

Capability Policy

2019-2023

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			Team Human Resources
Title	Capability Policy		
Amendments	Review date extension to March 2023; approved by Governing Body on 2.2.2022		
Purpose	The purpose of the policy is to provide a framework for managing underperformance in a fair and consistent manner. Its primary focus is that of improving performance to the standard required.		
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Consulted with	Staff Engagement Group and Trade Unions.		
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1. Introduction

- 1.1 NHS Nottingham and Nottinghamshire CCG (hereafter referred to as 'the CCG') places great importance on ensuring that employees are able to achieve and maintain an acceptable standard of performance which ensures an effective delivery of day-to-day services to clients, patients and staff. The CCG recognises that they have a duty to provide a policy that help employees maintain defined standards whilst identifying and managing areas of poor performance.
- 1.2 The aim of this policy is to provide a fair and consistent framework for resolving any identified concerns relating to performance. When such issues arise they should be dealt with in a supportive manner and as promptly as possible.
- 1.3 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 an employee's working arrangements, including a change of duties or providing additional equipment or training. We may also consider making adjustments to this procedure in appropriate cases. If an employee wishes to discuss this or inform us of any medical condition you consider relevant, they should contact their Line Manager.

2. Purpose and Scope

- 2.1 This policy applies to all staff regardless of length of service who are directly employed by the CCG. It does not apply to agency workers or self-employed contracts or others working for the organisation under a contract for service.
- 2.2 The aims of this document are:
- To ensure that employees understand the principles of the required standards expected of them;
 - To provide a fair and consistent framework for managing performance/ capability issues;
 - To ensure employees are kept fully informed and provided with guidance regarding work performance standards, and are involved in a supportive dialogue;
 - To put in place effective procedures to support and manage employees whose performance falls below the desired level and are offered practical assistance;
 - To ensure that cases of poor performance are managed appropriately with any underlying reasons for difficulties taken into account;

- To work alongside the appraisal policy and competency framework ensuring issues around performance come as “no surprise” and are identified and addressed at an early stage.
- 2.3 This policy does not apply to cases involving genuine sickness absence, proposed redundancies or misconduct. In those cases reference should be made to the appropriate policy or procedure.
- 2.4 Capability issues may be brought about through a shortfall in knowledge or experience or where existing skills have been overtaken by new technology and/or new ways of working or where an employee fails specialist examinations required for the post.
- 2.5 Data that is held in relation to any capability process will be retained and destroyed in accordance with the provisions of the General Data Protection Regulations 2018.

3. Roles and Responsibilities

3.1 Employees

Employees have a responsibility for:

- Ensuring that they are aware of the standards expected of them, asking for assistance, training, guidance and support in order to enable them to achieve the expected standard;
- Aiming to achieve a high standard of performance as individuals and contribute effectively to the team as and when appropriate;
- Informing their Line Manager or Human Resources of any job related or personal issues that may be preventing them from achieving the agreed standards, in order that the appropriate support and assistance can be provided;
- Contribute to any discussions about their performance and participate fully in any reasonable action plans;
- Comply with their professional codes of conduct where applicable.

3.2 Line Manager

Line Managers have a responsibility for:

- Encouraging, supporting and developing the employee;
- Agreeing standards of performance which are SMART (specific, measurable, achievable, realistic and timely) and ensure that these are communicated effectively to all employees within their teams;
- Provide a local induction to all new starters to ensure they are clear of the aims and objectives of the CCG and the team;
- Discuss and agree with the employee any changes in job role;

- Retain appropriate documentation of any training and development undertaken by employees;
- Conduct regular appraisals in line with the CCG's Appraisal Policy;
- Provide training and development opportunities to enable employees to realise their full potential;
- Ensure that employees are aware when they are exceeding expectations;
- Discuss any performance concerns informally in the first instance in order that the matter can be resolved without proceeding to formal processes;
- Ensure that all informal conversations are accurately documented and shared with the employee;
- Work in partnership with employee representatives to ensure that performance matters are dealt with fairly and consistently;
- When appropriate take specific action to facilitate disabled employees in meeting performance standards by agreeing and making reasonable adjustments to their working conditions or patterns in accordance with the Equality Act 2010.

