

## REGULATION 33 CAPABILITY PROCEDURE

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### A. GUIDANCE NOTES

#### 1. Introduction

- 1.1. The University is committed to supporting and developing its staff, to ensure that they are able to fulfil their roles and responsibilities to a high standard of competence. Through the University's recruitment procedures, every effort is made to ensure that new staff have the appropriate skills and abilities, or a clear, demonstrated potential to achieve these, for the roles they are recruited to fulfil. At the start of their employment (or internal transfer/promotion), staff should be clearly informed of their responsibilities and the standards of work performance required. This should be reinforced through appropriate induction and training, and effective, regular feedback, both positive and negative, relating to work performance. The University's appraisal scheme which addresses all elements of each individual's responsibilities, development, and performance, supports this approach. Managers are responsible for ensuring that performance issues are addressed promptly and fairly, and that they receive appropriate training, for example, in relation to recruitment, staff management, and appraisal.
- 1.2. The Capability Procedure provides a framework for dealing with cases, where staff fail to achieve the performance standards expected of them. The procedure applies to all staff, it promotes consistency, and should be applied in accordance with the University's Inclusive Sussex Strategy and its related HR policies. It aims to manage under-performance, by identifying the causes or contributory factors, and by ensuring that, as far as possible, all staff are enabled to fulfil their responsibilities, in line with the aims and objectives of the University.
- 1.3. The Capability Procedure addresses the ability to carry out a job to the required standard (the „can't“), as opposed to issues of willful inadequacy, or misconduct (the „won't“), which are handled through the University's Disciplinary Procedure.
- 1.4. The procedure also recognises that a proportion of University staff will not perform to the required standard. It provides managers with the mechanism to deal effectively with those who under-perform, ultimately by dismissing someone who does not show adequate improvement.

#### 2. Principles

- 2.1. Circumstances which may be work-related, or personal, may impact on an individual's performance. Wherever possible, managers should seek to address any individual or minor performance problems as they occur, and without the need to implement the Capability Procedure. Where the problems are serious, repetitive, and/or frequent, more structured support and assessment over a period of time is needed, and the Capability Procedure will be invoked. The procedure provides opportunities for improvement through a series of informal and formal stages.

- 2.2. The timescales adopted for the various stages of this procedure will vary. in accordance with the seriousness of the problem, the member of staff's role, whether the problem relates to a specific. or broader difficulty, and the time period during which the problem has existed. Normally the total period given for improvement will be no longer than two terms after the formal Capability Procedure has begun. For academic staff, the period may need to be a full academic year, during which SMART (see page 5) targets would be set. However, in certain cases, for example, where the provision of a key service is jeopardised, the period given for improvement will need to be considerably shorter.
- 2.3. In most cases. a member of staff should not be dismissed because of a failure to perform to the required standard. unless warnings and an opportunity to improve have been given. However, where a member of staff commits a single significant error, or a number of substantial errors due to negligence, or failure, to meet the required standards of the job, and the actual or potential consequences of that error are, or could be, extremely serious, warnings may not be appropriate. This procedure allows for a member of staff in this situation to be dismissed without notice, in which case Stage 3 of the procedure should be followed.

### **3. Reasons for poor performance**

3.1 The reasons for poor performance should be explored fully, to determine the most appropriate solution. Concerns about an individual's performance may arise from a number of factors, including:

- lack of aptitude, skill or experience, which may be the result of inappropriate recruitment, selection, induction or training;
- lack of proficiency and poor overall organisation;
- lack of facilities crucial to the individual's performance;
- changes in the nature and allocation of work, including heavy workload;
- changes in technology;
- personal/family difficulties;
- short-term health problems;
- reorganisation or redefinition of role;
- poor attendance at work, related to genuine ill-health;
- lack of motivation to perform role.

### **4. Responsibilities and rights**

#### **4.1 Members of staff**

Members of staff are responsible for:

- (i) ensuring that they are aware of their responsibilities;
- (ii) performing their duties to a satisfactory level;
- (iii) engaging in any reasonable training and development that will enable them to reach the required level of performance for the job;
- (iv) understanding that if their work performance falls below that which is deemed to be acceptable, managers will be obliged to address this;
- (v) responding to corrective measures that are identified;

- (vi) familiarising themselves with university procedures relating to their employment;
- (vii) informing their manager of any issues which could be affecting their work performance.  
This could include personal issues outside the workplace; health or disability issues.

