

## Managing Performance & Capability Policy

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## CONTENTS

<b>1.0 Introduction</b> <b>1.1 Purpose of Policy</b> <b>1.2 Scope</b>	<b>3</b>
<b>2.0 Policy Statement</b>	<b>3</b>
<b>3.0 Duties Standard Wording</b>	<b>3</b>
<b>4.0 Implementing the Capability Procedure</b> <b>4.1 Understanding when to interview</b> <b>4.2 Stage 1 - Informal Capability Management</b> <b>4.3 Stage 2 - Formal Capability Meeting</b> <b>4.4 Capability Warnings</b> <b>4.5 Stage 2 - Formal Review Meeting</b> <b>4.6 Stage 3 - Formal Hearing</b> <b>4.7 Appealing the outcome of Stage 3</b>	<b>4</b>
<b>5. Development, consultation and ratification – standard Wording</b>	<b>11</b>
<b>6.0 Equality and Human Rights Impact Assessment (EHRIA) – Standard Wording</b>	<b>11</b>
<b>7.0 Monitoring Compliance – Standard Wording</b>	<b>12</b>
<b>8.0 Dissemination and Implementation of Policy – standard wording</b>	<b>12</b>
<b>9.0 Document Control including Archive Arrangements – Standard Wording</b>	<b>12</b>
<b>10.0 Reference Documents N/A</b>	<b>12</b>
<b>11.0 Bibliography – N/A</b>	<b>12</b>
<b>12.0 Glossary</b>	<b>12</b>
<b>13.0 Cross Reference</b>	<b>12</b>

## **Introduction**

### **1.1 Purpose of Policy**

This Policy outlines how to manage performance at work and understand where performance is in need of improvement using a management intervention.

### **1.2 Scope**

This policy and its procedures apply to all fixed-term and substantive staff directly employed by the Trust. This policy does not apply to agency, locum, honorary, bank workers or students. Medical Staff should also refer to the Trust's Managing Concerns about Medical Staff policy.

## **2.0 Policy Statement**

- 2.1 Sussex Partnership NHS Trust is committed to providing an efficient and effective service to all service users. In order to achieve this, it is important that all staff within the trust are meeting the requirements of their position.
- 2.2 This policy is intended to provide a clear framework when an employee is failing to meet the standards expected of them due to a lack of capability rather than a refusal to work satisfactorily.
- 2.3 The policy is based on the principle that whenever an employee is failing to meet the requirements of their position, this should be brought to their attention with a clear indication of improvements required and training/help available together with the consequences of failure to improve.
- 2.4 In order to implement the capability procedure managers must be able to demonstrate that they have made reasonable attempts to rectify the problem informally with the member of staff.
- 2.5 Employees have a duty to communicate with management when problems arise which may impact on their work and managers have a duty to listen to staff and take action or offer assistance as appropriate within the scope of trust policies.
- 2.6 The fullest consideration will be given to the employee's circumstances with regard to length of service, past performance and any health, domestic or social factors which may be relevant. The needs of the trust, the safety of its patients, and the effectiveness of its service will however, remain paramount.

## **3.0 Duties**

All Staff have a duty to be familiar with workforce policies.

All staff should comply with the requirements set out in the policies and follow the procedures described within them.

Sometimes common sense and management discretion can mean that moving away from policies and procedures are more helpful to all parties. Where policies and procedures are

not followed, a clear explanation should be provided and agreement reached and documented. Any dispute as a result of a management decision to move away from the policy without an individuals' agreement will be covered by the Grievance Procedure.

## **Support and Representation**

Employees have a right to be accompanied by a single "companion" at all formal stages of this process. This can be a trade union representative, a fellow worker or an official employed by a Trade Union. This companion is allowed to address the hearing to put and sum up the worker's case, can express a view or opinion in an appropriate manner and in relation only to the case, and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case.

In exceptional circumstances there may be an occasion when it is recommended that a third party attends in an advisory capacity which should be with the agreement of those attending. This can be a representative from Occupational Health, Access to Work or an appropriate person who can support the employee such as a Care Worker. Family members or friends are not normally able to attend meetings or hearings.

## **Trade Union Representatives**

Trade union workplace representatives, otherwise known as stewards, are elected representatives whose role includes representing members both individually and collectively. All stewards have basic training in representation and access to regular training courses. They can gain support, advice and information from their branch, paid union officials via their regional offices and their union's online resources. Stewards are bound by the rules and governance structures of their union and are expected to keep up to date with relevant training.

## **4.0 Implementing the Capability Procedure**

### **4.1 Understanding when to intervene**

4.1.1 A feature of highly effective teams is that Supervision and Performance Management takes place regularly, and constructive feedback is given and acted upon. This is normally managed through open two-way dialogue, encouragement, support and the setting of clear goals to enable staff to maintain or improve upon their performance where necessary.

