

# 8

## Disciplinary, Performance-Based, and Adverse Actions

### Lesson Objectives

After completing this lesson, you will be able to:

- Describe disciplinary, performance-based, and adverse actions.
- Explain the role each Component and USD(I) fill relating to developing policies for disciplinary, performance-based, and adverse actions.
- Describe the DCIPS special termination authority authorized under Title 10 USC Section 1609.
- Explain the provisions for postemployment assistance for certain terminated intelligence employees under Title 10 USC Section 1611.

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## LESSON 8 INTRODUCTION

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This lesson lasts 50 minutes.



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# Lesson 8: Disciplinary, Performance-Based, and Adverse Actions

Duration: 50 minutes

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- You may or may not have any involvement in disciplinary, performance-based, or adverse actions at your Component, and may not be aware of the DCIPS policy in this area. DCIPS policy provides a high-level framework, permitting adaptation to the Component's culture, precedence, and business practices.
- Consult experts at your Component and Office of the General Council (OGC) for support early and often when taking disciplinary, performance-based, and adverse actions.

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### Your Notes:

- This lesson outlines policies and definitions applicable to disciplinary, performance-based, and adverse actions. In addition, this lesson covers appeals to actions, DCIPS special termination authority, and post-employment assistance for certain terminated employees.



## Lesson 8 Topics

### Lesson 8 Topics

- Topic 1 – Policy
- Topic 2 – Applicable Definitions
- Topic 3 – Types of Actions
- Topic 4 – Appeals to Actions
- Topic 5 – DCIPS Special Termination Authority
- Topic 6 – Post-Employment Assistance for Certain Terminated Employees



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### Your Notes:

## TOPIC 1: POLICY



### Policy

#### Policy

- Components shall execute disciplinary, performance-based, and adverse actions equitably and impartially
- Components must adhere to policy in Volume 2009
- Components are expected to monitor compliance with DCIPS policy
- Components shall normally employ progressive discipline



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- Disciplinary, performance-based, and adverse actions under DCIPS are discussed in detail in DoDI 1400.25 Volume 2009 – the DCIPS policy on this issue.

### What You Should Know:

#### *Disciplinary, Performance-Based, and Adverse Actions Policy*

- Components shall execute disciplinary, performance-based, and adverse actions equitably and impartially.
- Components must adhere to the DCIPS policy in Volume 2009 and are expected to issue internal guidance that adheres to the policy including the development and maintenance of a recommended table of penalties for various offenses.
- Service Components may adopt in whole or in part guidance of a parent service provided that it adheres to the requirements of DCIPS policy.
- Components are expected to monitor compliance with policy and respond to any reporting requirements established by the USD(I).
  - Data in DCPDS can often be obtained by USD(I) without burdening the Components; however, data from other systems require engagement by the

Component.

- The types of data to be tracked related to disciplinary, performance-based, and adverse actions will largely come from Component tracking systems.
- Except in situations involving national security or serious misconduct, Components shall normally employ progressive discipline in the event an employee continues to engage in misconduct after having been disciplined.

**Your Notes:**

## TOPIC 2: APPLICABLE DEFINITIONS



### Definitions

#### Applicable Definitions

- Adverse Action
- Disciplinary Action
- Performance-Based Action
- Progressive Discipline
- Unacceptable Performance



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### What You Should Know:

#### *Disciplinary, Performance-Based, and Adverse Actions Terms and Definitions*

- **Adverse Action:** A removal, suspension for more than 14 calendar days, furlough of 30 calendar days or less, or involuntary reduction in work level, pay band, grade, or base-pay taken by management.
- **Disciplinary Action:** A management action taken to correct improper or inappropriate behavior or conduct and intended to be corrective in nature.
- **Performance-Based Action:** A removal, reduction in base-pay, or reduction in work level, or pay band or grade as a consequence of performance that fails to meet established standards and has been properly documented as “Unacceptable.”
- **Progressive Discipline:** A series of actions, ranging from counseling, oral admonishment, letter of caution, and written reprimand, through to suspension, that are designed to correct repeated acts of inappropriate behavior or conduct.
- **Unacceptable Performance:** Performance of an employee fails to meet established performance standards or requirements, as a result of an overall

evaluation of “Unacceptable” (“1”) under DCIPS performance management.

**Your Notes:**

## TOPIC 3: TYPES OF ACTIONS

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### Types of Actions

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- Each group will be assigned a type of action
  - disciplinary action
  - performance-based action
  - adverse action.
- 10 minutes to review the information and prepare a summary to share with the class
- There is a form to record your summaries on page 8-14\_8-15 in the Participant Guide.
- While groups are summarizing, participants of the other groups should be making notes in their Participant Guides.

