



EAST HERTS COUNCIL
CAPABILITY POLICY AND PROCEDURES
MAY 2006

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1. **Purpose**

- 1.1 The Council's Capability Procedure has been established to help and encourage all employees to achieve and maintain appropriate standards of performance and attendance in support of its Mission Statement and Core Values.
- 1.2 The Capability Procedure takes account of the Employment Act 2002 (Dispute Resolution) Regulation 2004, The Disability Discrimination Act 1995 and (Amendment) Regulations 2003 and has been designed to uphold the principles of natural justice. (Other legislation relevant to this procedure is the Employment Act 1999.)

2. **Principles of the Capability Procedure**

- 2.1 No formal capability action will be taken against an employee until all other options have been exhausted.
- 2.2 At every stage in the capability procedure, the employee will be advised of the nature of the complaint against him/her and will be given the opportunity to prepare and state their case before any decision is made.
- 2.3 At all stages the employee will have the right to be accompanied by a union representative, work colleague or other companion. If the employee chooses to be accompanied by a companion, they must make it clear who the companion will be prior to any meetings taking place.
- 2.4 Management will be supported by Human Resources.
- 2.5 An employee will only be dismissed on the grounds of incapability if all other options have been exhausted.
- 2.6 The employee will have the right to appeal against any sanction imposed.
- 2.7 Managers should consult Human Resources for guidance on the use of this procedure to ensure consistency of approach.

- 2.8 If a grievance is raised that relates to an active capability case management will give consideration to suspending capability action until the grievance has been dealt with. The decision in such situations will be made on a case by case basis and will be at the discretion of management.
- 2.9 The Council is committed to ensuring equality in all its dealings with staff. Therefore managers should consider whether an employee requires additional support

3. Scope of the Procedure

- 3.1 The Procedure does not apply to employees at chief officer level and above.
- 3.2 The Procedure should be used to address concerns over the attendance or performance of employees where informal means have been unsuccessful.
- 3.3 The Procedure complies with the statutory duty to protect the employee against unfair disciplinary measures whilst enabling managers to fulfil their responsibility to manage their services.
- 3.4 For issues relating to unauthorised absence or persistent lateness the Disciplinary Procedure should be used.

4. Dealing with attendance issues

- 4.1 Dealing with long term or persistent ill health absence can be complicated and managers should seek advice from Human Resources before tackling the problem.
- 4.2 Managers should work with employees on improving attendance.
- 4.3 Reference should be made to the absence management procedures in the first instance.

5. Dealing with performance issues

- 5.1 It is important to raise concerns with employees at an early stage and not wait to address the matter during the PDRS cycle.
- 5.2 Informal efforts should be made in the first instance to address performance issues. Areas for improvement should be agreed, training and other forms of development identified and a timescale for improvement agreed.

6. Record Keeping

- 6.1 Records should be kept of all meetings with any actions arising and should be held by the manager, who should provide a copy for the employee so that they can record any notes if they so wish.

7. The Capability Procedure

- 7.1 This procedure should be invoked if the Head of Service forms the opinion that:-
- The employee is not co-operating;
 - The employee is not achieving the required level of improvement;
 - The employee is making some progress but is unlikely to do so within a reasonable timescale
 - It becomes apparent that a key part of the action plan to achieve the required standard (e.g. a training course) is not available within a reasonable timescale or at a reasonable cost.
 - In sickness cases involving long term absence, when occupational sick pay has been exhausted with no prospect of a return to work.
- 7.2 Guidance on the conduct of capability hearings is set out in Appendix 1.

7.3 HR advice should sought before commencing stage 1.

8. Stage 1

8.1 A meeting will be called at which the Head of Service will discuss their concerns, explain the seriousness of the situation and, depending on the employee's response may issue a verbal caution that the employee's future employment is in jeopardy, which will be confirmed in writing;

8.2 The verbal caution will be accompanied by a two-month period of intensive monitoring during which time the employee will be required to demonstrate a sustained improvement.

8.3 A further meeting will be called at the conclusion of the two-month period of intensive monitoring to discuss progress, at which the Head of Service *If the employee appears not to be responding, may apply a further two-month period of intensive monitoring, or refer the case to Stage 2.*

8.4 Stage 1, with its rounds of intensive monitoring and review may continue for as long as the Head of Service feels that the member of staff is making sufficient progress.

8.5 Once the member of staff has achieved sustained, acceptable improvement action under the Capability Procedure will cease.