4.1.2 However, there are occasions when staff are unable to fulfill the key requirements of their role and may not be contributing as an equal member of the team. In such cases, it may be necessary to give extra support and attention to a member of staff to enable them to address under-performance. It should be noted from the outset of this procedure, that inability to improve to a sufficient standard could ultimately result in dismissal or alternative work being sought.

4.1.3 The procedure covers the following areas:

- Unsatisfactory work performance
- Inability to demonstrate the level of skill or competence required for the position
- Unsatisfactory attitude or behaviour
- Health problems preventing the employee from attending work or carrying out the full range of duties expected of their role

If the reasons behind the performance problems are unclear then the manager should contact HR for advice about the appropriate procedure.

4.1.4 The procedure should not be used where employees are capable of carrying out their work satisfactorily but are neglecting to do so. In these cases the disciplinary policy should be considered. For performance issues relating to Ill Health, the Managing Sickness and Health Policy should be used.

## **4.2 Stage 1 - Informal Capability Management**

4.2.1 Before deciding to implement the Capability procedure a manager should be able to demonstrate that feedback on performance has regularly been addressed with the member of staff in a timely and constructive manner that can be clearly related to an incident, actions or series of behaviours. Where possible, such feedback should be recorded in a written document such as supervision notes, return to work meetings or an additional supervision note shared with the member of staff.

4.2.2 The manager should meet with the employee to discuss their concerns and inform the employee that informal monitoring will commence. SMART objectives should be set where appropriate and outcomes can be quantified, allowing the employee to comment and contribute to the goals. Improvements required in less quantifiable areas such as behaviour/attitude may be assessed using the principle of how such behaviour/attitude might negatively impact upon others in the working environment. A toolkit for managers is provided for guidance on setting and measuring appropriate objectives, and a checklist is included for the Informal Monitoring meeting which should be completed.

4.2.3 At this stage, the Manager must ensure that they explain the reasons why poor performance is a problem and the consequences for the employee of failing to meet the specified objectives. This will be confirmed in writing and a copy of the action plan will be shared with the member of staff.

4.2.4 Timescales for improved performance should be set, normally between 1-2 months. Timescales will be different in all cases and will be dependent on length of service, severity of performance issues, possible implications of poor performance for the service, the individual's circumstances or reasons for poor performance and previous performance.

4.2.5 A review date should be set in advance, although informal reviews may be held regularly throughout the informal capability management period. These should not be a substitute for normal supervision meetings, but may take place alongside management supervision.

4.2.6 If the employee has met the objectives by the end of the informal monitoring period, then the manager and employee can agree to end the capability management process and return to standard supervision and performance management. In the event there is a relapse in performance standards with good reason e.g. the level of skill needed to carry out the task to a sufficient standard has changed and the person has received the necessary training and support, the process may be repeated with a shorter timeframe for performance to be improved. If however, there is a relapse without good reason the matter will be addressed as a conduct issue and the disciplinary policy will apply.

4.2.7 In the event performance has not improved sufficiently to reach the required standard, the employee should be informed of this at the review meeting and a date arranged to convene a formal stage 2 capability meeting.

4.2.8 There is no right to representation or right of appeal at this stage.

### **4.3 Stage 2 - Formal Capability Meeting**

4.3.1 If performance has not improved to a sufficient standard, by the end of the informal monitoring period, a Formal Capability meeting (stage 2) should be held.

4.3.2 A Formal meeting would be held and the employee's failure to improve during the informal process would be discussed. Employees should be requested to bring with them any evidence of their improved performance, reasons why they may not have met their objectives and details of any other mitigation. The employee has the right to be accompanied by a union representative or a work colleague and should be notified of this in writing. The manager will be accompanied at this meeting by a Human Resources representative.

4.3.3 A template letter to invite the employee to a first stage meeting is included in the Toolkit, as is a checklist for running the meeting.

4.3.4 Possible outcomes of this meeting could be:

- Management agrees that performance has in fact, improved and performance management should return to standard supervision arrangements, or further informal monitoring.
- Performance has not improved against the objectives set & a Formal Capability Warning is issued. Dependent upon the impact that the poor performance has, this can be issued for a period of 3, 6 or 12 months.

4.3.5 Where a Formal Capability Warning is issued, a further period of capability monitoring between 1-3 months should be set. The frequency of monitoring meetings should be agreed at this stage. A Formal Review meeting should be booked at this point to avoid timescales slipping.

4.3.6 This should be recorded so that the objectives, timescales, methods of measurement and support systems are clear for all involved. An example form is included in appendix 4 of the Toolkit.

