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**PERFORMANCE CAPABILITY POLICY**

**AND PROCEDURE**

Performance Capability Policy

**Contents list** – please select from the list to move to the relevant section

[1. Introduction 3](#_1_Introduction)

[2. Principles 3](#_2_Principles)

[3. Application 4](#_3_Application)

[4. Informal Capability Procedure 4](#_4_Informal_Performance)

[5. Multipurpose Capability Hearings 4](#_5_Multipurpose_Capability)

[6. Formal Performance Capability Procedure 5](#_6_Formal_Performance)

[6.1 Stage One Performance Capability Meeting 5](#_6.1_Stage_One)

[6.2 Performance Capability Review Meeting 6](#_6.2_Performance_Capability)

[6.3 Stage Two Performance Capability Meeting 7](#_6.3_Stage_Two)

[7. Appeals 9](#_7_Appeals)

[7.1 Purpose 9](#_7.1_Purpose)

[7.2 Appeal Hearing 9](#_7.2_Appeal_Hearing)

[7.3 Outcome 10](#_7.3_Outcome)

[Appendix 1 – Capability Performance Improvement Plan 11](#_Appendix_1)

[Appendix 2 – Capability Appeal Form 12](#_Appendix_2)

# 1 Introduction

There may be occasions where, despite appropriate training and support, an employee’s capability to undertake a role falls short of the necessary level of performance for a variety of reasons such as lack of knowledge, skill or ability.

The Performance Capability Policy provides a fair and effective procedure to enable managers to respond to employees’ performance capability problems at work.

Any concerns regarding the performance of an employee will be handled supportively with consistency, objectivity and confidentiality. The primary objective is to support and encourage the employee so that they may achieve improved levels of performance, with dismissal being the last resort.

The provisions in this policy are non-contractual and may be updated from time to time. Whilst it will normally be followed, other than under the exceptions noted below, there may be situations where the format can be altered, in accordance with HR advice on a fair capability process.

# 2 Principles

The full principles that underpin the Performance Capability Policy are outlined in the ACAS Code of practice.

Dealing with performance issues can be a difficult experience for both employee and manager. In order to reduce the impact on those involved, we will strive to ensure:

* The process is as constructive as possible and takes into account both business needs and employee welfare
* All decisions made are fair, consistent and appropriate to the particular circumstances
* Steps are taken to maintain the dignity of all employees involved
* Managers clearly establish the required standards of performance prior to taking formal action
* Employee confidentiality is maintained at all times unless it needs to be breached, for example for safeguarding or health or safety reasons.
* This policy will comply with statutory requirements and will be applied in a non-discriminatory way. Therefore, employees can expect:

To have regular discussions with their manager so that performance issues can be discussed and reviewed.

Any shortcomings in their performance to be raised as promptly as possible with them and the underlying reasons discussed, giving the employee an opportunity to state their case before any decision is made or further action taken.

To receive appropriate and reasonable support, coaching, training and resources to help achieve and maintain a satisfactory level of performance within an agreed timeframe. Reasonableness will be determined with reference to the resources available to the Council.

To be notified of their right to be accompanied by a trade union representative, or work colleague not acting in a legal capacity, at appropriate stages of the formal capability policy and procedure (as outlined below).

To be given a right of appeal against dismissal or formal written warning.

Not to be dismissed without prior notification.

# 3 Application

Although in principle this policy applies to all employees of Mole Valley District Council, it will not apply to:

* Employees completing their probation period.
* Performance that fails to reach the required standard and is believed to be attributable to a wilful refusal to work will therefore be regarded as negligence. This 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 lack of motivation, care, interest or attention. In these cases, the Disciplinary Policy may be more appropriate.

# 4 Informal Performance Capability

Initial concerns regarding the work performance of an employee should be raised within the normal management processes. Reference should be made to notes of 1:1 meetings where concerns have previously been highlighted and the employee should be provided with examples where their work has not met a satisfactory standard. The aim is to ensure that the employee is:

* Made aware of the manager’s concerns about their performance
* Made aware of what those concerns are
* Made aware of how they are falling short of the required standards
* Provided with constructive advice and support to overcome those concerns

# 5 Multipurpose Capability Hearings

In some circumstances, concerns may arise that are impacted by both an employee’s sickness absence and work performance. In these cases, matters may be considered using the principles set out in both the Performance and Sickness Capability Policies at a multipurpose hearing.

Progress and targets will be reviewed through Multipurpose Capability Hearings using the formal capability procedure stages set out below.

