

TITLE	REF	VERSION
Capability Procedure	HRPRO004	1.0

  

DEPARTMENT	Group HR		
DATE	July 2022	REVIEW DATE	July 2024

# CAPABILITY PROCEDURE

## Procedure Statement

Activate Learning expects employees to work competently and effectively to perform the duties outlined in their job description. There is a requirement for the needs of the organisation's learners and clients to be met and for quality to be maintained. It is acknowledged that marginal or unsatisfactory performance may result from situations outside of the employee's control and may, when resulting from personal circumstances, be short term.

This procedure is intended to assist and encourage all employees to achieve and maintain standards of job performance. The aim is to ensure consistent and fair treatment for all and to assist an employee if they are experiencing difficulties in performing their duties satisfactorily. Under achievement may arise from a number of factors including:

- a change in performance standards or workloads or a reorganisation or redefinition of role;
- new working methods have not been properly explained and adequate training provided;
- there is an absence of facilities/resources crucial to performance;
- the employee is experiencing inter personal conflict;
- the employee feels a lack of support, leadership or communication;
- the employee is displaying a lack of aptitude, skill or experience;
- the employee some personal/family difficulties or short term health problems; and/or
- poor attendance, related to genuine ill health.

Concerns about capability should not be confused with disability. If an employee becomes disabled during the course of their employment every effort will be made to retain them in their original job or to redeploy them to a suitable alternative post, in line with the requirement of the Equality Act 2010. Recourse to the remainder of this procedure should only take place when consideration of all reasonable adjustments has been exhausted. An employee has the right to be accompanied and represented by a trade union in the formal stages of this procedure.

## 1.0 Purpose

- 1.1 This procedure is designed to assist and encourage all employees to achieve and maintain standards of performance and behaviour. The aim is to ensure consistent and fair treatment for all and to assist any employee who is experiencing difficulties in satisfactorily performing the duties required of the post to which s/he was appointed. It is designed to provide managers and employees with a framework to improve performance in the workplace.
- 1.2 Activate Learning recognise that employees need a clear understanding of the scope and nature of their role and the duties and responsibilities expected of them. Line managers must ensure that all employees operate at the required level of performance for their role and to address issues of under-performance in accordance with this procedure.
- 1.3 Activate Learning expect that our employees will always work to the best of their abilities and apply themselves. Line managers are expected to support and encourage their staff to achieve and maintain acceptable standards of work performance. Should it be identified that an employee is underperforming in their role this will be addressed under this policy and procedure. This policy and procedure is primarily a supportive one to enable employees to achieve the required standard.

Good performance management can help Activate Learning:

- motivate our employees
- check that all staff are making valuable contributions towards our organisational goals
- develop our employees
- recognise and acknowledge the good work of employees

- deliver tasks and projects effectively and to required standards
- spot and improve poor performance.

1.4 We expect that everyone who works for us perform their work at a standard which is clearly set out and understood. Line managers are expected to discuss expectations and standards with their direct reports and to agree these with them. Where the manager and employee cannot agree the manager will make the final determination of what the required standards will be.

## 2.0 Scope

- 2.1 This procedure applies to all employees other than Senior Postholders (as defined in the College's Instruments and Articles of Governance). Agency staff, contractors, consultants and those working under self-employed arrangements are not employees of Activate Learning and so are not covered by the scope of this procedure. The procedure does not apply to employees in their probationary employment for whom separate provisions apply, as defined in the Probationary Procedure.
- 2.2 This procedure is independent of the organisation's Disciplinary Procedure which deals with unacceptable conduct and is not intended to deal with issues of performance falling below an acceptable standard due to the ill health of an employee. These situations will be dealt with under the Sickness Absence Procedure.
- 2.3 This procedure is not incorporated into individual contracts of employment.