3.3 Human Resources

Human Resources have responsibility for:

- Providing Line Managers with advice and support on all aspects of this policy;
- Updating intranet and publishing policies and associated documents.

4. Procedure – Informal

- 4.1 At the informal stage the Line Manager will talk to the employee highlighting the areas of concerns and provide objective evidence e.g. where performance targets have been missed or when objectives are set at appraisal or one-to-ones have not been met.

The manager and employee should jointly:-

- Identify any underlying cause;
- Develop an action plan with clear targets to meet;
- Set a specific time scale to overcome the problems;
- Provide what support is available;
- Schedule regular review periods within the action plan to assess progress.

- 4.2 It may be more appropriate to manage the situation in line with another procedure depending on what underlying causes may have been identified during the discussion e.g.

- Sickness absence;
- Acceptable behaviours;
- Alcohol or substance misuse.

- 4.3 Action plans are normally set to be reviewed after four weeks in order to assess if targets have been met. However, in some circumstances it may be more appropriate to extend the review periods for up to a further four weeks.
- 4.4 There is no requirement for formal representation at this stage.
- 4.5 At the end of the review period, if performance is still not meeting the required standard the case should progress to the formal procedure. If performance has improved and is now meeting the appropriate standard, the Line Manager needs to confirm this with the individual and follow this up in writing.

5. Procedure – Formal

5.1 Formal Review

- 5.1.1 The Line Manager will undertake an assessment to decide if there are grounds for taking formal action under this procedure. The procedure involved will depend on the circumstances but may involve reviewing the employee's personnel file including any appraisal records, gathering any relevant documents, monitoring the employee's work and, if appropriate, interviewing other individuals confidentially regarding the employee's work.
- 5.1.2 The Line Manager will need to formally write to the employee inviting them to attend the formal review, providing at least five working days' notice.
- 5.1.3 The Line Manager should inform the employee of the specific concerns and highlight any agreed actions that were part of the informal process.
- 5.1.4 The Line Manager needs to provide evidence at the meeting regarding the specific concerns about the employee's performance and detail why this is an issue for the organisation.
- 5.1.5 At this meeting there will be a HR representative in attendance and the employee has the right to be accompanied by a Trade Union representative or a work colleague not acting in a legal capacity.
- 5.1.6 All informal actions that have already been taken should be discussed.
- 5.1.7 Following the meeting the following actions could be taken:

- A newly agreed action plan, along with a first written warning, with clearly defined targets and goals for the employee to achieve within the specified time period.
- The action plan must detail how performance will be monitored and have regular review meetings built into the plan.
- Consider alternative support, such as reduction in hours, realignment of workloads, coaching and mentoring support.
- If it is agreed by both parties that the employee is not capable of achieving the required standard of performance, alternative employment at the individual's capability level could be an option – Line Managers must engage with the HR Team if this is to be considered.

5.1.8 The outcome of the Formal Review must be detailed in writing to the employee and a copy placed on their personnel file. The first written warning 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 personnel file but will be disregarded in deciding the outcome of any future proceedings.

5.2 **Second Formal Review**

5.2.1 Once the specified time period within the action plan has been met, a review will need to take place to assess the employee's performance against the agreed objectives:

- If performance is deemed acceptable, no further action will be taken.
- If performance has improved but there are still some areas of concern, the time period for achievement of the action plan can be extended.
- Where the employee is deemed to have not reached the appropriate level of performance, a Second Formal Review Meeting will be held.

5.2.2 The Second Formal Review Meeting will follow the same format as the previous meeting. At this stage a final written warning may be issued.

5.2.3 Following the Second Formal Review Meeting the outcome of the meeting must be communicated to the individual in writing.

5.2.4 If at the end of the extended monitoring period there is no significant improvement in the employee's performance the Line Manager can progress the case to the Final Review Hearing.

