

Cherwell District Council

Personnel Committee

11 March 2015

Draft Shared Capability Policy

Report of Head of Transformation

This report is public

Purpose of report

To seek Member approval for a revised Capability Policy that can be used for Cherwell District Council and South Northamptonshire Council.

1.0 Recommendations

The meeting is recommended:

- 1.1 To approve the draft two-way shared Capability Policy.

2.0 Introduction

- 2.1 The Capability Policy provides a mechanism to manage employees who are failing to reach the required standards of performance due to a lack of ability rather than due to misconduct which would be dealt with through the Councils' Disciplinary and Dismissal Policy.
- 2.2 The policy provides employees with the opportunity to improve performance through a series of informal and formal stages, and to ensure there are appropriate and agreed targets that can be used to determine improvement in capability. Where required employees will also be provided with support through mentoring and training. Where there is not an improvement in capability that meets the expected standards required to undertake the duties of the role, then consideration will be given to redeployment and finally to dismissal.
- 2.3 The policy allows the manager to take appropriate action promptly and ensures a consistent approach is followed that will mitigate against any potential challenge should dismissal have to take place. Delaying - or worse doing nothing - may cause the performance problem to escalate. The result of this could be that the manager subsequently has to face a resource intensive problem, and loss to service provision, caused by underperformance rather than dealing with the problem while it is still in its infancy.

3.0 Report Details

- 3.1 The draft policy streamlines the existing CDC Capability Policy and the SNC Attendance and Performance Policy and attempts to take best practice from both, but also to ensure a robust and consistent approach is used across both Councils.
- 3.2 The formal process included in Section 7 of the draft policy, has been revised to include a more defined set of stages where warnings are issued, ultimately leading to potential dismissal, if none of the formal stages are completed successfully in improving employee performance.
- 3.3 In the event that an employee is underperforming the manager should be prepared to examine the circumstances and give support to the employee to help him or her to improve to the required standard of competence. If necessary, consideration should be given to carrying out a referral to Occupational Health in parallel to the monitoring period.
- 3.4 A lack of capability exists when, no matter how hard an employee tries, he or she is simply unable to perform the job to the standard required by the employer. It is the agreed standard that is relevant, and not the manager's personal opinion of the employee.
- 3.5 If an employee fails to come up to the required standard as a result of his or her own carelessness, negligence or idleness, this will not constitute incapability, but could be regarded as misconduct. Note: whilst an employee is in the probation period i.e. six months, any performance will be dealt with in accordance with the Probation Policy.
- 3.6 As a useful guide a flowchart has been included in the new draft policy along with an action plan template to ensure consistency and the use of SMART targets for improvement.
- 3.7 There has been a reduction in the Stage One monitoring period from twelve weeks to six weeks before the employee moves on to Stage Two. Six weeks is an adequate time period for the employee to show some improvement in conjunction with support and monitoring by the line manager. In some cases a slightly longer period of time might be needed but each case needs to be judged on its own merits.
- 3.8 The period of time that unspent formal warnings (below) will stay on an employee's personal file has also been outlined as below, so that the employee is fully aware that if there is any further underperformance within the agreed period stated then further action will be instigated.

First Stage Capability Action	One year
Second Stage Capability Action	Two years

4.0 Conclusion and Reasons for Recommendations

- 4.1 Incapability needs to be dealt with should it occur, and by having an appropriate policy in place this will ensure that both Councils can manage under-performance caused by incapability effectively and consistently. Managers will be able to ensure employees are performing effectively for the roles they are in and if not then action can be taken.
- 4.2 The revised draft policy will also improve the clarity and consistency of the process for employees too, particularly for those working in shared teams, where different policies are currently in place.
- 4.3 The draft policy will also ensure that there is appropriate mitigation against any claims made by employees who are dismissed as a result of incapability.