## 3.0 Responsibilities

### 3.1 Line Manager Responsibilities

Activate Learning has clear policies and positive management practices which support our staff to achieve and maintain an acceptable level of performance. Employees must be made aware of any performance issues at the earliest possible stage and advised of the required improvement. This includes setting clear standards of expected performance and behaviour and conducting regular review meetings at which feedback on performance will be provided. As part of this commitment a line manager will:

- Set out clear standards of work performance and behaviour for an employee;
- Explain fully the requirements of the job;
- Provide support, training, resources and feedback to employees to achieve the standards, skills and knowledge required for the role;
- Try to resolve any performance issues informally before using the formal procedure;
- Allow an employee reasonable time to reach an acceptable standard;
- Providing regular appraisal and feedback on each individual's progress;
- Informing their member of staff if they are failing to meet standards of performance and advising them on improvements required.
- If the employee's performance fails to improve, it is the responsibility of management to initiate action under this Policy.
- The organisation will consider options for redeployment, reasonable adjustments to work and other resolutions where it is appropriate to do so.

### 3.2 Employees' Responsibilities

Every employee is expected to take responsibility for their own performance and behaviour and will be required to undertake the following:

- To meet the performance standards which have been discussed and agreed;
- To work to the best of their abilities and always apply themselves;
- To take active steps to understand the required level and standards of performance for the job and clarify any unresolved points with their line manager;
- To actively participate in the organisation's appraisal and one to one review processes;
- To actively participate in training and development activities in order to develop competence and performance;
- To revise and make the required adjustments to your working practices in response to feedback from an employee's line manager;
- To identify any issues which are preventing an employee from working effectively and bring them to the attention of the employee's line manager;

- To cooperate fully with any actions taken by an employee's line manager to support improving performance;
- To consistently maintain the required levels of performance.

#### **4.0 General Guidance**

- 4.1 Those involved in capability issues should remember that the vast majority of employees make an effort to meet the standards expected of them at work. Matters should be dealt with promptly and without unreasonable delay.
- 4.2 In most cases where a capability matter arises it should be resolved at an early stage through informal discussion between the employee and their line manager.
- 4.3 Timescales given under this Policy may be varied and where possible this will be by mutual consent. For example, an employee may request that a capability hearing may be held earlier or later than the five working days specified under this Policy.
- 4.4 At every meeting or hearing the employee will be made fully aware of the nature of their alleged unsatisfactory work performance and have the opportunity to state his or her case before any decisions are made.
- 4.5 No formal capability action will be taken without a capability hearing being held.
- 4.6 Managers must consult the HR Department prior to any action being taken under this Policy.
- 4.7 Although normal performance standards apply, no action will be taken against a recognised trade union representative until the circumstances of the case and representation have been discussed with the full-time officer of the trade union concerned.
- 4.8 Where the unsatisfactory performance is sufficiently serious, the employee may be given a final written warning (or even dismissed in the case of gross incompetence) without having received a first written warning.
- 4.9 A representative from HR will normally be present at capability and appeal hearings.
- 4.10 The stages of capability do not operate independently but are a cumulative system for dealing with problems. Once the capability process has been initiated, subsequent breaches for any offence of unsatisfactory performance, within a warning period, could involve further action being taken.
- 4.11 When deciding whether to issue an employee with capability action, the manager will take into account any live warnings issued under this Policy. If there is already current action against an employee, any capability warning may be issued at the next higher level.
- 4.12 If an employee becomes ill and is unable to attend a capability or appeal hearing, the HR Department must be notified immediately. Where the illness is short-term, the meeting or hearing may be arranged for a later date. Payment of sick pay will be in accordance with the organisation's Sickness Absence Policy. The organisation reserves the right to refer the employee to its occupational health service at any time. Where the employee is too ill to attend a meeting or hearing in the reasonably near future, the investigation or capability hearing may proceed in their absence and their trade union representative or nominated work colleague may represent them at the meeting or hearing.
- 4.13 Where an employee refuses to attend meetings in accordance with this Policy without good reason (for example, illness which is covered by a Medical Certificate or Fit Note) they are in breach of their employment contract. The employee will be advised of this, in writing, and advised that unless they do attend, a capability decision may be taken in their absence, based on the information available.
- 4.14 Employees will have the right to be accompanied by a trade union representative or a workplace colleague (a companion) for action taken under formal sections of this policy. In order to exercise their right to be accompanied, an employee must make a reasonable request to the organisation under the

circumstances of the case. For example, it would not be reasonable for an employee to request that they are accompanied by a companion whose presence would prejudice the hearing.

