October 2021

CAPABILITY PROCEDURE

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1. About this procedure

1.1. St George's, University of London is committed to developing and maintaining constructive relations with its employees and believes that all employees should aim to achieve and maintain acceptable standards of performance.

1.2. The aim of this procedure is to provide a fair and consistent approach in line with the principles of natural justice and to support and encourage all employees to achieve and maintain St George's, University of London's required standards of performance. This procedure follows the principles of the ACAS Code of Practice on Disciplinary and Grievance Procedures as a minimum. Where St George's, University of London's Statutes relate to employment policies and procedures the Statutes will take precedence over this procedure.

1.3. This procedure is designed to deal with poor performance due to capability. Capability refers to an employee's ability to perform their role to the required standard due to a lack of knowledge, skill or ability. Where the employee's poor performance is related to conduct rather than capability it will be dealt with through the disciplinary procedure. Where the employee's capability issues are linked to health these will be dealt with under the sickness absence procedures.

1.4. There may be circumstances where it is unclear whether an issue arises as a result of misconduct or poor performance. Following appropriate assessment, St George's, University of London reserves the right to determine, at the discretion of the Director of Human Resources and Organisational Development (HR&OD) or their nominated designate, which procedure should be applied in any particular circumstances.

1.5. This procedure applies only to St George's, University of London employed staff who have completed their probationary period and been confirmed in post, with the exception of the Principal, who is subject to a different procedure.

1.6. This procedure does not form a part of any employee's contract of employment and it may be amended by St George's, University of London at any time, following agreement with the recognised trade unions. St George's, University of London may vary the procedure, including any time limits, as appropriate in any individual case.

1.7. Nothing in this procedure detracts from Academic Staff's freedom within the law to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions, as stipulated in St George's, University of London's Statutes.

1.8. For clinical academic staff, the relevant Trust's policy and procedure for Maintaining High Professional Standards in the Modern NHS will apply in the application of any formal procedure.

1.9. St George's, University of London will endeavour to deal with capability matters without unnecessary delay and expects the employee to co-operate to achieve that aim. However, it recognises that capability issues take time to resolve and that employees should be given adequate time to demonstrate improvement.

1.10. The flow chart in Appendix A demonstrates how the capability procedure operates.

2. Confidentiality

2.1. St George's, University of London's aim is to deal with performance matters sensibly and with due respect for the confidentiality of those individuals involved. All employees must treat as confidential any information communicated to them in connection with a performance matter.

2.2. Audio/Visual recordings are not permitted at any meetings or hearings under this procedure and will not be admissible within this process, unless permitted by St George's, University of London in special circumstances, for example to accommodate a disabled employee by way of a reasonable adjustment under the Equality Act 2010.

3. Resolving performance issues informally

3.1. If performance falls short of the expected standard this should be discussed informally between an employee and a line manager as part of routine discussions. Where a need for performance improvement is identified, the manager will confirm to the employee, ideally in writing, what needs to done, by when and how this is to be reviewed as well as any additional support to be provided. Brief confidential notes of this meeting, including details of any required actions or improvements, should be kept by the manager and shared with the employee.

3.2. Managers should ascertain whether any alleged failure to meet required standards or breach of policy or procedure is due to misconduct, capability or some other reason when determining the appropriate approach to take. Advice should be sought from the HR Department as to alternative options that could be considered.

3.3. In managing underperformance, the manager should outline, for example in a Performance Improvement Plan, the objectives, actions and outputs that the employee is required to achieve and the timeframe for improvement. The manager should also make clear what additional support, if required, is to be provided to assist the employee in meeting the objectives and how progress will be reviewed.

3.4. Formal steps will be taken under this procedure if the matter is not resolved.

4. Capability hearing

4.1. Where informal action does not lead to sufficient and sustained improvement in performance following informal guidance, support and advice, or where the alleged capability issue is too serious to be dealt with by informal action, a decision to initiate the formal capability procedure will be made in consultation with the Director of HR&OD or their nominated designate.

4.2. The formal capability procedure has two stages: Capability Hearing and Appeal Hearing. Capability sanctions should not be applied until the formal capability procedure has been followed, although any sanction would become effective prior to the Appeal stage but could be overturned on appeal.

4.3. A capability hearing will be convened and chaired by the manager of the employee who is the subject of the capability procedure and/or another designated manager at a similar level, in consultation with HR. In cases of a first capability hearing this will usually include the employee's line manager. The hearing should be held without unreasonable delay while allowing the employee reasonable time to prepare their case. Normally 5 working days' notice of a capability hearing will be given.

