other than the polygraph examiner, may not be present either.⁶

While legal counsel may not be “present” during the polygraph examination, there is nothing saying counsel cannot be *available* outside the examination room. Employees have an absolute right to *terminate* a polygraph examination once it has begun. While doing so may be treated *as a refusal* to take the examination (709.13), the right to counsel should afford the individual the right to *interrupt* the examination to consult with counsel. The denial of such a request should entitle the individual to terminate the examination, subject to resumption following consultation with counsel.

Some commentators believe that polygraph examinations are often used as a *means of interrogation* by polygraph examiners; that is, that polygraph examinations are used as an occasion to elicit statements from the individual that can be used in other proceedings.⁷ Since statements made *before, during and after* a polygraph examination *may be used by the government in subsequent proceedings*, having legal counsel available can be particularly important. Individuals asked to take polygraph examinations should not hesitate to insist on their right to counsel, including the right to consult with counsel with respect to any questions by an examiner which seem inappropriate, or prohibited by the C.F.R. regulations, at any time during the polygraph examination process.

⁶ On the other hand, the employee has an express “right to obtain and consult with legal counsel or another representative at any time during an *interview* conducted in accordance with § 709.15(c)” *after a polygraph examination*. (Section 709.15(c) concerns interviews by the Office of Counterintelligence following a polygraph examination.)

⁷ There is a useful collection of articles at a website maintained by the Federation of American Scientists, Project on Government Secrecy; see www.fas.org/sgp/othergov/polygraph.)

Questions That May / May Not Be Asked

The regulations contain extensive provisions about what may and may not be asked in a polygraph examination. The polygraph examiner is expressly restricted to questions “that are appropriate to a counterintelligence-scope examination” (709.11(a)). Such questions are “limited to topics concerning the individual’s involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign contacts, and deliberate damage to or malicious misuse of a U.S. government information or defense system.” (709.11(b))⁸

DOE is expressly *prohibited* from asking questions that “probe a person's thoughts or beliefs,” questions that “concern conduct that has no counterintelligence implication,” and questions that “concern conduct that has no direct relevance to an investigation.” (709.11(c))

Keep in mind that the regulations say that the polygraph examiner “determines the exact wording of the polygraph questions based on the examiner’s pretest interview of the individual, the individual’s understanding of the questions, and other input from the individual.” (709.12) This regulation vests the examiner with the authority to determine the proper wording of questions. But it also gives the individual undergoing the examination an opportunity to express his/her views and influence the particular questions that are asked.

Refusal to Take Polygraph Examination / Consequences

As noted above, the regulations give individuals the right to refuse to take a polygraph examination, and to terminate a polygraph examination once it has begun. Terminating an examination is generally treated as a refusal to take the examination. (See § 709.13.)⁹

⁸ In an “exculpatory” polygraph examination, any question “relevant to the matter at issue” may be asked. But exculpatory examinations are given *at the employee’s request*.

⁹ “(a) ... An individual may refuse to take a counterintelligence-scope or exculpatory polygraph examination, and an individual being examined may terminate the examination at any time. (b) If an individual terminates a counterintelligence-scope or exculpatory polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to take a polygraph examination under § 709.14.”

If an incumbent employee refuses to take a polygraph examination, DOE and its contractors may (or in some cases must) deny further access to the information or activities that led to the inquiry.¹⁰

Failing a Polygraph Examination / Consequences

Although further access may be denied, DOE and its contractors may *not* take adverse action *based on the results of a polygraph examination alone*. The regulations state that “DOE or its contractors *may not* (1) Take an adverse personnel action against an individual *solely on the basis of a polygraph examination result* of ‘deception indicated’ or ‘no opinion’; or (2) Use a polygraph examination that reflects ‘deception indicated’ or ‘no opinion’ as a substitute for any other required investigation.” (See § 709.25(a); emp. added.) Rather, a *full investigation* is required before a security clearance may be revoked.¹¹

Section 709.15 provides that, if there are “unresolved issues” at the conclusion of a polygraph examination, the examiner “*must* conduct an in-depth interview of the individual to address those unresolved issues.” (See § 709.15(a).) It is not clear if there is a right to counsel during this interview. But employees should assume there is and request the right to have counsel present for any such interview.

¹⁰ If taking a polygraph is “required *by statute* as a condition of continued access,” then “DOE and its contractors *must* deny the individual access to the information or involvement in the activities that justified conducting the examination...” (709.14(c)) The term “access” means “access to classified matter” or being eligible for “access to, or control over, special nuclear material.” (See § 709.3, *Definitions*.) On the other hand, if taking a polygraph is not “required by statute,” but rather is “required *by this part*,” then “DOE and its contractors *may* deny that individual access to the information or involvement in the activities...” (709.14(d)) In other words, the regulations seem to draw a distinction between a *statutory* requirement to take a polygraph and a *regulatory* requirement, making “continued access” mandatory in one case and permissive in the other. This distinction probably has little practical significance. DOE is likely to foreclose “further access” in any case in which an employee refused to take a polygraph.

