

# **Capability (Performance) policy & procedures**

**prepared by:** human resources (new policy)

**date:** July 2015

**for review:** July 2018

*this page is left intentionally blank.*

## **CONTENTS**

**paragraph**

### *POLICY STATEMENT ON CAPABILITY (POOR PERFORMANCE)*

#### **SECTION 1: GENERAL GUIDING PRINCIPLES**

Introduction	1.0
Scope	2.0
Officers authorised to take capability action	3.0
Definition of capability	4.0
Capability involving Trade Union Representatives	5.0
Managers responsibilities	6.0
Poor performance identified	7.0

#### **SECTION 2: THE CAPABILITY PROCESS**

Stage 1: informal discussion confirmed in writing	8.0
Monitoring and review	9.0
Stage 2: formal review meeting	10.0
Stage 3: final formal review meeting	11.0
Stage 4: capability hearing	12.0
Capability hearing – procedure	13.0
Outcomes	14.0
Officers authorised to take action	15.0
Appeals	16.0
Conduct of the appeals hearing	18.6
Appendix 1	

## **POLICY STATEMENT ON CAPABILITY (POOR PERFORMANCE)**

Chesterfield Borough Council's policy is to ensure fair and effective arrangements exist for dealing with issues of poor performance relating to capability and that, as far as possible, common standards are observed for all employees.

The procedure covers unsatisfactory conduct at work and unsatisfactory work performance where related to skill and/or aptitude. A separate disciplinary procedure applies to cases of misconduct.

This *Capability Policy and Procedure* aims to:

- promote efficient and safe performance of work;
- maintain good employee relations within the council;
- help and encourage staff to achieve and maintain the appropriate standards of conduct that the Council expects of all its employees.

### **Principles**

- No sanctions will be made against an employee until the case has been fully investigated, and a formal review has taken place.
- At every stage in the procedure the employee will be advised in writing of the nature of the performance issues alleged, and will be given the opportunity to challenge the allegations and state his/her case before any action is taken. Written notice will be given of formal reviews and hearings.
- At all formal review stages in the procedure the employee will have the right to be accompanied by a work colleague or union representative of his/her choice.
- Where, after all reasonable measures to support an improvement in performance have been exhausted and the employee is still unable to meet the required standard of performance, alternatives to dismissal, for example demotion, or transfer, may be applied. Withholding of increments may be applied in cases involving performance issues at the final written warning stage.
- An employee will have the right to appeal against a decision to dismiss.

## **SECTION 1: GENERAL GUIDING PRINCIPLES**

### **1.0 Introduction**

- 1.1 The purpose of this policy and procedure is to provide a fair and consistent means of addressing poor performance relating to a lack of skill(s) and aptitudes and is in line with the ACAS Code of Practice 'Dealing with Disciplinary and Grievance Procedures', 2015.
- 1.2 The aim is to bring about a satisfactory level of performance by addressing the reasons behind the poor performance. However, if after appropriate and reasonable support, the required performance standard cannot be achieved by the employee, the council may decide to dismiss or redeploy the individual.
- 1.3 This policy runs parallel with, but is not part of, the disciplinary procedure.

### **2.0 Scope**

- 2.1 This procedure will apply to all established, temporary employees, agency and casual workers employed by Chesterfield Borough Council with the exception of the Chief Executive. The provisions contained within the *Local Authorities (Standing Orders) Regulations 1993* will apply with regard to action in respect of the Head of Paid Service (Chief Executive) and any other officer to whom the regulations apply.

### **3.0 Officers authorised to take capability action**

- 3.1 In respect of any action taken against an employee under Stages 1-3 of the *Capability Procedure*, this will normally be undertaken by the employee's direct line manager as they are best placed to monitor performance and provide support to the employee. Should it be necessary to escalate to a Stage 4 Capability Hearing this will be conducted by the relevant manager with authority to dismiss.

### **4.0 Definition of capability**

- 4.1 The Employment Rights Act 1996 (ERA), defines capability as issues relating to - "skill, aptitude, health or any other physical or mental quality".
- 4.2 This procedure relates solely to poor performance related to skills and/or aptitude. Where an employee states that performance issues are related to an underlying health condition or disability, discuss with HR and consider a referral to OH for advice as reasonable adjustments under the Equality Act 2010 may be required.
- 4.3 Reasonable adjustments under the Equality Act 2010 may require adjustments to be made to the procedure itself and, if necessary, the requirements of a particular job where this may cause a particular

disadvantage to people with a specific disability. If a manager has any doubts, discuss with HR.