4.4. The employee will receive in writing prior to the hearing the following information:

- The date, time and location of the hearing.
- Details of the underperformance.
- The name of the manager chairing the hearing and other panel members, if appropriate.
- Confirmation of the right to be accompanied at the hearing.
- Confirmation that an HR representative will attend the hearing.
- All evidence considered.

4.5. The manager(s) conducting the hearing will undertake any necessary investigation to ensure that they have all the relevant information and evidence about the alleged shortcomings in the performance of the employee. Any documentation that either party intends to use in the hearing should be submitted to HR within a reasonable time of the hearing so that copies can be shared.

4.6. Normally witnesses will not appear at a capability hearing. If the employee wishes to call witnesses, they must request permission to do so from the manager conducting the hearing in writing, as far in advance of the date of the hearing as possible. Permission will only be granted in the most exceptional cases. Alternatively witness statements may be provided as part of the evidence (redacted if necessary).

4.7. If the employee is unable to attend for valid reasons, consideration will be given to a postponement. In the event that the employee is unable to attend on the rescheduled date, the hearing may be convened in the employee's absence when all the facts will be considered and a decision will be made.

4.8. In the unlikely event that it is considered appropriate for an employee to be suspended during capability procedures, for example where the level of competence may impact on students or staff, the fact and conditions of the suspension will be confirmed in a letter to the employee at the earliest opportunity. Suspension is not a disciplinary sanction and every effort will be made to keep the period of suspension to a minimum. Normally an employee will be suspended by the Head of Department/Director with agreement from the Director of HR&OD or their nominated designate. The employee will be updated periodically about the anticipated length of suspension. Any suspension will be on full pay and the same provisions will apply as those in the disciplinary procedure.

4.9. Where an employee is an accredited representative of a trade union recognised by St George's, University of London and is subject to the capability procedure, St George's, University of London will normally proceed as outlined under this procedure. However, St George's, University of London will not instigate formal capability proceedings without prior discussion of the matter (with the agreement of the employee), with a full-time official of that trade union.

4.10. At the hearing, the Chair will explain how the employee is underperforming and go through the evidence that has been gathered. The employee will be allowed to set out their case and answer any allegations that have been made. They will also be given the opportunity to ask questions and present evidence. In addition, the employee may provide information about any equality or diversity matters which may be relevant to their role. For example, any reasonable adjustments that may need to be considered to support with a disability.

4.11. If the capability hearing is adjourned by the Chair (eg for the purpose of gathering further information) the employee will be informed of the adjournment period. If further information is gathered, the employee will be allowed a reasonable period of time, together with their companion, to consider the new information prior to the reconvening of the capability proceedings.

4.12. The Chair will decide on the outcome of the capability hearing seeking guidance, where appropriate, from the relevant HR representative.

4.13. After the hearing, the Chair will notify the employee of their decision in writing as soon as is reasonably possible, normally within 5 working days of the hearing. If a capability sanction is to be applied the employee will be advised of the right to appeal.

5. The right to be accompanied

5.1. An employee has the right to be accompanied at hearings by a companion who is a work colleague, trade union representative or an official employed by a trade union.

5.2. The employee must make arrangements for their companion to attend the hearing and advise the Chair who their chosen companion is, in good time before the hearing. If the companion is not available at the time proposed for the hearing the Chair will postpone the hearing to a time proposed by the employee provided that the alternative time is both reasonable and not more than five working days after the date originally proposed. Other than in exceptional circumstances, only one postponement will be permitted.

5.3. The companion may address the hearing to put and sum up the employee's case, respond on behalf of the employee to any views expressed at the hearing and confer with them during the hearing. The companion does not, however, have the right to answer questions on the employee's behalf, address the hearing if the employee does not wish it or prevent the Chair from explaining their case.

5.4. Acting as a companion is voluntary and colleagues are under no obligation to do so.

6. Capability Sanctions

6.1. After the capability hearing the Chair will review all the evidence and decide what sanction, if any, is required. Following satisfactory completion of the probationary period, an employee will not normally be dismissed for performance related reasons without two previous formal warnings. However, in exceptional circumstances, dismissal with only one or no previous warnings may be appropriate.

6.2. The levels of capability sanctions that may be applied are as follows:

Capability Sanction	Details
A first written warning	Normally issued: • where performance does not meet St George's, University of London's standards or there is no improvement in performance about which the employee has previously been warned informally. Where it is found that such underperformance has occurred, a written warning will be issued to the employee and a copy placed on the employee's staff record within HR.