### Your Notes:

- In your group, review one of the three types of actions described in the *What You Should Know* boxes and provide a summary for the other two groups.
  - Take notes on all three types of actions on the following pages. There is a worksheet to record your notes on page 8-14\_8-15.
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<b>What You Should Know:</b>	
<i>Disciplinary Action</i>	
Definition	A disciplinary action is a management action taken to correct improper or inappropriate behavior or conduct and intended to be corrective in nature.
Goal	The goal is to address improper or inappropriate behavior or conduct early in order to resolve it.
Component-Specific Policies	<p>Component-specific policies regarding disciplinary actions must align to DCIPS Volume 2009 and provide for the carrying out of disciplinary actions to address an employee's delinquency or misconduct.</p> <p>Component policies provide Component-specific processes; these must provide as a minimum the timelines noted in DCIPS policy.</p> <p>DCIPS requires adherence to basic merit principles.</p>
Not Appealable	Employees may respond to a <i>proposed</i> disciplinary action except for a written reprimand, but may not further appeal once the final decision has been made.
Eligible for a Grievance	Employees may grieve final disciplinary actions pursuant to Component-specific policies aligned with DCIPS Volume 2014.
Formal Disciplinary Actions	Formal disciplinary actions include written reprimands and suspensions of 14-days or less.
Informal Disciplinary Actions	Component policies may provide for informal disciplinary actions; for example, an oral admonishment.

<b>What You Should Know:</b>	
<i>Performance-Based Action</i>	
Definition	<p>A performance-based action is a removal, reduction in base pay, or reduction in work level, or pay band/grade as a consequence of performance that fails to meet established standards and has been properly documented as unacceptable.</p> <p>Unacceptable performance is the performance of an employee that fails to meet established performance standards or requirements, and would result in an evaluation of “Unacceptable” (“1”) under DCIPS performance management.</p>
Component-Specific Policies	<p>Component-specific policies regarding performance-based actions must align to DCIPS Volume 2009 and provide for addressing unacceptable performance. <i>Volume 2011 addresses performance management.</i></p>
Performance Requirement	<p>Before taking action to reduce an employee’s:</p> <ul style="list-style-type: none"> <li>▪ rate of base-pay,</li> <li>▪ work level,</li> <li>▪ pay,</li> <li>▪ grade,</li> </ul> <p>and/or remove an employee from employment as a consequence of unacceptable performance, performance must be at a level that is, or will be, documented as unacceptable performance.</p>
When Performance is Considered Unacceptable	<p>Performance can be determined as unacceptable at any time during the evaluation period; there is no prohibition that prevents such a determination at any time, including the end of the performance period.</p> <p>Managers should not “wait-out” the performance period to start anew in the next period but should take action when the issue presents itself. Waiting makes the process harder – if the employee receives a “Successful” evaluation of record, he or she is being told performance is acceptable.</p>
Supervisor	<p>Supervisors shall inform the employee of the performance objectives and/or performance elements for which performance</p>

