



## **CAPABILITY POLICY**

### **1 Introduction**

#### **Purpose**

- 1.1 Employees are employed to undertake a specific role and are expected to perform their duties to a required standard. It is the responsibility of the manager to ensure that employees are aware of the standards of performance required. To do this managers should make proper use of the Performance and Development Appraisal Policy and regular supervision, ensuring that poor performance is identified at an early stage and support offered where necessary. This includes undertaking regular appraisal or supervisory meetings.
- 1.2 This policy formalises the procedure to be followed where problems arise which call into question whether an individual is capable of performing the duties which they are employed to undertake. This formal policy is to be invoked where regular appraisal or supervisory meetings have not brought about the required improvement. This policy should not be invoked for employees in their probationary period. Concerns in these circumstances should be addressed under the probationary procedures.

#### **Who does the Policy apply to?**

- 1.3 This Policy applies to all employees of the Council except teachers, for whom there is a separate procedure, and those employed in schools under the control of Governing Bodies, for whom procedures adopted by the Governing Body will apply. Separate provisions apply to staff whose terms and conditions are governed by the Joint Negotiating Committee for Chief Officers. Employees are as defined in section 230 of the Employment Rights Act 1996 or any substituting or amending legislation.

#### **Representation**

- 1.4 This policy will be implemented in accordance with the principles of natural justice. Thus, the employee must be informed that there are concerns about their performance or competence and be given the opportunity to respond and improve. An employee has the right to be represented or accompanied by their Trade Union representative or work colleague during any stage of the formal procedure. It is important that employees are informed of this right of representation beforehand.

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## 2 General Information

### Definitions

#### Capability

- 2.1 For the purposes of this policy lack of capability is defined as a situation where an employee consistently fails to perform their duties to the required standards, assessed by reference to skill and aptitude.
- 2.2 Poor performance may be attributed to a variety of reasons; it is important that managers understand and recognise that a different approach to handling the case will be required dependent on the reasons identified. Where an employee is failing to achieve the required level of performance through lack of capability, this may be due to either negligence or incompetence.

#### Negligence

- 2.3 Negligence normally involves a measure of personal blame, wilful conduct or misconduct on the part of the employee and their performance will have been judged inadequate due to a lack of motivation, care, interest or attention. In these cases the Council's Disciplinary Policy should be invoked.

#### Incompetence

- 2.4 Incompetence, however, implies that there is no element of choice in the employee's failure to measure up to the required standards. This may be because of a lack of ability, skill or experience, most likely arising from a mismatch between the abilities the employee possesses and the requirements of the post or a lack of adequate training and supervision. In these circumstances the Capability Policy will be appropriate.

#### Cases of Serious Error

- 2.5 Where the consequences of an employee's error(s) are serious or potentially serious, the Council's Disciplinary Policy should be invoked.

### Guidance

- 2.6 The Advisory, Conciliation and Arbitration Service have produced an "Advisory Handbook – Discipline & Grievances at Work". This handbook provides managers with practical advice and best practice in dealing with both disciplinary and capability matters. Managers can access this handbook on the Advisory, Conciliation and Advisory Service website.

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## Performance and Development Appraisal

2.7 The Code of Conduct sets out the standards expected of employees; this includes the expectation that employees effectively undertake their work responsibilities. The Council's Performance and Development Appraisal policy sets out key competencies against which employees will be appraised. Managers must ensure that they have fully met their responsibilities under the appraisal process before invoking the capability procedures.

### Other related HR policies

2.8 Where an employee is failing to achieve the required level of performance by reason of ill health, managers should refer to the Council's Management of Absence Policy or if appropriate the Alcohol & Drug Abuse Policy or Management of Stress Policy. The possibility that an underlying medical condition might be contributing to an employee's poor performance should always be considered before recourse to the formal capability or disciplinary procedures.

2.9 Where an employee cites personal problems e.g. domestic violence, bereavement, etc as a contributory factor affecting their performance, managers must take this into consideration and ensure that appropriate support and advice is given to the employee.

### Responsibilities

2.10 The manager's responsibilities are:

- To provide clear, measurable targets so that the employee fully understands the expectations of performance in the post
- To provide training, supervision and support to enable employees to achieve the required level of performance
- To appraise staff regularly and maintain appropriate records of attendance and completion of training courses
- To address any issues of capability as they arise
- To ensure that the employee who is being taken through this procedure receives a copy of this policy or if appropriate is referred to the intranet

2.11 The employee's responsibilities are:

- To undertake effectively their responsibilities to the required standard
- To recognise when their performance is falling below the required standard
- To request training, supervision, support and appraisal in order to be able to meet the required standard
- To attend training, developmental and supervisory sessions as requested
- To request clarification of the standard of work required, if this is unclear.