	The warning will: 1. set out the improvement in performance required; 2. the period of time allowed to demonstrate improvement (review period); 3. where appropriate, the additional support to be offered to the employee to assist attainment of the required improvement; 4. inform the employee that further underperformance is liable to result in further action under this procedure; 5. specify the period for which the warning will remain "live", after such period the warning will usually lapse; and 6. state that the employee may appeal against the warning. A written warning will lapse 6 months after issue, subject to satisfactory standards being maintained. In exceptional circumstances this timescale may be amended with agreement from the Director of HR&OD or their nominated designate.
Final Written Warning	Normally issued if: • a first written warning has already been issued and performance has not improved sufficiently to reach required standards **or** • where the underperformance is of a more serious nature such that a first written warning is not appropriate. Such a warning will: 1. set out the improvement in performance required; 2. the period of time allowed to demonstrate improvement (review period); 3. where appropriate, the additional support to be offered to the employee to assist attainment of the required improvement; 4. inform the employee that further underperformance is likely to result in dismissal; 5. specify the period for which the warning will remain "live", after such period the warning will usually lapse; and 6. state that the employee may appeal against the warning.

	Where it is found that such underperformance has occurred, a final written warning will be issued to the employee and a copy placed on the employee's personal record within HR. A final written warning will lapse 12 months after issue, subject to satisfactory standards being maintained. In exceptional circumstances this timescale may be amended with agreement from the Director of HR&OD or their nominated designate.
Dismissal	Normally occurs if: • there is insufficient improvement in performance within the specified period which has been the subject of a final written warning. The employee's salary will cease to be paid from the employment termination date and the employee will be advised of their right of appeal. In cases of summary dismissal, employees would be dismissed without notice or pay in lieu of notice. If an appeal is successful, the individual will be reinstated on to the payroll and will be paid any back-payments of salary they may be due.

7. Review period

7.1. If a warning has been issued, the employee and their manager will meet at an early stage (normally within 5 working days of the warning being received) to put in place a detailed programme of action to support the delivery of the required improvement in performance within the review period. The review period will be specified in the outcome letter.

7.2. At the end of the review period, a meeting will be convened between the employee and their manager to review progress to date. If there has been no improvement or insufficient improvement in the employee's performance during the review period, the employee will be invited to a further capability hearing.

7.3. Where the employee's performance meets the expected standards of sustained improvement, the capability proceedings will be concluded and this will be confirmed in writing to the employee by the manager, normally within 5 working days of the review meeting. Should the performance of the employee be considered unsatisfactory in the future, the procedure will start at the appropriate stage and due consideration will be given to the previous underperformance.

8. Appeal

8.1. An employee has a right of appeal against any formal capability sanction as set out below. Sanctions, including dismissal or warnings issued as a result of procedures, will remain in place pending the outcome of any appeal.

8.2. The employee must send their written notice of appeal to the Director of HR&OD, or their nominated designate, within 5 working days from the date of receipt of the capability outcome letter, clearly stating the grounds for the appeal which are limited to:

i. New evidence which was not available at the first hearing. This requires an explanation as to why this evidence was not presented at the first hearing.

ii. The issues had been misunderstood resulting in a perverse outcome.

iii. The disproportionate nature of the capability sanction and reason why.

iv. Procedural failure or irregularities.

8.3. A decision to dismiss will be implemented immediately. In the event that the appeal is successful, the employee will be reinstated and given full continuous service.