# 6 Formal Performance Capability Procedure

## 6.1 Stage One Performance Capability Meeting

If, following set targets and timescales for the necessary and identified improvement, it is considered that the employee has failed to achieve a satisfactory level of performance, the employee will be required to attend a Stage One Performance Capability Meeting. This meeting will usually be chaired by the Line Manager.

The employee will be:

* + Informed in writing about the arrangements made for the performance capability meeting and be provided with any relevant documentation
  + Informed of the purpose of the meeting
  + Informed of the right to be accompanied by a work colleague or Union representative
  + Given a minimum of 5 working days’ notice of the date and time of the meeting – where possible the date should be mutually agreed to allow for the employee to arrange for representation
  + Informed of the opportunity at the meeting to put forward an explanation, either personally or through a representative
  + Informed about the support available to the employee via the Council’s Employee Assistance Programme.

The purpose of the meeting is for the line manager to review concerns regarding the performance standards of the employee’s work. The line manager will need to outline where the employee’s performance was deficient and what improvements were sought in a way that could be measured or assessed.

The employee will then have an opportunity to raise any points that they wish to be considered. They are able to offer an explanation for their performance standards, discuss any mitigating factors and explore any possible solutions.

Non verbatim notes may be taken at the meeting by panel members to support their decision making. Each party may take notes for their own purposes, therefore there is no provision for a copy of these notes to be provided to the employee who may of course take their own notes.

An electronic recording may be made of the meeting.  If so, this will be discussed in advance and will not be done without the employee’s knowledge.

Covert recording is not permitted. It is unlikely to be of good quality and suggests lack of trust in the process or the managers who are conducting it and will be considered as a disciplinary matter. In serious cases, it may be considered gross misconduct.

The Line Manager will then reach a conclusion regarding the issues that have been raised and will make a decision on the basis of the information available.

The Line Manager will make a decision that:

## 6.1.1 Decision – No Further Formal Action Required

If the manager decides that no further formal action will be taken at this time, the employee must be notified of this in writing within 10 days of the date of the meeting. It may be deemed appropriate to maintain a ‘stage one warning’ on file for a specified period (up to 12 months), in which case the employee will be notified. In any case, the employee’s work will continue to be supported and reviewed on a regular basis through normal 1:1 meetings and appraisal discussions.

## 6.1.2 Decision – Further Action Required

Where the appropriate manager decides that the standards of performance remain a concern, it will be necessary for the Line Manager to outline an action plan and timescale in order to allow an opportunity for the employee to improve their performance. This will include:

* + - Setting up a time period for improvement, usually no more than 3 months.
    - Providing the employee with additional instruction, training, coaching or assistance, as appropriate
    - Where applicable (and bearing in mind the dual considerations of the needs of the business and the employee’s wellbeing), exploring flexible working options, or reasonable adjustments to the employee’s work environment
    - Outlining performance standards, targets, volume of work to be achieved

The employee will be made aware that a failure to improve their performance by the end of the agreed timescale could result in invoking Stage Two of the formal Performance Capability Procedure.

Agreed arrangements, timescales, targets, consequences of not correcting the performance shortfalls and a provisional date for a Performance Capability Review meeting will be set out to the employee in writing. Targets may be set out using a Performance Improvement Plan (PIP) as set out at Appendix 1, or other similar document that provides sufficient detail of the areas or concern, required improvements and appropriate support that will be provided.

## 6.2 Performance Capability Review Meeting

At the end of the review period, the Line Manager will write to the employee and arrange a Performance Capability Review Meeting to review the targets set out to them at the Stage One Performance Capability Meeting.

The decision may be made to convene the review meeting before the agreed end of the review period where specific targets have not been met and require discussion or action at an earlier point.

At the Performance Capability Review Meeting, the line manager will consider:

* If sufficient improvement has been achieved. In this case, a written confirmation will be given to the employee that no further formal action will be taken at this stage. Where appropriate, a ‘stage one warning’ may be maintained on file for a specified period (up to 12 months), in which case the employee will be notified. Where similar performance concerns are raised within the specified period, a Performance Capability Review Meeting may be reconvened, and capability proceedings may move to Stage Two of the Formal Performance Capability procedure.
* If targets have not been achieved and there has not been sufficient improvement, the employee will be informed immediately, and a written confirmation will be sent to the employee informing them that a Stage Two Performance Capability Hearing will be considered.

The Line Manager will prepare a report on the employee’s progress against the agreed targets and objectives, including any relevant documentation to support their decision to request a Stage Two Performance Capability Hearing.

The report will be provided to the relevant Exec Head who will decide if a Stage Two Capability Hearing is an appropriate course of action. If so, the Exec Head will convene a Stage Two Capability Hearing or appoint an appropriate Business Manager or SLT member to act on their behalf.

