



Great Yarmouth Borough Council Capability Policy and Procedure

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Capability Policy and Procedure

1.0 Introduction

- 1.1 This document forms part of a suite of policies with regard to Discipline, Capability and Grievance.
- 1.2 This procedure has been agreed with UNISON and applies to all Council employees (other than the Managing Director and Chief Officers who are covered by separate arrangements). The procedure takes account of the ACAS Code of Practice and Guidance Notes on Disciplinary and Grievance Procedures (2009).
- 1.3 Capability is defined by the Employment Rights Act 1996 as “capability assessed by reference to skill, aptitude, health or any other physical or mental quality.” On occasion employees’ work performance may fall below the required standard and this procedure aims to provide employees with appropriate support and guidance and to enable managers to respond in a fair and consistent manner paying due regard to the circumstances of any particular case.
- 1.4 Where employees are subject to a probationary period of service, matters of capability, competence and general suitability for the job will be assessed in accordance with and at the various stages set down in the probationary scheme. On occasion, it may be appropriate to deal with probationary employees for a capability offence under this procedure rather than the probationary scheme. In such cases time-scales may be shortened to fit in with the probationary period. Advice should be sought from HR in such cases.

2.0 Policy Rationale

- 2.1 At the time of the writing of this Capability policy in 2009, the council was under obligation to review its existing Capability policy in line with statutory requirements which came into force in April 2009.

In 2009, the Council was of the view that there was a need to ensure that an agreed standardised approach was being taken with regard to Disciplinary and Grievance handling and performance/capability management procedures, in order to protect Council assets, and to ensure compliance with audit requirements.

This policy seeks to establish a standard set of conditions, and a framework for the capability management of employees within the Council.

2.2 Scope

2.3 This Policy will apply to all Council employees (other than the Managing Director and Chief Officers who are covered by separate arrangements) to assist them in the performance of their duties.

3.0 Principles

3.1 The Policy is designed to ensure that there are clear internal arrangements for the effective management of performance and capability issues within the Council.

4.0 Capability Policy

4.1 There will be occasions when, for a variety of reasons, an employee is unable to meet the required standards of work performance. This procedure aims to provide employees with appropriate support and guidance and to enable managers to respond in a fair and consistent manner paying due regard to the circumstances of any particular case.

4.2 The capability procedure should be used for circumstances where employees are not meeting required standards of performance. It is separate from the Disciplinary Procedure, which applies to cases of misconduct, and the Attendance and Health Procedure, which applies to cases of incapability due to ill health. Capability is about the requirement for the employee to improve performance whilst conduct covers unacceptable behaviour that must stop.

4.3 The procedure applies to all Council employees (other than the Managing Director and Chief Officers who are covered by separate arrangements).

4.4 The main purpose of the procedure is to encourage and help employees to improve their performance, and, achieve and maintain a satisfactory standard of work.

4.5 The aim is to make it clear to employees what standards of performance are required. If employees then fail to achieve what is expected of them, they will, depending on the issue be given help and support or have action taken against them that will attempt to improve their performance.

4.6 It is the responsibility of the employee's manager to set the required standards for the job and ensure that they are met. Every employee will have an up to date job description to ensure that they are aware of the broad nature of the duties to be carried out in their job.

4.7 Employees have a duty to co-operate and will be encouraged to help identify the reason(s) for any poor performance and how it can be improved. Employees will be given assistance to improve their performance to a satisfactory standard.

4.8 During the capability procedure the following principles will be applied in order to ensure that employees subject to action under this procedure will receive consistent and fair treatment:

- EQUAL OPPORTUNITY - This procedure will be applied objectively according to the work and circumstances of the employee concerned and is designed to ensure that all employees are treated consistently and fairly, without discrimination on grounds of gender, race, disability, age, sexual orientation, religion or any other recognised grounds. The Council will make every effort to address the needs of those employees with a recognised disability, and reasonable adjustments will be made to working arrangements so as to ensure that no disabled person is placed at a disadvantage.
- CLARITY - Managers will clearly define the standards of performance required of employees and ensure all employees are made aware of such standards.
- CONFIDENTIALITY - Confidentiality should be maintained by all those involved, including the employee, at all stages throughout the procedure by ensuring that only those people who need to know have access to details. It may be necessary for the manager to inform close colleagues that an employee is subject to action under the procedure but not to disclose details of such action. While respecting confidentiality, it is important that the employee is free to discuss issues with their chosen representative who may be able to assist or support them through what is acknowledged to be difficult circumstances. Written records of issues will be treated as confidential.