Members of staff have a right to:

- (i) be informed of the requirements/performance standards of their job;
- (ii) seek help from their manager if they have their own concerns about anything which may be affecting their performance, without prejudice;
- (iii) be treated with dignity and respect at all times;
- (iv) be accompanied or represented at all formal stages of the Capability Procedure, by a fellow worker or trade union representative. The chosen companion will be allowed to participate fully in the meeting, and has the right to address the meeting, but not to answer questions on the member of staff's behalf;
- (v) request a postponement of a meeting if the chosen fellow worker/trade union representative cannot attend on the date proposed. and a suitable alternative person cannot be found. In this instance, the member of staff must offer an alternative date and time, so long as it is reasonable and falls no later than five working days after the date first proposed by the University;
- (vi) be treated in accordance with the principles of natural justice. This includes representation; the right of appeal; and the provision of evidence and relevant documentation.

## **4.2 Managers**

Managers are responsible for:

- (i) recruiting, selecting, training and managing staff appropriately, thus minimising the risk of poor performance;
- (ii) setting standards of performance and ensuring that these are communicated and understood. Standards of work performance should be outlined at the start of employment, and then reinforced through the induction process and training;
- (iii) ensuring that staff have a reasonable workload;
- (iv) providing induction to:
  - a) new recruits;
  - b) staff transferring from another school or department;
  - c) staff who have been redeployed;
  - d) staff promoted within the school or department;
- (v) providing feedback on work performance to every member of staff for whom they are responsible;
- (vi) providing appropriate support and assistance to help staff reach and maintain the required standards of work;
- (vii) ensuring that they receive appropriate advice and training relating to the operation of the Capability Procedure, subject to such training being provided by the University;
- (viii) dealing with poor performance as it becomes apparent, to avoid this having a detrimental effect on the performance of the school/central department, or on staff morale;

- (ix) ensuring that matters relating to an individual's work performance are dealt with sensitively and consistently, maintaining confidentiality, dignity, inclusivity and equality of opportunity.

Managers have a right to:

- (i) enquire, where appropriate, and with sensitivity, of issues that may be affecting a member of staff's work performance;
- (ii) be treated with dignity and respect at all times.

#### **4.3 Human Resources**

The Human Resources Department is responsible for:

- (i) training and advising managers on the Capability Procedure;
- (ii) monitoring the use of the Capability Procedure across the university;
- (iii) attending and keeping a formal record of meetings at all formal stages of the procedure.

#### **5. Exclusions**

The Capability Procedure does not apply to situations covered by other University procedures, in particular:

- staff under probation to whom a separate procedure applies;
- cases of misconduct which should be handled under the Disciplinary Procedure. Managers should liaise with their Human Resources representative for assistance, as to whether a case is one of misconduct or incapability;
- cases of incapability due to ill health, which should be handled under the Sickness Absence and Medical Incapacity Procedure.
- cases where the lack of capability may be due solely or partly to an impairment, in which case, advice should be sought from a Human Resources representative, and reference made to the University's Disability Policy and/or the Sickness Absence and Medical Incapacity Procedure.

#### **6. Statutory changes**

**6.1** Any enhancements to statutory provisions that affect this collective agreement, will automatically be incorporated.

#### **B. CAPABILITY PROCEDURE**

#### **7 Informal action**

7.1 Cases of minor shortfalls in performance are usually best dealt with by the manager informally, and without delay. This informal stage provides an opportunity to encourage open discussion of the issues involved, and to seek effective solutions. The manager should speak to the member of staff in private, and advise him/her of the shortfalls, and what is required of the member of staff to rectify them. The manager should consider appropriate support, guidance, and/or training, and make arrangements for this to be provided. The member of staff should have a clear understanding of what is required to meet the expected standards of performance, and that if s/he fails to meet these standards in a reasonable time period, the formal procedure will be invoked. The manager should make a file note of the discussion and of the outcome,

including any measures to be put in place to assist the member of staff to improve his/her performance to the required standard.

7.2 It is not expected that at any informal meeting between a manager and the member of staff there should be any third party involvement. However, a request by the member of staff to be accompanied by a fellow worker, or trade union representative, will not be unreasonably refused.

7.3 The Capability Procedure should only be used where informal action has failed, or the individual's performance issue is considered to be sufficiently serious, to warrant formal action.

## **8. Stage 1**

8.1 **Note:** Where it becomes apparent, during Stage 1, that ill health is a possible reason for the problems, the manager should follow the procedure set out in the Sickness Absence and Medical Incapacity Procedure (available on Human Resources website).