Where additional information or review is required, the Exec Head will set out the requirements in writing to the Line Manager and employee.

## 6.3 Stage Two Performance Capability Hearing

A Stage Two Capability Hearing will be called to discuss the continuing concerns around the employee’s performance.

To be chaired by the relevant SLT member (or BMT where appointed) and supported by an HR Adviser. The Line Manager (decision maker from stage one) will present the case with the employee and their representative (if desired) in attendance.

The employee will be:

* Informed in writing of the date and time of the hearing with a minimum of 5 working days’ notice. Where possible, the date should be mutually agreed to allow for the employee to arrange for representation
* Informed of the purpose of the hearing
* Provided with the line manager’s report and any relevant supporting documentation
* Informed of their right to be accompanied by a work colleague or their trade union representative
* Informed that they will have the opportunity at the hearing to put forward an explanation, either personally or through a representative
* Informed that one of the potential outcomes of the hearing could be dismissal/termination of contract of employment with Mole Valley District Council
* Advised of the Council’s Employee Assistance Programme.

At the Hearing, the Line Manager will outline where the employee’s performance was deficient and what improvements were sought in a way that could be measured or assessed.

Note taking applies as at section 6.1 (Stage One Performance Capability Meeting).

The Stage Two Hearing Chair will review all information and provide their decision to the employee typically within 5 working days of the hearing, either face to face or in writing.

## 6.3.1 Potential Outcomes

The Hearing Chair must decide whether the arrangements to manage the employee’s performance have proved to be successful and the employee’s performance has sufficiently improved, and that suitable support was provided. If the manager considers that the employee’s performance remains less than satisfactory, they may decide:

1. To allow more time for improvement, backed by a stage two warning if considered necessary (Up to 18 months). If the decision is to allow further time for improvement, the Stage Two Hearing may be reconvened on one further occasion. At this reconvened hearing, the Chair will decide whether the employee has reached a sustained and satisfactory level of performance.; or
2. To dismiss the employee from the current role but seek to find suitable alternative work during the notice period; or
3. To dismiss the employee without recourse to seeking alternative employment.

If the Stage Two Hearing Chair decides the employee has reached a sustained and satisfactory level of performance, the employee will be informed in writing within 10 days of the hearing, and this will mark the end of the capability procedure for the employee for the given instance. However, where there are live warnings on their file, these will continue in force for the duration of the warning.

# 7 Appeals

Employees have the right to appeal within the formal performance capability stages:

Following formal action at stage one and two of the procedure

Following the decision to dismiss by reason of capability and the issue of a dismissal notice.

Employees who wish to exercise their right of appeal must do so by writing, using the Appeal Form set out at Appendix 3. The appeal should be made to the decision maker at the stage of the capability process to which the appeal refers (unless a different name is confirmed in the decision letter to the employee) within 10 working days of receipt of their capability meeting outcome. The manager will make arrangements for appointment of an Appeal Hearing Manager for consideration of the appeal. HR should be copied into the appeal and the hearing arrangements.

## 7.1 Purpose

The purpose of the appeal is to review the decision taken by the Capability Meeting Manager and not to re-hear the case.  The employee should set out clearly the grounds for their appeal, including provision of relevant documentary evidence and how they would like the matter resolved. Grounds for appeal should relate to one or more of the following:

* + **The procedure** - an appeal can be lodged where an employee can demonstrate that the sickness capability procedure was applied unfairly or incorrectly.
  + **The facts** - an appeal can be lodged where the employee can demonstrate that the facts considered were not relevant; that the facts were not accurate; or where there are new facts/evidence which need to be considered that have come to light subsequent to the meeting/hearing.
  + **The decision** - an appeal can be lodged where the employee can demonstrate that the sanction received is disproportionate to the charges found taking into account the evidence/mitigating circumstances presented or where it is disproportionate to the outcome in other similar cases.

The appointed Appeal Hearing Chair will review the points of appeal and determine if there is a case to answer. Where it is determined that there is no case to answer the Appeal Hearing Chair will set out the reasons to the employee in writing. Where it is determined that there is a case to answer, an Appeal Hearing will be convened.

## 7.2 Appeal Hearing

## The Appeal Hearing Chair should arrange a hearing within 10 working days of receipt of the appeal, giving the employee 5 working days’ notice of the hearing (where it is not possible to give this notice, the employee will be advised of the reasons in writing and a reasonable alternative timeframe set).