4.9 Whenever a capability process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act **consistently**.
- Employers should carry out any necessary **investigations**, to establish the facts of the case.
- Employers should **inform** employees of the basis of the hearing and give them the opportunity to **put their case** in response before any decisions are made.
- Employers should allow employees to be **accompanied** at any formal capability meeting.
- Employers should allow an employee to **appeal** against any formal

5.0 Grievance during the Capability Procedure

- 5.1 During the capability procedure an employee may raise a grievance that is related to their case. The statutory procedures in relation to this situation are complex and the procedure to be followed will primarily depend on whether the outcome of the procedure could be dismissal or action short of dismissal (excluding warnings or paid suspension). Where a grievance is raised in direct response to the disciplinary procedure, the disciplinary procedure should be expanded to include the grievance issue, dealt with during the investigation and/or at the appeal hearing. If the findings are that the grievance issue should “stand alone” then the grievance procedure should be undertaken. Otherwise the capability procedure takes priority.

6.0 The Employee’s Representative

- 6.1 The employee may be accompanied at most stages of this procedure. Where the procedure refers to the ‘employee’s representative’, this refers to a named individual who will support the employee throughout the process. This individual can be a trade union official or a work colleague, who is an employee of the Council but is not a close relative and is not acting in a legal capacity.

7.0 Informal Procedure

- 7.1 All cases of alleged incapability will be dealt with in the first instance informally. It is part of the normal supervisory process that the standards of work performance required and any failure to meet these standards are brought to the attention of employees.
- 7.2 Where there is poor or unsatisfactory performance, the line manager should point it out to the employee as soon as possible and remind them, in a constructive and positive manner, of the standard required. Managers should use the 1:2:1 process to raise performance issues with the employee and should provide written confirmation of the standard that is expected.

8.0 Formal Procedure – Capability Review Meeting

- 8.1 Where the line manager believes that there is a persistent or more serious problem of poor performance and normal day-to-day management has not brought about the required improvement in performance, a Capability Review Meeting should be held with the line manager and the employee.

- 8.2 The employee will be notified of the decision to hold a capability review meeting in writing, 5 clear working days before the meeting. The notification will give details of the time and venue for the capability review meeting. Although there is no legal requirement to be accompanied at this stage, the employee may choose to bring a representative to the meeting for support. The manager may be accompanied by an HR Manager at this meeting if they wish.
- 8.3 At this meeting the manager will explain the gap between the actual performance and the required performance. The Manager should refer to specific examples where performance is unsatisfactory. The employee will have the opportunity to give reasons for the gap. The manager should identify whether there are any underlying reasons for the poor performance, including training needs and any special personal or domestic problems of the employee.
- 8.4 The line manager and the employee will then explore the areas of concern and agree what reasonable action is necessary for the employee to achieve the required standard. If at this stage the employee's poor performance is found to be due to conduct rather than capability, then the matter should be dealt with under the disciplinary procedure.
- 8.5 An **Improvement Notice** will be issued by the line manager within 5 clear working days of the meeting and will be recorded within the employee's personal file. An improvement notice is equivalent to a warning under the Disciplinary Procedure. The Improvement Notice will assist the employee to improve to the required standard and will set out:
- The performance problem
 - The improvement that is required and action taken by management to assist the employee achieve the improvement
 - The timescale for improvement as determined by the line manager - this must be an adequate period of time for improvement and further assessment
 - That the employee's performance will be monitored and reviewed at the end of the assessment period
 - Any support, including training, that the employer will provide to assist the employee
 - The possibility of further formal action being taken in the event of a failure to achieve the required level of improvement.
- 8.6 If the employee does not agree with the improvement notice they should discuss it with their line manager in the first instance. Ultimately the improvement notice will be a management instruction and employees could be disciplined for failing to carry it out. However, if the employee feels that the improvement notice is not reasonable then they have the right to raise a grievance under the Council's Grievance Procedure.