8.2 Where informal intervention has not resulted in the required improvement in performance, or where the manager feels that the individual would benefit from a more structured process of direction and support, the manager should inform the relevant Human Resources representative, and hold a meeting under Stage 1 of the Capability Procedure. For the avoidance of doubt, nothing in this Procedure shall require the institution of formal proceedings to be preceded by informal action, in particular if the performance issue is considered too serious to be addressed through informal intervention.

8.3 The member of staff should be given advance notice of the meeting, his/her right to be accompanied (see guidance note 4.1), and the purpose of the meeting, in writing. Any previous appraisal documentation should be reviewed prior to the meeting. In advance of the meeting, the member of staff should be provided (as far as is reasonably practicable), with copies of any documents to be considered at the meeting.

8.4 The purpose of the meeting is to inform the member of staff that s/he has failed to perform his/her duties to an acceptable standard, to give the individual an opportunity to respond, and to set a timescale for the individual's performance to improve.

8.5 Those present at the meeting should include the manager, the member of staff, the member of staff's chosen colleague or trade union representative, and a Human Resources representative.

8.6 At the meeting, the manager should:

- clarify the required standards of the role;
- explain clearly the shortfall between the individual's performance and these standards;
- give the member of staff an opportunity to respond to the issues raised about his/her performance;
- seek to establish the cause of poor performance, and any action which can be taken to help to improve the situation;
- identify any support services or investment which might be required;

- seek to identify any adjustments to the working environment which could assist the individual in meeting the requirements of his/her role;
- obtain commitment from all concerned to assist in resolving the problems; propose an
- action plan which sets out clear targets and timescales for demonstrable improvement. Input should be sought from the member of staff, and the action plan should be agreed by the member of staff, wherever possible; agree a reasonable time-scale for
- the individual's performance to improve;
- set a date for a review meeting to ensure that progress is being made.

8.7 After the meeting, the manager should give the member of staff a written action plan that contains:

- a detailed summary of the improvements required, and the standards to be met details
- of areas where support is needed, and the means of achieving that support; any agreed adjustments to the working environment;
- clear targets and timescales for demonstrable improvement
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8.8 All targets should be "SMART", i.e.

Specific  
Measurable  
Achievable  
Realistic  
Timebound

8.9 The manager should ensure that any other staff involved in the process are appropriately briefed.

8.10 The nature of the under-performance will determine the type, and range of help to be provided, but it could include:

- monitoring, review, and variance of workload and responsibilities;
- monitoring standards of performance against agreed objectives and the requirements of the job;
- review of the availability of suitable resources or materials;
- training or coaching, specifically aimed at achieving an improvement in performance (in liaison with the Staff Development Unit);
- the identification of a mentor;
- review of the amount of supervision needed;
- referral to the University's Occupational Health service, or the Staff Welfare Officer, (particularly if the meeting establishes that performance problems are related to the individual's personal life);
- opportunities to see good practice elsewhere within the University (or other organisation).

8.11 If it is decided that the unsatisfactory performance emanates from a change in the University's standards, the revised standards will be reiterated to the individual, and help will be offered to reach and maintain these standards.

- 8.12 The manager will monitor and assess the member of staff's performance against the SMART targets, set for an appropriate period of time, normally ranging from four to 10 weeks (potentially longer for academic staff). A written record of the monitoring process should be kept by the manager.

### **Stage 1 review meeting**

- 8.13 At the end of the monitoring period, the manager will meet with the member of staff, his/her representative (if appropriate), and a Human Resources representative, to review progress against the targets set. 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 manager should give the member of staff the opportunity to ask questions for clarification, and to respond to the outcomes of the monitoring process, including raising any relevant factors that should be taken into account when deciding future action. It may be possible that circumstances outside the member of staff's control have caused, or contributed to his/her reduced effectiveness over the period monitored.
- 8.14 The manager should decide, in the light of the issues discussed, what action is appropriate. Available options include:
- no further action under the Capability Procedure as the member of staff's performance has improved sufficiently;
  - an extension of the Stage 1 monitoring period;
  - to issue a written warning that the individual's performance remains unsatisfactory, and that further targets will be discussed, and set, at a meeting held under Stage 2 of the Capability Procedure.
- 8.15 The manager may adjourn the meeting in order to consider the issues and reach a decision. Wherever possible, the member of staff should be informed of the decision at the end of the meeting. This should be confirmed, in writing, by the manager as soon as possible, normally within five working days.