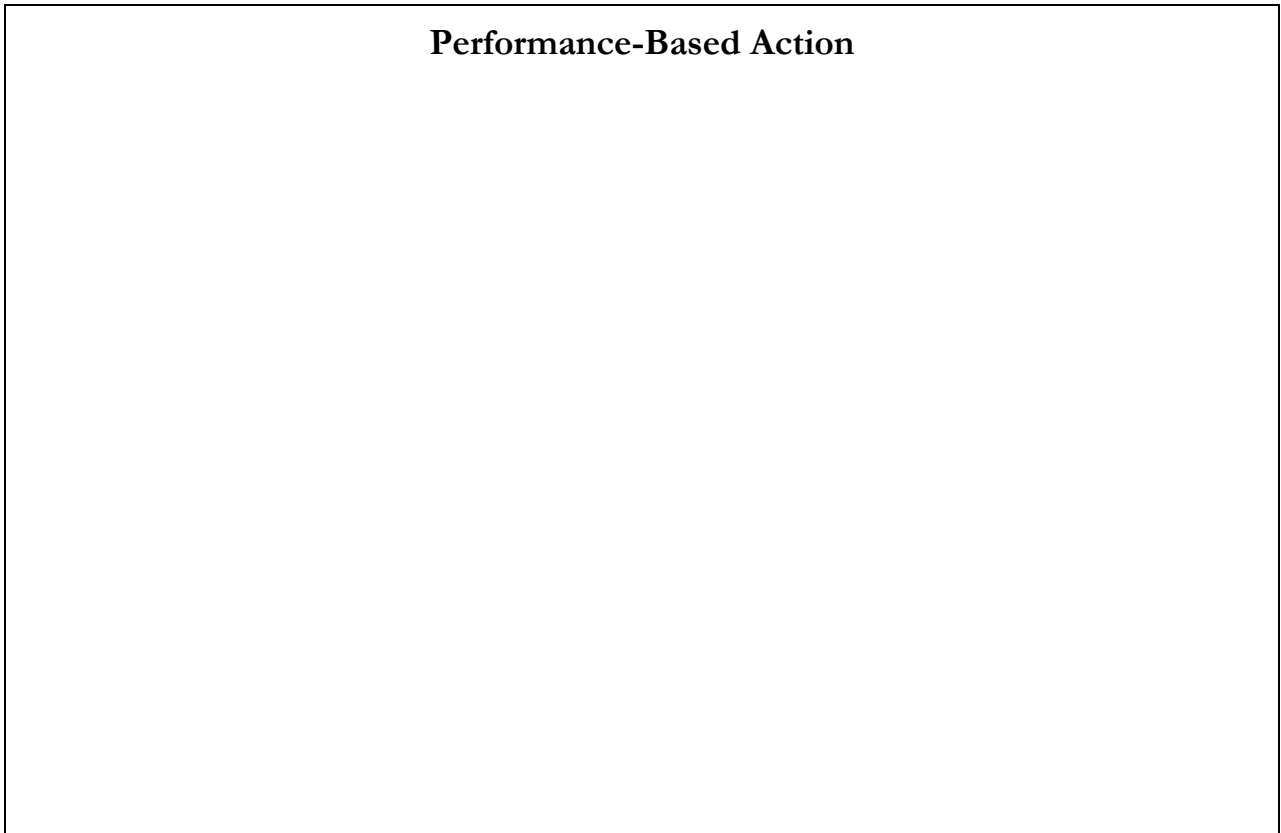
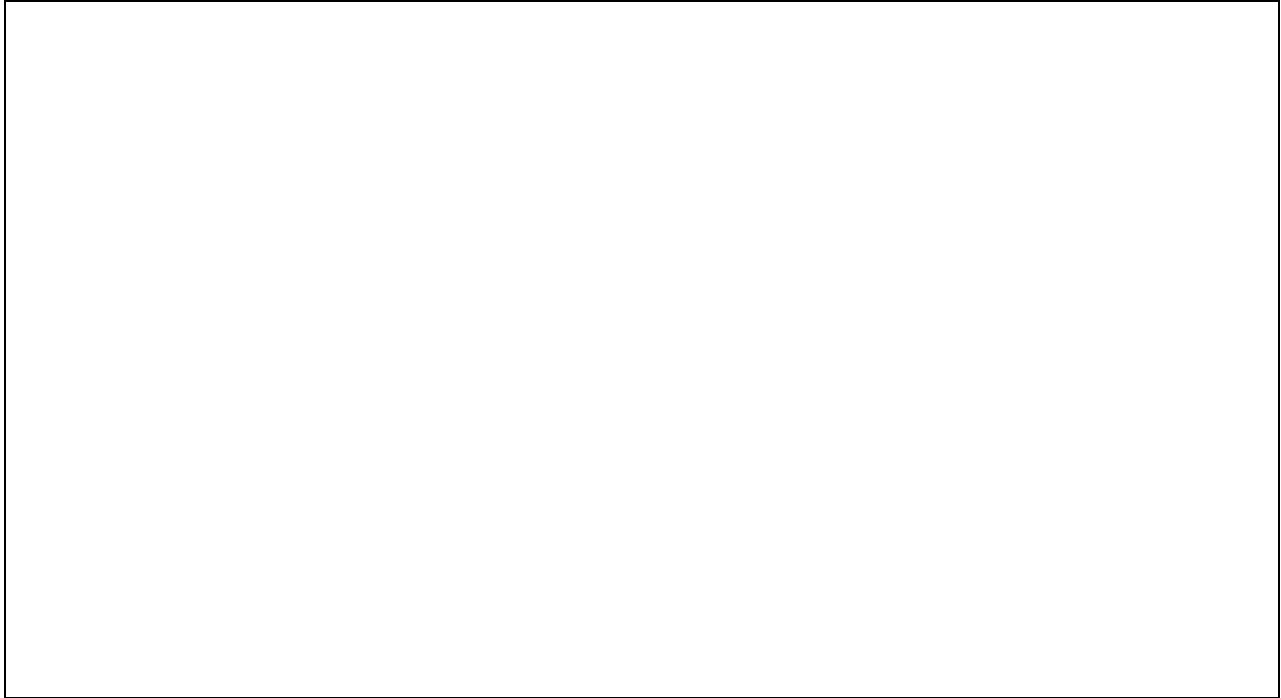
Responsibilities	<p>is unacceptable and inform the employee of the performance requirements or standards he/she needs to meet in order to demonstrate acceptable performance.</p> <p>Supervisors need to hold and document feedback sessions with employees that include:</p> <ul style="list-style-type: none"> <li>▪ Feedback shared with the employee</li> <li>▪ Statement of performance requiring improvement - <i>specifics</i></li> <li>▪ Actions supervisor and employee have agreed to implement in support of improvement – <i>What training, “reworking”, reviewing, timelines, etc. have been agreed to? How will success against these actions be measured?</i></li> <li>▪ Established period of time for improvement - <i>How much time has been identified for improvement? There is no minimum period or required period but it should be reasonable considering the work assigned to the employee</i></li> <li>▪ The consequences of failure to demonstrate acceptable performance improvement within the established period of time – <i>Be clear to ensure complete understanding by the employee, “If you do not improve and do this by this date, this action will be taken.” This is not the place for “may” - be clear about what will happen.</i></li> </ul>
Reduction in Pay	<p>Management can reduce pay to an amount not less than the minimum for the pay band or grade and in no case may the employee’s salary exceed the maximum for the pay band or grade to which the employee is assigned.</p> <p>Employees are not put on retained pay. Their pay can be aligned to the top of the band or the step 10, but cannot be set in the extended pay range or above the maximum of the grade or band.</p>
Employee Entitlement	<p>An employee whose removal or reduction in work level, pay band or grade, or base-pay is made on the basis of unacceptable performance is entitled to:</p> <ul style="list-style-type: none"> <li>▪ 30 calendar day advanced notice of the action to be taken.</li> <li>▪ A representative to assist him/her in preparing and/or presenting a reply to the notice or appeal of the action. <ul style="list-style-type: none"> <li>• The Component must be informed in writing of the</li> </ul> </li> </ul>

