



DEVON COUNTY COUNCIL

CORPORATE CAPABILITY POLICY AND PROCEDURE

**To be read in conjunction with DCC Corporate Capability Policy & Procedure
Management Guidance**

POLICY

1. INTRODUCTION

- 1.1 This procedure applies to all staff employed by Devon County Council, except probationers, Devon Direct Services and the staff of locally managed schools, where separate procedures are in force.
- 1.2 The procedure recommends appropriate management levels for different levels of action, but this will vary dependent upon Officers' availability and whether they have been suitably trained.
- 1.3 This procedure takes into account the requirements of the Dispute Resolution provisions of the Employment Act 2000 and will take effect from 1st April 2006 and supersedes all previous disciplinary procedures and practices.
- 1.4 This procedure applies in all cases where the capability of the employee is in question. It will not apply to staff working under a probationary period or to staff subject to retirement from DCC on the grounds of ill health or where there are concerns about sickness absence.

For probation see:

<http://www4.devon.gov.uk/private/corporate/policy/hr/probation/homepage.shtml>

For managing sickness absence see:

<http://www4.devon.gov.uk/private/corporate/policy/hr/sickness/homepage.shtml>

2. PURPOSE

- 2.1 Lack of capability is defined as a situation in which an employee fails consistently to perform his /her duties to professionally acceptable standards. The focus is on the fact that the employee cannot perform to a satisfactory standard, rather than **will not**, which will be dealt with through the Corporate Conduct Policy & Procedure.
- 2.2 This policy is for addressing the poor performance of an employee in a way that is fair, supportive, effective, consistent and in accordance with good employment practice, taking into account the requirements of the Disability Discrimination Act and the County Council's Justice Through Equality policies. The aim of the procedure is to effect sustained improvement in the employee's performance, with dismissal being very much a final resort.
- 2.3 When required standards are not adhered to, corrective action needs to be taken either informally by the line manager or a more senior member of staff or through the formal capability procedure depending on the circumstances of each case.

3. GENERAL PRINCIPLES

- 3.1 A representative from a recognised trade union / professional association or a companion who is a work colleague, may accompany staff at all stages of the procedure.
- 3.2 DCC will at all times endeavour to ensure that employees, through local managers and supervisors, will achieve and maintain a high standard of performance in their work. Every employee should be clear of the expectations upon them in terms of performance. Expectations need to be explained at induction, supervision and appraisal.

- 3.3 To this end, DCC will ensure that standards are established, performance is monitored and employees are given appropriate training and support to meet these standards.
- 3.4 In addressing an employee's poor job performance, the manager / supervisor should always be prepared to give support to the employee to help them to develop to the required standard of competence. This may be done through the provision of training, coaching, temporarily adjusting workload to facilitate an improvement, or informal supervisory guidance. Attempts should always be made to achieve a mutually acceptable solution to the problem informally, before any formal action is considered.
- 3.4 Although this procedure indicates a sequential approach to dealing with concerns about an employee's capability, there may be certain exceptional circumstances where the matter needs to be considered immediately under stages 2 or 3, as appropriate.
- 3.5 No employee will be dismissed for a first breach of capability, except in the case where the actual or potential consequences of an employee's poor performance are, or could be extremely serious.
- 3.6 Incapability and misconduct are often difficult to distinguish between in respect of poor work performance and a matter which is initially pursued through this policy may therefore be transferred to the Conduct Policy by agreement with the employee.
- 3.7 The Head of Employee Relations must be consulted on all formal stages of the Capability Procedure and will be responsible for maintaining consistency and fairness within the procedures on behalf of the County Council. In the event of a disagreement between the Head of ER and the Head of Directorate, in any specific case of formal capability action, the matter shall be referred to the Director of Personnel & Performance.

3.8 **PRINCIPLES OF NATURAL JUSTICE**

Essential to the fair and reasonable application of these procedures, is the underlying commitment to the basic fundamental principles of fair treatment, namely:

- The employee must know, in full, the capability issues that are giving rise for concern at the earliest opportunity;
- The employee must have an opportunity to state his /her case before any decision is made;
- Any decision made will be by an Officer who is not associated directly with the employee and has acted in good faith.
- The employee has the right to appeal against formal written and final written warnings and/or against dismissal.