4.3.7 The manager must write to the member of staff summarising the meeting. A template letter is included in the Toolkit. The manager should include the action plan and invite the member of staff to confirm its accuracy. It must be stated in this letter that failure to improve could result in a capability warning being issued and ultimately lead to dismissal.

#### **4.4 Capability Warnings**

4.4.1 A Capability Warning is a formal warning to advise an employee that their level of performance is unacceptable and that a failure to improve could ultimately result in their dismissal. This warning may only be issued following a formal capability meeting.

4.4.2 The employee's line manager has the authority to issue a maximum of 2 Capability Warnings under this policy in any rolling 12 month period, following adequate review periods.

4.4.3 Live Capability Warnings should remain on file for the specified period of time: 3, 6 or 12 months. At the end of the period, provided that the employee's performance has improved, the warning will be removed from the file. Current "live" Capability Warnings will be used for reference purposes.

4.4.4 The employee is expected to work towards the objectives for improvement agreed in the formal meeting. The manager is expected to ensure that any support agreed is provided to the employee and that all monitoring meetings take place. During the monitoring period, regular meetings should be held and clear evidence of progress towards the objectives should be recorded.

4.4.5 The employee has the right to appeal against any formal action or warnings.

#### **4.5 Stage 2 - Formal Review Meeting**

4.5.1 Following the Formal Monitoring period, the manager should hold a formal review meeting with the employee to discuss their progress against the action plan. The employee has the right to be accompanied by a workplace colleague or a union representative and should be notified of this in writing. A template letter to invite the employee to this meeting is included in the Toolkit.

4.5.2 The formal review meeting should be an opportunity to look back at the evidence collected through the monitoring period and decide on an appropriate way forward.

4.5.3 If there has been an improvement in performance against the standards set in the action plan then there are two possible courses of action:

**(i) Discontinue the formal capability policy.**

- The manager must ensure that robust performance management systems remain in place to monitor the level of performance.
- If performance subsequently drops below the minimum standards required once the process has ended and should a live Capability Warning be in place, it may be appropriate to recommence the process at the stage where it had stopped.
- Where the capability procedure is recommenced this will only be in cases where the original capability issues re-occur.
- If subsequent capability issues arise which are different to those originally identified, the procedure should be followed from the start.

**(ii) A 2<sup>nd</sup> Formal Capability Warning may be issued, and a further monitoring period agreed.**

- This may be where the impact of poor performance is minimal, some improvement has been shown but performance is still not at the required level; or where performance has reached the required level but the manager wishes to see a sustained level of improvement before discontinuing the formal capability procedure.

4.5.4 If there has not been an improvement in performance against the standards set in the action plan then there are two possible courses of action:

(i) Arrange a Stage 3 formal meeting to decide on appropriate ways forward. If a stage 3 meeting is required the meeting can be held as soon as possible but the manager should continue monitoring performance and identifying any improvements until it takes place.

(ii) Agree on alternative action if appropriate. This is only possible if the manager and the employee are in agreement about the most appropriate way forward. Appropriate action could include the following:

- Voluntary Redeployment into an alternative or lower banded post (pay protection will not apply)
- Voluntary early retirement
- Ill health-early retirement

4.5.5 If the manager has failed to agree and provide reasonable support e.g. training then the procedure may not move forward until this has been provided and a reasonable time has elapsed in order for the employee to show improvement.

4.5.6 The manager must write to the member of staff summarising the meeting within 10 working days. A template letter is included in appendix 8 of the Toolkit. The manager should explain the action to follow with clear timescales where appropriate.

#### **4.6 Stage 3 - Formal Hearing**

4.6.1 Due to the potential outcomes at this stage of the process the meeting should be chaired by a senior manager with authority to dismiss accompanied by an HR representative. In addition it may be appropriate to involve a professional representative where the performance issues relate specifically to an area of professional practice. The employee has the right to be accompanied by a union representative or a workplace colleague and should be notified of this in writing. A template letter to invite the employee to this meeting is included in Appendix 9 of the Toolkit.

4.6.2 The manager will be required to present all the evidence that has led them to believe that the capability issue cannot be resolved. This should consist of:

- Objectives and action plans set at both informal and formal stages
- Evidence of where the employee has not met the standards set
- Evidence of support given to the employee

4.6.3 The employee should already have copies of all the relevant documentation but it is good practice to prepare a Management Statement of Case including all the documentation and ideally a chronology of events which should be submitted to the hearing panel in advance of the meeting.

4.6.4 The employee will have the chance to state their case, detailing examples of improved performance, points of disagreement with any of the evidence or information provided by the manager and any mitigating circumstances they may have for failing to meet the required standard.