	<p>choice of representative and, in certain circumstances, (e.g., conflict of interest, compromise classified activities, or additional cost) the employee’s choice may be declined.</p> <ul style="list-style-type: none"> <li>• The Component is not responsible for providing or paying for the representative, only for permitting the employee to identify one.</li> <li>▪ A reasonable time period (typically 7 to 15 calendar days) to answer the notification of proposed action.</li> <li>▪ A written final decision.</li> <li>▪ Notification of the right to appeal.</li> </ul>
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<b>What You Should Know:</b>	
<i>Adverse Action</i>	
Description	An adverse action is a removal, suspension for more than 14 calendar days, furlough of 30 days or less, or involuntary reduction in work level, pay band, grade, or base-pay taken by management.
Not Adverse Action	Actions resulting from an Adjustment-in-Force (AIF), furloughs of more than 30 days, performance-based disciplinary actions and actions taken under Title 10 USC 1609 (DCIPS Special Termination Authority) are not adverse actions.
Employee Entitlement	<p>Component polices shall provide the following entitlements to employees whose adverse action is made on the basis of misconduct:</p> <ul style="list-style-type: none"> <li>▪ 30 calendar day advanced written notice of the action, unless the Component has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed, and is proposing a removal or suspension including indefinite suspension (in which case the advance notice may be shortened to 14 calendar days)</li> <li>• The advance written notice shall identify the</li> </ul>

	<p>specific misconduct or behavior and cite specific examples of the misconduct. Components should include dates, times, and other relevant information to specifically identify the misconduct or misbehavior.</p> <ul style="list-style-type: none"> <li>▪ Identification of a representative to assist in preparing and/or presenting a reply to the notice and dispute or appeal the action. <ul style="list-style-type: none"> <li>• The Component must be informed in writing and in certain circumstances (e.g., conflict of interest, compromise classified activities, or additional cost) the employee's choice may be declined.</li> <li>• The Component is not responsible for providing or paying for the representative, only for permitting the employee to identify one.</li> </ul> </li> <li>▪ A reasonable time period (typically 7 to 15 calendar days) to answer the notification of proposed action.</li> <li>▪ A written final decision.</li> <li>▪ Notification of the right to appeal.</li> <li>▪ Note: The advance written notice and opportunity to answer are not required for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities, pursuant to Section 752.404(d)(2) of title 5, Code of Federal Regulations.</li> </ul>
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## Disciplinary Action