## **9. Stage 2**

- 9.1 Where the manager decides to progress to Stage 2, the letter confirming the outcome of the Stage 1 monitoring process, will outline those areas where performance remains unsatisfactory, detail the arrangements for a Stage 2 meeting (which should normally be held within five working days of the Stage 1 review meeting), confirm the member of staff's right to be accompanied (see guidance note 4.1), and warn the member of staff that his/her employment may be terminated if the required improvement is not achieved.
- 9.2 Those present at the meeting should include the manager, the member of staff, the member of staff's chosen colleague or trade union representative, and a Human Resources representative.
- 9.3 At the meeting the manager should:
- re-clarify the required standards of the role;
  - explain clearly the shortfall between the individual's performance and these standards;

- give the member of staff an opportunity to respond to the issues raised about his/her performance;
- seek to establish the cause of poor performance, and any action which can be taken to help to improve the situation;
- identify any further support services, or investment, which might be required;
- seek to identify any adjustments to the working environment which could assist the individual, in meeting the requirements of his/her role;
- obtain commitment from all concerned to assist in resolving the problems;
- propose a further action plan which sets out clear targets, and timescales, for demonstrable improvement. Input should be sought from the member of staff, and the action plan should be agreed by the member of staff, wherever possible;
- agree a reasonable time-scale for the individual's performance to improve;
- set a date for a Stage 2 review meeting, to ensure that progress is being made.

9.4 The manager should write to the member of staff, normally within five working days of the meeting. The letter should detail the standards expected, targets, action plan, and timescale for improvement.

9.5 The timescale for this stage of the procedure, will vary depending on the individual situation, and in proportion to the level of seriousness of the performance difficulty. As a guideline, a period of between four and ten working weeks may be normal, but this could be shortened or lengthened, as appropriate. A written record of the monitoring process should be kept by the manager.

### **Stage 2 review meeting**

9.6 At the end of the monitoring period, a further meeting involving all those present at the initial Stage 2 meeting will be held to review progress, confirm the outcomes of the monitoring process, and identify any further improvements needed. The manager should decide, in the light of the issues discussed, what action is appropriate. The options at this stage could include:

- no further action under the Capability Procedure as the member of staff's performance has improved sufficiently;
- an extension of the Stage 2 monitoring period;
- to issue a final warning that the individual's performance remains unsatisfactory, and that further targets will be discussed, and set, at a meeting held under Stage 3 of the Capability Procedure.

9.7 The manager may adjourn the meeting in order to consider the issues and reach a decision. Wherever possible, the member of staff should be informed of the decision at the end of the meeting. This should be confirmed in writing, by the manager as soon as possible, normally within five working days.

9.8 Following the meeting, the member of staff should be advised in writing of the outcome. Where it has been decided that further action should be taken under this procedure, the written notification to the member of staff shall:

- i. include a final written warning, together with confirmation of the areas in which the individual's performance has been found to be unsatisfactory or inadequate, and the nature of the improvement required. The member of staff should be warned that his/her



- employment may be terminated, if the required improvement is not achieved;
- ii. Include a copy of the action plan;
- iii. Indicate the length of the assessment period and the intervals at which the member of staff's performance shall be reviewed during this period;
- iv. Set out the details of any support or assistance to be provided, to assist the member of staff, and the means of achieving that support;
- v. State that the member of staff may appeal against the final written warning, in accordance with section C below.

## 10. Stage 3

10.1 At the end of the Stage 2 assessment period, the manager will decide what action is appropriate, from the following options:

- No further action under the Capability Procedure, as the member of staff's performance had improved sufficiently, and the required standards are being met. In this case, the manager should write to the member of staff, confirming that his/her performance has reached the required standards, and that no further action will be taken under the Capability Procedure;
- An extension of the Stage 2 assessment period;
- Progression to Stage 3 of the Capability Procedure, where no significant and sustained improvement has occurred.

10.2 Where the manager responsible for Chairing the meetings at Stage 2 decides to progress to Stage 3, s/he shall write to the Vice-Chancellor (or nominee), confirming the decision to progress to Stage 3 of the Capability Procedure.

10.3 In such cases, the Vice Chancellor (or nominee) will appoint a Stage 3 panel consisting of three senior<sup>14</sup> members of staff (a Chair who is senior to the Stage 2 Chair and two other members, one of whom must be from another School/area of the University<sup>15</sup>) who have had no previous involvement in the matter. The Chair must have the authority to dismiss. The panel will be supported by a Human Resources representative.

10.4 At the Stage 3 meeting, the Stage 2 Chair will confirm the process followed to date, and the outcomes. The member of staff will be given an opportunity to explain his/her continued failure to achieve and maintain the required level of performance, and/or the circumstances under which s/he has become incapable of performing the required duties. A Human Resources representative will be present to advise on the procedure and keep a formal record of the meeting.

