

Performance and Capability Policy

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History

Issue	Date Issued	Brief Summary of Change	Approved by
1	Feb 2000	New policy	
2	Mar 2004	List of reference policies amended, last sentence amended to read 'in accordance with the Trust's Appeal Procedure' and Appendix 1 – new	Management Board
3	Mar 2008	General updated and renamed	Management Board
4	Sep 2012	General review and revision	TEC
5	Nov 2014	General review and revision. Section relating to pay progression removed as this is now incorporated in the new Appraisal Policy.	TEC
6	Dec 2017	General Update	TEC

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ASHFORD & ST. PETER'S HOSPITAL NHS FOUNDATION TRUST

PERFORMANCE & CAPABILITY POLICY

See also: Appraisal Policy
Single Equality Scheme
Dignity at Work Policy
Sickness Absence Policy
Alcohol & Drugs at Work Policy
Disciplinary Policy
Grievance Policy
Conduct, Capability, Ill Health and Appeals Policies and Procedures for Practitioners (Doctors and Dentists)

1. Purpose

This policy forms part of Ashford & St. Peter's Hospitals NHS Foundation Trust's commitment to creating a culture of personal responsibility. The Trust's Values (the '4P's) and Staff Pledge are integral to all aspects of day-to-day life in the organisation and underpin the application of all our employment policies and procedures.

The primary purpose of the policy is one of guidance and problem-solving. It aims to encourage employees to achieve and maintain high standards and encourage improvement amongst employees whose performance is unsatisfactory.

2. Scope

The policy applies to all staff employed by the Trust except doctors and dentists to whom the Conduct, Capability, Ill Health and Appeals Policies and Procedures for Practitioners (Doctors and Dentists) applies.

Issues may be raised by the employee about their own work situation or by their manager. Staff who are subject to professional codes of practice e.g. Nursing and Midwifery Council (NMC), Health and Care Professionals Council (HCPC), General Medical Council (GMC), General Dental Committee (GDC) are reminded of their requirement to work within these professional guidelines.

Issues of incapability due to sickness or ill health will be dealt with under the Trust's Sickness Absence Policy.

Issues of conduct such as carelessness, negligence or lack of effort will be dealt with under the Trust's Disciplinary Policy.

3. Key Principles

A number of key principles form the cornerstones of this policy:

- All staff will receive a yearly Appraisal and a personal development plan.
- All staff will be dealt with in a fair and consistent manner.
- Reasonable adjustments will be made wherever appropriate.

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- The formal procedure will only be used when either informal procedures have failed to achieve the desired results or the issue is sufficiently serious to warrant formal action being taken immediately.
- At every stage the member of staff will be informed of the standards required of them and will have the right to state their view on the issues.
- At all formal meetings the member of staff has the right to be represented by a staff representative from a trade union or staff association or from a colleague employed by the Trust or by another NHS employee
- This policy will normally be implemented sequentially. Exceptionally, however, there may be occasions when the seriousness of the situation warrants expediting the process to either the formal stages or an immediate move to the Capability Hearing stage
- Training, coaching, mentoring, supervision and other support will be provided to all staff, as appropriate at all stages short of dismissal and in a reasonable period of time to avoid recurrence of the problem
- Where possible and as appropriate staff may be redeployed within the Trust in order to retain the skills knowledge and experience within the organisation
- Employees will have the right of appeal against any dismissal decision in line with the Trust's Appeals Policy
- If the employee has difficulty reading or if English is not the first language, managers should take all reasonable steps needed at all stages to ensure that the employee fully understands the issues and the process. This can include the provision of an interpreter or translator if requested by the employee. Where the employee has communication difficulties as the result of an impairment, consideration should be given to whether, for example, a British Sign Language interpreter or loop system is needed. Where the employee may have difficulty understanding the documents or process, for example due to a mental impairment or learning disability, managers should take all reasonable steps to provide suitable support
- This policy and any letters written to employees under this policy can be provided in different languages, or in audio or braille format

4. Duties

Corporate/Trust-wide duties:

- Corporate responsibility for this policy lies with the Director of Workforce Transformation

Managers:

- To provide a comprehensive Trust and local induction programme for all new staff.
- To discuss the job description so that the employee fully understands the duties required.
- To provide training, supervision and support to enable employees to achieve the required standard of performance.
- To make staff aware of any changes in duties required or performance standards and ensure that timely and appropriate training, support etc. is provided.