3.9 **RIGHT TO BE ACCOMPANIED**

- In any case of formal capability action, the employee will have the right to be accompanied by a companion who is a work colleague or trade union/professional association representative
- If the employee wishes, the representative should be allowed to address the formal capability meeting in order to:
 - Put the employee's case
 - Sum up the employee's case
 - Respond on the employee's behalf to any view expressed at the hearing
- The representative has no right to answer questions on the employees' behalf, or to address the meeting if the employee does not wish it, or to prevent the employer from stating their case.

3.10 **FORMAL CAPABILITY ACTION AGAINST TRADE UNION REPRESENTATIVE**

Although the usual performance standards must apply to trade union representatives, no formal action, within this capability policy, will be taken against an employee who is an accredited trade union representative, nor will suspension normally be applied, until the circumstances of the case have been discussed with a full-time or other nominated official of the union concerned.

3.11 **PERSONNEL ADVICE**

- Employee Relations (ER) should be consulted when formal action within this policy is being considered.
- ER can provide advice on procedural matters, to any party, at any stage of this procedure.

3.12 **TIME LIMITS**

The time limits referred to in this procedure should normally be adhered to but may be varied by mutual agreement.

The applicability of the Disability Discrimination Act and consequent reasonable adjustments must be considered, e.g. it may be a reasonable adjustment, within the meaning of the DDA, to allow for a longer period of postponement, to enable the employee to attend the meeting.

4. **EQUAL OPPORTUNITIES**

This procedure is based on best practice and is designed to promote a consistent and effective approach. Managers have a particular responsibility to ensure that they manage the processes set out within this policy in accordance with the County Council's Justice Through Equality policies and in full compliance with the provisions and requirements of the Disability Discrimination Act, 1995. Action taken must not discriminate, either directly or indirectly, on the grounds of a person's race, colour, ethnic origin, nationality, sex, sexual orientation, religion or belief, marital status, disability or age.

5. **SPECIAL PROVISIONS FOR CHIEF OFFICERS AND DEPUTIES**

The general provisions of the County Council's Constitution, Part 6 – Codes of Personal Conduct, Officer Employment Procedure Rules, paragraph 5, shall apply to disciplinary action against or dismissal of Chief Officers and Deputy Chief Officers.

6. **RECORD KEEPING STANDARDS**

6.1 Appropriate agreed written records of any interviews, meetings or action taken under this Policy, including development or action plans agreed with the employee, should be compiled and retained for reference purposes together with copies of any other relevant documentation.

6.2 All records will be kept confidentially, secured and retained in accordance with the Data Protection Act (1998), taking into account an individual's right of access to personal information held about them.

7. **AUTHORITY TO TAKE ACTION**

- 7.1 Chief Officers and Deputy Chief Officers, designated by Devon County Council shall have delegated to them all the formal capability powers of the County Council as employer, including the power to dismiss in the case of all employees within their Directorates.
- 7.2 Delegated authority may be given to other Senior Officers, named by the appropriate Chief Officer / Deputy Chief Officer, to take defined levels of formal capability action against those employees within their jurisdiction following specific training.
- 7.3 Formal capability action may only be taken by a person with the appropriate authority. For the purposes of this policy the person with delegated authority to take formal action within the procedure, shall be known as the 'Designated Officer', who will act in good faith and will not have had any involvement in the case to date.
- Formal action taken at stage 2 of this procedure would be undertaken by a 'designated officer' who has been given the authority to take formal capability action, not necessarily at the level of dismissal. This would normally be a Manager from within the Service and within the line management chain.
 - Formal action taken at stage 3 of this procedure would be undertaken by a 'designated officer' who has been given the authority to dismiss.
- 7.4 All other managers / supervisors, who have not been given delegated authority, are only able to take informal action.

8. **EMPLOYEE RESPONSIBILITIES**

Employees must :-

- 8.1 be able to perform to a satisfactory level, accepting the required standards of work within the terms of his/her job descriptions;
- 8.2 participate fully in any meetings arranged to discuss aspects of his/her performance that are deemed unsatisfactory;
- 8.3 demonstrate a commitment to improving his/her performance;
- 8.4 participate in any training and/or take advantage of any professional development opportunities arranged as part of management support.