9. Stage 2

9.1 The Head of Service will refer the matter to his/her Director (Hearing Officer Stage 2) to hear the case, providing details in a "Management Statement".

9.2 The Hearing Officer Stage 2 will arrange a meeting to hear the case and will write to the employee setting out the concerns and advising the employee that the meeting will determine whether dismissal is appropriate.

- 9.3 The management statement setting out the details of the case which has led to formal capability action will be included with the letter.
- 9.4 The employee and management may be accompanied as set out in 2.3 and 2.4 above.
- 9.5 The Stage 2 meeting may have one of two outcomes:
- A final two-month period of intensive monitoring with a written caution that if the employee fails to demonstrate a sustained improvement they will be dismissed
 - or
 - Dismissal with notice.
- 9.6 The employee will be advised of the outcome of the hearing by the Hearing Officer Stage 2 within the timescales set out in 12.1. below and of the right to appeal against the decision if they are not satisfied with it.

10. Stage 3

- 10.1 If the employee wishes to appeal they must do so in writing within the timescales set out in 12.1. below, stating the grounds for the appeal.
- 10.2 The Hearing Officer Stage 2 will refer the matter to the Head of HR who will arrange an appeal hearing.
- 10.3 Further evidence may be introduced by either side *if* it is relevant to the grounds for the appeal.
- 10.4 The appeal hearing will follow the format of the Stage 2 hearing and the decision of the Chief Executive will be set out in writing.
- 10.5 The appeal hearing will not have to take place before the sanction given at Stage 2 takes effect.

11. Attendance at Hearings

- 11.1 If the date set for a meeting is not convenient for the employee's companion, the employee should suggest an alternative date within 5 working days of the date set for the meeting, unless agreement is obtained on both sides to alter this requirement.
- 11.2 If the employee fails to offer an alternative date within 5 working days of the date set for the meeting the manager will set the time and date of the meeting, which will proceed without the employee's companion if they are unable to attend.
- 11.3 The employee must take all reasonable steps to attend the hearing and must provide a medical certificate if they are unable to attend due to sickness. Under these circumstances management will offer a second date.
- 11.4 If the employee fails to attend, does not provide a medical certificate or is unable to provide a good reason for non-attendance, the capability issue will be considered in the employee's absence.
- 11.5 In such cases where the employee fails to attend a hearing without good reason the Hearing Officer Stage 2 will consider the management case together with any documentation submitted by the employee.
- 11.6 The line Hearing Officer Stage 2 will write to the employee giving a decision as set out in paragraph 9.6, above, and setting out the right of appeal.
- 11.7 The employee must exercise his/her right of appeal within 7 working days of the date of the letter advising of the outcome.
- 11.8 The appeal will follow the procedure as set out in 10.1 to 10.5 above.

12. Timescales

12.1 The timescales set out below are intended to ensure that matters are concluded as fairly and as quickly as possible. However they may be varied by management according to the demands of the service or by mutual agreement.

Stage 1/2	The line manager submits management statement detailing the case, coming to a conclusion and recommendation.	
	Head of Service writes to employee with details of the case, calling employee to a hearing and enclosing the management statement	10 working days
	Time allowable to reconvene meeting if the employee's companion is unable to attend	5 working days
	Employee may submit evidence and call witnesses	3 working days prior to the hearing
	Confirmation of Hearing decision in writing from date of hearing	5 working days
Stage 3	Employee writes to head of service invoking the appeal stage, from date of outcome letter	7 working days
	Timescales for notification of dates, receipt of further statements etc. as for stage 1/2.	

13. Responsibility for Hearing a Capability Case

13.1 Stage 1

13.1.1 A Head of Service may issue a verbal caution.

13.2 Stage 2

13.2.1 Stage 2 hearings will be heard by the Director.

13.3 Stage 3

13.3.1 Appeals will be heard by the Chief Executive.

14. Grounds for Appeal

14.1 Appeals must be based on one or more of the following grounds:-

- There was a significant breach of the procedure.
- The employee was given insufficient time in which to demonstrate that he or she could achieve the required standard.
- The employee was not offered suitable and available redeployment.
- That action by management, which was proposed by the employee during either the informal or formal stage of this procedure, was unreasonably rejected by management.
- That management have not acted reasonably.

15. Other Considerations

15.1 Managers should seek advice from Human Resources on capability at an early stage.

15.2 Managers cannot issue a verbal caution without invoking the formal procedure. However managers should make it clear to the employee the possible consequences if the issue in question cannot be resolved.

