

Final Version agreed with College
Unions on 19th April 2010

ROYAL HOLLOWAY
University of London

CAPABILITY POLICY AND PROCEDURE
(for all non-academic staff)

1. INTRODUCTION

1.1 POLICY STATEMENT

Royal Holloway, University of London (The College) accepts that where an employee is not capable of performing the duties required under the contract of employment, the application of the disciplinary procedure is inappropriate. It is the policy of the College to ensure that fair and effective arrangements exist for dealing with capability matters. This procedure is compliant with existing legislation, including the Employment Rights Act 1996, the Employment Relations Act 1999 and the ACAS Code of Practice. The College has a separate Absence Management Policy and Procedure which is available on <http://www.rhul.ac.uk/humanresources/Policydocs/AbsenceManagementPolicyProcedure.pdf>.

1.2 DEFINITION, PURPOSE AND SCOPE

1.2.1 In accordance with the requirements of the Employment Rights Act 1996 the College defines 'capability' as "capability assessed by reference to skill, aptitude, health or any other physical or mental quality".

1.2.2. This procedure applies to all non-academic staff employed by the College who have completed their probation period. Academic staff are covered by separate provisions under Statute 25 of the Revised Statutes of the College.

1.2.3 The purpose of this procedure is to deal with situations where an employee is not capable of adequately performing the duties required under the contract of employment due to lack of ability, or any reason other than misconduct which should be dealt with under the provisions of the Disciplinary Policy.

1.2.4 The aim of the Capability Policy and Procedure is to try to find a solution to enable employment to continue, although there is no guarantee that this will be possible. It aims to provide a fair and consistent method for dealing with unsatisfactory work performance where informal advice and guidance in supervisory meetings has failed to achieve the desired improvement. It is recognised that employee performance and attendance may be influenced by a number of factors. The College will offer reasonable assistance to all its employees to resolve issues of poor performance. A range of options and outcomes may result from this.

1.2.5 It is the responsibility of Heads of Departments, managers/supervisors to set the standards for performance and it is expected that all employees will endeavour to meet these standards.

1.3 PRINCIPLES

1.3.1 Managers/supervisors are expected to communicate regularly with their staff. In the normal course of their management/supervision of staff they will be expected to identify where a problem exists or may arise which impacts on an employee's performance. They should take responsibility for managing and providing support in order to resolve the matter in the appropriate way.

1.3.2 No employee will be dismissed on grounds of capability without account being taken of every stage of the procedure.

1.3.3 The employee's manager will investigate the cause of an employee's poor performance and will give the employee factual examples of his/her unsatisfactory performance. The employee

will be asked for his/her explanation, which will subsequently be followed up and checked where appropriate.

Where the reason for unsatisfactory performance is lack of the required skills, the employee will, where practicable, be assisted through training and be given reasonable time to reach the required standard of performance. If it is a question of lack of support staff, tools or other resources or facilities, attention should be paid to this and assistance provided if appropriate.

- 1.3.4 At all the formal stages of the procedure, the employee will have the right to be accompanied by a trade union representative (including the trade union solicitor) or workplace colleague of their choice.
- 1.3.5 Managers/supervisors have the right to meet employees where they have concerns about performance. Employees have the right to know what is expected of them. It is expected that standards of work should be set and reviewed informally. Employees should be willing to do everything they can, with the College's help e.g. training or mentoring, to overcome capability problems. At every stage in the procedure an employee will always be given a clear insight into the nature of the problem, consulted appropriately and will be given the opportunity to state their case before any decision is reached.
- 1.3.6 Timescales will be given for performance to improve and a review date to assess whether the improvement has been achieved within this timescale.
- 1.3.7 All reasonable measures will be taken by the College to support the employee including offers of training and alternative employment.
- 1.3.8 Where necessary medical advice will be sought if a health problem is evident. If a member of staff becomes disabled during their employment under the Disability Discrimination Act 1995 there is a requirement on the College to make reasonable adjustments under certain circumstances. Such adjustments may include, for example to allow the member of staff to continue to work and this could include adjustments to performance targets. Only after careful consideration of all options will a member of staff be dismissed from his or her post on the grounds of capability due to ill-health. Please refer to the College's Absence Management Policy and Procedure available on <http://www.rhul.ac.uk/humanresources/Policydocs/AbsenceManagementPolicyProcedure.pdf>.
- 1.3.9 If the necessary improvement is attained the papers relating to the matter will remain on file for a period of 12 months. Should the matter deteriorate within this period the next relevant stage of the procedure will be re-enacted. However, if any further problems arise after this 12 month period has elapsed they will be dealt with starting from stage 1 of the procedure.
- 1.3.10 If the outcome of the capability hearing at Stage 4 is dismissal, an employee will have the right of appeal.
- 1.3.11 The constitution of and procedure to be adopted by an Appeals Panel is set out in Section 4.
- 1.3.12 Training will be provided as appropriate to ensure as far as possible that capability matters are handled properly and fairly.
- 1.3.13 Representatives of the Human Resources Department are available to give advice and assistance to both parties. The Human Resources Department should be consulted prior to formal action being taken and a representative from the Human Resources Department will attend all formal capability hearings to advise and assist the Head of Department or manager/supervisor conducting the hearing or any appeals against formal action. The Human

