

# 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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**Duration:** Allow 50 minutes for this lesson.

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### Instructor Notes:

- Course participants may or may not have any involvement in disciplinary, performance-based, or adverse actions at their 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.
  - Some participants may not like that DCIPS policy is not more specific, e.g., there is no standard DCIPS Table of Penalties and argue that this lack of more detailed guidance does not support consistency and commonality across the Enterprise.
  - With this subject matter, the Component histories and precedence have driven their past decisions and the prior training and learning in this area of managers and consultants.
  - **Participants should be encouraged throughout discussions in this lesson to consult experts at their 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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**Instructor Notes:**

- Show slide 8-1, “Lesson 8: Disciplinary, Performance-Based, and Adverse Actions.”
- Participant Guide page 8-2



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

Duration: 50 minutes

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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.

**Instructor Notes:**

- Show slide 8-2, “Lesson 8 Topics.”
- Participant Guide page 8-3

**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:****Speaking Points:**

- In this lesson we’ll explore policy and definitions applicable to disciplinary, performance-based, and adverse actions. We’ll also look at the process for appealing actions, and the DCIPS special termination authority, and post-employment assistance for certain terminated employees that are unique to DCIPS.
- **First, we’ll take a look at policy.**

## TOPIC 1: POLICY

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### Instructor Notes:

- Show slide 8-3, “Policy.”
- Participant Guide page 8-4



### Policy

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#### 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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Slide 8- 3

### Your Notes:

- Instruct participants to read *Disciplinary, Performance-Based, and Adverse Actions Policy* in the *What You Should Know* box on page 8-4\_8-5 of the Participant Guide. Information is shown below for your reference.
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**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.



### Speaking Points:

- Based on what you just read, let's look at a couple of review questions.
  - In addition to adhering to policy, what should the Components' internal implementing guidance include? (Answer: The development and maintenance of a recommended table of penalties for various offenses.)
  - In the event an employee continues to engage in misconduct after having been disciplined, Components shall normally employ progressive discipline except in what situations? (Answer: Situations involving national security or serious misconduct.)
- A takeaway here is that **Component guidance plays a big part** in the day-to-day application of policies pertaining to disciplinary, performance-based, and adverse actions and must always be consulted. Components are responsible for establishing their own table of penalties and internal processing guidance, including form and format.
- Disciplinary, performance-based, and adverse actions under DCIPS policy are discussed in detail in DoDI 1400.25 Volume 2009 – the DCIPS policy on this issue (Tab 9 in the Supplemental Reference Guide).
- Now, let's take a look at some definitions that are important when discussing disciplinary, performance-based, and adverse actions.

## TOPIC 2: APPLICABLE DEFINITIONS

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### Instructor Notes:

- Show slide 8-4, “Definitions.”
- Participant Guide page 8-6



### Definitions

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#### Applicable Definitions

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



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### Your Notes:

- Instruct participants to turn to pages 8-6\_8-7 in the Reference Guide and to follow along as you discuss the definitions.
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**Speaking Points:**

- Briefly review the definitions in the WYSK box.

**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 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.

**Speaking Points:**

- Now let’s look at the types of actions in more detail.

### TOPIC 3: TYPES OF ACTIONS



#### Instructor Notes:

- Show slide 8-5, “Types of Actions.”
- Participant Guide page 8-8



#### Types of Actions

- 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.

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Slide 8-5

#### Your Notes:

- Divide participants into three groups.
- Inform participants that each group will review one of the three types of actions described in the *What You Should Know* boxes on pages 8-9\_8-13 of the Participant Guide (shown on the following pages for your reference) and provide a summary for the other two groups.
- There is a form to record their summaries on page 8-14\_8-15 in the Participant Guide.
- Assign as follows:

- Group one will review and summarize disciplinary action.
  - Group two will review and summarize performance-based action.
  - Group three will review and summarize adverse action.
- Allow groups 10 minutes to review the information, then reconvene and allow groups 5 minutes each to summarize.
  - While groups are summarizing, participants of the other groups should be making notes in their Participant Guides.

<b>What You Should Know:</b>	
<b>Disciplinary Action</b>	
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 policy 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>	
<b>Performance-Based Action</b>	
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	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>
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, <b>documented as unacceptable performance.</b></p>
When Performance is Considered Unacceptable	<p>Performance can be determined as unacceptable <b>at any time</b> 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</p>

	<p>performance is acceptable.</p>
<p>Supervisor Responsibilities</p>	<p>Supervisors shall inform the employee of the performance objectives and/or performance elements for which performance 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” - <b>be clear</b> about what will happen.</i></li> </ul>
<p>Reduction in Pay</p>	<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>
<p>Employee Entitlement</p>	<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</li> </ul>

	<p>presenting a reply to the notice or appeal of the action.</p> <ul style="list-style-type: none"> <li>• The Component must be informed in writing of the 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.</li> <li>• The Component is <b>not responsible for providing or paying for</b> the representative, only for permitting the employee to identify one.             <ul style="list-style-type: none"> <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> </li> </ul>
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<b>What You Should Know:</b>	
<b>Adverse Action</b>	
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</li> </ul>

	<p>calendar days)</p> <ul style="list-style-type: none"><li>• The advance written notice shall identify the 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.</li><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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**Speaking Points:**

- You may be wondering how and when actions can be appealed. Let's take a look at appeals next.