5.3 Final Review Hearing

- 5.3.1 To hold a Final Performance Review Hearing a panel will need to be formed – see **Appendix A** for the ‘Scheme of Delegation’. The HR Team will be able to provide support on the composition of the panel.
- 5.3.2 The employee will need to be formally invited to the hearing, giving at least ten working days’ notice and advised of the potential outcomes of the hearing.
- 5.3.3 The Line Manager who supported the employee through the informal and formal stages of the process will prepare the case for the hearing. They must provide specific examples of where performance has not met the expected level and provide all necessary evidence.
- 5.3.4 The employee will be given the opportunity to present mitigation and explanation as to why their performance is not as that expected level. This will need to be evidence based.
- 5.3.5 As part of the hearing the Chair will ask both management and the employee to present their case and ask any questions of witnesses either side has brought forward to evidence their case.
- 5.3.6 An employee may ask relevant witnesses to appear at the hearing, provided sufficient advance notice is given to arrange their attendance. The employee will be given the opportunity to respond to any information given by a witness. However, the employee will not normally be permitted to cross-examine witnesses unless, in exceptional circumstances, the panel decide that a fair hearing could not be held otherwise.
- 5.3.7 The panel will make their decision based upon the information presented to them on the day. Possible outcomes of the hearing are:
- Take no further action;
 - Undertake a further period of target setting, monitoring and review;
 - Redeploy the employee without protection to another role at the employee’s capability level;
 - Dismiss the employee.
- 5.3.8 If it is decided to dismiss the employee, the employee will be dismissed with their full contractual notice (or payment in lieu of notice if appropriate) unless performance has been so negligent as to amount to gross misconduct, in which case the employee may be dismissed without notice or any pay in lieu.

5.3.9 The outcome of the hearing must be confirmed in writing and should state the reasons for these decisions and provide the details of how to appeal clearly.

5.3.10 The employee will usually be informed within five working days of the hearing. Where possible the panel will also explain this information in person. If the decision was to dismiss, the reason for dismissal must be 'as a consequence of the employee's incapability to perform the required duties of the role to the appropriate standard.'

5.4 **Failure to Attend**

5.4.1 If the employee is unable to attend the hearing with prior notice, the hearing will be reconvened at a more suitable date. The CCG will make attempts to reconvene the meeting on three occasions.

5.4.2 If the employee or their representative does not attend the hearing, the Chair of the panel or HR will contact the employee to discuss the reason for non-attendance and reconvene the hearing at a more mutually convenient time. The employee must make every effort to attend the hearing, and failure to attend without good reason may be treated as misconduct

5.4.3 If the reason for non-attendance is due to sickness absence, the panel, prior to reconvening the meeting, will refer the employee to Occupational Health to ensure that they are fit to attend a future hearing. If the employee or their representative fails to attend the reconvened hearing, the hearing will be held in their absence. The outcome of the hearing will be communicated to the employee in writing.

5.5 **Right to be Accompanied**

5.5.1 All employees have a right to be accompanied by a Trade Union representative or colleague not acting in a legal capacity to any meeting within the Formal Stage of the Capability Process including the Appeals process. We may, at our discretion, allow you to bring a companion who is not a colleague or Trade Union representative (for example, a member of your family) where this will help overcome a particular difficulty caused by a disability, or where you have difficulty understanding English. The employee is responsible for arranging their own representation at meetings, hearings and appeals. The employee must tell the manager conducting the hearing who their chosen companion is, ahead of the hearing.

5.5.2 A companion is allowed reasonable time off from duties without loss of pay but no-one is obliged to act as a companion if they do not wish to do so.

- 5.5.3 If the employee's companion is unavailable for a specific date the meeting, hearing or appeal can be arranged to a more mutually convenient date.
- 5.5.4 If the companion will not be available for more than 5 working days the CCG may require the employee to choose someone else.