## TOPIC 4: APPEALS TO ACTIONS



### Appeals to Actions

#### Appeals to Actions

- Eligible employees may appeal adverse or performance-based actions within their Component
- Appeals must be based on a **final** written decision issued by the Component
- Eligible employees can appeal performance-based actions and adverse actions, but cannot appeal a disciplinary action



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### What You Should Know:

#### *Appeals to Actions*

- Employees who have successfully completed a DCIPS trial period (e.g., two years in a Defense Intelligence position) and who are employed in a permanent position or in an appointment of greater than two years, may appeal adverse or performance-based actions within their component in accordance with Volume 2009.
  - *Eligible employees can appeal performance-based actions and adverse actions.*
  - *Employees cannot appeal a disciplinary action.*
- Appeals must be based on a final written decision issued by the component – *proposals (proposed actions) are not appealable.*
- Appeals of certain actions taken under the DCIPS special termination authority may be appealed to the Secretary of Defense through the USD(I) in accordance with special appeal procedures – *if applicable, this would be documented in the notice of termination.*



- Appeals in which an employee alleges illegal discrimination cannot be brought through a component appeals process and should be processed through the component's Equal Employment Opportunity office.
- Disputes regarding performance evaluations of record should be addressed only through the administrative reconsideration process provided in Volume 2011, DCIPS Performance Management.
- If the appeal is based upon adverse or performance-based actions taken as a result of findings of unacceptable performance, appeals should be completed through Volume 2009
- Employees with MSPB appeal rights may appeal adverse or performance-based actions to the MSPB, however, if an employee by-passes the Component appeals process the employee may not then go back and appeal the action in the Component process.
- Employees alleging that an action taken against them was the result of a prohibited personnel practice as defined in section 2302(b) of Title 5 can appeal, bring a complaint to the Component's Inspector General (IG), or use other appropriate avenues, which could include filing a complaint with the US Office of Special Counsel, except for employees of the NSA, NGA, DIA.

### Your Notes:

## TOPIC 5: SPECIAL TERMINATION AUTHORITY



### Special Termination Authority

#### Special Termination Authority

- Special Termination Authority is appropriate only in the rarest circumstances
- Components are encouraged to work closely with their Office of General Counsel
- USD(I) must be notified and grant approval to proceed **before** a proposing official invokes this authority



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- Special Termination Authority is appropriate only in the rarest circumstances and requires approval from USD(I).

### What You Should Know:

#### *Special Termination Authority*

- This Special Termination Authority is appropriate only in the rarest circumstances.
- Title 10 USC 1609 provides an extraordinary termination authority that may be used to terminate the employment of a Defense Intelligence employee only if the action is in the best interest of the United States, and after a determination that the procedures prescribed in other provisions of law that authorize termination of employees cannot be invoked in a manner consistent with national security.
  - If provisions noted in Volume 2009 can be used in a manner consistent with national security, then 1609 is not appropriate.
- This authority lies with the Secretary of Defense, the Deputy Secretary of Defense, the heads of the Defense Intelligence Components, and the Secretaries

of the Military Departments.

- This authority cannot be further delegated.
- Prior to invoking this authority, Components are encouraged to work closely with their Office of General Counsel.
- Prior to invoking this authority, the proposing official must notify the USD(I) or his delegee of the intended authority and request approval to proceed.

**Your Notes:**

## TOPIC 6: POST-EMPLOYMENT ASSISTANCE FOR CERTAIN TERMINATED EMPLOYEES



### Post-Employment Assistance

#### Post-Employment Assistance

- Intended to address highly unusual personnel situations
- Post-employment assistance may be provided to certain terminated employees when assistance is essential to:
  - Maintain the judgment and emotional stability of the qualified former intelligence employee
  - Avoid circumstances that might lead to the unlawful unauthorized disclosure of classified information



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### What You Should Know:

#### *Post-Employment Assistance*

- Under Title 10 USC 1611, the Secretary of Defense may provide post-employment assistance to certain terminated employees when such assistance is essential to:
  - Maintain the judgment and emotional stability of the qualified former intelligence employee
  - Avoid circumstances that might lead to the unlawful unauthorized disclosure of classified information
- This is intended to address highly unusual personnel situations.
- In accordance with Volume 2009, Heads of Defense Intelligence Components shall request assistance from the USD(I) through the Director, Human Capital Management Office (HCMO).

### Your Notes:

## LESSON 8 REVIEW



### Lesson 8 Review

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#### Lesson 8 Review

- Topic 1 – Policy
- Topic 2 – Applicable Definitions
- Topic 3 – Types of Actions
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- Topic 5 – Special Termination Authority
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### Your Notes:

#### Lesson Transition:

The next lesson looks in detail at policies and procedures for addressing employee grievances.