



**London Borough
of Hounslow**

Capability Policy

Transformation & Human Resources

Issued by HR Policy Team
Effective from 15 November 2016

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CAPABILITY POLICY

1 Introduction

Principles

- 1.1 Performance management is critical to the effectiveness of this Council's business; dependent as it is on the workforce for the delivery of its services. It involves two processes which run in parallel:
- the informal day to day management of employees and teams by line managers and
 - the formal framework within which an employee's performance is assessed and improved, as provided by this policy and the PDA Policy
- 1.2 The two processes are mutually supportive and rely on the same factors for success, namely:
- monitoring of performance against accepted standards or targets
 - feedback on performance
 - delivering negative feedback objectively and constructively, with supporting evidence and allowing employee an opportunity to respond
 - coaching, training or other support to facilitate improvement
 - reviewing performance
 - recourse to further action if poor performance continues
- 1.3 This policy is to be used when an employee's performance is identified as falling below an acceptable level by reason of capability. It sets out a formal procedure to be followed when regular supervisory meetings have not brought about the required improvement.
- 1.4 The policy aims to provide a framework that is fair, equitable and transparent for improving and maintaining employee performance.
- 1.5 Separate policies exist for dealing with disciplinary matters, management of absence concerns and performance during probationary period. Such concerns should be addressed under the appropriate policy, details of which are available on the intranet.
- 1.6 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.

Scope

- 1.7 This Policy applies to all employees of the Council except teachers, for whom there is a separate procedure, and those employed in schools under

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the control of Governing Bodies, for whom procedures adopted by the Governing Body will apply.

- 1.8 Separate provisions apply to staff whose terms and conditions are governed by the Joint Negotiating Committee for Chief Officers.
- 1.9 Employees are as defined in section 230 of the Employment Rights Act 1996 or any substituting or amending legislation. This policy does not apply to agency workers. Issues relating to agency workers should be referred to the person's employing agency.

Role of Managers

- 1.10 It is the responsibility of the manager to ensure that employees are aware of the required levels of performance. Managers should therefore set clear and measurable standards of performance for employees. This is achieved through the use of competences, personal targets, objectives and up-to-date job descriptions/employee specifications.
- 1.11 Employees should be made aware of the consequences of failing to achieve and maintain the standards set for their performance. If necessary training, supervision and support to be provided to help achieve the required standards.
- 1.12 Managers are expected to comply with the Performance and Development Appraisal Policy, to ensure that performance concerns are identified at an early stage and support offered as necessary. This involves regular supervisory meetings, which should be recorded, using the 1-2-1 supervisory meeting template, available on the intranet under HR Forms.

Role of Employees

- 1.13 The Code of Conduct sets out the standards expected of employees; one being that employees effectively undertake their work responsibilities.
- 1.14 This includes recognising when performance is below the required standard; requesting and attending training, supervision and appraisal as necessary to achieve improvement in performance.

Role of Human Resources

- 1.15 HR will provide advice on employment law, Council policy and procedures as they relate to capability matters. They may also advise on the appropriateness of management action under this policy, with a view to achieving consistency in application across the organisation. They will not, however seek to influence the decision making process unless they are an active participant in the hearing or appeal panel.
- 1.16 HR Advisory Teams will make arrangements for Capability hearings and appeal panels.

Representation

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- 1.17 Employees have the right to be represented or accompanied by their Trade Union representative or work colleague during the formal stages only of this procedure. It is important that employees are informed of this right when invited to attend formal meetings.

2 General

What is Capability?

- 2.1 Capability refers to an employee's skills, ability, aptitude and knowledge in relation to their job. A lack of capability is where an employee consistently fails to perform their duties to the required standards, assessed by reference to the required skill and aptitude.
- 2.2 A key feature of lack of capability is that it is not the employee's fault. It is this that distinguishes it from poor performance due to conduct i.e. negligence, carelessness, apathy, idleness or lack of motivation.
- 2.3 Poor performance due to conduct involves a measure of personal blame, and should be addressed through the Disciplinary Policy.
- 2.4 Lack of capability implies that there is no element of choice in the employee's failure to measure up to the required standards. In which case managers will be required to consider the circumstances and give support to encourage improvement to the required standard of competence as set out in this policy.
- 2.5 Where the consequences of an employee's error(s) are serious or potentially serious, e.g. safeguarding concerns, the 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.

