

“NHS Organisation”

Capability Policy and Procedure

Approved by: **Welsh Partnership Forum**

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1. Policy Statement

The Core Principles of NHS Wales are:

- **We put patients and users of our services first:** We work with the public and patients/service users through co-production, doing only what is needed, no more, no less and trying to avoid harm. We are honest, open, empathetic and compassionate. We ensure quality and safety above all else by providing the best care at all times.
- **We seek to improve our care:** We care for those with the greatest health need first, making the most effective use of all skills and resources and constantly seeking to fit the care and services we provide to users' needs. We integrate improvement into everyday working, by being open to change in all that we do, which also reduces harm and waste.
- **We focus on wellbeing and prevention:** We strive to improve health and remove inequities by working together with the people of Wales so as to ensure their wellbeing now and in future years and generations.
- **We reflect on our experiences and learn:** We invest in our learning and development. We make decisions that benefit patients and users of our services by appropriate use of the tools, systems and environments which enable us to work competently, safely and effectively. We actively innovate, adapt and reduce inappropriate variation whilst being mindful of the appropriate evidence base to guide us.
- **We work in partnership and as a team:** We work with individuals including patients, colleagues, and other organisations; taking pride in all that we do, valuing and respecting each other, being honest and open and listening to the contribution of others. We aim to resolve disagreements effectively and promptly and we have a zero tolerance of bullying or victimization of any patient, service user or member of staff.
- **We value all who work for the NHS:** We support all our colleagues in doing the jobs they have agreed to do. We will regularly ask about what they need to do their work better and seek to provide the facilities they need to excel in the care they give. We will listen to our colleagues and act on their feedback and concerns.

They have been developed to help and support staff working in NHS Wales.

NHS Wales is about people, working with people, to care for people. These Core Principles describe how we can work together to make sure that what we do and how we do it is underpinned by a strong common sense of purpose which we all share and understand.

The NHS is continually under pressure to deliver more services, with better outcomes and maintain and increase quality against the backdrop of significant financial challenge, high levels of public expectation and with a population which is getting older and with increased levels of chronic conditions.

These principles have been developed to help address some of the pressures felt by staff in responding to these demands. They will re-balance the way we work together so we are less reliant on process and are supported to do the right thing by being guided by these principles when applying policies and procedures to the workforce.

As people working within the health service, we will all use them to support us to carry out our work with continued dedicated commitment to those using our services, during times of constant change.

The Principles are part of an ongoing commitment to strengthen the national and local values and behaviour frameworks already established across Health Boards and Trusts.

They have been developed in partnership with representatives from employers and staff side.

The Principles will be used to create a simpler and consistent approach when it comes to managing workplace employment issues.

2. About this Policy

- 2.1 The primary aim of this policy is to provide a framework within which managers can work with employees to maintain satisfactory performance standards and to encourage improvement where necessary.
- 2.2 It is the *NHS Organisation's* policy to ensure that concerns over performance are dealt with fairly and that steps are taken to establish the facts and to give employees the opportunity to respond at an initial informal discussion before any formal action is taken.
- 2.3 This policy is applicable to all employees, employed in the *NHS Organisation*, except Medical and Dental staff where specific arrangements apply in cases of professional conduct or competence. It does not apply to bank workers, agency workers or self-employed contractors.

Before considering any action in accordance with this policy, the relevant code of conduct and professional code of practice should be considered, and advice should be sought from the relevant professional lead.
- 2.4 Where an employee is either jointly employed or is not employed by the *NHS Organisation* but provides a service for the *NHS Organisation*, the capability issue will be addressed under the scope of the policy of the lead employer. The *NHS Organisation* will still have an active involvement in the management of the issue to ensure that the performance standards required by the *NHS Organisation* are met.
- 2.5 Managers should be aware that, depending on the outcome of discussions at either the informal or formal stages, it may be appropriate to defer handling the issue under the Capability Policy and refer instead to the alternative appropriate policies, e.g. Disciplinary Policy or Sickness Absence Policy.