- 4.15 Companions will be entitled to address the hearing in order to put forward and summarise the employee's case. They will also be allowed to respond on behalf of the employee to any views expressed at the hearing and to confer with the employee throughout the hearing. However, they will not have these rights where the employee does not wish it or if it will prevent the employee from explaining their case themselves.

## **5.0 Equality Act 2010**

Where employees are disabled, reasonable adjustments should be made to retain them in their original job, or redeploy them to a suitable alternative post, in line with the requirements of the Equality Act 2010.

## **6.0 Record Keeping**

- 6.1 Accurate and timely records must be kept of all formal meetings and correspondence. As far as possible, notes of capability meetings will be agreed with the employee concerned. Where agreement is not possible, both sets of the notes will be kept on the capability file. Records must include details of the matter raised, the employee's response, any action taken and the reasons for it together with all correspondence.
- 6.2 These records must be kept confidential and retained in accordance with the Data Protection Act 2018 and the organisations' Data Retention Policy.
- 6.3 Copies of any meeting records should be given to the individual concerned, although in extreme circumstances specific information may be withheld. In certain cases, anonymised statements may be used (for example to protect a witness where there is a concern that their safety may be compromised by disclosure of their identity). Appropriate legal or professional advice may be taken in such cases.
- 6.4 Whilst records will be kept of investigation and capability meetings, no electronic recording will be made of such meetings, unless it has been expressly agreed by all parties present beforehand.

## **7.0 Informal Capability Action**

- 7.1 Employees whose performance is not meeting an appropriate standard will be placed on a Performance Improvement Plan (PIP). The PIP will be drawn up by their manager and will be discussed with the employee. The required standard of performance will be made clear to them as will the timescale for improvement of their performance. Their performance will be regularly monitored against the PIP and if they are still not meeting an acceptable standard of performance, this will be made clear to them. They may then move on to formal capability action, defined below.
- 7.2 In most cases the employee's performance will have improved following a reasonable period for the PIP. Where this is the case, the employee's manager will confirm to the employee that the PIP is completed and will confirm to them the expected standards of performance.
- 7.3 Effective performance management is not achieved by an employee being subject to a series of PIPs (that is, more than two in a two-year period). Where there is not a sustained improvement in performance it may be appropriate to move the employee into a formal capability process without generating another PIP.
- 7.4 The manager monitoring the PIP must ensure that there are regular discussions with the employee about their progress in improving their performance. These meetings should take place at least fortnightly and, ideally, more regularly than this. It should be made clear to the employee that their progress towards improved performance is being reviewed and feedback given to them on their progress.
- 7.5 The PIP is a short-term tool for improving performance. It must have a specified end date which is a reasonable timeframe to expect an improvement in performance. Whilst there is not a limit on a PIP, it would normally be for a minimum of four weeks and for no longer than three months.



## 8.0 Formal Capability Action

- 8.1 Each case will be considered on its merits and in the context of the circumstances relevant at the time.
- 8.2 If minor lapses from acceptable standards of performance reoccur or if the matter is more serious, then the following capability penalties may be applied.
- 8.3 Where it is decided that there is a capability case to consider, the employee should be notified of this in writing. This notification will contain sufficient information about the alleged poor performance and its possible consequences to enable the employee to prepare to answer the case at a capability hearing. If appropriate, any written evidence, which may include witness statements, will be provided with the notification.
- 8.4 The notification will also confirm the details of the time and venue for the capability hearing and the employee will be advised of their right to be accompanied at the meeting.
- 8.5 The meeting shall be held without unreasonable delay whilst allowing the employee enough time to prepare their case. The employee will be given five days' notice of the hearing.
- 8.6 At any capability hearing, the complaint against the employee will be explained and the employee will be taken through any evidence obtained by the manager presenting the case against them. The employee will then be given the opportunity to set out their case in response to the allegations made. The employee will also be entitled to ask questions, present any evidence previously submitted and call relevant witnesses previously notified, prior to any decisions being made.
- 8.7 Where management intends to call relevant witnesses, the employee will be given advance notice of this and the employee shall be given the opportunity to raise points about any information provided by the witnesses during the hearing.
- 8.8 Where it is possible, efforts will be made to find alternative ways to assist people to improve their performance.