Performance and Development Appraisal (PDA)

- 2.7 The Council's Performance and Development Appraisal Policy sets out a framework for the regular assessment of employees. It provides a procedure for managers to discuss performance against key competencies and objectives, to consider learning and development needs and to determine an annual appraisal rating.
- 2.8 Compliance with the PDA process, will in most cases, ensure that action under this policy will not be the first time that employees become aware of performance concerns.

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- 2.9 The Performance and Appraisal Policy is not to be used as a substitute for this policy. Managers should therefore not wait until the next appraisal meeting or mid-year review to raise performance concerns with an employee and should instead take the appropriate action under this policy.
- 2.10 Outcomes from the appraisal process may be taken into consideration when using this policy.

Other related HR policies

- 2.11 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
- 2.12 The possibility that an underlying medical condition might be contributing to an employee's under performance should always be considered before recourse to the formal capability procedures. This will be particularly important for those employees who have a disability, see 2.16
- 2.13 Where personal problems e.g. domestic violence, bereavement, etc. are a contributory factor affecting performance, managers must take this into consideration and ensure that appropriate support and advice is given to the employee. This may include referring the individual to the Employee Assistance Programme.
- 2.14 In all the above it should be made clear in discussions with the employee that while reasonable support will be provided, objectives for improvement will be set and will need to be met.

Equality and Fairness

- 2.15 Managers must be fair, consistent and objective in dealing with performance issues across their team(s). Concerns from employees about the application of this policy should be fully considered and responded to.
- 2.16 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.

Timescales

- 2.17 All parties should make every effort to meet the timescales set out in the procedure. If necessary the timescales may be varied, in which case all parties involved must be informed of the decision and the reason for it.
- 2.18 If employees cite unavailability of their trade union representative (or work colleague) as a reason for not attending a formal meeting under this policy, then an alternative date may be arranged. This would normally be within 5 working days of the original date proposed. A rescheduled meeting would not normally be postponed again.

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Confidentiality

- 2.19 The Council is committed to maintaining the privacy of all employees, and proceedings under this policy should be kept confidential. Information relating to employees should therefore be password protected on IT systems and all paperwork/files securely locked.
- 2.20 It is not this Council's policy to allow recordings of meetings held under this procedure. Any breach will be grounds for disciplinary.
- 2.21 If employees have a medical condition that makes it difficult for them to take notes or recall the details of meetings and wish to record a meeting they make a request to their HR Manager. Decisions to permit recordings may be made on a case-by-case basis.

Records

- 2.22 A record should be maintained of all action under the different stages of the procedure. During proceedings managers should ensure that records are secure and kept confidential.
- 2.23 Once completed, records should be electronically forwarded to Human Resources, where relevant documents will be placed on the employee's personal e-file.

Monitoring and Review

- 2.24 All formal action under this policy should be notified to the appropriate HR Advisory team for the purpose of monitoring.
- 2.25 This policy will be kept under review and may be amended in accordance with changes in employment legislation as and when required.

3 Procedure: Stage 1 – Capability Meeting

Informal Action

- 3.1 Informal action takes place in the day-to-day supervision of employees by their line managers. Such supervision allows progress to be monitored and for a sudden downturn (or improvement) in performance to be noted. A form exists to record regular supervision meetings and is available on the intranet.
- 3.2 Informal action is appropriate in situations where the performance shortcomings are relatively minor and easily resolved. Prompt and timely action will often address concerns before they escalate.
- 3.3 In these cases managers should provide feedback on instances of unsatisfactory performance by explaining the problem, listening to the employee's response, indicating what improved performance should look like and how it can be achieved.