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- To make any reasonable adjustments and provide appropriate support for staff to ensure equality and diversity is maintained.
- To keep records of staff training and development.
- To keep records and evidence of performance issues and of the normal or average standards of performance being achieved within the department where appropriate.
- To ensure staff have a regular and up to date personal development plan (PDP) and yearly appraisal.
- To address any capability problems as they arise.
- To ensure that staff who are being taken through this process are informed of this policy.
- To provide the employee with specific examples of where their performance falls below the required standard with evidence as appropriate.
- To send a copy of all letters to the employee and to the Divisional HR Advisor to be placed on the employee's personal file.
- To promote and embody the Trust Values (4P's) and Pledge.
- To implement this policy and appendices fairly and consistently, ensuring that principles of equality of opportunity are adhered to.
- Take all reasonable steps to maintain confidentiality within the application of this policy.
- To ensure that their staff are aware of the policy.
- To seek advice from the HR Advisory Team as appropriate, on the application of this policy.

Workforce and Organisational Development Department:

- To advise managers and staff on the interpretation and application of this policy.
- To monitor and evaluate the application of this policy.

Employees:

- To be familiar with the requirements of their job description.
- To recognise when their performance is falling below the required standard.
- To request training, supervision, support and PDP in order to be able to meet the required standard of performance and undertake any training and development required.
- To request clarification of the standard of work required, if this is unclear.
- To inform their manager of any work or personal issues which may be impacting on their work performance to enable appropriate support to be given.

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- To raise the issue with the relevant senior manager or a HR Advisor if they feel they are being treated unreasonably (see the Trust's Dignity at Work Policy).
- To take all reasonable steps to attend any meetings that are arranged.

5. Definition

'Capability' refers to an employee's skills, ability, aptitude and knowledge in relation to the job that he or she is employed to do. Capability is defined in the Employment Rights Act 1996 by reference to the skill, aptitude, health or any other physical or mental quality of the employee.

Lack of capability will in most cases lead to unsatisfactory job performance, which is likely to cause problems both for the employee's manager and for the employee's colleagues. The key feature of lack of capability is that it is not the employee's fault. Very few employees choose to perform their work badly, make mistakes, fail to complete tasks or have poor relationships with colleagues or customers. Appropriate action should be taken promptly as soon as it is noticed that the employee is not performing certain aspects of his or her job satisfactorily. Delaying or not addressing may cause the performance concern to escalate.

The first stage in dealing with poor job performance is to determine whether the matter is one of capability or misconduct. This can normally be ascertained by one to one discussion with the employee and/or investigation. Capability issues will include situations where the employee's ability to perform the duties of the job is affected by lack of skill or aptitude and/or where performance requirements have changed or jobs have evolved over time.

Incapability is where the employee has received all necessary training but still cannot achieve a satisfactory level of performance possibly through no fault of his/her own. Therefore, when genuine capability issues are identified they have the potential to be resolved through the provision of that training and support.

If on the other hand, the employee fails to reach the required standard of performance as a result of carelessness, negligence or lack of effort, this will be dealt with under the disciplinary procedure as misconduct.

6. Procedure for dealing with Performance and Capability Issues

Where an employee's work does not reach or falls below the required standard, the following procedure shall be adopted.

Where a performance and capability issue is considered to be so serious as to pose a potential risk, consideration should be given to whether suspension from duty (on full pay) is appropriate. This should be discussed with a HR Business Partner or HR Advisor before any decision is made.

