

## **CAPABILITY PROCEDURE**

### **1. Introduction**

- 1.1 Employees have a contractual responsibility to perform to a satisfactory level and will be given every help and encouragement to do so. The Trust has a responsibility to set realistic and measurable standards of performance and for explaining these to employees.
- 1.2 Whilst the vast majority of employees meet or exceed the demands of their respective roles it is acknowledged that problems can and do arise. This procedure is intended to provide a framework for dealing with capability issues in a fair, supportive, realistic and consistent manner.

### **2. Purpose**

- 2.1 The purpose of this procedure is to address concerns about performance through an appropriate programme of monitoring, support, guidance, training and feedback with a view to enabling the employee to reach and maintain an acceptable level of performance.

### **3. Definitions**

- 3.1 The ACAS Guide describes capability as an employee's ability or qualification to do their job whereas a lack of capability is defined as a situation in which a member of staff fails consistently to perform their duties to a professionally acceptable standard.

### **4. Responsibilities**

- 4.1 The prime responsibility for the assessment of performance and the overall management of this procedure within a School / Academy / The Trust resides with the Headteacher /CEO.
- 4.2 The role of the manager is to identify any concerns with performance and discuss them with the employee concerned as soon as possible with the aim of finding a resolution. Managers should be open to factors outside of the work environment that may be impacting on an employee's performance as well as those within work when seeking to find a resolution.
- 4.3 All staff hold a joint responsibility with their manager for understanding what is expected of them. This is normally laid down in a job profile (job duties and a person specification) and for teachers this is also set out in the School Teachers' Pay and Conditions Document and the Teachers' standards.
- 4.4 The Head of HR is responsible for this procedure, its development, advising Headteachers on its application including attendance at formal meetings and drafting communication as required.

### **5. Scope**

- 5.1 This procedure should not be used for matters of misconduct, for which the disciplinary procedure may be used, or ill health for which the absence management policy will apply.
- 5.2 Capability concerns about the performance of Newly Qualified Teachers (NQTs) will be addressed through the statutory induction arrangements.
- 5.3 This procedure applies to all other employees.

### **6. Principles**

- 6.1 Wherever possible, issues will be dealt with in an informal manner, with a supportive approach. At times, however, it may be impossible to continue an informal approach and more formal procedures must be put in place.

- 6.2 Once the formal procedure is initiated, the appraisal / informal capability procedure ends.
- 6.3 Where action is being considered against an employee who is a trade union representative, the normal procedure will be followed. However matters will be discussed at an early stage with the relevant full time official, after obtaining the employee's consent to do so.

## 7. Line management

- 7.1 Good management, clear expectations and appropriate support go a long way to addressing performance concerns and early identification of problems. Effective management arrangements and / or appraisals will contribute to avoiding the need to invoke a formal capability procedure.

## 8. Right to be accompanied

- 8.1 Employees have a right to be accompanied by a trade union representative or work colleague at any meeting called in connection with this procedure. Employees are also encouraged to seek advice from their trade union at any stage of this procedure.

## 9. Warning levels

- 9.1 The warnings given under this procedure will reflect the seriousness of the failure to perform.
- 9.2 If the employee's unsatisfactory performance, or its continuation, is sufficiently serious (for example because it is having, or is likely to have, a serious harmful effect or pose a significant risk to others or the education of students), then it may be justifiable to move straight to a final written warning however this is only used in extenuating circumstances following a stage 1 meeting.

### Written Warning

A written warning will normally be issued to an employee whose performance is considered to be unsatisfactory following a stage 1 meeting. Written Warnings will be expunged after 12 months satisfactory performance. Where performance is unsatisfactory during this period the process will be re-instated from its last point.

### Final Written Warning

A final written warning will normally be issued when an employee continues to fail to achieve the required standards or fails to engage with the improvement process following a stage 2 meeting, however a final written warning may be issued at a stage 1 meeting where the circumstances are so serious to warrant a warning which is both a first and final warning for example where the employee's actions have had, or are likely to have, a serious harmful impact on students, staff, The School / Academy or The Trust. Final Written Warnings will be expunged after 18 months satisfactory performance. Where performance is unsatisfactory during this period the process will be re-instated from its last point.

### Dismissal

In rare cases where there is a serious lack of competence or continued failure to perform, an employee may be liable for dismissal.

### Other sanctions

As an alternative to dismissal, demotion, re-allocation of duties or a different role may be considered where appropriate to do so.

## 10. Informal capability

- 10.1 Informal capability is a term commonly used to describe the period during which an employee is supported to fully perform their duties and to address issues of under-performance on an

informal basis, and as a result circumvents the need to initiate a formal capability procedure.