8.7 Where there has been improvement in performance this should be recognised by the line manager and the matter dropped if no genuine cause for concern is perceived. This should be confirmed in writing to the employee and a copy of the letter should be placed on the employee's personal file. Although the improvement notice will then no longer be current, it will be kept on the personal file in a sealed envelope.

8.8 Where the improvement notice has not led to the desired improvement in performance within the timescale specified, the line manager should contact HR and the next stage of the formal procedure should be initiated.

9.0 **Formal Procedure – Capability Hearing**

9.1 **Documentation Review**

9.2 Prior to a capability hearing being convened under this procedure, the relevant Service Unit Manager will review all the documentation regarding the performance issues to ensure that the next stage of the formal process is appropriate at this stage. Where the Service Unit Manager did not undertake the informal process personally, they will meet with the relevant line manager to discuss the case and the line manager will then normally be called by the Service Unit Manager as a witness at the Capability Hearing. After reviewing the documentation, the Service Unit Manager will then decide whether the case is sufficiently serious to proceed to a capability hearing. Advice and guidance can be obtained from HR, if required, before making the decision.

9.3 Where it is decided that a capability issue appears to exist and therefore that a capability hearing is required, the Service Unit Manager will produce a written report, within 10 working days, detailing the case to date and all action taken so far.

NB: Where the employee subject to this procedure is a Service Unit Manager the Head of Service will undertake this role.

10.0 **Gross Incapability and Suspension**

10.1 In exceptional circumstances the actions and/or omissions of an employee may be considered gross incapability/incompetence. This would occur where the actual/potential consequences of any action/omission are considered so serious as to render the continued employment of the employee impossible, e.g. where others are put at risk of serious injury or death, or the Council's finances or reputation are put at serious risk.

- 10.2 In these cases the employee may be suspended from duty, (see Disciplinary procedure with regards to suspension), normally by the Head of Service, on full pay, pending further investigation and a Capability Hearing convened.
- 10.3 At this meeting the employee may be dismissed, without previous warning and without notice (i.e. summary dismissal), if the lack of capability is considered to be so serious as to amount to gross incapability/incompetence.

11.0 Notification of Capability Hearing

- 11.1 Following the review of the documentation, if the Service Unit Manager establishes that a capability issue appears to exist, the Head of Service will be informed and they will arrange a capability hearing. This hearing will be chaired by the Head of Service unless they are involved with presenting the case. An alternative Head of Service, the Managing Director or Deputy Director may chair the meeting in such a case.
- 11.2 The employee will be notified of the decision to hold a capability hearing in writing. This notification will contain a copy of the Service Unit Manager's report, which details the alleged poor performance and any written evidence. It should state if any witnesses are to be called. The employee's line manager, who carried out the informal stages of the procedure, will often be called as a witness. The employee will be given at least 5 clear working days notice of the hearing in order for them to be able to prepare an answer to the case. They may submit a written statement prior to the hearing, if they choose, and may call witnesses if they feel it relevant to do so. The notification will give details of the time and venue for the capability hearing. The employee can be accompanied at this meeting by their chosen representative. The employee will be sent a copy of the process to be followed at the hearing.

12.0 Non-attendance at a Capability Hearing

- 12.1 Employees (and their representatives) should make every effort to attend the hearing. If an employee feels that they are unfit to attend they should contact HR immediately who will normally seek a medical opinion from the Council's Occupational Health provider. If the employee fails to attend the arranged occupational health appointment, the hearing will normally go ahead and a decision will be made based on the information available.
- 12.2 If the employee fails to attend the arranged hearing without a valid reason, the hearing will be rearranged one more time. If the employee fails to attend the re-arranged hearing, it will go ahead in their absence and a decision will be made based on the information available. The employee may send their representative to the hearing in their place.

13 The Capability Hearing

13.1 At the Capability Hearing, the Chairperson will:

- Introduce those present to the employee and explain their roles
- Introduce and explain the role of the representative if present
- Explain the purpose of the meeting
- Explain how the meeting will be conducted (The Procedure used can be found in Appendix 1)
- Consider adjourning the meeting if it is necessary to investigate any new facts which arise
- Conclude the meeting by stating the decision that has been made and confirming what action, if any, should be taken, by whom and agreed timescales

13.2 The Chairperson will advise at the close of the meeting that the decision reached at the meeting will be confirmed in writing within 5 clear working days of the meeting and that the employee has the right to appeal against the decision reached.