All meetings, whether informal or formal, should result in written SMART objectives or an action plan. This will be drawn up between the manager and member of staff to address any performance issues. A copy of this will be given to the employee and should include:

- Identification of the expected standards / objectives.
- A realistic timescale normally between 4 to 6 weeks for review, appropriate to the circumstances.

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- Identification of any work or personal issues which may be impacting on performance.
- Identification of necessary and appropriate training, coaching, mentoring, supervision and other support.
- Availability of any additional independent support for example through the Employee Assistance Programme and/or occupational health.
- Clarification of the appropriate method of monitoring performance.
- The period of time for review and the date for the next meeting. (The review period may be shortened if further concerns arise during the review period)

7. Record Keeping

It is imperative that accurate, dated and clear records of all events and meetings between managers and staff relating to performance reviews are kept. In addition to the basic details and discussion these should include all actions agreed, who is to undertake the action and by what date/timescale. Managers should ensure that staff are given copies of all notes from meetings and discussions and they are to be agreed as true records.

8. Management action prior to formal capability procedures (informal process)

The formal performance and capability procedure will only be used as a last resort when informal management actions have failed to produce the required improvement in performance or where the performance is so poor as to justify immediate formal procedures.

The manager should meet informally with the employee to discuss any perceived performance problems. The appropriate number of informal meetings prior moving to the formal stage will vary from case to case. The manager may wish to discuss this issue with a Human Resources professional. These meetings are part of the normal management/employee relationship and do not constitute part of the formal procedure.

The purpose of an informal meeting is to ensure that the employee clearly understands what is expected by the Trust, the acceptable standards of performance, how they are failing to meet these standards and the potential consequences of failure to improve. It is also to help the employee improve performance by discussing problems with the manager and thereby avoiding the use of the formal capability procedure wherever possible.

As part of the discussion the manager should be able to provide specific examples of where the employee's performance falls below the required standard with evidence as appropriate. The manager may also need to provide evidence of the normal or average standards of performance being achieved within the department.

The manager and employee will use a problem solving approach to identify what is affecting the individual's performance. If performance appears to be related to a health problem, the employee may be referred to Occupational Health for an assessment in accordance with the Trust's Sickness Absence Policy.

The manager should confirm the content and outcome of the informal meeting to the employee in writing, together with a review date and the action plan. This written communication must make it

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clear that a performance/capability issue with that individual is being dealt with informally. It is the duty of the manager to ensure that any support agreed is provided in a timely manner.

At agreed date at the end of the review period the manager will meet with the employee to discuss the outcome. If the employee has reached the required standard of performance, the employee will be informed and this will be confirmed in writing. Performance will continue to be monitored as part of the on-going Personal Development Review (PDR) and Appraisal process.

If the performance falls below a satisfactory level following the removal from the informal stage of the policy, the performance management process may be commenced at the first formal stage of the policy.

If at the end of the review period there is no improvement in performance or the improvement is inadequate the employee will be informed either that there will be a further informal review period or that the formal procedure will be invoked and this will be confirmed in writing. A first formal review meeting should be arranged as soon as possible

PLEASE NOTE: At the last informal meeting the manager must inform the employee that failure to meet the required standard will result in the formal procedure being invoked. A copy of this policy should be given to the employee.

9. Formal stage

9.1 Procedure at formal meetings

- The member of staff will be given at least seven calendar day's written notice of formal meetings.
- The employee will have the right to representation at all formal meetings by a trade union or staff association representative or a colleague employed by this Trust or another NHS employee.
- A Human Resources professional should attend all formal meetings in an advisory capacity.
- The aim of the meeting will be to identify the problem and causes and to agree a way forward.
- The manager will explain what the problem is and what is expected by the Trust.
- The manager will explain what standard of performance is expected and provide specific examples of where the employee's performance falls below the required standard with evidence as appropriate.
- The employee or their representative will have the opportunity to respond, explain the reasons for their performance and to explain any issues that they feel are impacting on their performance.
- The manager and employee will discuss the way forward in order to agree an action plan.
- The staff member and the manager will agree a reasonable timescale for reaching the required improvement and a review date will be set. This is likely to be between 6 and 8 weeks.