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- 3.4 The employee is then given an opportunity to improve their performance. If necessary managers should ensure that any training needs identified are provided. Any review would take place as part of the normal supervision.
- 3.5 If informal action is inappropriate or where it has not achieved satisfactory performance, then a formal meeting should be arranged.

Formal Capability Meeting

- 3.6 Prior to arranging the meeting, managers must ensure that their concerns are based on evidence rather than a subjective opinion and that the evidence to substantiate their concerns has been collated.
- 3.7 They should also be able to identify specific occasions where their concerns had been raised with the employee.

Discussion with HR Adviser

- 3.8 To this end managers should meet with their HR Adviser, who will help them to prepare fully for the formal meeting. This will involve reviewing the performance concerns, the documentary evidence and provide templates for their use. The HR Adviser will also advise on how best to deal with the following aspects of the meeting:

- Making clear to the employee that their performance is unsatisfactory
- Reviewing performance and setting out the areas of concern
- Reviewing the previous efforts made to support the employee
- Giving the employee an opportunity to explain and what are mitigating factors
- Considering types of training, and other similar support which may be appropriate and how this might be provided or accessed
- Need for an action plan and how to develop using SMART targets (Action Plan template and guide on setting SMART objectives available on the intranet or from HR)
- Is it appropriate to consider withholding the next increment which the employee may be due (see paragraph 3.19/3.20 below).

- 3.9 The formal meeting will be conducted by the manager and the employee should receive at least five working days' written notification of the meeting.
- 3.10 The letter will set out the purpose of the meeting, outline the performance concerns, inform the employee of their right to be accompanied by a union representative or workplace colleague and advise that the meeting is the first stage of the formal procedure. The employee should be referred to Capability Policy on the intranet or provided with a copy if necessary.
- 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 (see 2.18). A written record will be kept of the meeting.

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The Meeting

- 3.12 At the meeting the manager will need to discuss the possible cause(s) of the poor performance, making the employee aware that the meeting is in part investigatory, not disciplinary, with the aim of achieving improvement in performance through support, training, coaching etc.
- 3.13 During the meeting the manager will:
- Clearly state the nature of the concerns and explain the impact that it has on services/colleagues/team
 - Reiterate that they are not being blamed for the problem; that this meeting seeks to resolve the issue through improvement in their performance
 - Give specific examples where their performance has fallen below the required standard or where tasks have not been completed on time or satisfactorily
 - Seek acknowledgement that there are performance issues
 - Ask the employee for an explanation for the unsatisfactory performance, and consider any mitigating factors
 - Restate the standards expected in terms of job tasks, deadlines, outputs and targets
 - Ask employee's opinion on what they can do to achieve improvement in performance
 - Identify any reasonable support required including training and development
 - Set clear SMART targets/objectives/standards, with a realistic timescale for the required improvement, taking into account any mitigating factors
 - Identify an appropriate review period
 - Confirm that an improvement is expected and needs to be maintained otherwise further action may be necessary
 - Keep a written record of the discussion and actions required
- 3.14 If at any point of the discussion the manager considers that the issue is not one of capability i.e. competence, but rather negligence or misconduct, then disciplinary action should be considered.
- 3.15 It is essential that the employee understands exactly what is expected of them, otherwise there is unlikely to be any significant or sustained improvement.
- 3.16 At the end of the meeting the manager should summarise the discussion and agreed action points and remind the employee that the consequences of not achieving the required standard of performance, could ultimately lead to their dismissal.
- 3.17 The outcome of the meeting will be confirmed in writing within five working days. The letter should be accompanied by the action plan detailing actions, timescales and the date of the review meeting.

Written Warning

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- 3.18 The letter should also confirm 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.

Withholding Increments

- 3.19 Employees, who have not reached the maximum spinal column point of their grade, should be informed that their next increment may be withheld if they fail to achieve the required improvement within the agreed review period.
- 3.20 Any decision to withhold an increment must be supported by clear evidence of a failure to reach the required standard.