Resources Department should also ensure that any necessary reviews of management practice take place, e.g. recruitment and selection, performance management.

2. **STAGE ONE - INFORMAL STAGE**

2.1 When it becomes apparent to a manager/supervisor that an employee's capability to perform the duties required is in question they have the right and duty to bring the matters of concern to an employee's attention. These could arise from complaints, supervision sessions, and formal or informal appraisals or work reviews.

2.2 **Initial Investigation/Informal Action**

2.2.1 The manager/supervisor shall:

- (a) investigate fully the cause of an employee's poor performance in order to provide information/evidence to put to the employee. Causes could include lack of skills, inadequate training, lack of support staff, tools or other resources, lack of communication or problematic working relationships;
- (b) meet with the employee confirming the status of the meeting;
- (c) make the employee aware in specific terms of the standards expected and define shortfalls;
- (d) give the employee an opportunity to respond and consider the response;
- (e) confirm any support/supervision/training/job redesign or informal means to assist or resolve the problem;
- (f) seek independent medical advice where it is believed that a health issue is affecting performance. (This will then be handled under the College's Absence Management Policy and Procedure);
- (g) seek advice from the Human Resources Department. The Human Resources Department must be informed of any capability cases before they proceed to the formal stage of the Capability Procedure;
- (h) a representative from the Human Resources Department may accompany the manager/supervisor throughout any stage of the Capability Procedure but must be present at formal meetings and appeals;
- (i) confirm a time period over which monitoring will take place;
- (j) note and confirm the discussion outcomes and review period/date.

2.2.2 The manager/supervisor should explain to the employee that if there is no improvement at the end of the review period, he/she might initiate the formal stages of the Capability Procedure.

2.2.3 The manager/supervisor must have attempted to manage the unsatisfactory performance before entering the formal Capability Procedure.

3. **THE CAPABILITY PROCEDURE**

3.1 **Stage Two – Formal Review Meeting**

3.1.1 Where improvement is not adequate at the end of the specified period, the employee will be invited in writing to a formal review meeting with the manager/supervisor.

3.1.2 The manager/supervisor will arrange a formal review meeting with the employee. This must be confirmed in writing giving at least five working days notice from the date the letter was sent to the employee.

3.1.3 The notification to attend a meeting must include the following:

- (a) that the meeting is being held in accordance with the Capability Policy & Procedure;
- (b) the nature of the unsatisfactory performance;
- (c) the date, time and location of the meeting;
- (d) the employee's rights to be accompanied at the meeting by a trade union representative (including the trade union solicitor) or a workplace colleague of their choice. If the companion is not available the employee can offer an alternative time and date so long as it is reasonable and falls before the end of the period of five working days beginning with the first working day after the date proposed by the manager/supervisor;
- (e) the identity of the person chairing the meeting and of the Human Resources representative;
- (f) a copy of the Capability Policy & Procedure.

3.1.4 At the meeting, the manager/supervisor should tell the employee in specific terms of the standards expected and current shortfalls using specific examples. The employee and/or companion will have the opportunity to put forward their own views and explanation.

3.1.5 Together the manager/supervisor and the employee will make every effort to agree a way forward by formulating an action plan. This plan will clearly identify where the performance issues exist and ways in which this gap in performance can be bridged. The manager/supervisor and employee will agree a set of measurable objectives and ways of achieving them within realistic timescales. These will be included in the action plan and confirmed in writing together with details on how performance will be monitored and the length of the review period.

3.1.6 A letter must be sent to the employee including an overview of the discussion, the action plan, any training to be provided and/or support from the manager/supervisor, future review dates and an explanation of what will happen next if standards are not achieved.

3.1.7 The aim of instigating this programme is to help the employee achieve what is expected of him/her and to restore the individual's confidence in his or her own abilities.