¹¹ Note, however, that: “The Secretary or the D/OCI may suspend an individual’s access based upon a written determination that the individual’s *admission* of involvement in one or more of the activities covered by the counterintelligence polygraph, when considered in the context of the individual’s access to one or more of the high risk programs identified in § 709.4(a)(1)-(8), poses an unacceptable risk to national security or defense. In such cases, DOE will investigate the matter immediately and make a determination of whether to revoke the individual’s access.” (709.25(b); emp. added.)

If there are still unresolved issues after the interview, and if the remaining issues “raise significant questions relevant to the individual’s access to the information or involvement in the activities that justified the polygraph examination,” then DOE, after so advising the individual and providing “an opportunity for the individual to undergo an additional polygraph examination,” *must* undertake “a *comprehensive investigation* of the individual, using the polygraph examination *as an investigative lead*.” (See § 709.15(b); emp. added.) The Office of Counterintelligence conducts an “eligibility evaluation,” which may then be followed by an interview conducted by DOE. The regulations explicitly state that: “No denial or revocation of access will occur until the eligibility evaluation is completed.” (709.15(c))¹² The individual then has the right to further review through an evidentiary, administrative hearing.

The Right to a Hearing

Part 710 of the regulations establishes “criteria, procedures, and methods for resolving questions concerning the eligibility of individuals who are employed by, or applicants for employment with, Department of Energy (DOE) contractors...” (710.2) These procedures are used to resolve issues involving denial of access to “classified matter” or “special nuclear material.”

The regulations expressly state: “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*.” And: “It is also the policy of DOE that none of the procedures established by DOE for determining eligibility for access authorization 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.” (See § 710.4, (a) & (b); emphasis added.) There is an *immediate appeal procedure* if the individual believes that these provisions have been “inappropriately applied.” (710.6, (b) & (c)) The details of this procedure are beyond the scope of this summary, but several aspects are worth mentioning with respect to DOE’s review (not just the administrative hearing).

There is a general duty on the part of the individual to cooperate: “It is the responsibility of the individual to cooperate by providing full, frank, and truthful answers to DOE’s relevant and material questions, and when requested, to furnish or authorize

¹² There are further steps specified in the procedures if the matter is not resolved at this stage, but these are lengthy and so are beyond the scope of this summary.

others to furnish information that the DOE deems pertinent to the individual's eligibility for DOE access authorization. This obligation to cooperate applies when completing security forms, during the course of a personnel security background investigation or reinvestigation, and at any stage of DOE's processing of the individual's access authorization, including but not limited to, personnel security interviews, DOE-sponsored mental evaluations, *and other authorized DOE investigative activities under this subpart.*" (710.6(a); emp. added.) It is not clear whether refusing to take a polygraph examination amounts to a "failure to cooperate."

The decision-making process is to be guided by common sense: "The decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." (710.7(a)) Certain criteria are listed in the regulations to aid in making decisions. While these criteria are not meant to be "exhaustive," they are useful in shaping the kind of appeal one would want to present.¹³

There is a long list of items which constitute "derogatory information." These items are considered in reaching a determination. The list is too long to include here, but may be found at 10 C.F.R. § 710.8. An investigation which finds "derogatory information" creates a question "as to the individual's eligibility for access authorization." (See § 710.9(a).) Such information authorizes the "Local Director of Security" to conduct an interview with the individual or other appropriate action (including a DOE-sponsored mental evaluation). If still unresolved, the matter may be forwarded to the Director, Office of Safeguards and Security, with a request for authority to conduct an "administrative review proceeding." (710.9) Access authorization may be *suspended* in the meantime. (710.10) A full description of the procedures is beyond the scope of this summary.

¹³ "In resolving a question concerning an individual's eligibility for access authorization, 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." (710.7(c))

Privacy Rights

The DOE “owns all polygraph examinations records and reports.” (709.26(a)) The records and reports are maintained by the Office of Counterintelligence “in a system of records established under the Privacy Act of 1974, 4 U.S.C. § 552a.” (709.26(b)) The DOE is required to “afford the full privacy protection provided by law to information regarding an employee’s refusal to take a polygraph examination.” (709.26(e)) Records of the examination, other than the report, are *destroyed 90 days after the examination if the results were favorable*. Otherwise, the records “are retained at least until the final resolution of any request for reconsideration...” (See § 709.26(f); emp. added.)

Polygraph Examiners

“DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE administers only DODPI approved testing formats.” (709.31(a)) Thus, the examiner must be certified by the DOE and must conduct no more than five examination in any 24-hour period. (709.31, (b) - (d)) There are also specified training requirements. (709.32)

Caution re Use of Information

This summary is meant to provide an overview of regulations for employees asked to take a polygraph examination. ***It is not “legal advice” and is not meant to be used as a substitute for consulting with an attorney. Any employee asked to take a polygraph examination has a right to consult with counsel and should do so.*** Each case is different, and legal advice needs to be responsive to the particular facts of any case.