9. **MANAGEMENT RESPONSIBILITIES**

- 9.1 Managers are responsible for making performance expectations explicit through induction, supervision and appraisal.
- 9.2 It is the responsibility of management to ensure that appropriate support, training and guidance is made available where reasonably practicable and to provide feedback to staff, in respect of their work performance, through the supervisory process.
- 9.3 Managers must manage the capability procedure effectively, fairly, consistently and reasonably.
- 9.4 Managers must be specific about the standard required as this will be the basis for evaluating improvements and the employee cannot be expected to achieve the standard if these have not been made clear.

PROCEDURE

10.0 **INFORMAL ACTION (STAGE 1)**

Initial informal discussion

- 10.1 Where the line manager / supervisor first establishes that an employee's performance is unacceptable, an informal discussion will be held with the employee to try to establish the reason.
- 10.2 The employee should be told precisely and specifically in what way they are failing to meet the required standards.
- 10.3 The causes of the poor performance should be explored and an agreement should be reached as to any appropriate remedial action.
- 10.4 If the problem is thought to be health-related, medical advice should be sought from Wellbeing @ Work.
- 10.5 Capability due to genuine ill health or sickness absence will be dealt with through the Managing Sickness Absence Policy.
- 10.6 Where poor performance is due to an employees' disability, consideration must be given to making reasonable adjustments, within the requirements of the Disability Discrimination Act.
- 10.7 The employee must be told what improvement is required, what support will be given and how performance will be reviewed, with clear agreed measurable targets being given.
- 10.8 A review date must be agreed by both parties. The employee must be given a minimum of 4 weeks to meet the targets set, unless there are exceptional circumstances where this would not be possible or appropriate.
- 10.9 If the required improvement is not forthcoming within an agreed/appropriate period the employee should be advised that continued failure to achieve and sustain the required standards may result in the matter being pursued through the formal stage 2 of this procedure.
- 10.10 Brief agreed notes that the meeting took place and what action was agreed should be placed on file and a copy given to the employee.
- 10.11 The informal procedure should allow for issues to be dealt with quickly and confidentially. Professional guidance, given by the line manager/supervisor, may be confirmed in writing at this stage, so that it is clear to all parties what improvement is required before formal action, within this procedure, would be considered.

Informal review meeting

- 10.12 At the review meeting, the line manager / supervisor will meet with the employee to pull together all the information from the review period and to informally discuss the extent to which the performance has improved or not.
- 10.13 Having considered the evidence available from the review period and the employee's views, the line manager / supervisor may decide to act as follows:
 - (a) take no further action.

- (b) agree a further review period, up to a maximum of 4 weeks, unless there are exceptional circumstances where this would not be possible or appropriate.
- (c) move to the formal stage 2 of this procedure.

10.14 The outcome of the informal review meeting must be confirmed in writing to the employee within 5 working days.

11. **FORMAL ACTION (STAGE 2)**

11.1 Where performance fails to improve after Stage 1, or where the actual or potential consequences of an employee's poor performance are, or could be extremely serious, e.g. child protection / H&S issues, formal action at Stage 2 may be considered and a formal capability meeting arranged.

Formal Capability Meeting

- 11.2 The employee will be notified, in writing, of the concerns regarding his/her performance and will be invited to a formal capability meeting to discuss the matter. This meeting will be convened, by a 'Designated Officer', supported by someone from ER, who has had no previous involvement in the case. The purpose of this meeting is for the line manager / supervisor to state formally the concerns regarding the standards of the employee's work performance, what support / adjustments have been put in place to assist the employee and to give the employee an opportunity to offer any explanation and/or to put forward any mitigating factors.
- 11.3 The employee will be given at least 5 working day's notice of this meeting.
- 11.4 The employee must be advised of their right to representation at the meeting. See paragraph, 'Right to be Accompanied'.
- 11.5 If the employee's chosen representative is not available on the date set for the meeting, then an alternative time and date will be offered within five working days of the original date for the meeting, whenever possible.
- 11.6 A report detailing identified performance issues and supportive measures agreed and undertaken, with notes of all meetings, monitoring reports and any other relevant documentation attached, will be produced by the line manager / supervisor for the formal capability meeting, with advice from ER if necessary. A copy of this will be given to the employee at least 5 working days before the meeting.
- 11.7 After the meeting, the 'Designated Officer' may take one of the following courses of action, according to the circumstances of the case:
 - (a) **Take no formal action.**
 - (b) **Agree a further review period, under the informal stage**, up to a maximum of 4 weeks, unless there are exceptional circumstances where this would not be possible or appropriate.
 - (c) **Issue an oral warning** – and continue to follow the formal stage with a further review, up to a maximum of 4 weeks, unless there are exceptional circumstances where this would not be possible or appropriate.
 - (d) **Issue a formal written warning with an 'improvement note'**, setting out:
 - the shortcomings in performance
 - the improvement that is required