3.2 **Stage Three – Capability Hearing**

3.2.1 If following the review period, agreed at stage 2, satisfactory performance has still not been maintained, the employee will be requested to attend a capability hearing. This must be confirmed in writing, giving the employee at least five working days notice, from the date the letter was sent to the employee. The purpose of the capability hearing will be for a Panel consisting of the Head of the relevant Department (or another suitable Head of Department or nominated appropriate manager) and someone with appropriate knowledge of the duties and/or work environment to hear the case. The hearing will be as informal as possible, both parties will be given the opportunity to state their case and ask and answer questions.

3.2.2 The notification to attend a capability hearing must include the following:

- (a) that the meeting is being held in accordance with the Capability Policy & Procedure;
- (b) the reason for the meeting, the date, time and location;
- (c) the employee's rights to representation at the hearing by a trade union representative (including the trade union solicitor) or a workplace colleague of their choice. If the representative is not available the employee can offer an alternative time and date so long as it is reasonable and falls before the end of the period of five working days beginning with the first working day after the day proposed by the manager/supervisor;
- (d) the identity of the person conducting the meeting, of the person with appropriate knowledge of the duties and/or work environment and of the Human Resources representative.

- 3.2.3. At this stage, the employee and manager/supervisor will discuss why there is still a shortfall in the expected standards and agree a final date by which the required improvement must be shown. A final warning letter must be sent including an overview of the discussion, the action plan, any training to be provided and/or support from the manager/supervisor, future review dates and what will happen next if standards are not achieved. At this meeting the manager/supervisor should also discuss the possibility of finding alternative employment in the College. This may be at a lower grade.
- 3.2.4 If the employee is agreeable the College will endeavor to look for alternative employment, having taken into account the skills and competencies of the employee.
- 3.2.5 The manager/supervisor and Human Resources representative will:
- (a) in conjunction with the employee, consider whether reasonable alternative employment is available and whether it is appropriate, and, if so, whether it can be offered to the employee.
 - (b) consult the employee about alternative employment – even if it would appear that none is available;
 - (c) ensure that the views and individual circumstance of the employee are taken into consideration;
- 3.2.6 If alternative employment is found the Director of Human Resources will make the offer in writing, giving the employee a timescale in which to consider the offer. If accepted a trial period of a minimum of four weeks and a maximum of 6 months will be arranged.
- 3.2.7 Under the Capability Policy and Procedure protection arrangements, for salary and/or Terms and Conditions of Employment do not apply where an employee accepts a post on a lower grade than their current post. The Employee will, however, transfer to an equivalent incremental point on the lower graded post. For example if an employee is on the 2nd point of the grade in their existing post they will transfer to the 2nd point on the grade of the new lower graded post.
- 3.2.8 Other outcomes available to the Head of Department may include:
- (a) no further action; or
 - (b) refer the case back to stage two for further support and mentoring.
- 3.2.9 If the necessary standards are still not met in the current post and/or it has not been possible to find an alternative job within a reasonable period, or if the employee has rejected the offer or refuses to transfer to such a job or it be felt that the employee is not suitable for the post at the end of the trial period, the case would proceed immediately to stage four.

3.3 **Stage Four – Final Capability Hearing**

- 3.3.1 The purpose of the final capability hearing will be for a Panel, which will include appropriate staff not previously involved at stage three, to consider whether the employee's employment should be terminated. The hearing will be conducted as informally as possible, both parties will be given the opportunity to state their case and ask and answer questions. If this stage has been reached following a trial period the new manager will present to the panel the reasons why he/she considers that the employee is not suitable for the post.