6. Appeals

- 6.1 Employees have the right of appeal against formal disciplinary sanctions. The employee should appeal in writing to the relevant senior manager (see **Appendix A**), stating their grounds for appeal, within ten working days of receipt of the date on the outcome/decision letter.
- 6.2 If the employee raises any new matters in their appeal, further investigation may be required.
- 6.3 If any new information comes to light, the employee will be provided with a summary including, where appropriate, copies of additional relevant documents and witness statements.
- 6.4 The employee will have a reasonable opportunity to consider this information before the hearing.
- 6.5 The manager who chaired the Final Review Hearing will present the case to the Appeal's Panel. The Appeal Hearing may be a complete re-hearing of the matter or it may be a review of the fairness of the original decision in the light of the procedure that was followed and any new information that may have come to light. This will be at the panel's discretion depending on the circumstances of the case. In any event, the Appeal will be dealt with as impartially as possible.
- 6.6 The Panel will include members of the Senior Leadership Team who have not previously been involved with the case – see **Appendix A** for 'Scheme of Delegation'.
- 6.7 The Appeal's Panel will make their decision based on the evidence presented to them at the Hearing considering the following:
- Whether the Line Manager has offered reasonable and appropriate support in order to improve performance.
 - What the concerns were relating to performance and what the reasons were for this.
 - Whether the panel believe the employee can make the necessary improvements and sustain these improvements.

- Whether there any other job roles the employee could do or is willing to do within the range of capability.
- 6.8 When considering whether dismissal was a fair and reasonable action to take, the Panel must consider the following:
- The employee's performance record.
 - Any mitigating reasons for under-performance.
 - The employee's employment record in its entirety.
 - Whether there is alternative work that the employee can carry out that is more suitable to their level current capability.
 - Any other factor that the panel considers to be relevant i.e. underlying health condition, carer responsibilities, etc.
- 6.9 The Appeal Hearing may:
- Confirm the original decision;
 - Revoke the original decision; or
 - Substitute a different penalty.
- 6.10 The employee will be informed in writing of the final decision as soon as possible, usually within five working days of the Appeal Hearing. Where possible the employee will also be informed in person. There will be no further right of appeal.

7. Records

- 7.1 Records of all stages of this process must be kept by management. Meeting notes must be agreed by both management and the employee before being retained on the personnel file.
- 7.2 Employees are entitled to receive copies of the meetings notes/minutes.
- 7.3 The employee and anyone accompanying the employee (including witnesses), must not make electronic recordings of any meetings or hearings conducted under this policy.

8. Equality and Diversity Statement

- 8.1 The Nottingham and Nottinghamshire CCG pays due regard to the requirements of the Public Sector Equality Duty (PSED) of the Equality Act 2010 in policy development and implementation, both as a commissioner and as an employer.
- 8.2 As a commissioning organisation, we are committed to ensuring our activities do not unlawfully discriminate on the grounds of any of the protected characteristics defined by the Equality Act, which are age, disability, gender

re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

- 8.3 We are committed to ensuring that our commissioning activities also consider the disadvantages that some people in our diverse population experience when accessing health services. Such disadvantaged groups include people experiencing economic and social deprivation, carers, refugees and asylum seekers, people who are homeless, workers in stigmatised occupations, people who are geographically isolated, gypsies, roma and travellers.
- 8.4 As an employer, we are committed to promoting equality of opportunity in recruitment, training and career progression and to valuing and increasing diversity within our workforce.
- 8.5 To help ensure that these commitments are embedded in our day-to-day working practices, an Equality Impact Assessment has been completed for, and is attached to, this policy.

9. Communication, Monitoring and Review

- 9.1 The application of this policy and the effectiveness of the provision of awareness training will be monitored by the HR Team as and when required. This will also be in line with the requirements within the NHS Resolution Risk Management Standards, Equality Statutory Duties and Care Quality Commission that require the CCG to record analyse and publish employee relations activity to ensure the organisation is eliminating discrimination and promoting equality of opportunity. In accordance with this requirement summary reports will be submitted to the relevant CCG's Board. Any suspected discriminatory trend will be investigated.
- 9.2 To ensure compliance of this policy, reviews will be carried out on a regular basis by the most suitable lead individual. Any outcomes of reviews will be reported to the relevant Committees appropriate to the CCG who will review the results and delegate actions/planning for any issues/outcomes that have been identified to the most appropriate lead individual.
- 9.3 This policy will be reviewed every three years or sooner in light of new legislation.
- 9.4 Any individual who has queries regarding the content of this policy, or has difficulty understanding how this policy relates to their role, should contact the HR Team on email – ncccg.hr.greaternottingham@nhs.net

APPENDIX A: Scheme of Delegation

The Scheme of Delegation has been developed to manage any disciplinary or grievance processes within the CCG. The table provides detail of the lowest grade officer that can take specified action or issue a disciplinary sanction.

