

Introduction

Newport City Council is committed to providing a high standard of service to all service users and citizens of Newport and recognises the need to maintain and improve Council services and standards.

All employees have a contractual responsibility to perform their duties to a satisfactory standard and be accountable for the standard of their work and quality of services delivered.

Where it is identified that the required standards of performance and competency are not being achieved, the issues must be addressed by both the employee and their manager. The manager must provide information supporting their concerns regarding the employee's standard of performance.

Aims of the Policy

The Council aims to encourage all employees to maximise their performance, including work standards, productivity and knowledge; providing them with the opportunity to understand their capability and the opportunity to develop and improve.

Scope

This policy applies to all Council employees with the following exceptions:

- Employees in their probationary period; the Council's Probationary Period Policy should be used.
- Newly qualified teachers during their induction period, who are subject to the provisions of the Education (Induction Arrangements for School Teachers) (Wales) Regulations 2003.

School Based Employees

This policy is commended to individual school Governing Bodies for adoption. If adopted, the policy will apply to all employees under direct control of that Governing Body.

To be read in conjunction with:

Capability Guidance

1.0 Principles

- 1.1 Section 98(3) of the Employment Rights Act 1996 defines 'capability' as "the ability of a member of staff to perform required work to a satisfactory standard by reference to skill, aptitude, health or any other physical or mental quality".
- 1.2 The overall purpose and intention of the *Capability Procedure* is to provide a positive and structured approach to resolving issues of unsatisfactory performance in the work place.
- 1.3 Employees are required to attend all meetings / hearings that take place in accordance with the *Capability Policy and Procedure*. If the employee is unable to attend a meeting / hearing due to unforeseen circumstances they must advise their manager of this as soon as possible. A decision may be made to rearrange the meeting; alternatively the employee may be given the opportunity to make written representations to the meeting or to send a Trade Union Representative or work colleague on their behalf.

If the employee fails to attend the meeting without prior notification and / or a reasonable explanation, the hearing will proceed in their absence and a decision will be made based on all the information available at the time of the meeting.
- 1.4 At all formal stages of the procedure, the employee should be advised that they have the right to be represented by a Trade Union Representative or a work colleague. Where an employee's representative is unavailable to attend a formal hearing, [one alternative date within seven calendar days of the original date should be arranged](#). Should the employee or their representative be unable to attend the re-arranged date, the Hearing will be held in their absence or written representations will be accepted.
- 1.5 Normal performance and capability standards will apply to Trade Union Representatives as Council employees. No formal action in accordance with this policy should be taken until the relevant full-time officer of the Trade Union concerned has been notified.

- 1.6 If at any stage of the procedure, an employee is absent due to sickness, advice must be sought from the Council's Occupational Health Adviser to ensure that the capability procedure is not unduly delayed. Employees must be aware that the capability procedure will not cease due to their absence on sickness grounds.
- 1.7 There may be occasions when an employee's performance is satisfactory throughout the period of a live warning only to lapse soon after its expiry. Where a pattern emerges and/or there is evidence of abuse, the employee's performance record should be borne in mind in determining whether a warning should be issued for a longer period of time or progression to Stage 2 should be considered.
- 1.8 At **any** stage of the procedure consideration may be given to whether it is appropriate to explore redeployment for the employee, including redeployment to a post at a lower grade than that of the employee's substantive post. Redeployment will only be considered where a fully funded vacancy exists. An employee subject to the capability procedure would not take precedence over other employees on the Council's Redeployment List, and therefore redeployment to an alternative post cannot be guaranteed. Where redeployment to a lower graded post is agreed, the provisions of the Council's *Detriment Scheme* would not apply.
- 1.9 In some cases the employee may refuse to accept that a performance problem exists. In these circumstances the manager should continue to follow the procedure. If the employee refuses to accept and respond to the support provided, and the performance does not improve to an acceptable standard, it may be necessary to proceed straight to Stage 2 of the procedure.
- 1.10 For specific posts, the Council is required by law to report cases of serious / professional incompetence to professional registration bodies e.g. social workers, teachers, educational psychologists, solicitors. Where applicable, the Council will make such referrals promptly, in accordance with the specific legislative requirements and the relevant registration body's procedures. The Council will provide full co-operation to the registration body in their investigations, which will include the disclosure of Council documentation where required.

2.0 Capability Procedure

2.1 Initial Support for Employees

Before commencing the capability procedure, the manager must ensure they are satisfied that appropriate informal support has been provided to the employee to assist them in maintaining a satisfactory standard of performance. Guidance on the provision of appropriate support for employees where there are performance concerns can be found in the [Capability Guidance](#).

There may be instances where the performance standards are considered to be so serious or too numerous to be dealt with informally and therefore the formal capability procedure should commence. Should the manager have these concerns advice should be sought from Human Resources before proceeding to the formal capability procedure.

Where the performance concerns relate to a Head of Service / Head Teacher, the capability procedure should be managed by a Strategic Director / Chair of Governors or nominated member of the Governing body.