5.0 Consultation

CDC/SNC Joint Management Team	Support the Proposals
South Northamptonshire Trade Union	Support the Proposals
Cherwell District Council Trade Union	Support the Proposals
Cherwell District Council Staff Consultation Group	Support the Proposals

6.0 Alternative Options and Reasons for Rejection

- 6.1 The following alternative options have been identified and rejected for the reasons as set out below.

Option 1: Retain the current individual policies of each Council which would not provide a clear, consistent process across the Councils.

7.0 Implications

Financial and Resource Implications

- 7.1 There are no financial implications arising directly from this report.

Comments checked by: Paul Sutton, Head of Finance and Procurement

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Legal Implications

- 7.2 The Employment Rights Act 1996 sets out the requirements that employers must adhere to when managing performance at work, especially where it may lead to dismissal. Employers must also use a fair process and follow it to dismiss employees.

- 7.3 Employees have a right not to be unfairly dismissed and an employer must use one of the five fair reasons for dismissal. Lack of capability or qualifications is a fair reason for dismissal.
- 7.4 The ACAS Code of Practice is a document used by employment tribunals to assess the fairness of dismissals. The Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations. It also covers poor performance / capability.

Comments checked by:

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8.0 Decision Information

Wards Affected

N/A

Links to Corporate Plan and Policy Framework

N/A

Lead Councillor

None

Document Information

Appendix No	Title
Appendix 1	Draft Shared Capability Policy
Appendix 2	Capability Flow Charg
Appendix 3	Capability Action Plan
Appendix 4	Capability Staff Consultation
Background Papers	
None	
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Appendix 1

CAPABILITY POLICY

1. INTRODUCTION

- 1.1 The Councils' Capability Policy aims to positively assist those employees who do not currently possess the necessary skills or attributes to adequately perform their duties at work and/or to reach an acceptable standard of performance.
- 1.2 The Capability Policy provides a framework for dealing with cases where employees fail to achieve the performance standards expected of them due to lack of ability and where there is no evidence of deliberate misconduct by the employee.
- 1.3 It provides employees with the opportunity to improve through a series of informal and formal stages. Failure to improve in a required timeframe could result in dismissal.

2. EXCLUSIONS

- 2.1 This policy applies to all employees of Cherwell District and South Northamptonshire Councils.
- 2.2 Exclusions of this policy are those whom are covered by a separate policy and include:
 - Chief Executive of Cherwell and South Northamptonshire Council
 - Monitoring Officers
 - Section 151 Officers
- 2.3 The Capability Policy does not apply in the following circumstances:
 - Cases of gross negligence will be dealt with in accordance with the Disciplinary Policy.
 - Staff within their probation period will be subject to the Probationary Policy.
 - Cases of ill health should be dealt with in accordance with the Absence Management Policy.
 - Cases where the lack of capability may be due to disability or pregnancy, in which case advice should be sought from Human Resources.
- 2.4 Consideration should be made by managers as to whether an employee's performance might be health and/or disability related and whether reasonable adjustments should be made in accordance to the Equality Act.

3. PRINCIPLES

- 3.1 All employees have a contractual duty to be competent and to perform their role in an acceptable way. Where this is not happening, employers are entitled to intervene with a view to:
 - improve the performance of the employee informally first.

- invoke the formal process if no satisfactory improvement is made or where the matter is deemed very serious.

3.2 If an employee fails to reach the required performance standards as a result of carelessness, negligence or idleness this will not constitute a capability issue but will be managed through the Councils' Disciplinary and Dismissal Policy.

3.3 The timescales adopted for the various stages of this policy will vary in accordance with the seriousness of the problem, and the nature of the work carried out by the post holder.

3.4 If following formal capability action the employee's performance improves to a satisfactory standard they will no longer be monitored in accordance with the Capability Policy. However, if further unsatisfactory performance occurs whilst the warning is still live this Policy will be re-invoked at the next stage.