Review Period

- 3.21 The review period is to allow sufficient time for the employee to improve their performance. The length of the review period will vary depending on the circumstances of the case. A reasonable review period could vary from between two to three months, with a minimum of six weeks.
- 3.22 When deciding on the review period it is important to factor in periods of annual leave, sickness and also where appropriate the availability of any training that may have been agreed as part of the action plan.
- 3.23 During the review, the manager should regularly monitor performance against the targets/objectives. Meetings should therefore be scheduled with the employee to discuss progress being made and their achievements. It is also an opportunity to review the action plan, and modify action points if necessary. As such these will be 1-2-1 meetings. A review form exists to record these meetings and is available from HR.
- 3.24 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.
- 3.25 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. A failure to maintain satisfactory performance during the following 12 months will normally result in a Capability Hearing being convened.
- 3.26 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

4 Procedure: Stage 2 – Capability Hearing

Arrangements for Capability Hearing

- 4.1 This is a formal hearing which may result in dismissal should the employee's performance be deemed to fall short of the required standard.

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- 4.2 The hearing will be conducted by a Chief Officer and a representative from Human Resources will attend in an advisory role. The management case will normally be presented by the manager involved in the stage 1 process.
- 4.3 Employees will receive ideally seven, but minimum of five, working days' written notice of the Capability Hearing. The letter should outline:
- the purpose of the hearing and possible consequences including dismissal or demotion
 - details of the unsatisfactory performance as measured against the required standards of performance
 - the date, time and location of the hearing and the name of the Chief Officer hearing the case
 - their right to be accompanied by a union representative or a work colleague
 - where to access the Capability Policy intranet or if necessary provide a copy
- 4.4 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.
- 4.5 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.
- 4.6 Where the employee is unable to attend a capability hearing and provides a reason for failing to attend, which is acceptable to the panel, the hearing will be rearranged to another day. In making these further arrangements the employee should receive three working days' notice of the rearranged hearing.
- 4.7 Where an employee provides a GP note citing stress as a reason for non-attendance this, in itself, is not sufficient justification to delay the hearing. The employee, through their GP, should provide accompanying detailed medical reason for the employee being unable to proceed with the capability process at that stage.
- 4.8 If an employee is unable or fails to attend the rearranged hearing, it may take place in the employee's absence. In deciding to proceed, the panel must take the circumstances leading to the non-attendance into consideration. The employee's trade union representative or work colleague may attend without the employee as a last resort and will be allowed to present the employee's case. The employee may be allowed to make a written submission as an alternative.

Capability Hearing

- 4.9 The Chief Officer will manage and Chair the proceedings as follows:

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- Invite both sides (employee and management) to be present in the room at the same time
- Introductions and reiterate the purpose of the hearing
- The manager will first present their case, setting out evidence that clearly identifies the employee's shortcomings in relation to the required standards, the support programme offered and calling any witnesses individually
- Questions may be put to the manager and their witnesses by the employee, their representative, the Chair and by the HR Advisor
- The employee and/or their representative will then present their case, calling their witnesses
- Questions may then be put to the employee by the manager, the Chair and the HR Advisor
- Management and the employee will then be asked to sum up their respective cases, with management summing up first
- Both sides will then withdraw from the hearing

Decision

4.10 The Chief Officer will then 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.

4.11 Their decision will be either:

- (i) A final opportunity to improve performance - This would only be where some improvement has been made and the Chief Officer considers that a further short review period would achieve the required level of performance. The review period, generally be no more than 4 weeks, will be determined by the Chief Officer, and will involve monitoring by the manager. This decision may also include the withholding of an annual increment. The written letter of notification will issue a final written warning that a failure to meet the standards required will lead to the employee's dismissal. Should this occur then the Hearing panel will be reconvened.
- (ii) To dismiss the employee with notice
- (iii) Acceptance that the employee has made significant improvements - The letter of notification will advise that satisfactory performance must be maintained for a period of 12 months. Any further lapses would result in a capability hearing being convened.

4.12 Where the decision is dismissal, the notice period will commence immediately once the employee has received written notification of their dismissal.