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## **Equal Opportunities**

- 2.12 Managers must ensure that issues of equality and fairness are considered and adhered to when applying this policy. Employees must be dealt with in a fair and consistent manner. Where concerns that this is not happening are raised the manager must ensure that these are fully considered and responded to.
- 2.13 Where the employee has a disability, the manager must give consideration to any reasonable adjustments, which may be necessary to enable the employee to improve their performance. Advice may be sought from Human Resources and/or Occupational Health if appropriate.

## **Confidentiality**

- 2.14 The Council is committed to maintaining the privacy of all employees, therefore the need for confidentiality is an integral part of this policy. Further guidance is available in the Corporate Confidentiality Policy.

## **Review**

- 2.15 This policy will be kept under review and may be amended in accordance with changes in employment legislation as and when required.

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### 3 Procedure

#### Informal Action

- 3.1 The manager's responsibilities are set out in general terms in paragraph 2.10. The underlying principle of managing performance is that actual concerns should be based on evidence rather than subjective opinion only.
- 3.2 Therefore it is essential that the manager uses the Performance and Development Appraisal policy to assess the employee's performance against relevant competencies and to identify areas of under-performance or development need. Equally important are the regular supervision meetings, which should take place between appraisals, allowing progress to be checked or a sudden downturn (or improvement) in performance to be noted. Invoking this procedure does not require that the Performance and Development Appraisal interview has been recently undertaken.
- 3.3 Where the manager has identified areas of concern, s/he should raise these with the employee at the earliest opportunity. The manager will:
- Identify the specific areas of performance which are unsatisfactory
  - Confirm that the employee fully understands the required standards that are to be met
  - Ask the employee for any explanation for the unsatisfactory performance and consider any mitigating factors
  - Identify any reasonable support required including training and development
  - Set clear and unambiguous targets for the employee
  - Set a realistic timescale for the required improvement, taking into account any mitigating factors
  - Keep a written record of the discussion and actions required
  - Provide the employee with a written action plan detailing actions, timescales and the date of the next review meeting
- 3.4 It is essential that the employee understands exactly what is expected of them, as otherwise the manager is unlikely to see any significant or sustained improvement.

The targets set by the manager should therefore be **SMART**:  
**S**pecific  
**M**easurable  
**A**chievable  
**R**ealistic  
**T**ime-related

- 3.5 Depending on the areas or degree of concern and any mitigating circumstances put forward by the employee, the manager may hold a further meeting in an attempt to produce the desired improvement.

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- 3.6 Where the employee makes satisfactory improvement within the stated review period, the manager will write to the employee acknowledging the improvement and informing them that this standard must continue to be met for 12 months for the process to be considered complete. If the required standards are not maintained for 12 months, the manager may resume capability proceedings.
- 3.7 If at any point the manager considers that the issue is not one of capability (competence) but negligence, disciplinary action will be appropriate.
- 3.8 Where the manager has followed the steps outlined above and no significant improvement has been achieved, s/he should instigate the next stage of this Policy.

### **Formal Meeting**

- 3.9 Once the manager has determined that an employee's performance remains a cause for concern a Formal Meeting will be arranged. The meeting will be conducted by the line manager. They may be accompanied by a colleague manager or Human Resources representative if required.
- 3.10 Employees should be given at least five working days' written notification of the Formal Meeting. This letter should also set out the purpose of the meeting, outline the (remaining) areas of concern and inform the employee of their right to be accompanied by a union representative or workplace colleague. The employee should receive a copy of the Capability Policy or where practicable referred to the intranet.
- 3.11 The manager should consider any request by the employee for a deferment to enable them to be represented but such requests should not delay proceedings unduly. A written record will be kept of the Formal Meeting.
- 3.12 The purpose of the meeting will be:
- To make clear to the employee that their performance is still not at the required standard
  - To review the performance and set out the areas of concern
  - To review the previous efforts made to support the employee
  - To give the employee another opportunity to discuss the reasons for their performance and consider any mitigating factors
  - To consider and identify, with the employee any further support or assistance, which may assist them in improving their performance
  - To draw up a final action plan, again using SMART targets (see 3.4)
  - To consider, based on the evidence whether it is appropriate to withhold the next increment which the employee may be due (see paragraph 3.14 below).

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- 3.13 The employee will be informed that a failure to improve performance within the stated review period, or a failure to sustain improvement for 12 months, will lead to a Capability Hearing, which could result in their dismissal.
- 3.14 Employees, who have not reached the top of their incremental pay scale, should be informed that their next increment may be withheld if they fail to achieve the required improvement in performance. A decision to withhold an increment must be supported by clear evidence of a failure to reach the required standard.
- 3.15 The outcome of the meeting will be confirmed in writing to the employee within five working days. Where appropriate an action plan should be attached.