#### **Possible outcomes of a Stage 3 Capability Hearing**

4.6.5 The manager chairing the meeting should then make a decision about the appropriate action. The options may include:

- Discontinuation of the capability procedure if the chair believes there is insufficient evidence to support the claims made by the manager
- A further monitoring period if the chair believes there to be an opportunity for the issue to be resolved with additional time and support mechanisms
- Redeployment into a more appropriate position for the employee's level of skill, competence or health issues. The manager may recommend appropriate redeployment but there can be no guarantees of a suitable redeployment option unless the current manager has already explored this and secured an appropriate position. If redeployment needs to be sought the chair needs to define the timescale over which this will be sought and what the outcome will be if no redeployment is found i.e. termination of employment. Pay protection would not apply.
- Redeployment into a lower banded post. The current manager will need to advise whether it is possible to downgrade the current job and reduce the level of the duties in order for the individual to be able to perform to an acceptable level. Any re-grading or redeployment would be without protection of existing terms and conditions including pay.
- Dismissal with notice or with pay in lieu of notice, although pay in lieu of notice (PILON) can only be agreed if such provision exists in the employee's contract.

4.6.6 If making a decision to dismiss, the manager chairing the meeting should satisfy themselves that the line manager has taken all reasonable action and that the possibility of alternative employment has been investigated.

4.6.7 The chairperson must write to the employee summarising the meeting within 10 working days. If the decision was to dismiss the letter should include the full reasons for the decision. A letter template is included in the Toolkit.

4.6.8 If a decision other than dismissal was made the letter should include the reasons for the decision and the follow up action that will be taken, by whom and the timescales. A template letter is included in the Toolkit.

## **4.7 Appeals**

4.7.1 An employee may appeal against the outcomes of any formal action taken or warnings issued. The appeal, which must set out briefly the principal grounds on which it is being made, must be made in writing by the employee within ten working days of receiving the written confirmation of the action and addressed to their Director of Service. A copy of the notice of appeal should also be sent to the Director of HR.

4.7.2 Arrangements will be agreed for an appeal hearing to be held as soon as possible.

4.7.3 An appeal panel will be convened ideally comprising of:

- a manager senior in authority to the dismissing officer;
- plus one other senior manager (who may also have specialist knowledge if the matter concerns professional practice); and
- a representative from the HR team.

4.7.4 The decision will normally be given verbally to the employee after the meeting, and the decision will be confirmed in writing within ten working days of the meeting. If the panel does not reach a decision immediately, the meeting will be adjourned and re-convened at a mutually acceptable date.

4.7.5 The chairperson will have the authority to:

- Dismiss the appeal, partially or in its entirety
- Uphold the appeal, partially or in its entirety
- Substitute the penalty with some other alternative

4.7.6 The decision of the chairperson will be final.

## **5. Development, consultation and ratification**

This policy has been developed in partnership with Staff Side colleagues through the HR Policies working group and ratified at both the Trust Partnership Forum and People Committee.

## **6.0 Equality and Human Rights Impact Assessments (EHRIA)**

The policy has undergone an equality and human rights impact assessment.

## **7. Monitoring Compliance**

The HR Department will commission Audits from time to time and maintain statistics and monitor trends which will be reported regularly to the People Committee, a sub-committee of the Board. Updates will take place at the review date or before in line with changes in legislation, case law or best practice.

Some policies are audited annually and published as part of the Equality, Diversity and Human Rights Report to check compliance

## **8. Dissemination and implementation of policy**

This policy will be circulated to all staff by means of communication tools available to the Trust such as Partnership Bulletins, leadership briefings, circulated at team meetings and will be placed on SUSI. New staff will be made aware of the policy at the Trust induction. Paper copies will be made available to members of staff on request. Training for managers will be offered to ensure that they are familiar with the policy and its procedures.

### **9.0 Document Control including Archive Arrangements**

It will be the responsibility of the Sponsor and Author of this policy document to ensure that it is kept up to date with any local, national policy or legislation. The policy will be managed in accordance with the Policy for Procedural Documents.

### **10.0 Reference Documents – Not Applicable**

#### **11.0 Bibliography**

<http://www.acas.org.uk/index.aspx?articleid=2927> ACAS Advisory Booklet: How to Manage Performance

<http://www.cipd.co.uk/hr-resources/factsheets/performance-management-overview.aspx>

Williams, R.S. (2002). *Managing Employee Performance: Design & Implementation in Organizations*. International Thompson Press, London.

### **12.0 Glossary – Not Applicable**

### **13.0 Cross Reference**

If a capability matter arises this policy should be read in conjunction with the following policies:

- Sussex Partnership NHS Trust - Disciplinary Policy
- Sussex Partnership NHS Trust – Managing Sickness and Health Policy
- Sussex Partnership NHS Foundation Trust - Performance Management Policy.