3.5 Employees will have the right to be accompanied at all formal meetings by a union representative or colleague.

3.6 Employees will be made aware of their right of appeal against any formal action taken in this procedure.

4. RESPONSIBILITIES

4.1 Managers are responsible for:

- ensuring that performance issues are addressed promptly, fairly and consistently.
- explaining clearly the shortfall between the employee's performance and the required standards.
- providing regular feedback on work performance.
- establishing the cause of the poor performance and any action which can be taken to help improve the situation.
- making reasonable adjustments in cases where the employee is not performing their duties satisfactorily due to health reasons.
- identifying any support services which might be required (e.g. the identification of a mentor, training or coaching, referral to Occupational Health or Counselling).
- ensuring that reasonable time limits and clear and measurable targets are agreed with employees to achieve the required standard of performance. During these time periods, performance must be closely monitored and recorded and employees advised of any shortcomings and the degree to which performance must be improved. This may include reviewing the amount of supervision needed.
- maintaining clear records of difficulties encountered, assistance given and any actions taken.

- setting a date for a review meeting.

4.2 Employees are responsible for:

- ensuring that they are aware of their responsibilities in their role.
- performing their duties to the required standard.
- engaging in any training and development that will enable them to reach the required standard.
- responding to corrective measures that are identified.
- familiarising themselves with the Councils' policies and procedures.
- informing their manager of any issues which could be affecting their work.

5. DAY TO DAY MANAGEMENT

- 5.1 Employees have a contractual responsibility to perform to a satisfactory level and should be given every help and encouragement to do so as part of day to day management. Supervision should include opportunities for the manager to provide training, support and feedback to the employee about their performance against the job role and targets.
- 5.2 Where under performance is identified the manager should seek to provide appropriate training and support to assist the employee to rectify this.

6. INFORMAL ACTION

- 6.1 Wherever possible, managers should seek to address any individual or minor performance problems as they occur on an informal basis. Only in serious cases should the informal action stage be omitted.
- 6.2 The manager should record their own notes of informal meetings held with the employee to ensure that there is evidence of discussions taken place and actions agreed as a result of the meeting.
- 6.3 Where performance continues to be unsatisfactory after day to day management, then the manager should seek to agree an informal action plan of performance improvements. This may be incorporated in the employee's appraisal or can be in a separate document. If following a review of the action plan the manager feels that the employee's performance is still below standard it will be appropriate to proceed with the formal stages of this policy. The manager should seek advice from Human Resources.

FORMAL PROCESS

7. STAGE ONE

7.1 First stage formal capability meeting

- 7.1.1 If following informal assistance the employee's performance hasn't satisfactorily improved, or where the matter is serious, they will be asked to attend a first stage formal meeting, where a HR representative will also be present. The employee will be offered the right to be accompanied and should be given five working days' notice of the meeting and its purpose in writing. The letter must include full details of the areas of under-performance identified by the line manager so that the employee can prepare for the meeting.
- 7.1.2 During the meeting the performance against any previous informal action plan will be discussed. Any additional capability issues must also be fully discussed and considered. The manager and employee should agree an action plan based on SMART objectives (Specific, Measurable, Achievable, Realistic, Time bound).
- 7.1.3 The line manager should also explore whether there are any reasons for the poor performance. If necessary, consideration should be given to carrying out a referral to Occupational Health in parallel to the monitoring period. Only in exceptional circumstances will the process be halted pending the results of an Occupational Health referral.
- 7.1.4 Following the meeting, the line manager must write to the employee within five working days, notifying them of the outcome. The employee must also be given a date for a (six week) review meeting so that they are aware how and when their performance will be reviewed.
- 7.1.5 The line manager will monitor and assess the employee's performance for an appropriate period of time normally six weeks (or long enough to overcome any barriers previously identified). The line manager will arrange regular feedback / 1-2-1 sessions, in private, and not wait until the end of the review period.