### **Review Period**

- 3.16 The principal aim of the review period is to allow sufficient time for the employee to improve their performance. The period of the review will vary dependent on the circumstances of the case.
- 3.17 During the review period, the manager should continue meeting with the employee on a regular basis to discuss progress. Discussion should focus on the employee's performance against the targets set out in the action plan, taking account of any training and support that had been agreed.
- 3.18 At the end of the specified period the manager should consider the overall performance during the review period, take into account the facts of the case and decide what further action should be taken.
- 3.19 Where there has been clear improvement and the employee's performance deemed satisfactory, the employee should be advised of this in writing and informed that no further formal action will take place provided that improvement is maintained for 12 months. Any failure to maintain satisfactory performance during the following 12 months will normally result in a Capability Hearing being convened.
- 3.20 If at the end of the review period there is no satisfactory improvement in performance, the employee should be advised accordingly and informed that a Capability Hearing will be convened.

### **Capability Hearing**

- 3.21 This is a formal hearing which may result in dismissal should the employee's performance be deemed to fall short of the required standard.
- 3.22 The hearing will be conducted by a panel comprising a senior officer and a representative from Human Resources, one of whom will chair

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the proceedings. Neither of these officers should have been involved in the earlier stages.

- 3.23 Employees should be given at least five working days' written notice of the Capability Hearing. This letter should outline the (remaining) areas of concern and inform the employee of their right to be accompanied by a union representative or a work colleague. The employee should receive a copy of the Capability Policy or be referred to the intranet where practicable.
- 3.24 A written record will be kept of the Capability Hearing. The outcome of the hearing will be confirmed in writing to the employee within five working days.
- 3.25 The letter requiring the employee to attend the hearing will explain that the purpose of the hearing is to consider the employee's competency to carry out the job for which they are employed and whether there are grounds for dismissal.
- 3.26 The procedure is that the manager will first present their case, followed by the employee's case. The Panel or the other side may ask questions once the case has been presented. Both sides will then be asked to sum up their respective cases.
- 3.27 In presenting their evidence, the manager will provide the full case history and support programme offered. The employee's shortfall in relation to the required standards should be clearly identified in the supporting documents.
- 3.28 The panel will review the case made by both the manager and the employee and will assess the likelihood of the employee achieving the standard required with any further support.
- 3.29 The decision of the panel will be either:
- (i) To draw up a further action plan with a timescale considered appropriate by the panel having taken account of the circumstances of the case. This may include the withholding of an annual increment. There will also be a warning that failure to meet the standards required within the timescale will lead to the employee's dismissal (a final written warning). Where the latter situation arises the panel will be reconvened.
  - (ii) To dismiss the employee with notice
  - (iii) Acceptance that the employee has made significant improvements and agree to continued monitoring for a period of 12 months
- 3.30 Any decision to dismiss must be approved by the Chief Officer. The notice period will commence immediately once the employee has received written notification of their dismissal. The employee may be

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given pay in lieu of notice instead of being required to serve his or her notice.

- 3.31 Where the panel is recommending dismissal, they may determine, subject to availability, to offer a post either at the same or a lower level that is within the employee's skills and abilities. Such an arrangement can only be made with the agreement of the employee. If the employee accepts this offer, then the terms and conditions (including pay) attached to this post will be applied. However advice must be sought from Human Resources to ensure compliance with employment procedures.

## **Appeals**

### Right of Appeal

- 3.32 An employee who receives a written warning under this policy must, when notified in writing of this decision, be informed of their right to appeal against such action.

### Arrangements for Appeal

- 3.33 An appeal should be made in writing and lodged with the appropriate Human Resources Unit within five working days of receipt of the outcome from the Capability Hearing. This letter should state the grounds of appeal.
- 3.34 A senior manager and a Human Resources Advisor, neither of whom should have been involved in the Capability Hearing, will hear the appeal.

### Appeal Hearing

- 3.35 The Appeal hearing should take place within 14 working days of receipt of the employee's written notice of appeal. Where this timescale cannot be met the employee should be informed of the reason for the delay. The employee will be given five working days' notice of the appeal hearing. Copies of all documents relating to the appeal will be made available to all parties, together with a copy of this policy.
- 3.36 The hearing will confine itself to the specific grounds of appeal and will not reconsider the whole case. The panel may call for additional information to be provided and may adjourn the appeal meeting so that this information may be acquired.
- 3.37 The Appeal Panel must decide on the basis of both sets of representations, together with any additional information acquired, whether to allow the appeal, reject it or substitute a further action plan and review period.

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- 3.38 The decision following the appeal is final and there is no further right of appeal. The decision will be confirmed in writing within five working days of the appeal hearing.

Appeals against dismissal

- 3.39 An appeal against dismissal should be made to the Chief Officer and will be referred to the Assistant Director of Corporate Governance to arrange an Employment Appeals Panel. A separate procedure exists for the conduct of the Employment Appeals Panel.
- 3.40 Where possible the Panel should consider the appeal during the employee's notice period.

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