The hearing may be held in person or virtually. Where a hearing cannot be convened within a reasonable timeframe (e.g. due to absence) or a hearing is not deemed to be conducive to the timely and successful conclusion of the appeal, the Appeal Hearing Chair may opt to conducted any necessary investigation and deliver their findings in writing. The most suitable approach will be determined by the Appeal Hearing Chair depending on the needs of the case, and will be outlined to the employee in writing.

The employee is entitled to be accompanied/supported by a trade union representative or a workplace colleague. The Appeal Hearing Chair will be supported by a member of the HR team.

The Appeal Hearing Chair will consider the grounds put forward for appeal and assess whether or not the conclusion reached in the formal Capability Meeting was appropriate. It should not be a rehearing of the original process, but rather a consideration of the rationale for being dissatisfied with the outcome. The Appeal Hearing Chair may wish to speak to the decision makers from previous stages of the Capability process, where clarity over decisions made during the original meeting/hearing is required. They may invite them to attend the Appeal Hearing where this supports their considerations.

Where the reason for the appeal may impact actions from the Capability Meeting outcome, these actions need to be put on hold until the appeal has reached an outcome. The Appeal Hearing Chair is responsible for ensuring this i.e, that any actions from capability meeting/hearing outcome are put on hold where necessary.

## 7.3 Outcome

The decision of the Appeal Hearing Chair as to whether the points of appeal are upheld or not will begiven verbally to the two sides at the end of the hearing and/or provided in writing, normally within five working days. If it is not possible to respond within 5 working days because, for example, some investigatory work needs to be completed, the manager will give the employee a written explanation of the reason for the delay and a reasonable time frame for a response.

Where there are several elements to the capability appeal, a decision on whether or not to uphold each element should be made and communicated in the written response. In addition to stating whether the appeal is upheld, the written response should also set out what, if any, actions are required.

The decision of the Appeal Hearing Chair is final and there is no further right of appeal.

# Appendix 1

# Performance Improvement Plan

|  |  |  |  |
| --- | --- | --- | --- |
| Your name |  | Manager’s name |  |
| Personnel number |  | Date of commencement |  |
| Job Title |  | Date of review |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Set the objectives to be achieved by the end of the review period and identify any support and development required. Ensure that progress is reviewed regularly throughout the period and assess whether objectives have been met by the end of the review period. | | | | |
| Objectives/ behaviours | Actions/ targets | Support/ development required | Review | Manager’s assessment |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
| **Have the requirements of the Performance Improvement Plan been met?** If met, then continue to monitor performance through regular supervision. If not met, then progress to stage one of the formal Capability Procedure. Contact HR for further support. | | | | Met/ Not met |
| Record of conversation signed by:  ---------------------------------------------- -----------------------------------------------------  Post holder’s signature and date Manager’s signature and date | | | | |

# Appendix 2

# Capability Appeal Form

Employee Name:

Job Title:

Team:

Manager to whom the capability appeal is addressed:

Name of representative (if any):

1. Outline the nature of, and reasons for, your appeal providing any supporting documentation.

2. Please state the name and job title of the manager who held your capability meeting and explain why you do not think your capability has not been conducted and/or resolved satisfactorily.

3. What specific action(s) would you like management to take to resolve this issue?

Signed: Date:

To be completed by manager receiving the appeal form:

Date received ………………..... Date copied to HR ......…………..

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Version** | **Version Status** | **Date** | **Version Comment** | **Version Author** |
| V1.1 | Final SLT draft | SLT meeting 7/10/21 | For SLT approval for document to be shared with Business Managers and Staff Hub.  SLT given 2 weeks to review and consider | KI |
| V1.2 | SLT amends discussed and agreed | SLT meeting 21/10/21 | Final SLT approved draft for BMT, Staff Hub consultation  (2 weeks – 25/10/21 until Monday 8/11/21 10.00 am) | KI |
| V1.3 | Amends discussed and agreed post Hub/BMT consultation | SLT meeting 11/11/21 | Agreed amendments following consultation | KI |
| V2 | Proposed Policy for all staff consultation | Week comm 15/11/21 | Policies out for all staff consultation (2 weeks) | KI |
| V2.1 | Amends made post consultation above | SLT meeting  2/12/21 | Proposed amendments following consultation for SLT discussion and approval | KI |
| V3.1 | FINAL (pre-formatting) | Week comm 6/12/21 | Policy finalised for publication and implementation | KI |
| V3.2 | Final (formatted) | Anticipated December 2021 | Final version post formatting | Comms |
| V4 | Review | 2024 | Policies to be reviewed at least every 3 years or in the event interim changes are needed (e.g. changes in legislation, work practices). | KI |