2.2 Capability Procedure - Stage 1

- 2.2.1 Where the employee fails to improve sufficiently following appropriate informal management support, or the performance standards are considered to be so serious or too numerous to be dealt with informally, then the manager should inform the employee that the formal capability procedure will be commenced and a formal Capability Hearing will be arranged. At Stage 1, this will be heard by the appropriate Section Head / Head Teacher (or their nominated representative), who will chair the Hearing.

School-based Employees

In a school, if the Head Teacher is the manager presenting the Capability case, the case will be heard by a nominated member of the Governing Body. In these circumstances, references to Head Teacher in Section 2 should be read as referring to the nominated Governor. The nominated Governor should not be a staff governor.

- 2.2.2. [The employee should be notified of the date and arrangements for the Hearing in writing with a minimum of seven calendar days notice.](#) All documentation relating to the management case must be forwarded to the employee and the Chair of Capability Hearing a minimum of seven calendar days prior to the date of the Hearing by the manager. Should the employee wish to submit any documentation in support of their case, this must be provided to the Chair of the Capability Hearing (with a copy to the manager) no less than 48 hours prior to the date of the Hearing.
- 2.2.3 The format of the hearing will follow the process outlined in the [Capability Hearing Format Document](#), following which the Section Head / Head Teacher (or their nominated representative) will determine one of the following outcomes:
- i. [The employee's performance is satisfactory and no further action will be taken.](#) The employee must be reminded of the requirement to sustain a satisfactory standard of performance and the consequences for failing to do so.
 - ii. The employee's performance is unsatisfactory and therefore the employee will be issued with one of the following warnings:
 - [First Written Warning](#)
A first written warning will be considered where, despite the provision of previous advice and guidance, the employee has failed to improve to the standard required.
 - [Final Written Warning](#)
A final written warning will be considered either where, despite the issue of a written warning, the employee has failed to improve to the standard expected, OR where the employee's performance falls so far short of a satisfactory standard that the issuing of a final written warning is justified.
 - iii. [To extend the review period up to a maximum of four working weeks.](#) This can only be applied where the employee is already in receipt of a warning.

Where a warning is issued the employee must be set a review period of 6 working weeks and also be provided with a [Performance Improvement Plan \(PIP\)](#). The PIP should be drafted by the Chair of the Capability Hearing in consultation with the manager. This information (confirmatory letter and PIP) must be sent to the employee by the Chair of the Capability Hearing within seven calendar days of the Capability Hearing and should confirm the time frame of the review.

- 2.2.4 All formal warnings issued as part of the Capability Policy will remain in force for 12 months from the date they are issued. They will be disregarded for purposes of Capability after this time period if the employee has sustained a satisfactory standard of performance. If at any point during the time the warning is live the manager determines that the employee's performance, in any part of their duties, falls below a satisfactory standard, they will be notified that a further Capability Hearing will be arranged.

If an employee has a period of long term absence from work i.e. sickness absence, unpaid leave, during the period of a live Capability warning, the line manager may determine that consideration needs to be given to an extension of the warning in order to take account the duration of the absence. The decision on extension rests with the Chair of the Capability Hearing and in order to consider this proposal a Capability Hearing should be arranged.

In addition to the issuing of a formal warning, the Section Head / Head Teacher (or their nominated representative) may also consider whether it is appropriate to explore redeployment for

the employee to an alternative post in accordance with Section 1.8 of this policy.

2.3 Review Period

- 2.3.1 During a review period, the manager will support the employee and monitor their performance against the objectives / targets set in the PIP. At the end of a review period, the manager will provide feedback to the employee and determine whether the employee has achieved a satisfactory standard of performance.
- 2.3.2 Should the manager determine that the employee [has achieved a satisfactory standard of performance](#) during a review period this will be confirmed in writing and the employee will be reminded of the expectation of a sustained satisfactory standard of performance, the consequence of failure to sustain this standard and the expiration date of any previous warning.
- 2.3.3 Should the manager determine that the employee [has failed to achieve a satisfactory standard of performance](#) during a review period, they will be notified that a further formal Capability Hearing will be arranged with the appropriate Section Head/Headteacher. Where an employee has already been issued with a Final Written Warning, the employee will proceed to Stage 2 of the Capability Policy.

2.4 Capability Procedure - Stage 2

- 2.4.1 A Stage 2 Capability Hearing may be arranged in the following circumstances:
- Where the employee has been issued a final written warning under Stage 1 of the capability procedure and has failed to achieve the required performance improvement
 - Where the employee fails to accept there is a performance problem
 - Where the manager considers that the performance concerns are so serious or too numerous to be dealt with under Stage 1
 - Where the manager determines a pattern has emerged or there is evidence of abuse

A Stage 2 Capability Hearing will be heard by a Head of Service as the Chair of the Capability Hearing or, in the case of a maintained school, the Governing Body's Staff Discipline and Dismissal (SD&D) Committee.