Staff Group	Written Warning	Final Written Warning	Dismissal	Suspension from Duty	Appeals
Chief Officer	Clinical Chair in consultation with NHS England	Clinical Chair in consultation with NHS England	Clinical Chair in consultation with NHS England	Clinical Chair in consultation with NHS England and Head of HR & OD	Clinical Chair from a different footprint in consultation with NHS England and Head of HR & OD
Directors	Accountable Officer	Accountable Officer	Clinical Chair	Accountable Officer in consultation with Head of HR & OD	Clinical Chair in consultation with NHS England and Head of HR & OD
Employees who report directly to a Director	Director	Director	Director from a different directorate	Director in consultation with Head of HR & OD	Chief Officer in consultation with Head of HR & OD
All other employees	Line Manager (Band 4 and above)	Line Manager (Band 4 and above)	Director	Director in consultation with Head of HR & OD	Director from a different directorate in consultation with Head of HR & OD

APPENDIX B: Equality Impact Assessment for the Capability Policy

Date of assessment:	July 2019			
For the policy, and its implementation, please answer the questions against each of the protected characteristic and inclusion health groups:	Has the risk of any potential adverse impact on people in this protected characteristic group been identified, such as barriers to access or inequality of opportunity?	If yes, are there any mechanisms already in place to mitigate the adverse impacts identified?	Are there any remaining adverse impacts that need to be addressed? If so, please state any mitigating actions planned.	Are there any positive impacts identified for people within this protected characteristic group? If yes, please briefly describe.
Age¹	No	N/A	N/A	N/A
Disability²	Yes	Mechanisms are in place via the Communications and Engagement Team to enable the policy to be received in other accessible formats.	N/A	N/A
Gender reassignment³	No	N/A	N/A	N/A
Marriage and civil partnership⁴	No	N/A	N/A	N/A
Pregnancy and maternity⁵	No	N/A	N/A	N/A

¹ A person belonging to a particular age (for example 32 year olds) or range of ages (for example 18 to 30 year olds).

² A person has a disability if she or he has a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

³ The process of transitioning from one gender to another.

⁴ Marriage is a union between a man and a woman or between a same-sex couple.

Same-sex couples can also have their relationships legally recognised as 'civil partnerships'.

⁵ Pregnancy is the condition of being pregnant or expecting a baby. Maternity refers to the period after the birth, and is linked to maternity leave in the employment context. In the non-work context, protection against maternity discrimination is for 26 weeks after giving birth, and this includes treating a woman unfavourably because she is breastfeeding.

Date of assessment:	July 2019			
For the policy, and its implementation, please answer the questions against each of the protected characteristic and inclusion health groups:	Has the risk of any potential adverse impact on people in this protected characteristic group been identified, such as barriers to access or inequality of opportunity?	If yes, are there any mechanisms already in place to mitigate the adverse impacts identified?	Are there any remaining adverse impacts that need to be addressed? If so, please state any mitigating actions planned.	Are there any positive impacts identified for people within this protected characteristic group? If yes, please briefly describe.
Race⁶	No	N/A	N/A	N/A
Religion or belief⁷	No	N/A	N/A	N/A
Sex⁸	No	N/A	N/A	N/A
Sexual orientation⁹	No	N/A	N/A	N/A
Carers¹⁰	No	N/A	N/A	N/A

⁶ Refers to the protected characteristic of race. It refers to a group of people defined by their race, colour, and nationality (including citizenship) ethnic or national origins.

⁷ Religion refers to any religion, including a lack of religion. Belief refers to any religious or philosophical belief and includes a lack of belief. Generally, a belief should affect your life choices or the way you live for it to be included in the definition.

⁸ A man or a woman.

⁹ Whether a person's sexual attraction is towards their own sex, the opposite sex, to both sexes or none. <https://www.equalityhumanrights.com/en/equality-act/protected-characteristics>

¹⁰ Individuals within the CCG which may have carer responsibilities.