3. Principles

- 3.1. All employees should be treated fairly and with dignity and respect.
- 3.2. An appropriate Workforce and OD (W&OD) representative will be available to support managers and employees in the application of this policy.
- 3.3. Line Managers are responsible for ensuring that all new employees undertake both *NHS Organisation* and local induction on commencement of their new post. In addition, they will receive a job description and person specification and will be given a clear understanding of their duties and the standards expected. To support new or promoted employees, the line manager will also need to assess any immediate development needs which they may have and the timescales within which these need to be addressed. All employees will participate in a performance review at which a Personal Development Plan will be agreed on at least an annual basis, in line with the pay progression policy.

If an individual is in the formal stage of the capability policy at the beginning of sickness and/or maternity/adoption leave and there is evidence to show that they would be unlikely to have met their pay progression criteria, it may be possible to withhold their pay increment. However, advice must be sought from a relevant member of the W&OD team and such a decision must take account of any potential discrimination claims.

During the normal course of their duties, line managers should meet regularly with their employees and bring to their attention any issues relating to their performance. During an induction period, the expectation would be that the level of support required would be greater than once the employee has settled in.

4. Rights of accompaniment

All employees have the right to be accompanied by a Trade Union representative or a NHS Organisation workplace colleague, at all formal hearing stages of the procedure. However, as long as a suitable alternative representative is available, unavailability of a preferred representative or workplace colleague should not delay the hearing taking place.

Where reference is made in this policy to the employee's "representative", this will refer to the Trade Union representative or work place colleague.

5. Identification of a Capability Issue

In the first instance, performance issues should normally be dealt with informally between the employee and their line manager as part of day-to-day management.

Where appropriate, a note of any such informal discussions should be shared with the employee and placed on the employee's personal file.

Informal discussions may help:

- a) clarify the required standards;
- b) identify areas of concern;
- c) establish the likely causes of poor performance and identify any training needs; and/or
- d) set targets for improvement and a time-scale for review.

This procedure should be used for more serious cases, or in any case where an earlier informal discussion has not resulted in a satisfactory improvement.

6. Initial Assessment

6.1 If initial discussions have not resulted in a satisfactory improvement and if the *NHS Organisation* has ongoing concerns or more serious concerns come to light about an employee's performance, an Initial Assessment will be undertaken, which may be by the line manager, to decide if there are grounds for taking formal action under this policy. The procedure involved will depend on the circumstances but may involve reviewing the employee's personal file including any appraisal records, gathering any relevant documents, monitoring the employee's work and, if appropriate, interviewing the employee and/or other individuals confidentially regarding the employee's work.

6.2 Managers need to consider in the light of relevant *NHS Organisation* policies and procedures any underlying issue such as:

- Health and/or domestic issues;
- Bullying/harassment or feeling intimidated for any other reasons;
- Inadequate resources to do the job;
- Insufficient training or the need for further training;
- Changes in the job environment.

7. Incapability Due to Disability

7.1 Consideration will be given to whether poor performance may be related to a disability and, if so, whether there are reasonable adjustments that could be made to the employee's working arrangements, including changing duties or providing additional equipment or training. The *NHS Organisation* has a duty under the Equality Act 2010 to make reasonable adjustments as appropriate.

7.2 If an employee wishes to discuss this or inform the *NHS Organisation* of any medical condition the employee considers relevant, the employee should

contact his/her line manager who may refer the employee to Occupational Health for assessment and support.

8. Confidentiality

- 8.1 The aim of the *NHS Organisation* is to deal with performance matters sensitively and with due respect for the privacy of any individuals involved. All employees must treat as confidential any information communicated to them in connection with a matter which is subject to this capability procedure.
- 8.2 The employee and anyone accompanying the employee (including witnesses), must not make electronic recordings of any meetings or hearings conducted under this procedure.
- 8.3 The employee will normally be told the names of any witnesses whose evidence is relevant to the employee's capability hearing, unless there are exceptional circumstances in which the *NHS Organisation* believes that a witness's identity should remain confidential.

9. Redeployment/Downgrading

If it is mutually agreed at any stage in the process that redeployment/downgrading is in the best interests of both the employee and the organisation, every effort will be made to find a suitable appointment. In particular, the following must be considered:

Temporary redeployment:

- The availability of opportunities;
- It will be for the manager and employee to agree a suitable trial period for these arrangements;
- Review arrangements whilst in the new post;
- Protection of all earnings would apply.

Permanent redeployment:

- The availability of opportunities;
- Protection of earnings will not be applied.