## TOPIC 4: APPEALS TO ACTIONS



### Instructor Notes:

- Show slide 8-6, “Appeals to Actions.”
- Participant Guide page 8-16



### 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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### Your Notes:

- Instruct participants to turn to *Appeals to Actions* in the *What You Should Know* box on page 8-16\_8-17 of the Participant Guide.
- Explain that you will summarize the information and ask a few questions.



**Speaking Points:** (ask the following questions; the sub-bullets back up the answers)

- According to the information in the Participant Guide, which types of actions can be appealed? (*Answer* : Eligible employees can appeal performance-based actions and adverse actions; Employees cannot appeal a disciplinary action.)
  - 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.
- Are proposals (proposed actions) appealable? (*Answer: No.*)
  - Appeals must be based on a **final** written decision issued by the Component.
- Appeals in which an employee alleges illegal discrimination cannot be brought through a Component appeals process. How should such appeals be processed? (*Answer: Appeals in which an employee alleges illegal discrimination should be processed through the Component's Equal Employment Opportunity (EEO) office. EEO is the appropriate office for such claims.*)
  - 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. We will talk more about this authority in the next section.
- Disputes regarding Performance Evaluations of Record should be addressed only through the administrative reconsideration process provided in Volume 2011, DCIPS Performance Management. There is a special process established for such requests for reconsideration.
- Adverse or performance-based actions resulting from the Performance Evaluation of Record may be appealed through these (Volume 2009) procedures. Keep in mind this is not the Performance Evaluation of Record, but actions taken that may be based on the findings of unacceptable performance in the Performance Evaluation of Record.

- Employees with Merit System Protection Board (MSPB) appeal rights may appeal adverse or performance-based actions to the MSPB; however, if an employee by-passes the Component appeals process and goes directly to the MSPB, the employee may not subsequently appeal the same 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, or use other appropriate avenues, which could include filing a complaint with the US Office of Special Counsel. This does not apply to employees of the National Security Agency (NSA), National Geo-Spatial-Intelligence Agency (NSA), and Defense Intelligence Agency (DIA).

### 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 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.



### Speaking Points:

- Now we'll talk about the Special Termination Authority.

## TOPIC 5: SPECIAL TERMINATION AUTHORITY



### Instructor Notes:

- Show slide 8-7, “Special Termination Authority.”
- Participant Guide page 8-18



### Special Termination Authority

#### Special Termination Authority

- Special termination authority is extraordinary and 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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### Your Notes:

- Participants may read bullets 3 and 6 in the WYSK “Special Termination Authority” as a conflict; one delegates to their directors while the other requires USD(I) approval to proceed. It may be confusing, but the USD(I) is exercising his authority to approve actions, then the Directors may take action. The issue is, this is such a sensitive issue, no component can be permitted to proceed without USD(I) approval.
- Explain that the Special Termination Authority is **extraordinary** and appropriate only in the rarest circumstances and with approval from USD(I).
- If provisions noted in Volume 2009 can be used in a manner consistent with national security, then 1609 is not appropriate.

- Ask participants to read *DCIPS Special Termination Authority* in the *What You Should Know* box on page 8-18\_8-19 of the PG.
- **Ask the following questions:**
  - With whom does the authority lie for using the DCIPS Special Termination Authority? (*Answer:* Secretary of Defense, Deputy Secretary of Defense, heads of the Defense Intelligence Components and the Secretaries of the Military Departments.)
  - Prior to invoking this authority, Components are encouraged to work closely with whom? (*Answer:* Office of General Counsel.)
  - Prior to invoking this authority, Components must do what? (*Answer:* Notify the USD(I) and request authority to proceed.)
- **Ensure the group understands they cannot proceed without USD(I) approval and should coordinate with their OGC throughout the process.**

### 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.
- 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 and receive** the approval to proceed.



### Speaking Points:

- Next, we'll talk about post-employment assistance.

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



### Instructor Notes:

- Show slide 8-8, "Post-Employment Assistance."
- Participant Guide page 8-20



### 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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### Your Notes:

- Briefly discuss how **post-employment assistance can be provided** to certain terminated intelligence employees.
- Inform participants that this information is covered on page 8-20 of the Participant Guide.



**Speaking Points:** (This is the exact text found in the PG WYSK box “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
- There is no entitlement to receive it.
- This is intended to address highly unusual personnel situations.
- **Heads of Defense Intelligence Components shall request this assistance** from the USD(I) through the Director, Human Capital Management Office in accordance with Volume 2009.
  - **Employees or former employees cannot request** this assistance directly from the USD(I).

### 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).

## LESSON 8 REVIEW



### Instructor Notes:

- Show slide 8-9, “Lesson 8 Review.”
- Participant Guide page 8-21



## Lesson 8 Review

### Lesson 8 Review

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



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### Your Notes:

- Review the lesson’s topics.



### Speaking Points:

- Key points to remember include:
  - Volume 2009 (Tab 9 of the Reference Guide) provides the overarching policy and framework for Component programs.
  - Special Termination Authority is not to be used for routine termination actions. As such, it should **rarely apply** and requires early engagement with USD(I).
- Are there any questions?

### Lesson Transition:

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