15.3 The Disability Discrimination Act requires that employers make reasonable adjustments. It is important that this duty is taken seriously. It is also important for managers to be aware that poor performance may be linked to ill health. Therefore, assumptions should not be made about the health of an employee. Occupational Health must be contacted at an early stage and the employee be referred back as necessary to obtain up to date advice.

15.4 An employee has the right to refuse a request to attend occupational health. However, failure to do so may jeopardise

their case as management will have to taken decisions without the benefit of medical advice.

- 15.5 Capability issues should be treated as a matter of confidentiality. Failure to do so may result in disciplinary action.
- 15.6 In cases of long term sickness absence where efforts have failed to bring the employee back to work, dismissal may be the only appropriate option.

THE CONDUCT OF CAPABILITY HEARINGS (STAGE 2)

1. The Hearing Officer Stage 2 should be accompanied by an HR officer, whose role is to advise on procedure, to advise on ensuring consistency and equity of treatment, to take notes of the proceedings of straightforward, non-contentious cases and to ensure that the letter setting out the decision of the hearing is sent to the employee. He/she may also ask questions of clarification of either side.
2. The Hearing Officer will decide whether an additional note taker should be present.
3. The Hearing Officer will:
 - ◆ Ensure that all the relevant documents have been received by the parties.
 - ◆ Provide an opportunity for either side to raise any concerns about procedural matters.
 - ◆ Ask the employee whether he/she accepts the concerns raised.

If the Employee Accepts the Concerns Raised

4. The employee will be asked whether he/she wishes to offer an explanation or to have any mitigating circumstances taken into account.
5. The presenting manager will then be asked if he/she has any comments on the employee's explanation and/or mitigation
6. The Hearing Officer will then ask everyone, except the HR Officer to leave the room whilst he/she considers the matter, advised by the HR Officer.
7. Both sides will then be called back to be told what level of capability action is being taken and the rights of appeal.

8. A letter confirming the action and setting out the reasons for it will be sent to the employee within 5 working days of the hearing.

If the Employee does not Accept the Concerns

9. The Presenting Officer will present her/his case.
10. Witnesses (if any) will remain in the room only while they give their evidence.
11. Witnesses will be questioned by the Presenting Officer.
12. Witnesses may then be cross questioned by the employee or her/his representative and by the Hearing Officer. The HR Officer will also be given the opportunity to ask questions.
13. At the conclusion of her/his case, the Presenting Officer may be questioned by the employee or her/his representative, the Hearing Officer and the HR Officer.
14. The employee, or her/his representative, will then present their case, calling witnesses and being open to questions in a similar fashion to the Presenting Officer.
15. First the Presenting Officer and then the employee or her/his representative will then be given the opportunity to sum up, without introducing any new evidence.
16. If the Hearing Officer feels that he/she needs further evidence, or to hear from a witness again, or to hear from a witness that neither side chose to call, before he/she can reach a conclusion, he/she may adjourn the hearing to make the necessary arrangements.
17. The Hearing Officer will then ask everyone, except the HR Officer to leave the room whilst he/she considers the matter, advised by the HR Officer.
18. Both sides will then be called back to be told the decision, what level of capability action is being taken (if any) and the right of

appeal. If more time is needed to reach a decision, both sides may be informed of the decision in writing. Such delays should be avoided wherever possible and only in exceptional circumstances exceed 1 working day.

THE CONDUCT OF APPEAL HEARINGS (STAGE 3)

1. Appeal hearings will not rehear the whole case, but will focus on the grounds of appeal that have been accepted.
2. The Hearing Officer Stage 3 will ensure that all the parties have the relevant documents and ensure that both sides understand the grounds of appeal that that are to be considered.
3. The employee or her/his representative will set out the grounds of the appeal and their justification, referring to the documents that have already been submitted.
4. At the conclusion of the case for the appeal, the presenting manager, the hearing officer and the HR Officer may question the employee or her/his representative.
5. The presenting manager will then respond to the case for appeal in a similar fashion.
6. At the conclusion of her/his response she/he may be questioned by the employee or her/his representative, the hearing officer and the HR Officer.
7. The hearing officer will then ask everyone, except the HR Officer to leave the room whilst he/she considers the matter, advised by the HR Officer.
8. Both sides will then be called back to be told the decision. If more time is needed to reach a decision it may be given to both sides in writing. Such delays should be avoided wherever possible and only in exceptional circumstances exceed 1 working day.