- 10.2 Informal capability is a part of the appraisal policy (refer to staff / teachers experiencing difficulties).
- 10.3 Employees will not be placed on the formal capability procedure before they have had time to take on board the concerns raised about their performance and given reasonable time and opportunity to change their practice.
- 10.4 Possible reasons for capability concerns could include (this list is not exhaustive):
- the knowledge and skills for the role have changed, but the employee has not acquired these;
  - external factors are impacting on performance either within or outside the work environment;
  - the difficulties have been long standing, but have only now been recognised or addressed;
  - the employee lacks the knowledge, skills, qualifications, experience or personal qualities required to perform the job.
- 10.5 Before initiating informal capability the appraiser must discuss their concerns with the Headteacher and gain their agreement to enter informal proceedings. The Headteacher will not be involved in the informal process; however they will nominate a member of the Senior Leadership Team to maintain an overview of the support provided and progress being made.
- 10.6 During informal capability proceedings the manager will ensure that the employee is informed of the issues of concern and the required standards and will develop an action plan with the employee to assist them to achieve required standards. The aim of informal capability is to improve performance to avoid the need for formal proceedings.
- 10.7 The documented action plan may include some / all of the following:
- providing guidance or clarification on the relevant aspects of concern;
  - attendance at training;
  - appointing a mentor or buddy;
  - observation (teachers);
  - measure of success;
  - timescale for review
- 10.8 At the end of the review period it is normally the case that either:
- performance has improved and no further action is required;
  - improvements are being made, but more time is needed to assess;
  - matters are not improving and the concerns need to escalate to the formal procedure.
- 10.9 Before any further action is taken, the appraiser will discuss and agree the next steps with the Headteacher
- 10.10 The employee will receive written confirmation of the outcome following the review period.

## **11. Stage 1 meeting**

- 11.1 If, following an informal period of support, review and monitoring to address capability concerns and if insufficient improvement has been made, the reviewer will consult with the Headteacher. If there is clear evidence that support processes have been exhausted, the employee will be invited to a stage 1 meeting.
- 11.2 At least 10 working days' notice in writing will be provided of this meeting including the purpose, time, place and the right for an employee to be accompanied by a trade union representative or work colleague.

- 11.3 Employees will also receive written confirmation of:
- the aspects of performance which remain a concern;
  - supporting evidence;
  - an outline of the possible courses of action which might follow after the meeting;
  - a copy of this procedure.
- 11.4 Where the employee or their representative is unable to attend the meeting for good reason, steps will be taken to re-arrange the hearing to a mutually convenient date, usually within 5 working days of the original date. If an employee or their representative fails to attend again without good reason, the hearing may still take place and decisions may be made.
- 11.5 A note-taker will be present at the meeting and a copy of the notes taken will be provided to the employee.
- 11.6 The Headteacher will conduct the meeting which is intended to establish the facts and the way forward.
- 11.7 The manager will be required to present their evidence concerning the employee's performance and the employee will be given opportunity to respond to these points and make representations to the Headteacher concerning their performance.
- 11.8 A Headteacher may adjourn the meeting if further evidence or investigation is required before they can reach a conclusion about whether the concern about the lack of capability is justified.

## 12. Outcomes from the stage 1 meeting

- 12.1 Having heard from both parties the Headteacher will determine the outcome which is normally:
- the matter is satisfactorily resolved
  - there are insufficient grounds to initiate the formal capability procedure and the appraisal process should continue to be used.
  - to initiate the formal capability procedure and issue a written warning.
- In extreme cases, where the education or health and/or safety of pupils is jeopardised, the warning issued at this stage could be a final written warning.
- 12.2 The employee will normally be advised of the outcome at the end of the meeting, but in all cases the outcome will be confirmed in writing to the employee within 5 working days.
- 12.3 Where a written or, in exceptional circumstances, a final written warning is issued the Headteacher will confirm:
- the nature of the failure in performance/ professional shortcomings;
  - the standard of performance and the evidence required to end the capability procedure;
  - the support that will be available to enable performance to be improved noting that the employee is invited to contribute to the support plan;
  - The review period;
  - how performance will be monitored and by whom;
  - the timeframe for improvement;
  - The date of the next formal review meeting
  - the level of warning issued and when it will be expunged subject to satisfactory performance;
  - that failure to improve may lead to further warnings and ultimately dismissal;
  - the right and process of appeal.