7.2 First stage formal capability review meeting

- 7.2.1 At the end of the first stage monitoring period, the manager and a HR representative will meet with the employee to review progress. The manager will give a clear indication of the outcomes of the monitoring process, and identify any progress made and any further improvements needed. The employee should be allowed to respond to the outcomes of the monitoring process and have the opportunity to ask questions.
- 7.2.2 The manager must decide based on the discussions and progress what action is appropriate. Available options include:
- No further formal monitoring under the Capability Policy as the employee's performance has improved sufficiently. In this situation a record of the first stage capability action will be held on the employee file for a period of one year and if performance becomes unacceptable during this time then the second stage of the policy will be invoked.

- Progression to the second stage of the Capability Policy if no significant improvement is evident.

7.2.3 The line manager must write to the employee informing them of the decision. If the second stage of the policy is to be invoked the letter should provide details of the further improvements in performance required and also set a date for the second stage review meeting. The letter should also warn the employee that if the required improvement in their performance is not achieved then following a stage two review they may progress to a formal hearing where one outcome could be dismissal.

7.2.4 The employee has the right of appeal against this decision; however, the second stage will commence immediately, and will only be halted in circumstances where an appeal is received.

8.0 STAGE TWO

8.1 Second stage capability review meeting

8.1.1 At the end of the second stage monitoring period, no longer than six weeks, the service manager and a HR representative will meet with the employee to review progress. The meeting should be held as with the first stage review meeting. The service manager (line manager's manager) not involved in the first stage should chair the meeting.

8.1.2 The service manager must decide based on the discussions and progress what actions are appropriate. Available options are:

- no further formal monitoring under the Capability Policy but a record of the Second Stage Capability Action will be held on the employee file for a two year period and if performance becomes unacceptable during this time then the Third Stage will be invoked.
- to extend the monitoring period, only in exceptional cases, where good improvement is evident, but the employee has just fallen short of the required performance standards.
- progress to the Third Stage of the Capability Policy if no significant improvement is evident.

9.0 STAGE THREE

9.1 Formal Hearing

9.1.1 Where an employee has failed to reach the required standards of performance or conduct required for their position after previous stages of the Capability Policy, they should be invited to a formal hearing in order to reach a decision about their employment status.

9.1.2 The employee should be invited in writing to attend the meeting, allowing five working days' notice. The letter should state the reasons why they have fallen short of the required standards and should advise them that a possible outcome of the meeting could be dismissal. Any documents which will be considered during the hearing must be provided to

the designated hearing officer and the employee at least five working days prior to the hearing.

9.1.3 The employee will have a right to be accompanied at the meeting by a work colleague or trade union representative.

9.1.4 The hearing will be chaired by an independent designated Head of Service who will be assisted by an independent HR representative. Neither should have been involved in previous stages of the process.

10.0 HEARING ORDER OF PROCEEDINGS

Opening

The designated officer should begin by explaining how the hearing will be carried out.

The complaint

At the hearing the line manager will explain the capability issues and the outcomes of the monitoring process.

Right to reply

The employee will be allowed to explain their continued failure to achieve and maintain the required level of performance. The employee should also be given a reasonable opportunity to ask questions and seek clarification.

Summing up

After questioning is completed the designated officer will summarise the main points of the discussion and will ask the employee to sum up and add anything further they wish to say.

Adjournment

The designated officer will then adjourn the hearing before a decision is taken about whether a sanction is appropriate. This allows time for reflection and proper consideration.

More matters come to light

If new matters come to light in the course of a hearing, not being matters which could have been previously raised by the employee, the hearing shall be adjourned if requested by either the management or the employee side to investigate the new facts and the hearing will be reconvened when this has been done.

Penalty/sanction

If it is decided that, on the balance of probability, the employee's performance is unlikely to reach an acceptable standard, the appropriate penalty will be considered. At the end of the hearing the designated officer should inform the employee of the outcome of the meeting. The outcome of the meeting should then be confirmed in writing to the employee.