14.0 Possible Outcomes of a Capability Hearing

14.1 **Final Improvement Notice** - Where an employee's failure in performance gives further cause for concern, or where initially the matter is of a very serious nature but is considered short of gross incompetence, a Final Improvement Notice may be issued by the Chairperson of the hearing within 5 clear working days of the hearing. It will contain a clear indication that a failure to perform to the required standard in the timescales stipulated may lead to dismissal. A Final Improvement Notice shall be recorded within the employee's personal file.

14.2 **Dismissal** - If the issuing of an Improvement Notice does not bring about stipulated improvements, the employee will be required to attend a capability hearing and, unless there are exceptional circumstances, will be dismissed subject to the appropriate notice period. Details of the reasons for dismissal and appeal rights will be included in the letter of dismissal, which will be issued within 5 clear working days of the hearing.

14.3 Also, there may be serious incidents short of gross incapability which make continued employment impossible because (for example) they create an irretrievable breakdown of trust between the manager and the employee. If at the hearing this is established, on the balance of probabilities, and the necessary trust between employer and employee is broken leading to a situation which, in the opinion of the Senior Manager, makes continued employment impossible, dismissal with notice may take place. Redeployment may be a suitable alternative option.

14.4 Gross Incapability - Except in very exceptional circumstances, if the situation is considered sufficiently serious an employee will normally be suspended forthwith (which will be confirmed in writing) pending any necessary investigations. Except in exceptional circumstances, if at the hearing, on the balance of probabilities, gross incapability is established, dismissal without notice or pay in lieu of notice will follow.

15.0 The Appeals Procedure

15.1 Employees have the right of appeal against the decision made by the Chairperson of the Capability Hearing.

15.2 Appeals against Final Improvement Notices

Appeals against Final Improvement Notices shall be considered by a Head of Service, Managing Director or Deputy Director (but, in any event, not to the person who made the decision being appealed against). An HR Manager may act as advisor to the Chairperson at the hearing.

15.3 The employee must lodge their appeal, in writing, to the Chairperson of the Capability Hearing within 10 clear working days of the date of the letter informing them of the decision.

15.4 Appeals against dismissal

Appeals against dismissal shall be to the Council's Appeals Committee (which is comprised of Elected Members). An HR Manager & a Legal Advisor may act as advisors to the committee at the hearing. The employee must lodge their appeal, in writing, with the Chairperson of the Capability Hearing within 10 clear working days of the date of the letter informing them of the decision. The Chairperson of the Capability Hearing will then notify Member Services who will place the appeal on the agenda of the next Appeals Committee.

15.5 Member Services will give the employee notice, in writing, at least 5 clear working days in advance of the time and place of the meeting of the Committee at which your appeal is to be considered. The Committee Meeting should normally occur within 20 working days of the Senior Manager receiving the written request for the appeal to be placed on the agenda of this meeting.

16.0 The Appeals Procedure

16.1 At the Appeal Hearing the employee may appear in person and has the right to be accompanied by a representative. The procedure used can be found in Appendix 2. The Appeal will be upheld or rejected.

16.2 The employee will receive written confirmation (from the Chairperson of the Appeal Hearing) of the Council's decision within 5 clear working days of the decision being made. This decision will be final within the Council's procedure.

16.3 If, as a result of an appeal, an improvement notice is withdrawn, it will be removed from the employee's personal file. Otherwise, when the necessary improvements have been made, a note to that effect will be recorded on the employee's file but the improvement notice will remain on file in a sealed envelope for the duration of employment with the Council.

17.0 Implementation

17.1 This policy will initially be implemented through the Heads of Departments and Service Unit Managers of the Council.

17.2 An email will be sent to all employees to make them aware of the policy.

17.3 It is the responsibility of managers to ensure that new employees receive information about this Policy, and should be part of any local induction where appropriate. Human Resources shall include this policy in the employee handbook and will add the Policy to its list of policy issues provided to any new starters. Managers must also ensure that any changes to this policy are effectively communicated within their areas of responsibility.

18.0 Compliance

18.1 Managers are responsible for ensuring that employees are aware of the location of this policy. In addition, Managers are responsible for keeping employees up to date about any changes within the policy.