### 13. Length of the review period

- 13.1 The length of the review period will be discussed with a view to reaching agreement where possible, although it will be the Headteacher's decision if agreement is not possible.
- 13.2 The timescale for improvement will depend on a number of factors including:
- the nature of the improvement required;
  - how long it will take to put support / training in place;
  - the time to judge the impact of support / training;
  - previous opportunities for improvement;
  - the impact of on students / colleagues / the School / Academy / The Trust
  - the willingness of the employee to improve.
- 13.3 Formal monitoring reviews will be undertaken as outlined in 12.3, the content of which will be documented and provided to the employee.
- 13.4 Typically review periods will be 6 weeks. 4 weeks may be set for exceptional cases<sup>1</sup> whereas the maximum review period will be 10 weeks.
- 13.5 In all cases the review period should be reasonable, proportionate, not excessively long or short in order to provide sufficient opportunity for improvement.
- 13.6 The review period may be cut short by the Headteacher if there is evidence that the performance is so serious that in the case of teachers, that no learning is taking place or, that the health, safety or welfare of children is at risk, or the employee may be acting in a grossly negligent or grossly incompetent manner, or that they are failing to access the support required without good reason and no / limited progress is being made as a result.

*<sup>1</sup> Exceptional cases are those of particularly serious concern, for example the lack of capability jeopardises the education of children, health or wellbeing of students, or the employee has failed to show any improvement despite significant support already having been provided or where the employee has purposely failed to engage with the improvement process. In such cases the employee will have been issued with a final written warning.*

### 14. Ongoing review

- 14.1 Managers should continue normal monitoring, evaluation, guidance and support during the review periods.

### 15. Stage 2 meeting

- 15.1 At the end of the first review period, there will be a formal review meeting to assess performance over the period, unless the employee was issued with a final written warning at the first stage, in which case they will be invited to a stage 3 meeting.
- 15.2 The employee will be given at least 10 working days' notice of the day, time and venue for meeting and informed of their right to be accompanied by a trade union representative or work colleague. All material to be used in the meeting will be provided at the same time. A note-taker will be present at the meeting and a copy of the notes taken will be provided to the employee.
- 15.3 The Headteacher will conduct the meeting and the manager will present the evidence from the review period. The employee will have an opportunity to respond to the evidence and make representations. If the improvement plan and associated targets set at the first meeting have not been achieved the employee will be given the opportunity to offer an explanation as to why.
- 15.4 The outcomes from the second stage meeting are normally that either:

- The Headteacher is content that level of performance has been satisfactory and there is confidence that it can be sustained. As such the formal capability procedure will end and the employee will return to normal appraisal and management supervision arrangements.

OR

- The Headteacher is satisfied that sound progress is being made and there is confidence that further improvement is likely with a little more time. In such cases the Headteacher may extend the review period which, in these cases, may exceed 10 weeks, however the period should be reasonable and not overly long or short. The review process for stage 2 will recommence at the end of the additional review period.

OR

- The Headteacher may extend the review period for up to a further 6 weeks to assure themselves that the progress which has been made can be consistently sustained without support.

- the Headteacher considers that the employee has not achieved the required standards or has not made reasonable attempts to make satisfactory progress and as such a final written warning will be issued.

15.5 A copy of the notes taken at this meeting and confirmation of the outcome of the stage 2 meeting will be provided to the employee within 5 working days following the meeting to include (where applicable).

- the continued nature of the failure in performance/ professional shortcomings
- the standard of performance and the evidence required to end the capability procedure the support that will be available to enable performance to be improved noting that the employee should be invited to contribute to the support plan;
- confirmation of the review period
- how performance will be monitored and by whom;
- the timeframe for improvement;
- The date of the next formal review meeting
- a final written warning and when it will be expunged subject to satisfactory performance;
- that failure to improve may lead to dismissal;
- the right and process of appeal.

## 16. Stage 3 meeting

16.1 At the end of the review period, there will be a formal review meeting to assess performance over the review period which should normally be no longer than 4 weeks.

16.2 The employee will be given at least 10 working days' notice of the day, time and venue for meeting and informed of their right to be accompanied by a trade union representative or work colleague. All material to be used in the meeting will normally be provided at the same time. A note-taker will be present at the meeting and the Headteacher will host the meeting and hear the evidence.

16.3 The employee will have an opportunity to respond to the evidence and make representations. If the improvement plan and associated targets set at the earlier meeting have not been achieved the employee will be given the opportunity to offer an explanation as to why.

16.4 The outcomes from the stage 3 meeting are normally that either:

- The Headteacher is content that level of performance is now satisfactory; there is confidence that it can be sustained. As such the formal capability procedure will end and the employee will return to normal appraisal and management supervision arrangements. The Headteacher should only make this decision if there is firm evidence that the

standards have now been met and there is confidence what this can be sustained.

OR

- the Headteacher considers that the employee has failed to reach the required standards or has not made reasonable attempts to make satisfactory progress and as such a capability hearing will be arranged with a panel of governors.

16.5 A copy of the notes taken at this meeting and confirmation of the outcome of the stage 3 meeting will be provided to the employee within 5 working days following the meeting.

## 17. Capability hearing

17.1 The employee will be given at least 5 working days' notice of the day, time and venue for meeting and informed of their right to be accompanied by a trade union representative or work colleague.