The outcome could include:

- dismissal with pay in lieu of notice.
- demotion or redeployment to another post (note, it is not possible to create new posts for this purpose nor allow pay protection).

11.0 TIME LIMITS ON WARNINGS

11.1 Copies of formal capability action will be held on an employee's personal file and will be marked as 'spent' after the following periods:

- First Stage Capability Action One year
- Second Stage Capability Action Two years

12.0 APPEALS

12.1 Appeals against the first and second stages

12.1.1 Employees will be advised in writing about their right to appeal against the outcome of the first or second stage of the process. The letter will detail who the appeal should be addressed to. The employee's notice of appeal shall include a statement in writing of the grounds on which they wish to challenge the decision and must be made within five working days of receipt of the outcome.

12.1.2 Appeals against warnings shall be considered by an independent Head of Service.

12.1.3 Appeal hearings for warnings will normally take place within fifteen working days of receipt of the employee's written notice of appeal.

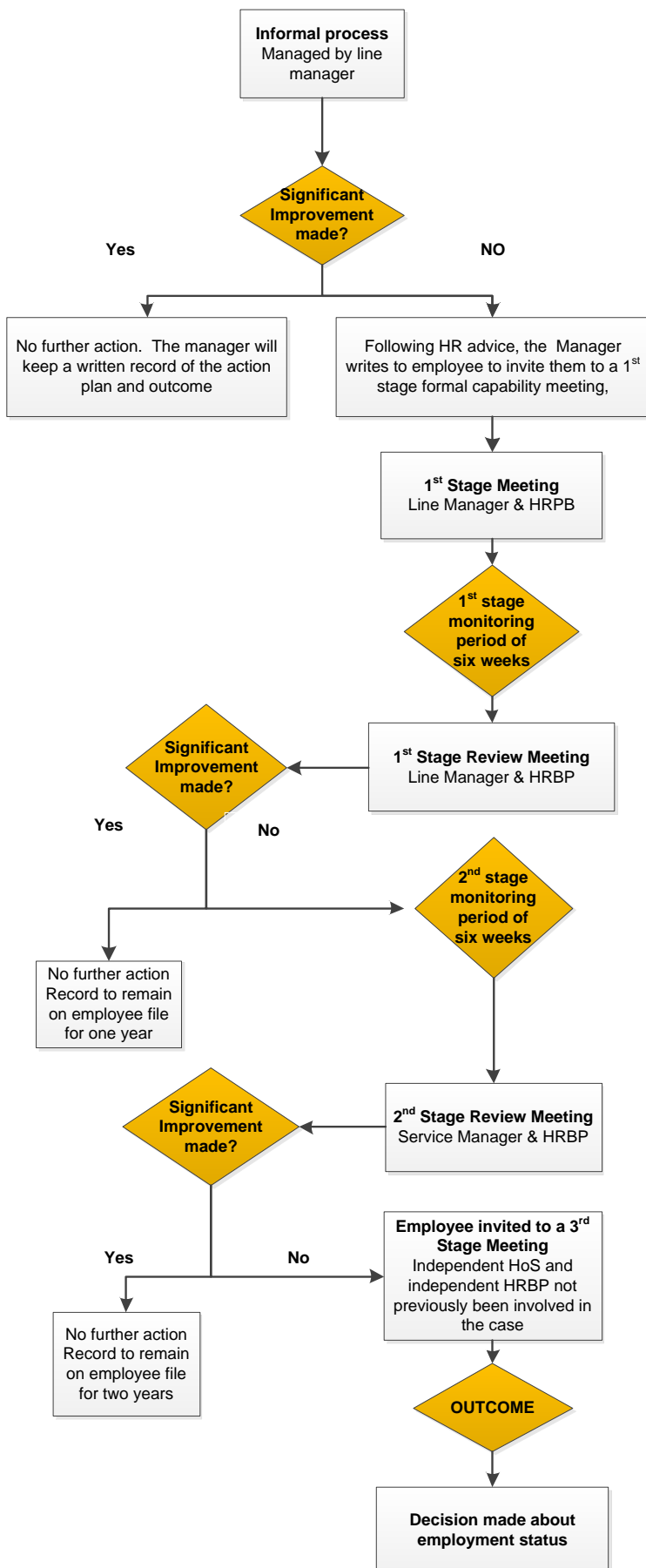
12.1.4 If the outcome of the Second Stage is that the manager recommends a formal hearing takes place the situation will be independently reviewed during the hearing process and therefore employees will not be able to appeal in respect of this outcome. However, the employee will be able to appeal against any decision or sanction made at the hearing.