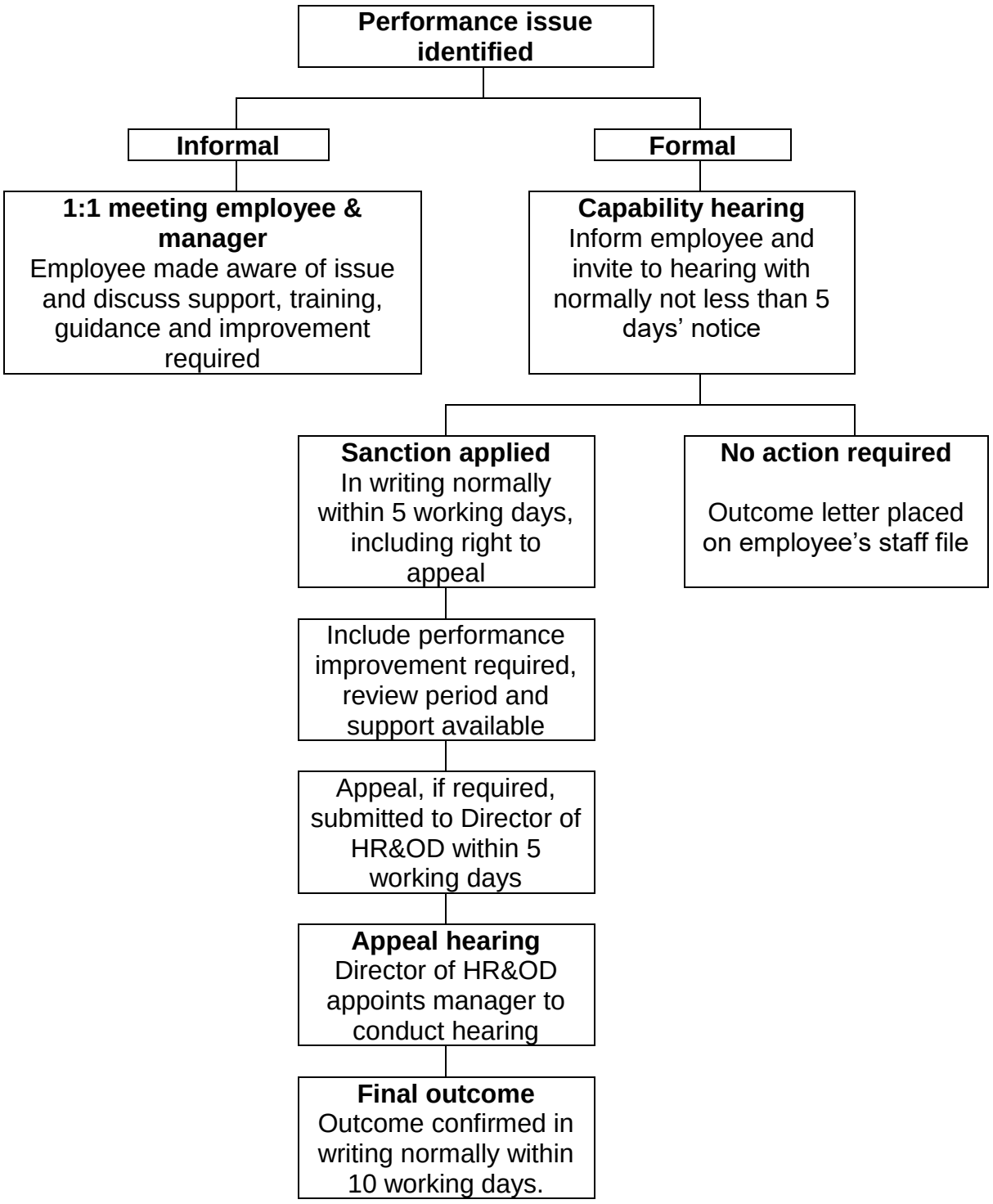
8.4. Every effort will be made to hear the capability appeal as soon as reasonably possible. The employee will be given the right to be accompanied at the appeal hearing and an HR representative will be present. The appeal will be heard by another manager(s) (nominated by HR) not involved in the original capability hearing, of equal or higher seniority. As stipulated in St George's, University of London's Statutes, appeals against dismissal by a member of the Academic Staff should be heard by a panel which includes a member of Council not employed by St George's, University of London.

8.5. The Appeal Chair will set the date for the appeal hearing, and will expect the employee to make all reasonable efforts to attend at the date stipulated.

8.6. The appeal will ordinarily be conducted by way of a review of the decision to issue a sanction, as opposed to a rehearing. That is, the appeal will involve a determination as to whether the decision was one which a reasonable person could have made, on the basis of the evidence and arguments which were presented to that decision maker, taking into account the employee's reason for appeal (within the appeal criteria above).

8.7. In exceptional circumstances the Appeal Chair will determine that the appeal will be conducted as a rehearing. Such a decision will be entirely at the discretion of the Appeal Chair.

8.8. The Appeal Chair will make their decision as soon as reasonably practicable after the appeal hearing, and will communicate that decision in writing to the employee, ideally within 10 working days. The Appeal Chair has the right to uphold or overturn the original sanction either in part or in full, and to apply lesser or greater sanctions if

deemed appropriate. The written decision of the Appeal Chair will be final, and will conclude this procedure.

Appendix A: Capability Procedure Flow Chart