17.2 The letter will outline the purpose of the meeting and will inform the employee that an outcome may be dismissal.

17.3 All material to be used in the meeting will normally be provided at the same time which will include a written statement of the circumstances which have led the Headteacher to recommend dismissal.

17.4 A note-taker will be present at the meeting which will be heard by a governor's panel consisting of up to three, but at least two governors. The staff governor may not be a member of the governor panel.

17.5 The Headteacher will present the case, highlighting the steps taken and the support and monitoring put in place.

17.6 The employee will have an opportunity to respond to the evidence and make representations. If the improvement plan and associated targets set have not been achieved the employee will be given the opportunity to offer an explanation as to why.

17.7 Witnesses may be called by either party where they have information of direct relevance.

17.8 The panel may ask questions and seek clarification from all parties present.

17.9 The outcomes from a capability hearing are normally that:

- capability concerns are so significant that following the process outlined in this procedure the concerns remain and as such the employee should be dismissed. In cases of a capability dismissal, employees will be provided with notice in accordance with their contract of employment.

OR

- The employee will not be dismissed and the final written warning will remain in place for 12 months during this time the employee will be expected to maintain satisfactory performance. If the concerns reoccur within 12 months the procedure will be re-instated from the last step.

OR

- Consideration is given to other alternative roles which are both suitable and available.

17.10 The employee will normally be verbally informed of the outcome of the capability hearing, but in any event they will receive confirmation in writing within 5 working days.

17.11 If the governor panel decides to dismiss an employee the letter of confirmation will state the reasons for dismissal, the date on which employment will end, the notice period and the right of appeal. In these cases the employee will be suspended from duty during the notice period subject to the outcome of any appeal.

## 18 Appeals

- 18.1 Lodging an appeal will not delay the commencement of a programme of support and monitoring.
- 18.2 Where an employee appeals against a decision to issue a written warning or a final written warning, the appeal will be heard by a panel of two governors.
- 18.3 Where an employee appeals against dismissal the matter will be referred to a Governors' Appeal Committee comprising of up to three, but at least two governors (excluding all Governors who have been previously involved in the case and the Staff Governor)
- 18.4 The employee must set out in writing the grounds of the appeal within 5 working days of receipt of the original decision in the case of a written or final written warning and within 10 working days in cases of dismissal.
- 18.5 If the employee is appealing against dismissal, the date on which dismissal takes effect will not be delayed pending the outcome of an appeal. However, if the appeal is successful the employee will be reinstated with no loss of pay.
- 18.6 The employee will be given 10 working days' notice of an appeal hearing, unless an earlier date is mutually agreed. This notice will include the time and date of the meeting and will include their right to be accompanied by a trade union representative or work colleague.
- 18.7 At an appeal hearing the penalty will be reviewed, but it cannot be increased. The appeal panel may decide to retain, reduce or overturn the penalty imposed.
- 18.8 The decision of the hearing will be notified to the employee in writing within 5 working days of the hearing and the employee will be advised that this decision is final and there is no further right of appeal.

## 19. Suspension from duty

- 19.1 Employees who are dismissed following a capability hearing will be suspended from duty during the notice period subject to the outcome of any appeal.
- 19.2 In other severe cases the Headteacher or the Chair of Governors has the power to suspend an employee from duty. Suspension on the grounds of capability will only be considered in exceptional cases, for example to protect students, staff, health and safety or others or property.
- 19.3 Suspension will be on full pay, and it is not in itself a disciplinary sanction and in all cases will be confirmed to the employee in writing.

## 20. Confidentiality

- 20.1 All employees must treat as confidential any information communicated to them in connection with the capability procedure.
- 20.2 All correspondence and documentation related to this procedure will be kept confidential and in accordance with the Data Protection Regulations it will be maintained in an appropriate system of record keeping.
- 20.3 All parties involved in this procedure must not make electronic recordings of any meetings or hearings conducted under this procedure.



## 21. Grievances

- 21.1 Where a member of staff raises a grievance during the capability procedure and where the grievance and capability cases are related it will normally be appropriate to deal with both issues concurrently and a grievance should not interrupt the prescribed timescales.

## 22. Sickness

- 22.1 If long term sickness absence appears to have been triggered by the commencement of monitoring or a formal capability procedure, the case will be dealt with in accordance with the absence management policy.

## 23. General Data Protection Regulation

- 23.1 All data within this policy will be processed in line with the requirements and protections set out in the General Data Protection Regulation.

### Document management

Review cycle:	Every two years
Next review due:	September 2022
Policy owner	Head of Human Resources
Approving body:	Board of Trustees
Equality Analysis reviewed:	9.7.2020

Summary flowchart - formal procedure