Demotion or transfer to another post

4.13 Where the employee is deemed not capable of undertaking their current role then demotion or transfer to another post that is within the employee's skills and abilities may be appropriate. This would be in limited circumstances e.g. where the employee has recently been promoted but

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had a record of satisfactory performance in their previous lower graded post.

- 4.14 Such an arrangement can only be made with the agreement of the employee and is subject to availability of a post. If the employee accepts this offer, then the terms and conditions (including pay) attached to this post will be applied. Advice must be sought from Human Resources before any discussions or decision is made to ensure compliance with employment procedures.

5 Procedure: Stage 3 – Appeal

Right of Appeal

- 5.1 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.

Grounds of Appeal

- 5.2 Appeals may be lodged on the following grounds:
- The process followed was procedurally flawed
 - The decision to dismiss was not appropriate and/or reasonable in the circumstances
 - The targets/objectives and or the length of the review period was not appropriate and/or reasonable in the circumstances
 - New evidence has come to light, which if available at the Capability Hearing may have resulted in a different outcome

Arrangements for Appeal

- 5.3 The notification of the appeal must be made in writing to the HR Manager and lodged within five working days of receipt of the outcome from the Capability Hearing. In their letter the employee must clearly set out their reasons for the appeal; it is not enough to merely state the grounds on which the appeal has been made. If further clarification or elaboration is necessary, either or both parties will be asked to provide this information within two working days of the request.
- 5.4 Appeals, other than against dismissal, will be heard by another Chief Officer and a HR Advisor, neither of whom should have been involved in the Capability Hearing.
- 5.5 On receipt of the grounds of appeal, the Chair of the Capability Hearing will be asked to prepare a response to the employee's appeal and to attend the appeal hearing. They may be accompanied at the appeal by the manager who presented the management case at the Capability Hearing.
- 5.6 Witnesses may be called only where their presence is essential to the issue of the appeal. The Chair of the Appeal Panel will determine whether attendance is necessary; both parties should therefore inform the HR

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Adviser at least three working days before the hearing that they wish to bring witnesses and their reason for doing so.

- 5.7 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.
- 5.8 The employee will receive, in writing, five working days' notice of the appeal hearing. They will be provided with management's written submission (see 5.3) and receive a copy of the Capability Policy, either via intranet or hard copy as appropriate.
- 5.9 The letter of notification will also invite the employee to forward details of any witnesses and provide written submissions that they may be relying upon not less than three working days in advance of the hearing.

Appeal Hearing

- 5.10 The hearing will confine itself to the grounds of appeal and will not be a full re-hearing of the original case. New evidence will only be considered where it significantly affects the previous decision and to not allow it would result in an unjust outcome.
- 5.11 The Panel has the discretion to adjourn the hearing for additional information to be acquired if deemed necessary.
- 5.12 The Chief Officer, as Chair, will manage the proceedings and will:
- Invite both the employee, their representative and the management side to be present in the room at the same time
 - Introduce all parties and explain the purpose of the hearing
 - Ask the employee or their representative to present their grounds of appeal, setting out the evidence to support their argument
 - Invite the management side and the panel to put questions to the employee
 - If appropriate, ask the employee to call any witnesses individually
 - Invite the management side and the panel to put questions to the witnesses
 - Call upon the management side to respond to the appeal
 - Allow the employee (or their representative) and the panel to put questions to the management side
 - Ask the manager to call any witnesses individually
 - Invite the employee (or their representative) and the panel to put questions to the witnesses
 - Ask the employee (or their representative) and then the management side to sum up their respective cases
 - Request both sides to withdraw from the hearing to allow the panel to make their deliberations
- 5.13 The 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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- 5.14 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

- 5.15 An appeal against dismissal will be referred by the HR Manager to the Head of Governance to arrange an Employment Appeals Panel. A separate procedure exists for the conduct of the Employment Appeals Panel.
- 5.16 Where possible the Panel should consider the appeal during the employee's notice period.

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