- 2.4.2 [The employee should be notified of the date and arrangements for the Hearing in writing with a minimum of seven calendar days notice.](#) All documentation relating to the management case must be forwarded to the employee and the Chair of Capability Hearing / SD&D Committee a minimum of seven calendar days prior to the date of the Hearing by the manager. Should the employee wish to submit any documentation in support of their case, this must be provided to the Chair of the Capability Hearing / SD&D Committee (with a copy to the manager) no less than 48 hours prior to the date of the Hearing.
- 2.4.3 The format of the hearing will follow the process outlined in the [Capability Hearing Format Document](#), following which the Chair of the Capability Hearing/ Staff Discipline and Dismissal Committee will determine one of the following outcomes:
- i. [The employee's performance is now satisfactory and no further action will be taken at this time.](#) The employee's performance will continue to be monitored through the normal performance management processes and a satisfactory standard of performance must be sustained. The final written warning previously received will remain on file until the date of expiry. (LINK to letter)
 - ii. The employee's performance is unsatisfactory. The Chair of Capability Hearing / Staff Discipline and Dismissal Committee will then determine **one** of the following outcomes:
 - Dismissal of the employee on grounds of incapability. This must be confirmed in writing ([Corporate](#) Letter) ([School](#) Letter)

- [Extension of the current Final Written Warning for no longer than an additional 12 months](#)
- [Redeployment into an alternative post in accordance with point 1.8 of this policy.](#)
- To [extend the review period up to a maximum of four working weeks](#) and reconvene the Hearing at the end of this period.

3.0 Appeals Procedure

- 3.1 An employee has the right of appeal against any formal action taken as a result of a Capability Hearing at either Stage 1 or Stage 2. If the employee exercises their right of appeal, the Appeal Hearing decision is final and there is no further right of appeal.

Intent to appeal must be notified in writing within seven calendar days of the date of the formal capability action and include the grounds for appeal.

Where an employee appeals against the issuing of a First or Final Written Warning and a review period is set as a result, the review period will not normally be held in abeyance pending the outcome of the appeal hearing. The employee will be expected to continue to work towards the targets identified in the PIP with the manager support whilst arrangements are made for the appeal hearing.

3.2 Stage 1 Appeals

- 3.2.1 An employee who wishes to appeal against formal action under Stage 1 (i.e. the issuing of a written or final written warning) has the right of appeal to the manager immediately senior to the one who has issued the warning, stating their grounds of appeal.

School-based Employees

In a school, an employee who wishes to appeal against formal action under Stage 1 (i.e. the issuing of a written or final written warning) which was determined by either the Head Teacher or a nominated Governor, has the right of appeal to the Governing Body's Staff Discipline and Dismissal Appeal Committee. The letter of appeal must be addressed to the Clerk to the Governing Body, and must state the employee's grounds of appeal.

If the Stage 1 appeal is against the determination of the Head Teacher's nominated representative, the employee should appeal to the Head Teacher. The letter of appeal must be addressed to the Head Teacher, and must state the employee's grounds of appeal.

3.3 Stage 2 Appeals

- 3.3.1 An employee who wishes to appeal against dismissal has the right of appeal to the Members' Appeal Panel. The letter of appeal must be addressed to the Head of People and Transformation and must state the employee's grounds of appeal. An employee who wishes to appeal against other action, short of dismissal, under Stage 2 has the right of appeal to the relevant Strategic Director. The letter of appeal must be addressed to the relevant Strategic Director and must state the employee's grounds of appeal

School-based Employees

In a school, an employee who wishes to appeal against formal action under Stage 2, including dismissal, has the right of appeal to the Governing Body's Staff Discipline and Dismissal Appeal Committee. The letter of appeal must be addressed to the Clerk to the Governing Body, and must state the employee's grounds of appeal.

3.4 Appeal Hearing and Outcome

- 3.4.1 The format of the Appeal Hearing will follow the process outlined in the [Capability Appeal Hearing Format Document](#). The Appeal Hearing is a re-hearing of the case and will consider whether the sanction imposed is appropriate. If the outcome of the appeal is that a lower sanction should be issued, the extent of that sanction must be specified.

3.4.2 Following an appeal hearing the employee should be notified of the outcome in writing. In certain circumstances it may not be possible to reach a decision during the hearing process. Should this be the case, the employee should be notified at the end of the hearing of the expected date by which a decision will be made. This date will be within seven days of the date of the Hearing.

School-based Employees Only

In a school, where the Staff Discipline and Dismissal Appeal Committee upholds the original Committee's decision that the employee be dismissed on grounds of incapability, this will be confirmed to the employee in writing. The employee must be informed of the following:

- *That their appeal has not been upheld and the decision that they be dismissed from their employment is therefore confirmed (LINK to letter)*
- *That a formal letter of termination of contract of employment will be sent to them by the Chief Education Officer*

The Clerk to the Governing Body will notify the Chief Education Officer of the decision of the Staff Discipline and Dismissal Appeal Committee to dismiss the employee on grounds of incapability. Within 14 days of receipt of this notification, the Chief Education Officer will formally terminate the employee's contract of employment on grounds of incapability, and provide details of their notice period.

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