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- A record of the meeting and action plan will be retained by the manager and staff member.
- Levels of management authority are given in Appendix 1.

9.2 Stage one formal review meeting

At this meeting the issues will be discussed, including the points detailed in **section 6** above, and the action plan will be drawn up between the manager and member of staff to address any performance concerns (see **section 5** above). The employee should be advised that failure to meet and maintain the required standards within the agreed timescale may lead to a final stage two meeting being held. A copy of the action plan will be given to the employee with the letter confirming the content and outcome of the meeting within five working days of the meeting.

If appropriate any other employment options will also be discussed and included in the letter.

During the review period, the manager will meet at agreed intervals to discuss and feedback progress. The frequency of these meetings could be between two and four weeks however cases may differ. If at the end of the period allowed for improvement the employee has reached the required standard of performance, then no further action need be taken and this fact should be confirmed at a meeting with the employee and in writing. Performance will continue to be monitored as part of the on-going PDR. If however the performance falls below a satisfactory level following removal from the formal stage of the policy, the performance management process will be recommenced at the first formal stage of the policy.

If, the manager identifies that the improvement has not been made and sustained then the manager may choose to move to stage 2. Stage 2 will then be a further period of monitoring (6 to 8 weeks) and will be followed up by a Stage 2 Review Meeting. During Stage 2, you put in any additional support that may be required that wasn't considered in Stage 1. At the end of Stage 2 if there is no improvement – you will go to panel. There is no scope to extend Stage 2 unless there are exceptional circumstances.

9.3 Stage two formal review meeting

At the stage two review meeting the following points will be discussed.

- A reminder of what the performance/capability concerns are, including any issues which have arisen during the process.
- A reminder of the standard of performance that is expected.
- Any further training needs identified and any further training and/or other developmental support that will be provided.
- If the review period is being extended then the period of time allowed for the improvement to take place and the review. This is likely to be within 6 and 8 weeks.
- If appropriate, any other employment options for example a suitable alternative role within the department or division.
- That this is the final stage of the procedure and if the standards are not met by the end of the review period, this could lead to a capability hearing where dismissal is a potential outcome.

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The manager will confirm the outcome of the meeting in writing together with a copy of the action plan.

If at the end of the period allowed for improvement the employee has reached the required standard of performance then no further action need be taken and this will be confirmed to the employee in a further meeting and in writing. Performance will continue to be monitored as part of the on-going Appraisal.

Where, despite encouragement and assistance, an employee is unable to reach the required standard of performance, the manager will meet with the employee to inform them that a formal capability hearing will be recommended. The manager will prepare a written report detailing the issues and all action taken, to present to the appropriate senior manager (see appendix 1). The senior manager will decide whether the capability hearing is appropriate or whether to refer the case back to the line manager for further action before considering dismissal.

9.4 Stage three capability hearing

The capability hearing will be set up as quickly as possible, preferably within two weeks. The timing of the hearing will however need to take account of the availability and varying shift patterns of staff and representatives.

A manager with the appropriate level of authority will set up and chair the capability hearing. The manager who has been managing the performance and capability (hereafter referred to as 'the line manager') will present a report at the hearing and the employee will present their response.

The capability panel will consist of an appropriate senior the dismissing manager and a Human Resources professional.

In more complex cases, or where specialist information will be discussed, a professional advisor may be co-opted on to a capability panel to provide advice on professional or technical issues at the discretion of the manager.

The manager chairing the hearing (hereafter referred to as 'the hearing manager') will write to the employee giving at least seven calendar day's notice of the hearing. The letter must be hand delivered or sent by recorded delivery and should contain information such as:

- The reasons for the hearing.
- The fact that it is part of the formal meeting held under the Trust's Performance & Capability Policy.
- Who will present the management case and the names of any witnesses.
- The right of the employee to call witnesses and to submit documents and statements.
- The right of the employee to be represented.
- That the potential outcome of the hearing is dismissal.
- The management report and any other documentary evidence that will be discussed or referred to at the hearing must be attached.