18.2 All employees that are designated as employees of the Council are obliged to adhere to this Policy.

Human Resources have a responsibility to advise the Head of Service, Line Manager or individual on all aspects of this policy

Trades Unions can advise individuals on all aspects of this policy, and may represent/accompany the individual at meetings/hearings.

18.3 Equality Impact Assessment

Is available on request

19.0 Health and Safety

19.1 There are no direct health and safety implications arising from this policy, however a suspension process risk assessment may require to be completed in occasional cases

20.0 Reference Documents

20.1 This Policy should be read in conjunction with the following legislation, regulations and Council policies:

- ACAS Code of Conduct and Guidance notes
- Grievance Policy
- Disciplinary Policy
- Code of Conduct

21.0 Distribution

21.1 This Policy will be available for all the Council's designated locations and the employee handbook. Copies will also be available from the 'I' drive and on the Council's Intranet.

22.0 Review

22.1 This Policy will be reviewed on an annual basis with the next review date being June 2012.

Appendix 1

PROCEDURE FOR CAPABILITY HEARING

The procedure followed at Capability Hearings will be as follows.

Introduction - The Chairperson will introduce the parties. A representative from Human Resources will also be present to support the Chairperson.

Presentation of case by Manager - An opening statement may be made and as part of the presentation of the case witnesses may be called.

The employee will have the opportunity to ask questions after each witness has given evidence.

The Chairperson and the adviser may also ask questions.

Presentation of case for the employee - An opening statement may also be made and as part of the presentation of the case witnesses may be called.

The officer handling the case for the employer may ask questions after each witness has given evidence.

The Chairperson and the representative from HR may also ask questions.

Re-examination - Both parties will be asked if they wish to re-examine any evidence before they proceed to the next stage.

Final Statements - Both the officer handling the case for the employer and the employee (last) may make a final statement.

Adjournment - Either party may request an adjournment of the hearing at any stage.

Consideration of the case - All parties to the hearing will then withdraw. The chair, assisted by the adviser, will then deliberate. If it is necessary to recall either party or witness in order to clear up any point of uncertainty on the evidence given, both parties will be recalled notwithstanding the fact that only one may be concerned with the point giving rise to doubt.

Decision - The Chairperson will, if possible, give a decision to the parties immediately after the hearing. On occasion, time constraints may make it necessary to adjourn the hearing in order to properly consider the information

provided. In this case, a decision meeting will be arranged for a later date. In any case appropriate confirmation in writing will be given within 5 clear working days.

Note: *References to 'employee' include the representative acting on the employee's behalf*

Appendix 2

PROCEDURE FOR CAPABILITY APPEAL HEARING

The procedure followed at Capability Appeal Hearings will be as follows.

Introduction - The Chairperson, who may be accompanied / assisted by an adviser from HR (and at Appeals Committee a Legal Adviser), will introduce the parties.

The case for the employee - An opening statement may also be made in which the employee presents their reasons for appeal and as part of the presentation of the case witnesses may be called.

The officer handling the case for the employer may ask questions after each witness has given evidence.

The Chairperson / committee and the adviser(s) may also ask questions.

The case for the employer - An opening statement may be made and as part of the presentation of the case witnesses may be called.

The employee will have the opportunity to ask questions after each witness has given evidence.

The Chairperson / committee and the adviser(s) may also ask questions.

Re-examination - Both parties will be asked if they wish to re-examine any evidence before they proceed to the next stage.

Final Statements - Both the officer handling the case for the employer and the employee (last) may make a final statement.

Adjournment - Either party may request an adjournment of the hearing at any stage.

Consideration of the case - All parties to the hearing will then withdraw. The Chairperson / committee, assisted by the adviser, will then deliberate. If it is necessary to recall either party or witness in order to clear up any point of uncertainty on the evidence given, both parties will be recalled notwithstanding the fact that only one may be concerned with the point giving rise to doubt.

Decision - The Chairperson will, if possible, give a decision to the parties immediately after the hearing. On occasion, time constraints may make it necessary to adjourn the hearing in order to properly consider the information provided. In this case, a decision meeting will be arranged for a later date. In any case appropriate confirmation in writing will be given within 5 clear working days.

Note: *References to 'employee' include the representative acting on the employee's behalf*