- 3.3.2. An employee will proceed to stage four of the Capability Procedure where:
- (a) satisfactory performance has not been maintained and/or;
 - (b) it has not been possible to find suitable alternative employment for the employee within a reasonable period of time or another acceptable alternative and/or;
 - (c) the employee has rejected or refused to transfer to alternative employment.
- 3.3.3 The employee will be requested to attend the final capability hearing. This must be confirmed in writing giving the employee at least five working days notice of the hearing.
- 3.3.4 The notification to attend a hearing must include the following:
- (a) that the meeting is being held in accordance with the Capability Policy & Procedure;
 - (b) the nature and details of the unsatisfactory performance and a summary of actions taken to date;
 - (c) the date, time and location of the meeting;
 - (d) the employee's rights to representation at the hearing by a trade union representative (including the trade union solicitor) or a workplace colleague of their choice. If the representative is not available the employee can offer an alternative time and date so long as it is reasonable and falls before the end of the period of five working days beginning with the first working day after the date proposed by the manager/supervisor;
 - (e) the identity of the person hearing the case, of the person with appropriate knowledge of the duties and/or work environment and of the Human Resources representative attending;
 - (f) any accompanying documents including witness statements, to which reference is to be made at the hearing. If necessary, witnesses should be available to attend the interview, unless the employee accepts in advance that the witness statements are statements of fact;
 - (g) the employee should also make available to the manager/supervisor any documentation he/she intends to refer to at the interview and indicate which, if any, witnesses are to be called;
 - (h) a copy of the Capability Policy & Procedure.
- 3.3.5 The final capability hearing is called and chaired by the Head of the relevant Department (or by another representative to whom the Head of Department has specifically delegated in writing his/her discretion to chair Stage 4 Hearings). Human Resources normally organise the Hearing. Where the relevant Head of Department has acted as the manager/supervisor, another Head of Department would be nominated to conduct the hearing.
- 3.3.6 Human Resources on behalf of the manager/supervisor will send the employee and the relevant Head of Department or nominated representative, relevant documentation at least five working days before the hearing. The documentation will include a written management case detailing the nature of the capability concerns in respect of the employee along with any documentary evidence to be presented in the hearing.
- 3.3.7 Similarly, if they wish, the employee (or representative) will have the opportunity to submit to Human Resources a written case along with any documentary evidence to be presented in the hearing, to be forwarded to the manager/supervisor and Head of Department at least 24 hours beforehand.
- 3.3.8 The Panel will reach its decision after having heard all the evidence at the hearing.
- 3.3.9 The outcomes available to the Panel when deciding what action is to be taken on this matter may include:
- (a) dismissal of the employee; or

- (b) refer the case back to stage three;
- (c) no further action.

Before making their decision the Panel may reconvene the hearing to clarify any points of uncertainty.

- 3.3.10 The Panel may give their decision immediately following an adjournment, or defer the decision for further consideration. In either case, the decision will be communicated to the manager/supervisor, employee and employee representative, in writing within 5 working days of the conclusion of the hearing.

The letter should include:

- (a) the decision and the reason for it;
- (b) the right of appeal and if the decision is to dismiss, details of the person to whom the appeal should be made and the requisite timescale;

4. APPEALS

4.1 Grounds of Appeal

- 4.1.1 The grounds of appeal may constitute one or more of the following:

- (a) the procedure – the procedure was not correctly followed and because of this there was a material failure which adversely affected the decision;
- (b) the decision – the Panel did not come to the right conclusion because the evidence did not support a finding of incapability; or the decision was too harsh taking into account the nature of the incapability, the mitigating circumstances and/or the employee's previous service.

4.2 Appeals against dismissal at Stage 4

- 4.2.1 An employee dismissed under the Capability Procedure can appeal against their dismissal. Formal written notification of an appeal must be made to the Director of Human Resources within five working days of receipt of the letter confirming the dismissal. This letter must contain the grounds of appeal.

4.3 Procedure

- 4.3.1 Once notification of an appeal has been received then an appeal against formal action will normally be heard within twenty working days.
- 4.3.2 The appeal hearing will not be a re-hearing of the whole capability case unless the Panel hearing the appeal conclude that the earlier proceedings were in some way fundamentally flawed.
- 4.3.3 The Appeal Panel will assess whether the original Panel has acted reasonably in the circumstances.
- 4.3.4 Appeals against a dismissal will be heard by a Panel of three senior members of staff including a Human Resources representative. The panel members will be nominated by the Director of Human Resources and should include a member of staff from the same staff group. The Chair of the panel will also be agreed at this stage.

4.4 **Prior To The Hearing**

- 4.4.1 The Human Resources representative to the stage 4 final capability hearing will examine any new evidence. If in the opinion of the Human Resources representative there is any significant or substantial new evidence then the matter will be remitted to a freshly constituted capability panel. No new evidence should be submitted during the appeal hearing.
- 4.4.2 The Human Resources representative will notify the employee and Chair of the Final Capability Hearing of the details of the appeal hearing.
- 4.4.3 The notification to attend the hearing must include:-
- (a) the date, time and place of the hearing;
 - (b) the employee's rights to representation at the hearing by a trade union representative (including the trade union solicitor) or a workplace colleague of their choice. If the representative is not available the employee can offer an alternative time and date so long as it is reasonable and falls before the end of the period of five working days beginning with the first working day after the day proposed by the manager/supervisor;
 - (c) copies of any supporting documentation in the case of when new evidence has come to light, which may affect the judgement of the original panel. Where possible, witnesses should be available to attend the hearing, unless the employee and manager both accept that the witness statements from the formal capability hearing stage are accurate.
- 4.4.4 The Human Resources representative will confirm the following to the Panel hearing the appeal
- (a) the date, time and place of the hearing;
 - (b) the grounds for the appeal, accompanied by all relevant correspondence and documentation, including any previous warnings and witness statements.