4.4 Performance issues related to misconduct are managed under the Disciplinary Policy and Procedure. In determining which procedure is to be followed, managers must establish whether poor performance is an issue of:

- deliberately '**will not**' perform – follow **disciplinary** procedures
- is '**not able**' to perform – follow **capability** procedures

4.5 Capability is a potentially fair reason for dismissal under s.98 (2) (a) of the Employment Rights Act 1996. To comply with the requirement of reasonableness under s.98(4) of ERA 1996, the employer must show that the employee's performance was sufficiently bad to justify dismissal and that it acted reasonably in dismissing the employee for this reason.

## **5.0 Capability action involving trade union officials**

5.1 No capability action will be taken against an accredited trade union representative until the circumstances of the case have been discussed with a full-time regional, district or area official of the trade union concerned. When an accredited union representative may be liable to capability action, the HR Manager, or nominated representative should be informed immediately so as to make contact with the full-time trade union official before proceedings commence.

## **6.0 Manager's responsibilities**

6.1 It is important that managers deal with unsatisfactory performance quickly and effectively, as any inaction may be seen as condoning the poor performance. The longer the issue persists then the harder it may be to resolve.

6.2 It is important that during both the induction process and the probationary period employees are made aware what standards of performance are expected.

6.3 Any performance issues which arise during the probationary period should be addressed during probationary interviews. [See the separate Probation Procedure for performance issues during probationary period.]

6.4 Ongoing feedback should be provided to employees through regular one to one meetings. Although this may be discussed during the biannual Employee Performance and Development (EPD) interviews, managers must not wait until this meeting to raise any issues.

## **7.0 Poor performance identified**

- 7.1 When an issue about performance arises managers should evaluate the situation by assessing and collating evidence e.g.
- what are the indicators which point to the fact that the employee is not meeting the standards required for the job?
  - have there been valid complaints / criticisms from colleagues, customers or other service users?
  - is there factual evidence of inadequate performance, such as poor results/outcomes?
  - has the manager personally observed poor performance?
- 7.2 Before discussing with the employee the manager should consider the following:
- what is the standard expected?
  - what is the presenting problem?
  - what explanations might there be for the presenting problem?
  - what might the consequences be if the issue is not acted upon?
  - is there an obvious solution e.g. training need, job-shadowing, mentoring, reading policies or procedures?
  - what would be a reasonable period in which to expect an acceptable standard? (this may vary depending on the individual circumstances)

## **SECTION 2: CAPABILITY PROCEDURE**

### **8.0 Stage 1: informal discussion confirmed in writing**

- 8.1 When it has been identified that there are concerns about an employee's performance, the manager should arrange for an **informal** discussion.
- 8.2 As the meeting is part of the normal management function the employee is not entitled to be accompanied. However if the employee requests to be accompanied it is recommended that the request be granted.
- 8.3 The purpose of the meeting is for the manager to:
- constructively and objectively advise the employee where performance is not meeting the required standard and why;
  - give the employee an opportunity to respond;
  - jointly agree (if possible) what the underlying problem is (if this is health related refer to HR and OH for advice on the impact of the health condition on performance)

- identify reasonable and appropriate strategies for enabling the employee to meet the required standard;
- commit to provide appropriate support and agree an action plan for action with timescales (see Appendix1)
- confirm the period over which performance will be monitored allowing enough time for training and support to be delivered (which should be of a minimum of 4 weeks),
- confirm appropriate framework for review e.g. monthly review meetings, and
- warn that a failure to improve within the time may result in a formal meeting under Stage 2 of the Capability Procedure.

8.4 The manager should make notes of the meeting and the points discussed and confirm in writing to the employee, enclosing a copy of the signed action plan.

## **9.0 Monitoring and review**

9.1 During the agreed monitoring period the steps in the action plan should be followed in full and the employee should receive regular written feedback.

9.2 The manager should keep under review the appropriateness of the capability procedure. Evidence may emerge that the problem is one of misconduct, in which case the manager must discuss with HR whether the disciplinary procedure should be invoked, or health related in which case OH referral may be appropriate.

9.3 Review meetings should be held as agreed. At the review meetings the employee should be given clear feedback on progress against the required standard. The manager should review the support provided to ensure its suitability and efficacy. Any additional and reasonable support and/or training identified should be considered where appropriate.

9.4 Where at the end of the monitoring period the employee meets the required standard of performance the employee should be informed that no further action will be taken.

9.5 Where the required standard has not been reached within the time period and there is no likelihood of the standard being met, the employee should be informed in writing that, as the required standard of performance has not been achieved; Stage 2 of the procedure is to be activated.

9.6 If, however, there are reasonable signs of improvement and it is clear that the improvement is such that the required standard is likely to be met during an extended period, the manager may decide to extend the monitoring and review period. HR are available to provide support if needed.

## **10.0 Stage 2: formal performance review meeting**



- 10.1 The employee should be notified of the requirement to attend a formal performance review meeting and advised that they have the right to be accompanied by a representative (trade union or work colleague). The notice should be in writing and not less than five working days being the meeting.
- 10.2 The purpose of the meeting will be to:
- review performance during informal monitoring period
  - identify the continuing shortfall in performance
  - consider any extenuating circumstances
  - set formal targets for improvement – action plan (see appendix 1)
  - discuss what further training/ support can reasonably be provided
  - agree a further monitoring period
  - warn that failure to improve within the timescale may result in a formal meeting under Stage 3 of the Capability Procedure
- 10.3 After the meeting, the manager should confirm in writing the points discussed, the agreed action plan and the formal written warning which will remain on the employee's file for a period of 12 months.
- 10.4 There is no right of appeal against a formal warning. However, if the employee feels they are being treated unfavourably then they can raise a complaint under the grievance procedure.
- 10.5 Following the successful completion of a performance monitoring period, the employee's performance will continue to be monitored. If, at any stage during the following 12 months the employee's performance again starts to fall short of the acceptable standard, the manager may decide to initiate Stage 3 of this procedure.
- 10.6 Where the required standard has not been reached within the time period, the employee should be informed in writing that, as the required standard of performance has not been achieved a final formal review meeting at Stage 3 of the procedure is to be held.

### **11.0 Stage 3: final formal review meeting**

- 11.1 If there is still a failure to improve and performance is still unsatisfactory despite previous warnings, then a final formal review meeting will be held as in paragraph 10.2 and a final written warning will be issued by the line manager. This will provide details as with Stage 1 and Stage 2, but will also warn the employee that dismissal may result if there is no satisfactory improvement.

- 11.2 A copy of this final formal review decision will be kept and placed on the employee's personal file. It will remain on the employee's file for a period of twelve months.
- 11.3 If performance does not improve or deteriorates during the final warning period then action will proceed to Stage 4.

## **12.0 Stage 4: capability hearing**

- 12.1 The employee must be notified in writing, not less than 5 working days before the date of the hearing. The notification must include:
- the location, time and date of the hearing and the names of the officers attending the hearing;
  - the facts for consideration at the hearing, detailing the performance standards not being met;
  - the requirement to attend and the entitlement to be accompanied (by a trade union representative or work colleague);
  - the employee can call on witnesses to attend the hearing;
  - confirmation that the hearing may result in dismissal on grounds of capability;
  - confirmation that there would be a right of appeal against any action taken;
  - copies of any documents to be referred to at the hearing.

## **13.0 Capability hearing – procedure**

- 13.1 The capability hearing will proceed as follows:
- i) The presenting officer (normally line manager) will present the case and may call any witnesses
  - ii) The employee (or representative) will have an opportunity to ask questions of the presenting officer and any witnesses called
  - iii) The hearing officer will have an opportunity to ask questions of the presenting officer and witnesses
  - iv) The employee (or representative) will put his/her case to the presenting officer and may call any witnesses
  - v) The presenting officer will have an opportunity to ask questions of the employee and his/her witnesses
  - vi) The hearing officer will have the opportunity to ask questions of the employee and his/her witnesses
  - vii) The presenting officer and the employee will have the opportunity to sum up their case with the presenting officer's submission being received first
  - viii) The presenting officer and the employee will withdraw

- ix) Any advisors to the hearing officer (e.g. HR Manager or a nominated representative) will remain in the room whilst a decision is made
- x) The hearing officer can call either/both parties to return if clarification of certain points are required
- xi) Where it is not possible for the hearing officer to reach a decision that day, both parties will be informed that the decision is to be deferred and confirmed in writing within 5 working days.

## **14.0 Outcomes**

14.1 The hearing officer will reach a decision based on the following:

- i) no capability issue established
- ii) further monitoring period, with continuation of warning (where reasonable progress demonstrated but the standard still not met)
- iii) redeployment
- iv) dismissal with contractual notice.

14.2 Where redeployment is to a lower graded post, depending on the merits of the case, the hearing officer may consider protection of earnings, but this will not be an automatic right.

14.3 Where notice is given, the opportunity for redeployment to an alternative post should be considered, subject to suitable opportunities arising during the notice period.

## **15.0 Officers authorised to take action**

15.1 The employee's line manager may take action up to and including a decision to call a capability hearing.

15.2 Only those nominated officers with authority to dismiss under the Council's *Delegated Authority Protocol* can take the decision to dismiss.

15.3 The ability to dismiss, and therefore to sit as a hearing officer, will be restricted to nominated individuals. Where it is one of these who have issued a formal warning and ultimately decided to call a capability hearing, the role of hearing officer will be undertaken by the appropriate Executive Director or Chief Executive.

## **16.0 Appeals**

16.1 Appeals against dismissal and redeployment may be made.

16.2 An employee may appeal against the decision of the hearing officer within ten working days of written notification of the capability decision. The grounds of any appeal will be based upon this decision, no unrelated matters may be considered. A trade union or work colleague (but not a paid legal

representative) may represent the employee at the appeal hearing. Having re-considered the decision, outcomes may be changed.

16.3 Where an employee appeals against a decision to dismiss, the appeal will be heard by the Appeals and Regulatory Committee. A meeting of the Appeals and Regulatory Committee will be convened within ten working days of the receipt of the notice of appeal, or such longer period as is mutually agreed, at which the appeal will be considered.

#### **16.4 Conduct of the appeals hearing**

16.6 The appeals hearing shall proceed as follows: -

- a) the presenting officer will put the case in the presence of the appellant and representative (if applicable) and may call witnesses;
- b) the appellant will have the opportunity to ask questions of the presenting officer regarding the evidence given and of any witnesses called;
- c) the appeals officer/committee will have the opportunity to ask questions of the presenting officer and witnesses;
- d) the appellant or their representative will put their case in the presence of the presenting officer and may call any witnesses in support of their case;
- e) the presenting officer will have the opportunity to ask questions and the appeals officer/committee will have the opportunity to ask questions of the appellant, their representative and their witnesses;
- f) the presenting officer will have the opportunity to sum up the case;
- g) the appellant or their representative will have the opportunity to sum up their case;
- h) the appellant, their representative and the presenting officer will withdraw;
- i) in the event that the appeals officer/committee wish to clarify any points of uncertainty will recall either/both parties;
- j) after careful deliberation, the appeals officer/committee will recall both parties to deliver a decision on whether to allow or dismiss the appeal. The decision will be confirmed in writing to the appellant within seven days.

16.5 The decision of the appeals officer/committee will be final and there shall be no further internal appeals procedure or action of the appellant, their representative and their witnesses.



IMPROVEMENT PLAN FOR .....

Appendix 1

Area for improvement – (description of where performance is not meeting expectations).	Expectations/targets to be achieved	Support, training or resources required to achieve targets	Dates to be achieved by	Review of targets

Signed.....Date.....  
(manager)

Signed:.....Date:  
(employee)