10. Timescales for Achieving Improvement

The timescales for achieving improvement will be dependent on various factors such as the risks of the role not being carried out competently within the *NHS Organisation*, the impact on the service, the complexities of the job itself, and the availability of the necessary training and support. However, managers are responsible for setting SMART (Specific, Measurable, Achievable, Relevant, Timely) targets for improvement. As a guideline the timescales to achieve the improvement should normally be a minimum of one month and no more than three months. During the period, there is an expectation that the manager and employee will have regular meetings to review performance. Periods of review

may be paused if an employee is absent from work for an extended length of time in excess of 28 days, to cover the length of the absence where improvement cannot be monitored.

11. Notification requirements for formal capability hearings

If the NHS Organisation considers that there are grounds for taking formal action over alleged poor performance, the Employee will be required to attend a capability hearing. The employee will be notified in writing of the concerns over their performance, the reasons for those concerns, and the likely outcome if it is decided after the hearing that the employee's performance has been unsatisfactory. The NHS organisation will also include the following where appropriate:

- a) A summary of relevant information gathered as part of any investigation.
- b) A copy of any relevant documents which will be used at the capability hearing.
- c) A copy of any relevant witness statements, except where a witness's identity is to be kept confidential (which will only be in exceptional circumstances), in which case the employee will be given as much information as possible while maintaining confidentiality.

All documentation will be passed to the employee as soon as possible but no later than 21 calendar days prior to a capability hearing. Any additional information which the employee wishes to rely upon should be submitted as soon as possible but no later than 10 calendar days prior to the hearing. In exceptional circumstances, the employee may request to make a submission which has not been made available within the above timescale. The list of agreed witnesses will be provided no later than 14 calendar days before the hearing date.

12. Procedure at capability hearings

If the employee or their representative cannot attend the hearing they should inform the *NHS Organisation* immediately and the *NHS Organisation* will usually arrange an alternative time. The employee must make every effort to attend the hearing, and failure to attend without good reason may be treated as misconduct. If the employee fails to attend without good reason or is persistently unable to do so (for example, for health reasons), the *NHS Organisation* may have to take a decision based on the available evidence including any written representations made by the employee.

The hearing will normally be held by the employee's line manager (save for at Stage 3 when it is likely that a more senior manager will hear the case) and it is likely that the manager will be supported by an appropriate professional advisor, and a member of the W&OD Department. The employee may bring an employee representative to the hearing (see paragraph 4). The employee representative may make representations, ask questions, and sum up the employee's case, but will not be allowed to answer questions on behalf of the employee. The employee

may confer privately with their employee representative at any time during the hearing.

The employee may ask relevant witnesses to appear at the hearing, provided sufficient notice is provided to arrange their attendance. The employee will be given the opportunity to respond to any information given by a witness and be permitted to cross examine witnesses in an appropriate manner.

The aims of a capability hearing will usually include:

- a) Setting out the required standards that the *NHS Organisation* believes the employee may have failed to meet and going through any relevant evidence that gathered.
- b) Allowing the employee to ask questions, present evidence, call witnesses, respond to evidence and make representations.
- c) Establishing the likely causes of poor performance including any reasons why any measures taken so far have not led to the required improvement.
- d) Identifying whether there are further measures, such as additional training or supervision, which may improve performance.
- e) Where appropriate, discussing targets for improvement and a time-scale for review.
- f) If dismissal is a possibility, establishing whether there is any likelihood of a significant improvement being made within a reasonable time and whether there is any practical alternative to dismissal, such as redeployment (see section 9).

A hearing will be adjourned if the *NHS Organisation* needs to gather any further information or give consideration to matters discussed at the hearing. The employee will be given a reasonable opportunity to consider any new information obtained before the hearing is reconvened.

The *NHS Organisation* will inform the employee in writing of its decision and the reasons for it, usually within seven calendar days of the hearing.

13. Stage 1 Hearing

Where performance issues have not been resolved at an informal level, or where there is a failure to reach and sustain the required standard, a stage 1 hearing will be held.

Following a Stage 1 capability hearing, if it is decided that the employee's performance is unsatisfactory, the *NHS Organisation* will give the employee an improvement notice, setting out:

- a) The areas in which the employee has not met the required performance standards.
- b) Targets for improvement.
- c) Any measures, such as additional training or supervision, which will be taken with a view to improving performance.
- d) A period for review (see section 10).
- e) The consequences of failing to improve within the review period, or of further unsatisfactory performance.