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The employee must take all reasonable steps to attend the hearing. An employee who cannot attend should inform the employer in advance whenever possible. If the employee fails to attend through circumstances outside their control and unforeseeable at the time the meeting was arranged the employer should arrange another meeting. A decision may be taken in the employee's absence if they fail to attend the re-arranged meeting without a reason that is satisfactory to the Trust.

In exceptional circumstances, where there is a history of the employee failing to attend meetings, the employee may be informed from the outset that the first scheduled hearing may be heard in their absence if they fail to attend without a satisfactory reason.

If an employees' union representative or companion cannot attend on the first arranged date, the manager will rearrange the hearing within a reasonable timeframe. The employee must notify the manager as soon as possible in advance of the hearing if a second date must be arranged for this reason. The representative's unavailability is not sufficient reason to postpone the hearing for a second time and the employee should make alternative arrangements to be accompanied or represented. A hearing will only be postponed on one occasion for this reason.

A representative may attend in place of the employee but their evidence will not carry the same weight as oral submissions made by the employee.

The decision regarding the outcome of the capability hearing rests with the hearing manager. Other members of the panel attend in an advisory capacity.

10. Procedure at capability hearing

The line manager will present their case, going through the report that has been drawn up and calling witnesses as appropriate. The panel members and the employee/their representative will have the opportunity to ask questions.

The employee or their representative will provide their response to the report, calling witnesses as appropriate. The panel members and the line manager will have the opportunity to ask questions. A representative can carry out all the functions on behalf of the employee, apart from answering questions on their behalf.

Any party can request an adjournment at any time. The manager will determine whether it should be allowed.

At the end of the hearing, each side will summarise their case following which the manager will adjourn to consider the outcome.

Once an outcome has been decided the hearing will be reconvened and the outcome communicated to the employee with details of the right of appeal.

During the hearing witnesses will attend only whilst giving evidence.

Consideration will be given by the hearing manager to whether:

- There are reasonable grounds for action under the performance and capability policy.
- The policy has been followed and fairly applied and that a sufficient number of review meetings have been held under that policy in the individual circumstances.

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- The employee has been given the opportunity to state his/her case and this has been properly considered.
- There is enough evidence to reach a reasonable belief that the allegation of incapability is true that the Trust can no longer support the employee's lack of capability.
- Consideration has been given to alternatives to dismissal.
- Redeployment or alternative employment in the Trust is appropriate.
- Demotion to a lower graded post is appropriate – protection of salary would not apply in these circumstances.
- There are any mitigating circumstances that affect the decision.
- The employee's length of service and previous performance has been taken into account.
- Dismissal on grounds of capability with the appropriate notice period is appropriate.
- The action is consistent with previous similar cases within the Trust.
- The action is reasonable in the circumstances.

If redeployment or demotion is considered appropriate as an alternative to dismissal, information on vacancies in the Trust will be provided as soon as possible. Unreasonable refusal of redeployment or demotion will result in termination of employment.

The outcome will be confirmed in writing by the hearing manager within ten calendar days of concluding the hearing. The letter should show how a reasonable and logical conclusion has been reached and should contain at least the following:

- The key points of evidence heard at the hearing.
- The employee's response.
- The reason for the dismissal or other action.
- What was taken into account in making the decision.
- In the case of dismissals, the reason for and the effective date of dismissal.
- Any right of appeal, the timescale for lodging an appeal and how it should be made.

Formal minutes or verbatim notes will not normally be taken at capability hearings. The panel members will take informal notes to aid their decision making process but these do not constitute formal minutes. Employees and their representatives are advised to take their own notes during the hearing.