12.2 Appeals against the third stage formal hearing

12.2.1 Appeals against dismissal shall be considered by elected members (in accordance with the Councils' Disciplinary Policy).

12.2.2 Appeals against any other outcome of the third stage will be heard in accordance with the procedures for Stages One and Two.

Appendix 2 Capability process flow chart



REMINDERS FOR EACH STAGE

The letter to include:

- Right to be accompanied
- Five working days' notice prior to the meeting taking place
- Full details of the areas of under performance

The Meeting:

- Under performance discussed
- Action plan agreed using SMART targets
- Line Manager should write to employee within five working days confirming the outcome and the monitoring period(6 weeks)

Monitoring Periods:

- 6 week monitoring period
- Employee should be supported and monitored throughout the monitoring periods

Appeals

- If the employee appeals proceeding to next stage of the process then the review period is halted until the appeal outcome is known

Stage Two Review Meeting Outcomes:

- No further monitoring but record held on employee file for two years
- Progress to 3rd Stage, the employee needs to be warned that the outcome could mean dismissal

- The employee will be giving 5 working days' notice when proceeding to the 3rd Stage Meeting

STAGE THREE OUTCOME OPTIONS:

- Dismissal with pay in lieu of notice.
- Demotion or redeployment (note, it is not possible to create new posts for this purpose).

Appendix 3 Action Plan

Development area	Specific requirement	Measure of success	Timeframe	Progress/comments

Employee signature:

Date:

Manager signature:

Date:

Appendix 4

Capability Policy- Staff Consultation

1. 7.2.1 Need to add in the employee's right to be accompanied. Also in 8.1.1 and in Appendix A.
2. Section 2.3: Why only 'gross' negligence? See section 1.2 'deliberate misconduct.' Need consistency in terminology. See also 3.2.
3. Section 3.5: Need to add in a section about help to over-come barriers in equal opportunities terms.
4. Section 4.1 refers to 'difficulties encountered.' Is that difficulties in relation to the employee, the hearing or procedure?
5. What is the rationale for changing the 'live' period of the warning to 2 years? What is it on the current SNC policy?
6. Section 8.11 specifies a review period of 'no longer than 6 weeks.' However 3.3 says the timescales adopted for the various stages of this policy will vary in accordance with the seriousness of the problem and the nature of the work carried out by the post holder.
7. Section 9.1.2: Who is the designated hearing officer?' Has this been defined / made clear so far in the policy? Ensure consistency with other policies where there may be a formal hearing.
8. Section 9.1.14: Suggest the following wording taken from the SNC policy ' No-one chairing an appeal hearing should have been directly involved in the case previously. Ideally no-one advising the person who is chairing the appeal should have been directly involved in the case either. However, it is accepted that if a member of the HR team is acting as an adviser, it is possible that he/she may have had some earlier involvement in the case.'
9. Section 10: Order of proceedings. Dislike the wording 'explain their continual failure.' It feels loaded. Suggest 'Employee is invited to respond to the management presentation and ask questions etc.
10. Section 12.2.2: Wording not clear 'appeals against any other outcome of the third stage will be heard in accordance with the procedures for Stages one and two.' Re-word this sentence.