The improvement note will normally remain active for six months from the end of the review period. After the active period the warning will remain permanently on the employee's personal file but will be disregarded in deciding the outcome of any future capability proceedings.

The employee's performance will be monitored during the review period and the *NHS Organisation* will write to inform the employee of the outcome:

- f) if the line manager is satisfied with the employee's performance, no further action will be taken at this stage but the improvement notice will remain active from the end of the review period;
- g) if the line manager is not satisfied, the matter may be progressed to a Stage 2 capability hearing;
- h) if the manager feels that there has been a substantial but insufficient improvement, the review period may be extended.

14. Stage 2 Hearing

If the employee's performance does not improve within the review period set out in an improvement note, or if there is further evidence of poor performance while the improvement note is still active, the *NHS Organisation* may decide to

hold a Stage 2 capability hearing. Written notification will be provided as set out in paragraph 11.

Following a Stage 2 capability hearing, if it is decided that the employee's performance is unsatisfactory, the *NHS Organisation* will ordinarily give a final written warning, setting out:

- a) the areas in which the required performance standards have not been met;
- b) targets for improvement;
- c) any measures, such as additional training or supervision, which will be taken with a view to improving performance;
- d) a period for review; and
- e) the consequences of failing to improve within the review period, or of further unsatisfactory performance.

A final written warning will normally remain active for 9 months from the end of the review period. After the active period, the warning will remain permanently on the employee's personal file but will be disregarded in deciding the outcome of future capability proceedings.

The employee's performance will be monitored during the review period and the *NHS Organisation* will write to inform the employee of the outcome:

- f) if the line manager is satisfied with the employee's performance, no further action will be taken;
- g) if the line manager is not satisfied, the matter may be progressed to a Stage 3 capability hearing; or
- h) if the manager feels that there has been a substantial but insufficient improvement, the review period may be extended.

15. Stage 3 hearing

Following the Stage 2 Hearing and subsequent review period, and where an improvement to the degree required has not been achieved, termination of employment will be considered. This will take account of all previous action that has been taken in an attempt to improve the employee's performance.

The decision maker at this stage should not have been involved previously and should have the authority to dismiss.

The *NHS Organisation* may decide to hold a Stage 3 capability hearing if there is reason to believe:

- a) the employee's performance has not improved sufficiently within the review period set out in a final written warning;
- b) the employee's performance is unsatisfactory while a final written warning is still active.

Written notification of the hearing will be sent as set out in paragraph 11.

Following the hearing, if it is found that the employee's performance is unsatisfactory, a range of options will be considered including:

- a) extending an active final written warning and setting a further review period (in exceptional cases where it is believed that a substantial improvement is likely within the review period);
- b) giving a further final written warning;

A final written warning will normally remain active for 9 months from the end of the review period. After the active period, the warning will remain permanently on the employee's personal file but will be disregarded in deciding the outcome of future capability proceedings.

- c) redeployment (subject to a trial period of a duration to be agreed but a minimum of 12 weeks) at the end of which the situation will be reviewed and if the redeployment has been successful for all parties, a permanent variation of contract will be put in place. If the redeployment has been unsuccessful in the view of any party, then a stage 3 hearing will be reconvened, and the likely outcome will be dismissal.
- d) dismissing the employee;

Dismissal will be with full notice or payment in lieu of notice.

16. Appeals against action for poor performance

Should the employee feel that a decision about poor performance under this procedure is wrong or unjust the employee should appeal in writing, stating the full grounds of appeal, to [APPROPRIATE POSITION] within 14 calendar days of receiving the written notification.

If appealing against dismissal, the date on which dismissal takes effect will not be delayed pending the outcome of the appeal. However, if the appeal is successful the employee will be reinstated with no loss of continuity or pay.

If an employee raises any new matters in the appeal, the *NHS Organisation* may need to carry out further investigation. If any new information comes to light it will be provided to the employee with a summary including, where appropriate, copies of additional relevant documents and witness statements.

The employee will have a reasonable opportunity to consider this information before the hearing.