10.5 Having taken the member of staff's explanation into account, and sought advice from the Human Resources representative, the Stage 3 panel will consider what action is appropriate. Available options include:

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<sup>14</sup> Grade 8 or above

<sup>15</sup> Where the member of staff is employed within a School, the panel member will be from a different School; where the appellant is employed with Professional Services, the panel member will be from another Division. The panel member will normally be from the same staff group as the member of staff (e.g. academic, professional support, technical etc)

- the possibility of redeployment to a more suitable post, if necessary on a trial basis. Where a member of staff is transferred to a lower grade job, s/he will be transferred to the grade of that job with an associated salary. The member of staff should be allowed sufficient time, normally 10 working days, to consider the offer, and should be informed that a refusal will normally result in termination of employment. The member of staff should be asked to give a written response within the specified time period;
- to make a recommendation to dismiss the individual with due notice.

10.6 There is a right of appeal against a dismissal under this procedure. Please refer to the appeals procedure below.

## **C. APPEALS**

### **11. General**

11.1 A member of staff may appeal against the outcome of any of the formal stages of the procedure on the grounds of:

- (i) evidence does not support the decision reached;
- (ii) perceived unfairness of the outcome;
- (ii) severity of the outcome;
- (iii) new evidence coming to light that could not have reasonable been known at the time of the meeting;
- (iv) procedural irregularities.

### **12. Appeals against warnings**

12.1 Where a member of staff wishes to appeal against a warning issued under Stage 1, or Stage 2, of the procedure, the following procedure applies:

- a letter detailing the reason for appeal, together with any relevant supporting papers, should be submitted to the manager responsible for the outcome, within ten working days of the written confirmation of the outcome. The manager responsible for the outcome should ensure that all papers are passed to a senior manager not previously involved in the procedure, who will be responsible for hearing the appeal;
- the appeal will normally be held within ten working days of the senior manager's receipt of the paperwork. The senior manager will outline the reason for the action taken, and will invite the appellant (or his/her colleague or representative), to expand upon the grounds of appeal detailed in the appeal letter. Where appropriate, the senior manager will invite the manager responsible for the outcome, to respond to the points made by the appellant. A member of Human Resources will be present to advise on the procedure and keep a formal record. The senior manager may need to adjourn the hearing at any point, to investigate issues raised;
- wherever possible, the member of staff will be informed of the outcome of the appeal, at the end of the hearing. The decision should be confirmed in writing, within five working days of the hearing. There is no further level of appeal.

### **13. Appeals against dismissal**

- 13.1 Appeals against dismissal are heard by an Appeal Panel appointed by the Vice Chancellor (or nominee), consisting of two senior managers (one of whom shall be the Chair), and an independent employment solicitor, appointed by the University, (who shall not be employed by the University nor act for the University other than in their capacity as a member of a panel for appeals against dismissal). In the case of the independent peer (from the staff), independent shall have the meaning of not having had prior involvement in the case. In the case of the independent person external to the University, independent shall have the meaning of having no involvement with the University which might be prejudicial to impartial judgement, (and for the avoidance of doubt, any payment by the University to such external person in respect of their time incurred in respect of the appeal, shall not be deemed to prejudice their impartial judgement). In the case of an appeal of an academic member of staff, one of the two senior managers shall be a Head of School from another School, or other academic peer. The panel will be supported by a Human Resources representative.
- 13.2 Appeals must be submitted in writing to the Director of Human Resources within ten working days of receipt<sup>16</sup> of the dismissal letter, specifying the grounds for appeal as detailed above. The appeal will normally be held within fifteen working days of receipt of the paperwork, and the member of staff will be given at least five days<sup>16</sup> notice, in writing, of the arrangements for the appeal hearing.
- 13.3 An appeal against dismissal shall not normally take the form of a re-hearing of the evidence and witnesses, seems like a word is missing here? may be called only with the Chair of the Appeal Panel's permission, which shall usually be given only, where there was good reason for the witness not being called to give evidence at the Stage 3 meeting.
- 13.4 At the appeal hearing, the member of staff shall present his/her grounds of appeal and the Chair of the Stage 3 meeting shall respond.
- 13.5 The appeal Chair shall produce a written decision, normally within ten working days of the appeal hearing, which will be sent to the member of staff.
- 13.6 The appeal hearing will represent the final stage in the procedure.

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<sup>16</sup> Receipt will be deemed to be 48 hours from the date of the letter.