4.5 **The Appeal Hearing**

- 4.5.1 The hearing will be conducted as informally as possible, both parties will be given the opportunity to state their case, call witnesses and ask and answer questions.
- 4.5.2 No new evidence will be considered during the appeal hearing.
- 4.5.3 The appeal panel may, at their discretion, adjourn the appeal in order that further clarification of the points raised may be produced by either party or for any other reason.

4.6 **The Outcome Of The Appeal Hearing**

4.6.1 **Confirmation**

4.6.2 The decision of the original final capability hearing is upheld.

4.6.3 **Change of Sanction**

4.6.4 If it is the view of the appeal panel that the original decision was inappropriate a new decision is issued.

4.6.5 A record of the original hearing and the appeal will be placed on the employee's personal file.

4.6.6. **Set Aside**

4.6.7 It is the view of the Panel hearing the appeal that the decision of the original Panel was unfair and the employee demonstrated a satisfactory level of performance. In this case no further action is to be taken and all records of the original written outcome and hearing will be removed from the personal file of the employee.

4.6.8 In all cases the decision of the Panel hearing the appeal is final and will be confirmed in writing to all parties within five working days of the hearing. There is no further right of appeal.

5. **CAPABILITY IN SPECIAL CASES**

5.1 **Trade Union Representatives**

5.1.1 The above capability procedure shall apply equally to those members of staff who are appointed or elected, under a trade union's rules, to represent members of the trade union employed by the College. However, on any occasion where such a trade union representative is to be the subject of a capability interview or hearing, the Director of Human Resources, in addition to informing the employee of their right to be accompanied by a trade union representative (including the trade union solicitor) or work colleague, shall inform the appropriate full-time union official as quickly as is reasonably practical and, in any case, before the date of the interview or hearing is fixed.

5.1.2 The full-time trade union official shall also be given a copy of any communication containing the result of such a capability interview or hearing, which is sent to the employee.

5.2 **Senior Administrative Staff of the College reporting directly to the Principal**

5.2.1 If there is an allegation concerning capability or evidence of unsatisfactory performance, the Principal will institute an investigation and decide whether to dismiss the matter, or to proceed under the Capability Procedure.

5.2.2 In the case where the Principal has decided to proceed with a capability hearing, he or she will request the Council of the College to appoint a panel to hear the evidence and to determine the formal written outcome.

5.2.3 The panel appointed by the Council of the College will consist of two lay members of the Council, one of whom will be the Chairperson, and a senior member of staff nominated by the Principal. The Director of Human Resources or representative will be in attendance in an advisory capacity (unless party to the case already).

5.2.4 The format of the capability hearing shall follow the steps set out in Section 3.2 of this procedure.

5.3 **APPEALS IN SPECIAL CASES**

5.3.1 **Trade Union Representatives**

5.3.2 The above procedures shall apply equally to those employees who are appointed or elected, under a trade union's rules, to represent members of the trade union employed by the College. If a trade union representative appeals against the decision of a capability hearing then the Human Resources representative shall ensure that in addition to informing the member of staff of their right to be accompanied by a trade union representative (including the trade

union solicitor) or colleague, shall inform the appropriate full-time union official as quickly as is reasonably practical and, in any case, before the date of the interview or hearing is fixed.

5.3.3 The full-time trade union official shall also be given a copy of any communication containing the result of such an appeal interview or hearing, which is sent to the member of staff.

5.3.4 **Senior Administrative Staff of the College**

5.3.5 Appeals against the decision, should be received by the Principal within five working days of the receipt of the letter from the panel appointed by Council. This letter must state the grounds for the appeal.

5.3.6. An appeals panel will be convened at the request of the Principal to Council within twenty days of receipt of this letter.

5.3.7 In case of an appeal, the Principal will request the Council to appoint an appeals panel which should consist of two lay members of the Council, one of whom will be the Chairperson and a senior member staff nominated by the Principal, none of whom have previously been personally involved in events leading up to the decision which is the subject of the appeal. The Director of Human Resources or representative will be in attendance in an advisory capacity (unless party to the case already).

5.3.8 Procedures for the appeal hearing shall follow the steps set out in Section 4 of this procedure.

AGREEMENT

The College may review its Capability policy and procedures as required. Management and trade union representatives will normally review the contents and operation of this policy and procedure, within three years of the last review date.

Signed..... Date..... John Grimmer
Director of Human Resources

Signed..... Date..... UCU Officer

Signed..... Date..... UNITE Officer

Signed..... Date..... GMB Officer