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11. Appeals

Employees have a right to appeal against the action taken. An employee may choose to appeal, for example, because they think a finding or penalty is unfair or that the Performance and Capability Policy was not used correctly.

This right must be exercised within 10 calendar days in line with the Appeals Policy of the date of the letter confirming the capability dismissal. The grounds of appeal must be clearly summarised in writing to the Director of Workforce and Organisational Development.

Further information can be found in the Trust's Appeals Policy and Procedure.

12. Complaints / grievances during the capability process

If the employee raises a grievance or makes a complaint under the Dignity at Work or Grievance Policy about the application of the procedure or another matter, the manager and Human Resources professional should consider whether the capability procedure should be suspended whilst the complaint is investigated. Human Resources should carry out a brief review of the complaint to ascertain if the complaint has face validity.

Complaints must be genuine and other procedures should not be used to try to circumvent the reasonable actions of the manager to bring about improvements in an employee's performance. If an investigation concludes that the grievance or complaint was groundless and raised with the intention of avoiding or ending action being taken by the manager to bring about the necessary improvements consideration will be given to whether disciplinary action should be taken against the employee on grounds of misconduct.

13. Mediation

Consideration will be given to whether the involvement of a third party might assist in addressing performance issues and/or in rebuilding relationships after a capability procedure. This might involve an internal mediator who has not previously been involved in this performance and capability process.

Mediation is an entirely voluntary process for both sides in any issue and does not preclude the use of other stages of this policy if it is not successful.

14. Dissemination and implementation

This Policy will be published via the intranet and staff notified via Aspire.

Training will also be provided to managers responsible for implementing this policy.

15. Review

Policies will be reviewed when statutory requirements/best practice guidelines dictate, or no longer than 3 years after the previous review/initial ratification.

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16. Archiving arrangements

Responsibility for archiving trust-wide policies lies with the Quality Department where all paper copies will be stored, and electronic folders have been set up to hold master copies.

Requests for retrieval of this document can be made to the Quality Dept.

17. References

- Employment Rights Act 1996
- [NHS Agenda for Change Terms and Conditions Handbook](#)

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18. Appendices

18.1 Appendix One – Minimum levels of authority to act

STAFF GROUP	FIRST STAGE	FINAL STAGE	DISMISSAL
Executive Directors	Chief Executive	Chief Executive	Chief Executive
Staff reporting directly to an Executive Director	Executive Director	Executive Director	Executive Director
Staff reporting directly to a Divisional, Associate or Deputy Director	Divisional, Associate or Deputy Director	Divisional, Associate or Deputy Director	Divisional, Associate or Deputy Director
All other staff	Service Manager; Head of Department/Service; Head of Nursing or Midwifery	Service Manager; Head of Department/Service; Head of Nursing or Midwifery	Divisional, Associate or Deputy Director; General Manager; Head of Nursing or Midwifery
Medical and Dental Staff	See: Conduct, Capability, Ill Health And Appeals Policies And Procedures For Practitioners (Doctors And Dentists)		

- Where the designated manager has had direct, previous involvement with the case, the authority to act will be delegated to another manager of equal status
- In the absence of a manager, cross cover/deputisation arrangements may apply

18.2 Appendix Two - Example Informal / Formal Action Plan to address and improve performance

Skill	Example of concern	Action	Outcome	Achieved Yes/No/Time extended	Completion Date	Achieved Yes/No	Not Achieved	1ST REVIEW DATE	2ND REVIEW DATE

I understand that I am required to complete this action plan within the time scales listed and will demonstrate achievement of the outcomes. I understand that failure to do so could lead to the formal stage being implemented / more formal capability management.

Managers Name: Managers Signature: Date:

Employee Name: Employee Signature: Date:

Note: to be written in conjunction with the job description and person specification

18.3 Appendix Three - Example Informal / Formal Action Plan Review Meeting Notes

Identified concern	Notes of review meeting

Managers Name: Managers Signature: Date:

Employee Name: Employee Signature: Date: