

## TRUST POLICY MANAGING PERFORMANCE (CAPABILITY)

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### FOR USE BY:

**This document is to be followed by all staff of Gloucestershire Hospitals NHS Trust and Gloucestershire Managed Services**

### FAST FIND:

- To deal with a minor issue informally, see action card [DCP4](#)
- To deal with any issue that might lead to formal capability action under the Managing Performance Policy, consult Human Resources (HR) advisor FIRST before starting any formal processes
- To look up Flow-chart, see [B0288 RD5](#)
- To look up Managing Performance (capability) processes, see [section 6](#) of this document.
- To look up template letters please see [Manager's Toolkit](#)
- Where capability issues are related to sickness absence, see also the Trust's [Sickness Management Policy](#)
- Information relating specifically to medical, dental and pharmacist staff in issues of clinical competency can be found in Action Card [DCP10](#) and "Maintaining High Professional Standards" which is available via the Department of Health website ([www.dh.gov.uk](http://www.dh.gov.uk))

## 1. INTRODUCTION / RATIONALE

The Trust is committed to providing an excellent standard of patient care. To do this we rely on staff receiving effective support, being clear about what is expected from them, being able to fulfil their role and committed to demonstrating positive and effective behaviours.

Gloucestershire Royal Hospital NHS Foundation Trust aims to help and encourage all staff to achieve and maintain high standards of performance and is committed to providing the necessary training to encourage them to improve and learn from mistakes.

The purpose of this policy is to establish procedures designed to deal with those cases where an employee is lacking in some area of knowledge, skill or ability and is consequently unable to carry out part, or all of the duties required of them, as per the job description, to an acceptable standard.

This policy sets out standards that are required and the potential consequences of failing to observe those standards.

## 2. DEFINITIONS

Word/Term	Descriptor
Performance Management	Performance Management is a process which contributes to the effective management of individuals and teams in order to achieve high levels of performance across the Trust. As such, it establishes shared understanding about what is to be achieved and an approach to leading and developing people which will ensure that it is achieved.
Capability	Performance assessed by reference to skill, aptitude, health or any other physical or mental quality.
Competence	The ability to perform duties in a capable manner.
Fair blame	Ensuring that human error is taken account of in a fair manner, but with the expectation that employees will take responsibility for their actions and learn from their mistakes.
Staff Side Representative	Officer/steward of trade union or professional organisation, who may be a lay representative (employed by the Trust) or a full-time officer (employed by the union/organisation)
Informal Counselling	The use of informal counselling is an essential part of the Managing Performance process and can help to prevent issues progressing to a formal level.

## 3. POLICY STATEMENT

**3.1** This policy applies to all employees of Gloucestershire Royal Hospital NHS Foundation Trust. It will be used in conjunction with the Agenda for Change National Agreement, in particular areas relating to appraisal and in accordance with Maintaining High Professional Standards in the Modern NHS for medical staff.

**3.2** The procedures are designed to be used where there is an identified genuine lack of capability, rather than a deliberate failure on the part of the employee to perform up to the standards of which they are capable and contracted to perform. A deliberate failure will be addressed under the Trust's Disciplinary Policy.

Capability issues relate to the failure (or difficulty) to deliver adequate job performance, standard of care or standard of management, rather than poor conduct which often results from intent to behave inappropriately. These issues can arise through lack of knowledge, ability or consistently poor performance. Capability issues can arise from a single incident or series of events, reports or poor work outcomes, such as:

- out of date work practices
- inappropriate work practices arising from a lack of knowledge, experience or skills that put patients and other employees at risk
- incompetent work practices
- inability to communicate effectively with colleagues and/or patients
- inappropriate delegation of responsibility
- inadequate supervision of delegated tasks
- ineffective team working skills
- health issues affecting ability to carry out normal job requirements

**3.3** Issues of capability and conduct may overlap. Conduct issues should be managed in accordance with the Trust’s Disciplinary Policy. A warning given under one policy may be taken into account in determining the appropriate level of action in another. Capability can include attendance of an employee, which should be managed in accordance with the Trust’s Sickness Management Policy.

**3.4** Where the unsatisfactory performance is attributable to the employee’s incapacity on the grounds of ill health, this will be dealt with under the Sickness Management Policy and referral to Occupational Health offered. If the manager considers that the employee should not be attending their usual work, whilst waiting for an Occupational Health appointment, the manager may consider offering suitable alternative work pending the outcome of an Occupational Health review.

**4. ROLES AND RESPONSIBILITIES**

<b>Post/Group</b>	<b>Details</b>
Employee Employee means the person whose capability is in question	<ul style="list-style-type: none"> <li>• The employee to demonstrate the Trust Values and Behaviours</li> <li>• Engage in the annual appraisal process, undertake training and development as set out in their personal development plan and apply their learning in practice to improve performance</li> <li>• Comply with the Managing Performance Policy</li> <li>• Attend meetings as requested and discuss issues in respect of Performance Improvement Plans such as training requirements or adjustments and support they may need</li> <li>• Confirm any mitigating circumstances</li> <li>• Arrange a representative if required</li> </ul>
Manager The manager of the employee	<ul style="list-style-type: none"> <li>• Appraise staff on fair, evidence based assessment of performance and capability</li> <li>• Identify training and development requirements</li> <li>• Set agreed objectives and timescales</li> <li>• Informally counsel on performance</li> <li>• Ensure staff understand this policy if required and to provide them with a copy</li> <li>• Ensure there is an up-to-date job description, which has been banded through the Agenda for Change process</li> <li>• Action reasonable adjustments</li> <li>• Seek Occupational Health advice about support or reasonable adjustments and make a referral where employee stress or an underlying condition is a concern</li> <li>• Consider the use of other related policies if appropriate</li> <li>• Facilitate attendance at training and development that will help improve the employees capability and performance</li> <li>• Notify the HR Advisory Team of any capability issues being managed through the formal process</li> <li>• Decide whether to progress the case to the formal hearing</li> <li>• Schedule the date of the meetings and confirm in writing</li> <li>• Inform employee of their rights to a representative</li> <li>• Conduct a formal review of performance via the formal stage of the policy</li> </ul>
HR Representative	<ul style="list-style-type: none"> <li>• Advise managers about how to use the policy</li> <li>• Attend formal meetings (at the formal stages of the process)</li> <li>• Monitor the process</li> </ul>
Staff Side Representative	<ul style="list-style-type: none"> <li>• Accompany employees who request a representative at formal interviews</li> <li>• Assist the employee with preparing if required</li> <li>• Representatives may not answer questions directed towards employees or witnesses, but may respond to views and confer with the employee</li> </ul>
Occupational Health (OH)	<ul style="list-style-type: none"> <li>• Provide advice to managers about how to support employees who are under stress as a result of going through the capability process or who have a condition which affects their capability</li> <li>• Signpost to other support available including Staff Support Services</li> </ul>

**5. THE MANAGING PERFORMANCE (CAPABILITY) PROCEDURE – THE STAGES**

**5.1 Informal Process / Informal Counselling**

The Trust aims to resolve issues of capability and competence through on-going assessment and support, involving regulatory bodies where appropriate. Early identification of problems is essential to minimise risk to patients or colleagues. Use of informal counselling is an essential part of the Managing Performance process and can help to prevent issues progressing to a formal level. Action Card [DCP4](#) details the process to be followed. Always ensure that minor performance issues are dealt with promptly; do not wait for an appraisal to deal with matters that need immediate attention.

Representation is not necessary in cases of informal action, although employees may request it, and managers/HR may encourage it if they feel it would be helpful to the process. Managers must ensure that they have enabled staff to do any training relevant to their job role prior to instigating any form of capability proceedings.

## 5.2 Formal Process

The formal procedure consists of three stages. Stage One, Stage Two and Stage Three (Capability Hearing)

5.3 There will be regular feedback sessions during the period and end with another formal meeting. See [section 9](#) below. At this stage it will be decided whether a capability hearing will be required. The review period will depend on the nature of the duties carried out and the responsibilities of the job. The final review or hearing can be brought forward if serious problems arise during the review period.

5.4 The following table shows the different stages, who attends, potential outcomes and timescales:

Stage of Procedure	Who attends	Potential Outcomes	Timescales
<b>STAGE 1</b>	<ul style="list-style-type: none"> <li>• Manager</li> <li>• Employee</li> <li>• HR</li> <li>• Staff Side Rep</li> </ul>	<ul style="list-style-type: none"> <li>• Explain capability and performance issues.</li> <li>• Explain reasons for improvement required.</li> <li>• Objectives and review date to be set.</li> <li>• Identify training needs and support to achieve this.</li> <li>• Offer mentoring.</li> <li>• Occupational Health referral</li> <li>• Improvement review.</li> <li>• Inform of outcome if failure to improve performance.</li> <li>• If improvement is not sustained, then the employee is issued with a first written warning and the process will move to the next stage in the process.</li> <li>• A formal warning issued under this procedure may result in incremental pay being withheld, in line with the Pay Progression Policy.</li> </ul>	<ul style="list-style-type: none"> <li>• Manager to invite member of staff to stage 1 meeting, providing a copy of the policy and giving 7 days' notice of the meeting</li> <li>• Manager provides written confirmation of outcome/plan within 7 days of the meeting</li> <li>• Manager sets review period / frequency</li> </ul>
<b>STAGE 2</b>	<ul style="list-style-type: none"> <li>• Manager</li> <li>• Employee</li> <li>• HR</li> <li>• Staff Side Rep</li> </ul>	<ul style="list-style-type: none"> <li>• Review stage 1.</li> <li>• Explain capability and performance issues</li> <li>• Explain reasons for improvement</li> <li>• Objectives and review date to be set</li> <li>• Identify training needs and support to achieve this</li> <li>• Offer mentoring, Occupational Health referral</li> <li>• Improvement review</li> <li>• Inform of outcome if failure to improve performance</li> <li>• If improvement is not sustained then a final written warning will be issued and consideration to whether the capability hearing stage will be implemented, if not the next stage will be a stage 3 capability hearing.</li> <li>• A formal warning issued under this procedure may result in incremental pay being withheld, in line with the Pay Progression Policy.</li> </ul>	<ul style="list-style-type: none"> <li>• Manager provides 7 days' written notice of the meeting</li> <li>• Manager sets review period/frequency</li> <li>• Manager to provide written confirmation of the outcome/plan within 7 days of the meeting</li> </ul>
<b>STAGE 3</b>	<p>Panel usually compromised of:</p> <ul style="list-style-type: none"> <li>• One manager of appropriate level</li> <li>• HR Rep not previously involved in the case</li> <li>• Lead Professional (as appropriate where a third panel member is required)</li> </ul> <p>Also in attendance:</p> <ul style="list-style-type: none"> <li>• Line Manager who has supported employee through Stage 1 &amp; 2 (+ HR Rep who has supported Manager)</li> <li>• Employee</li> <li>• Staff-side Rep</li> </ul>	<ul style="list-style-type: none"> <li>• Potential outcomes:</li> <li>• Loss of annual increment</li> <li>• Demotion without pay protection</li> <li>• Dismissal</li> </ul>	<ul style="list-style-type: none"> <li>• 14 calendar days' written notice of hearing</li> <li>• Management case provided 7 days' prior to hearing</li> <li>• Delay of meeting should be no more than 7 days due to unavailability of participants</li> <li>• Response to management case provided not less than 2 days prior to hearing</li> <li>• Written confirmation of outcome within 7 days</li> </ul>

## 6. MEETINGS – STAGE ONE

6.1 When the manager considers that an employee's performance and / or behaviour has fallen below an acceptable standard, and informal attempts at addressing have not managed to support a sustained improvement, the manager should invite the member of staff to a Stage One meeting (See [Manager's Toolkit](#) - Appendix 4 Letter inviting member of staff to stage 1 meeting) (enclosing a copy of the Managing Performance Policy) in order to:

- Outline the reasons for the meeting;
- Confirm the standards that are required and the reasons why;
- Discuss any problems encountered in meeting the required performance standards;
- Identify any assistance that may assist improved performance;
- Set and agree an action plan (See [Manager's Toolkit](#) - Appendix 1 Performance Improvement Plan) with timescales for improvement and agree and document a review date;
- Explain capability process in full.
- Issue a written warning.

6.2 If it is established that the performance problems are related to the employee's personal life and / or work relationships then appropriate counselling/support will be considered / offered as part of the review.

6.3 Written confirmation of the details of the discussion will be sent to the employee within 7 calendar days along with a copy of the agreed action plan (See [Manager's Toolkit](#) - Appendix 1 – Performance Improvement Plan). A template letter is attached (See [Manager's Toolkit](#) - Appendix 5 Outcome letter from stage 1 meeting). A copy will be placed on the personal file.

6.4 During the initial review period, the manager will need to consider whether the employee's performance has improved against the clear goals and objectives set at the beginning of the process. Dialogue should be maintained with the employee concerned to acknowledge progress or otherwise. If a sustained improvement has been made to the extent that no further action is necessary, the manager shall ensure that this is communicated and a record of this outcome is placed on the personal file. (See [Manager's Toolkit](#) - Appendix 3 Letter confirming maintenance of required standards). If improvement has not been achieved arrangements should be made to meet with the employee in accordance with the procedure below.

6.5 If a sustained improvement is not maintained then movement on to the next formal stage of the process will take place. (See [Manager's Toolkit](#) - Appendix 6 Letter confirming outcome of stage 1 review).

## 7. MEETINGS – STAGE TWO

7.1 In cases where employee capability issues have not been resolved at Stage One or where unsatisfactory performance is sufficiently serious to warrant commencement of the process at Stage Two (e.g. where health and safety is at risk or significant costs or other liabilities are involved), Stage Two of the process will be invoked. In particularly serious issues it is possible to move directly to the final hearing stage. The individual will be advised of the meeting in writing with 7 calendar days' notice and informed that they have the right to be accompanied. (See [Manager's Toolkit](#) Appendix 7 - Letter inviting member of staff to stage 2 meeting) (see section 5).

7.2 The aim of this meeting will be to:

- Review the action plan agreed at Stage One.
- Discuss the reasons for not achieving the required performance standards as described in the plan.
- Provide the employee with a written explanation of the standards and/or behaviours which have not been achieved.
- Explore any additional support available to help achieve the required performance standards; this may be in the form of additional training, re-training, mentoring, supervision, occupational health or staff support services.

- Set and agree an action plan (See [Manager's Toolkit](#) Appendix 1 – Performance Improvement Plan) with SMART targets for improvement and agreement for a review date documented.
  - Specific –What is the issue/action that the role requires?
  - Measurable – how will you measure whether the objective has been met or not?
  - Achievable – the goal is not extreme but may stretch the employee in order to achieve it.
  - Relevant – the objective should be relevant to the employee's role.
  - Time-Bound- what is the deadline for the objective to be achieve.
- To advise the employee of the outcome if the action plan and/or behaviours are not met to the required standard including the ultimate possibility of dismissal.
- Advise the individual that any entitlement to a gateway salary incremental progression will be withheld until the required standards and/or behaviours have been met and sustained. This must be communicated to all parties (including the payroll department) at least 8 weeks before the increment is due.
- Issue a final written warning.

**7.3** The outcome of the meeting will be confirmed in writing, enclosing the agreed action plan. The employee is responsible for ensuring their representative has a copy of the outcomes. (See [Manager's Toolkit](#) Appendix 8 – Outcome letter of Stage 2 meeting)

**7.4** At the end of the specified review period, a second formal interview will be held at which time:-

- If the required change/improvement has been made, the employee will be informed and encouraged to maintain improvement.
- If some improvement has been made, but the standard has not yet been met, the review period could be extended.
- If there has been no discernible improvement, the manager shall explain to the employee that they have failed to improve. The manager should give the employee the opportunity to explain any mitigating circumstances that may be responsible for the lack of improvement.

**7.5** Should the latter be the case, consideration will be given to whether there are suitable alternative vacancies, in accordance with the Trust's redeployment policy, contained within the change management policy. In the absence of any suitable vacancies, the employee will be advised that there is no alternative but to move to the final stage of the procedure, which may lead to dismissal. (See [Manager's Toolkit](#) Appendix 9 – Outcome of Stage 2 Review meeting).

**7.6** The Manager should prepare the Management Statement of Case in preparation for the Capability Hearing at Stage Three of the procedure (See [Manager's Toolkit](#) Appendix 10 – Performance Capability Report).

## **8. CAPABILITY HEARING – STAGE THREE**

**8.1** Termination of employment on the grounds of capability or ability to practice etc. could be a final outcome of the capability hearing; no hearing should take place without advice from the HR Advisory Team. The capability hearing will be convened as a final stage of this policy normally when all other stages have been exhausted.

**8.2** It is in the interest of all parties that hearings are convened at the earliest possible opportunity, therefore should a specific individual be unavailable to accompany the employee at the hearing, within the schedule set out within this policy; an alternative representative should be arranged by the employee or by the Union.

**8.3** Throughout this procedure where it is not possible for an employee to attend a meeting, a further attempt will be made to reconvene at an alternative date and time within 5 working days. Should the employee subsequently be unable to attend a reconvened meeting, the meeting may go ahead in their absence. If the employee cannot attend, a written statement can be provided and the representative can still attend. Continuing without the employee will only be carried out after considering a home visit or a meeting in a neutral place and, if applicable, medical advice. The reasons for this course of action should be documented.

- 8.4 The capability hearing shall be convened to consider dismissal on the grounds of capability. The panel should consist of a manager with the authority to dismiss as the Chair supported by an HR representative not previously involved with the case.
- 8.5 The employee shall be invited, in writing, to the hearing to present their case to the panel. The letter will define the purpose of the hearing and possible outcome. (See [Manager's Toolkit](#) Appendix 11 – Letter inviting member of staff to Stage Three hearing). They will be given 14 calendar days' notice of the hearing, and provided with a management case 7 calendar days prior to the hearing. (See [Manager's Toolkit](#) Appendix 10 – Performance Capability Report) The individual will be advised that they have the right to be accompanied. (See [section 5](#))

## 9. PROCEDURE FOR CAPABILITY HEARING

- 9.1 The purpose of the hearing is to review the evidence and to enable the employee to respond to any allegations that have been made. At the hearing the Chair of the panel will introduce those present, describe procedures for the hearing and ensure fairness of the hearing. (For the Sequence of the Capability Hearing (Please see action card [DCP5](#))
- 9.2 The management case should be sent to the employee no less than 7 calendar days prior to the hearing. (See [Manager's Toolkit](#) Appendix 10 – Performance Capability Report). Any response or evidence to be considered from the employee or their representative should be provided to the chair of the capability hearing no less than 2 calendar days prior to the hearing.

## 10. APPEAL

Employees who have had capability action taken against them have a right of appeal. All details of the appeals process are contained in action card [DCP6](#).

## 11. GENERAL PRINCIPLES

### 11.1 Link to Incremental Pay Progression

A formal warning issued under the Trust's Managing Performance (Capability) Policy may result in incremental pay being withheld, in line with the [Pay Progression Policy](#). The relevant panel will make an individual assessment of how the capability issue has impacted on the achievement of appraisal objectives, performance or Trust values. Where there is evidence that there has been an impact on the achievement of appraisal objectives, performance or Trust values, incremental progression will be withheld. The panel will normally advise the individual of this decision at the time of the hearing.

### 11.2 Notification to professional bodies

In the case of capability issues in professionally registered employees, it may be advisable to seek advice from relevant regulatory bodies at an appropriate stage; HR will advise on this. If capability or competence concerns cannot be resolved through this policy, the matter may need to be referred externally. The lead professional director, with the endorsement of the Trust's Performance Panel is responsible for taking the decision to notify regulatory bodies. Refer also to action card [DCP10](#), and for medical/dental/pharmacist staff, refer to the Department of Health's Maintaining High Professional Standards framework document.

Notification to professional registration bodies (e.g. GMC, NMC) will be applicable in the following circumstances:

- Doctors, dentists and pharmacists – NCAS will be consulted with at an early stage of any capability process in accordance with the Maintaining High Professional Standards framework document. NCAS will advise on the appropriateness of onward referral to the GMC
- Nurses, AHPs – professional bodies will be notified in cases of dismissal, summary dismissal or demotion as a measure short of dismissal. Professional bodies may also be notified if there is a serious capability issue which could affect fitness to practice or professional registration; this will be determined on a case-by-case basis

It may also be appropriate to contact the SHA to issue an alert in the case of a clinical/medical employee who may attempt to work in breach of a professional restriction. See action card [DCP10](#).

### 11.3 Grievances

The raising of a grievance should not normally delay ongoing proceedings and the expectation is that this would be dealt with after the conclusion of a capability hearing, or at least to run concurrently with it. Human Resources advice must be sought in all cases, who will refer the issue to staff side representatives for further discussion, if appropriate. However, it is accepted that if a grievance is upheld, any capability action taken may need to be reviewed in the light of this decision, but only where the grievance issue is relevant to the case.

If the grievance relates to a matter of potential discrimination, it may be appropriate for the panel to consider the issue at a separate hearing prior to the capability/appeal hearing.

If a grievance is raised during a capability hearing, the chair of the panel may take the following actions:

- consider suspending the process for a short period whilst the issue is dealt with according to the [Trust Grievance Procedure](#)
- hear the grievance after the capability or appeal hearing has taken place

Vexatious grievances, if proven (see [Trust Grievance Procedure](#)) may lead to separate disciplinary action.

### 11.4 Resignation

Where an employee chooses to resign during the capability process, it will normally still proceed, with the ex-employee given the option of attending any hearing with their professional/staff side representative. Exceptions to this process must be agreed with a Divisional HR Manager.

### 11.5 Special Circumstances

Special arrangements might be required for handling capability matters among staff on night or weekend shifts, employees in isolated areas of the Trust, or staff with special needs. The Trust will provide time in lieu for attending meetings outside normal working hours. This policy and associated procedures must be followed at all times.

### 11.6 Fair Blame Culture

The Trust is committed to a culture of 'Fair Blame' in that its pledge to all employees of GHNHSFT, following a critical incident or event, including, but not limited to:

- Reported incidents
- Formal complaints
- Negligence claims

Is that in the first instance, (prior to any informal or formal disciplinary or capability process) management/HR will liaise with the Trust's Department of Clinical Risk, so that guidance on applying fair blame approach can be obtained. See also the NPSA Incident Decision Tree and Incidents, Accidents and Fair Blame.

The above does not in any way preclude the Trust's right to by-pass this process step where it is in the interests of patients, staff, public, visitors, or any other person or party, where there is potentially or actually an issue of detriment.

The fair blame culture makes the assumption that employees will use their own judgement in the workplace, but are required to take responsibility for their own actions and learn from mistakes made. The Trust aims to not blame employees unfairly for human error in the spirit of encouraging the reporting of errors and system failures. [Implementing Human Factors](#) in Healthcare is a helpful reference document on this topic. Action Card [DCP9](#) gives specific guidance on the issue of drug errors.



## 12. TRAINING

See separate training needs analysis and the [Trust Mandatory Training Policy](#).

## 13. MONITORING OF COMPLIANCE

Do the systems or processes in this document have to be monitored in line with national, regional or Trust requirements?	YES
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Monitoring requirements and methodology	Frequency	Further actions
Consistency review of capability cases	Annual	Review of information and report
Review of capability appeals	Annual	Review of information by HR Advisors / HR Business Partners
Review of casework and outcomes against HR metrics	Annual	Review of case information against process.

## 14. REFERENCES

Cornwall Partnership NHS Foundation Trust – Capability Policy and Procedure – (April 2015)

Meadows S, Baker K, Butler J. The Incident Decision Tree: Guidelines for Action Following Patient Safety Incidents. Available via [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov)

National Clinical Assessment Service (2011). Handling Concerns about Practitioners' Health. Available via [www.ncas.npsa.nhs.uk](http://www.ncas.npsa.nhs.uk)

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Equality Impact Assessment (EIA)	<a href="#">B0288 EIA</a>
Related Trust Documents	<a href="#">Investigation Guidance Notes</a> <a href="#">Disciplinary Procedure</a> <a href="#">Grievance and Disputes</a> Accidents, Incidents and Fair Blame Incident Decision Tree <a href="#">Disciplinary/Capability Policy Action Cards</a>
Other Relevant Documents	Occupational Health Service Assessment Form
External Compliance Standards and/or Legislation	Health, Work and Wellbeing – ACAS booklet Managing Attendance and Employee Turnover – ACAS booklet ACAS Code of Practice 1 – Disciplinary and Grievance Procedures Code of Conduct for NHS Managers Maintaining High Professional Standards