- the timescale for achieving this improvement, up to a maximum of 4 weeks, unless there are exceptional circumstances where this would not be possible or appropriate within this timescale.
- who will undertake the monitoring
- a review date and
- any support, including training, that will be provided to assist the employee

The employee should be informed that the improvement note represents the first stage of the formal procedure and that failure to improve could lead to a final written warning and ultimately dismissal, within Stage 3 of this procedure. A copy of the improvement note should be kept and used as the basis for monitoring and reviewing performance over the specified period.

12. **FORMAL ACTION (STAGE 3)**

- 12.1 If concerns regarding the employee's capability at Stage 2 continue or where the 'first offence' is sufficiently serious or is likely to have a serious harmful effect on DCC or the service being provided, e.g. child protection / H & S issues, it may be justifiable to move directly to Stage 3 of this procedure and a formal capability meeting will be convened. This would be convened by a 'Designated Officer' (supported by someone from ER), who has been delegated with the authority to dismiss and who has had no previous involvement in the case.
- 12.2 The 'Designated Officer' involved at stage 2, if applicable, will attend and present a report giving clear details of the outcome at stage 2, what decision was made and how the decision was reached. This 'Designated Officer' will also be responsible for calling any necessary witnesses.
- 12.3 The employee will be notified, in writing, of the concerns regarding his/her performance and will be invited to attend a formal capability meeting to discuss the matter. At least 5 working days notice of the meeting must be given.
- 12.4 The employee must be advised of their right to representation at the meeting. See paragraph 3.9, 'Right to be Accompanied'.
- 12.5 If the employee's chosen representative is not available on the date set for the meeting, then an alternative time and date will be offered within five working days of the original date for the meeting, whenever possible.
- 12.6 After the formal capability meeting at stage 3, the 'Designated Officer' may take one of the following courses of action, according to the circumstances of the case:
- Take no further action.**
 - Issue an oral warning** – and continue to follow the formal stage with a further review, one last time, up to a maximum of 4 weeks, unless there are exceptional circumstances where this would not be possible or appropriate.
 - Issue a formal written warning with an 'improvement note' (if this has not already been issued at stage 2), setting out:**
 - the shortcomings in performance
 - the improvement that is required
 - the timescale for achieving this improvement, up to a maximum of 4 weeks, unless there are exceptional circumstances where this would not be possible or appropriate within this timescale.
 - who will undertake the monitoring
 - a review date and

- any support, including training, that will be provided to assist the employee

(d) **Issue a final written warning.**

(e) **Dismiss with notice.** In circumstances where employees are under notice of dismissal due to capability issues, the County Council is committed to look for alternative employment within the Authority.

13. **WRITTEN CONFIRMATION**

13.1 In all cases where formal action is taken, the employee shall have the decision confirmed in writing within five working days. The letter must state the level of the action taken and the reasons for that action. In the case of a formal written warning with an improvement notice or final written warning, the letter must specify any remedial action required of the employee and the consequences of continued unsatisfactory performance. Where there are any dates for review these should also be included.

13.2 Unless otherwise specified to the employee in the letter of confirmation, a formal written warning will be disregarded for further formal capability purposes after six months, and a final written warning after twelve months.

13.3 The written confirmation of a formal written warning, with an improvement note, or final written warning or dismissal must inform the employee of their right of appeal.

13.4 Warnings which are time expired will be removed from the file and will be disregarded for further formal capability purposes unless there are exceptional circumstances. The Designated Officer must therefore seek advice from the Head of Employee Relations on the nature of the perceived exceptional circumstances before considering making any reference to previous warnings which are time expired. Such references must, however, be appropriate to the seriousness of the circumstances concerned and will normally only have regard to any potential risk to vulnerable clients or children, in the care of the Authority.

14. **APPEAL**

14.1 An employee has a right of appeal against a formal written warning, a final written warning and/or against dismissal.

14.2 The right of appeal against a formal written warning and final written warning will be to the Chief Officer or his/her designated Deputy, of the Directorate concerned, or a Manager acting at Deputy or Assistant Director level, except in cases where that Officer has issued the improvement note. In such cases the right of appeal will be to another Chief Officer nominated by the Director of Personnel & Performance.

14.3 The right of appeal against dismissal is to the Personnel Panel, which is a panel of at least three County Councillors.

14.4 The right of appeal must be exercised within ten working days of receipt of the letter of confirmation of formal action. The appeal, stating the grounds on which it is made, must be in writing and addressed to the Director of Personnel & Performance, who make the necessary arrangements.

14.5 In all cases of appeal the employee may appear in person with a representative if he/she so wishes.

- 14.6 The appeal hearing will be convened at the earliest convenient date, but normally within 8 weeks, unless there are exceptional circumstances where this would not be possible and both the appellant and the Authority have mutually agreed to extend the timescale.
- 14.7 The decision of the appropriate Appeal Body, (Personnel Panel or Chief Officer), must be communicated in writing to the employee, within 5 working days, and shall be final within the procedures of Devon County Council.

15. **SENDING HOME**

- 15.1 In exceptional circumstances an employee may be instructed by the local manager to leave the place of work immediately and stay away on normal pay until further notice, provided that:
- a. in the opinion of a senior officer, the employee's continued presence would be detrimental to the County Council's interests; and
 - b. no officer with authority to implement suspension from duty is available; and
 - c. the instruction is reported to the appropriate Designated Officer as soon as possible thereafter so that he/she can determine whether the employee is to be formally suspended or reinstated to the place of work.
- 15.2 Wherever possible, advice should be sought from ER before such action is taken and alternatives to sending home should be considered first.
- 15.3 Where such an instruction is given by the local manager it must be confirmed in writing within five working days, giving reasons for the instruction.
- 15.4 Within 5 working days of sending the employee home, the Designated Officer must, with advice from ER, review the situation and determine whether to keep the employee at home, impose suspension or allow the employee back to work.

16. **SUSPENSION**

- 16.1 Suspension within the Capability Procedure would be applied only in exceptional circumstances. Advice from ER should always be sought before suspending an employee.
- 16.2 However, it may be necessary to suspend the employee if it is considered that his/her continued presence in the work place would have a seriously detrimental effect, e.g. serious H&S impact / child protection implications.
- 16.3 Suspension should only be considered where other options (e.g. moving the staff member to another workplace) have been considered first but found to be inappropriate.
- 16.4 Whenever possible, a meeting should take place with the individual and any alternatives to suspension should be considered.
- 16.4 An employee may be suspended on normal pay:
- (a) when in the opinion of the Designated Officer this will allow a more objective investigation;
 - (b) when the poor performance is such that the outcome may be dismissal or a recommendation to dismiss;

(c) where it is prejudicial to Devon County Council's interests for the employee to remain at work.

- 16.5 Suspension could occur at any stage within the procedure. However, such a decision will only be taken by an appropriate officer with delegated authority to dismiss after advice from ER.
- 16.6 The reasons for the suspension must be stated clearly to the employee and confirmed in writing. The employee may give their views in person or in writing as appropriate. The letter should indicate that the act of suspension is a neutral act and does not imply guilt.
- 16.7 An agreed senior member of staff, not involved in the case, should be nominated to maintain contact with the employee, i.e. sending notes of team meeting, etc but not to discuss the circumstances of the suspension. The name of a member of the ER Service will also be provided to the employee if s/he wishes to seek advice on procedural matters.

Where suspension is imposed, it can only be removed by a Designated Officer. Designated Officers will be responsible for monitoring the appropriateness and length of any suspension.

For detailed management guidance supporting this policy see:-

http://www4.devon.gov.uk/private/corporate/policy/hr/capability/mgrguide_homepage.shtml