## 9.0 First Written Warning

- 9.1 Unsatisfactory performance may result in a First Written Warning being issued. A First Written Warning will set out the nature of the unsatisfactory performance and the change in performance required (with a timescale for the required improvement). The employee will be told that the Warning will remain current for **twelve months**. The employee will be informed of the consequences of further unsatisfactory performance within the twelve-month currency of the Warning. A further act of unsatisfactory performance within a set period will normally result in a Final Written Warning being issued. A copy of the First Written Warning will be placed on the employee's personal file and will be removed from their file after twelve months if there has been no further capability action taken.
- 9.2 The First Written Warning will be issued within **five working days** of the capability hearing. The employee will be advised of their right of appeal against the capability action taken.

## 10.0 Final Written Warning

- 10.1 Following further unsatisfactory performance, or the employee's failure to comply with the terms of a First Written Warning within the relevant timescale, a Final Written Warning may be given. The organisation reserves the right to move straight to a final written warning if the evidence supports that form of action.
- 10.2 A Final Written Warning will be given to the employee within **five working days** of the capability hearing. It will give details of the unsatisfactory performance, the improvement or change in conduct required and the timescale allowed for this. It will also inform the employee that failure to improve their performance, or further unacceptable performance, may lead to dismissal. The employee will be advised of their right of appeal against the capability action taken.
- 10.3 A copy of the Final Written Warning will be placed on the employee's personal file. The warning will be removed after **eighteen months** if no further capability action has been taken.

## **11.0 Dismissal**

- 11.1 The employee may be dismissed if they have failed to comply with the terms of a current Final Written Warning or they have been given a Final Written Warning and their performance has still not improved to an acceptable standard.
- 11.2 The employee will be provided with written confirmation of the action within **five working days** of the Capability Hearing, including the reason for dismissal, the appropriate period of notice (or pay in lieu of notice), the date on which employment was terminated, and the employee's right of appeal together with the date by which the appeal must be submitted.
- 11.3 Any decision to dismiss shall only be carried out by a manager with authority to do so.

## **12.0 Other Capability Actions**

- 12.1 A capability hearing may conclude that another penalty may be appropriate instead of, or as well as, a First or Final Written Warning. Such action could include demotion or deployment to another post in the College. Where such a change is made, the employee will move to the terms and conditions (including pay) of the new post.

## **13.0 Appeals Against Capability Action**

- 13.1 Where an employee feels that the capability action taken against them was wrong or unjust, they can appeal against the action taken. They must put the grounds for their appeal in writing within ten working days of the capability action being confirmed to them. The appeal should be sent to the HR Department who will arrange an appeal hearing and notify the employee of the arrangements for the hearing.
- 13.2 In the interest of ensuring that appeal hearings are dealt with impartially, a manager not previously involved in the original hearing who will be at a more senior or the same level as the manager who took the original capability action will conduct the appeal hearing.
- 13.3 Notification of the appeal hearing must be made in writing to the employee giving **five working days'** notice (unless otherwise agreed). This notice will advise the employee of their right to representation by a Trade Union representative or work colleague.
- 13.4 Appeals will be dealt with as quickly as possible.
- 13.5 No new evidence may be presented at an appeal hearing without the prior agreement of all the parties. Where new evidence is pertinent to the case, agreement to submitting it will normally be given.
- 13.6 The manager hearing the appeal may endorse the original decision, may substitute a lesser penalty or remove the capability action against the employee. They may not substitute a higher level of penalty against the employee.
- 13.7 The purpose of an appeal is to review the decision made by the Chair of the capability hearing, rather than re-hear the capability hearing in full. However, all relevant evidence will be heard.
- 13.8 This decision will be confirmed in writing to the employee within five working days, which will include the following:
  - i. Confirmation of the outcome of the appeal, any capability penalty imposed and the reasons for this;
  - ii. Confirmation that the decision is final and that there is no further internal right of appeal.

## **References**

Disciplinary Procedure  
Sickness Absence Procedure  
Probation Procedure  
Grievance Procedure

## **Appendices**

APPENDIX 1 Capability Flowchart

## Appendix 1: Overview of Capability Procedure