The administrative arrangements will be put in place within 14 calendar days and wherever possible the appeal heard within 28 calendar days of the notification of appeal being received. At least 7 calendar days before the Appeal Hearing the Appeal Officer must receive the nature of the appeal and all documentary evidence in support of it. Failure to comply may result in either the appeal being postponed or the appeal going ahead without this information.

There will be two levels of constitution of appeal hearings: -

For appeals against warnings short of dismissal, the appeal will normally be heard by a manager one level above the manager who imposed the penalty.

A (W&OD/HR) Advisor will be in attendance in order to give advice and to support the Appeal Officer in ensuring that all aspects of the appeal are fully explored.

In cases of appeals against dismissal, the appeal will normally be heard by a senior officer nominated (by the Director of Workforce and Organisational Development), in line with the organisation's scheme of delegated authority.

The officers nominated to hear an appeal must not have been involved in the process at any earlier point.

The purpose of the appeal is to establish if the decision taken at the hearing was reasonable in light of the grounds raised by the employee. The appeal is not a re-hearing of the original evidence.

The appeal hearing must restrict itself to looking at the grounds of appeal made by the employee and ensuring that these grounds are adequately examined in order to reach a proper judgement on whether the appeal should be upheld.

The appeal hearing will consider specifically whether the action decided upon was fair and reasonable at the time that the action was taken. The appeal hearing may look at whether the procedure was applied correctly when deciding on the action.

The appeal will take account of any substantial new information cited in the grounds for appeal.

The decision reached by any level of appeal hearing is considered final. No further appeal mechanism will operate within the *"NHS Organisation."*

Where possible, the appeal hearing will be conducted by a [more senior] manager who has not been previously involved in the case. [A member of the W&OD Department AND/OR the manager who conducted the capability hearing] will also usually be present. The employee may bring an employee representative to the appeal hearing.

An appeal hearing will be adjourned if there is a need to gather any further information or give consideration to matters discussed at the hearing. The

employee will be given a reasonable opportunity to consider any new information obtained before the hearing is reconvened.

Following the appeal hearing the *NHS Organisation* will:

- a) confirm the original decision; or
- b) revoke the original decision; or
- c) substitute with a different sanction.

The *NHS Organisation* will inform the employee in writing of its final decision as soon as possible, usually within one week of the appeal hearing. There will be no further right of appeal.

17. Training and/or awareness raising

All staff will be made aware of this policy upon commencement with the *NHS Organisation*. Copies can also be viewed on the *NHS Organisation's* intranet or obtained via the W&OD department. Training will be provided as appropriate.

18. Equality

The *NHS Organisation* recognises the diversity of its workforce. Our aim is therefore to provide a safe environment where all employees are treated fairly and equally and with dignity and respect. The *NHS Organisation* recognises that the promotion of equality and human rights is central to its work both as a provider of healthcare and as an employer. This policy has been impact assessed to ensure that it promotes equality and human rights. The assessment was undertaken using the toolkit of the NHS Centre for Equality and Human Rights and completed in September 2017.

19. General Data Protection Regulations 2018

All documents generated under this policy that relate to identifiable individuals are to be treated as confidential documents, in accordance with the *NHS Organisation's* Data Protection Policy.

20. Freedom of Information Act 2000

All *NHS Organisation's* records and documents, apart from certain limited exemptions, can be subject to disclosure under the Freedom of Information Act 2000. Records and documents exempt from disclosure would, under most circumstances, include those relating to identifiable individuals arising in a personnel or staff development context. Details of the application of the Freedom of Information Act within the *NHS organisation* may be found in the *NHS Organisation's* publications scheme.

21. Records Management

All documents generated under this policy are official records of the *NHS Organisation* and will be managed and stored and utilised in accordance with the *NHS Organisation's* Records Management Policy.

22. Review

This policy will be reviewed in 3 years' time. Earlier review may be required in response to exceptional circumstances, organisational change or relevant changes in legislation or guidance.

23. Monitoring

Details of all capability procedure outcomes will be monitored and reported as deemed appropriate by the employing organisation.

24. Approval

Signed on behalf of the Staff Side:

Signed:

Name:

Title:

Date:

Signed on behalf of the Management Side:

Signed:

Name:

Title:

Date:

Appendix 1 – Capability Hearings Flowchart