## Worked example of improvement plan

Area for improvement – (description of where performance is not meeting expectations).	Expectations/targets to be achieved	Support, training or resources required to achieve targets	Dates to be achieved by	Review of targets
1. <i>(name)</i> has failed to follow the correct policies and procedures required of her to be able to undertake her role correctly.	<p><i>(name)</i> is to read and become familiar with:</p> <ul style="list-style-type: none"> <li>• CBC Housing policies and procedures (to be set and monitored in 1:1 supervisions)</li> <li>• Health and Safety policies and procedures including risk assessment</li> <li>• CBC's Code of Conduct</li> </ul> <p>These are to be tested by <i>(manager)</i> with <i>(name)</i> giving a summary of the main points for each procedure at her 1:1 supervision meetings.</p>	<i>(name)</i> to query with her line managers aspects of policy and procedure for which she feels are not clear or understandable to her.	<p>To start 20 Nov '07 and completed by March '08</p> <p>20 Nov '07 25 Sept '07</p> <p>21 August '07</p>	
2. <i>(name)</i> has failed to follow guidance from her line managers.	<i>(name)</i> to apply instruction given by line managers and to ask questions if she does not understand an issue. To be able to apply knowledge and understand your role.	When <i>(name)</i> asks questions/has queries, the manager will arrange time to explain thoroughly.	To start immediately and on going	
3. Motivation: <i>(name)</i> is regularly only attempting work that is set for her as targets in 1:1 supervisions. This work is considered to be routine housing work e.g. completing support plans, reviewing support plans, Carelink emergency contact detail	<i>(name)</i> to prioritise and achieve her routine/regular work without prompt or target setting from managers. To manage her time efficiently and effectively, finding a work pattern for herself that keeps her up to date with her workload. To produce work to	Manager to give advice and support when requested or when a need is identified.	To start immediately and achieved by 25 Sept '07	

forms, checking that pendants and pull cords are working, etc.	a high quality. To be able to complete routine duties without prompt or target setting.			
4.a) Motivation: It has been observed that when <i>(name)</i> identifies an issue, she can often ignore it, e.g. <i>(name)</i> had not arranged cover on the day she attended a meeting even though it was her responsibility to do so, <i>(name)</i> was unable to access a tenant during mornings to complete a support plan review, and this had to be identified by a manager who also had to suggest that she see the tenant during an afternoon.	That <i>(name)</i> is able to identify for herself what needs to be done and find solutions or seek advice. <i>(name)</i> needs to be flexible in her approach to different tenants needs.  When <i>(name)</i> has identified a need or issue, she should act on it, completing the task and not give up or ignore it. <i>(name)</i> is to demonstrate that she is dealing with issues/addressing tenant needs.	Manager to give advice and support when requested or when a need is identified.	To start immediately and on going  25 Sept '07	
4.b <i>(name)</i> seems to put in the minimum effort with most tasks.	<i>(name)</i> to draft her own plans of two projects or tasks that will help motivate her and improve quality or service to customers i.e. chair based exercise classes, social club, etc.		25 Sept '07	
5. <i>(name)</i> appears not to know at times what has been discussed in team meetings, training, and other meetings that she has attended.	<i>(name)</i> to make herself familiar with issues raised in meetings and training. To re-read meeting minutes or training notes so she is able to apply knowledge and understanding within her role. <i>(name)</i> to actively participate in meetings to get the most out of them. To read minutes of meetings when she has been absent and checks her understanding.	To get clarification from her manager if in doubt about her understanding.	To start immediately and on going	



	<i>(name)</i> is to demonstrate that she has taken on board information discussed at meetings by explaining her understanding of agenda items during 1:1 meetings.		21 August '07 and at the following 1:1 meeting after each team meeting.	
6. Attitude: <i>(name)</i> has occasionally shown a carefree attitude towards her role, commenting to others when she has not done her work, in a manner that shows a disregard for standards or quality. <i>(name)</i> can appear to show little interest in her work at times.	To show a positive attitude in her role and in promoting Dales Housing, and that her work reflects a high quality customer care approach. <i>(name)</i> is to take ownership of issues raised with her, addressing them appropriately. <i>(name)</i> has already received extensive customer care training and demonstrated her understanding. <i>(name)</i> is to apply that knowledge and demonstrate by always showing a professional attitude when dealing with both internal and external customers. <i>(name)</i> has recognised for herself that she may occasionally need to be chased up on issues more than once – to demonstrate in 1:1 meetings.	Manager to give advice and support when requested or when a need is identified.	To start immediately and on going	
7. <i>(name)</i> has previously been subject to performance action plans and regular target setting in 1:1 supervision meetings.	<i>(name)</i> to be aware that if she does not meet her targets and sustain them, she will face further disciplinary action which could lead to dismissal.	Manager to give advice and support when requested or when a need is identified	To start immediately and on going	

Signed.....Date.....

Signed:..... Date:

(manager)

(employee)