



# Capability Procedure

## Teaching Staff

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Linked with other policies:

- Data Protection
- Disciplinary
- Staff Code of Conduct

Signed:

S. Dey

### Version Control

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## **1. Background**

This procedure reflects the ACAS code of Practice on disciplinary and grievance procedures. It applies only to those teachers and Headteachers about whose performance there are serious concerns that the appraisal process has been unable to address.

Early low level concerns about performance should be managed through the appraisal process, as set out in the Education (School Teachers' Appraisal (England) Regulations 2012 (The Appraisal Regulations). A separate procedure exists for non-teaching staff.

Early Career Teachers (ECTs) would normally have poor performance addressed as part of their induction year arrangements and the statutory guidance on Induction for ECTs in England covers this. The statutory guidance on induction does, however, give schools the option of using the (local) capability procedure which may lead to dismissal before the end of the induction period. The statutory guidance details the actions that need to take place before the capability procedure is used for ECTs.

Where the performance of the Headteacher is the focus of this procedure, all references to "Headteacher" in the text should be read "Directors or other nominated Advisor".

Through the implementation of this procedure, the Headteacher will be mindful of the employer obligation to seek to maintain and protect the mental health and wellbeing of all staff as far as is reasonably practicable.

Throughout this procedure reference to companion means trade union representative or work colleague. Where an employee discloses a mental health issue which could be a disability, efforts will be made to seek to agree with the employee and reasonable adjustments to the procedure. This could include allowing the employee to be supported by an individual who does not meet the statutory definition of a companion but does understand the individual's condition and its effects, and/or; having regular breaks during longer grievance meetings, and/or holding the meeting at a neutral venue.

It is expected that in most cases, any decision to dismiss (where there has been failure to improve performance) will lie with the Headteacher.

Although normal performance standards must apply to an employee who is a lay trade union official, no disciplinary action, beyond an informal oral warning will be taken until the circumstances of the case have been discussed with the relevant professional trade union officer.

## **2. Covert recordings**

The Directors believe that the covert recording of workplace meetings undermines trust between individuals.

The covert recording of any meetings or proceedings, including disciplinary and grievance hearings and appeals, by an employee potentially constitutes an act of gross misconduct. It features in the list of non-exhaustive acts of gross misconduct in the school's guidelines on conduct document. Without sufficient mitigation, the covert recording by an employee of colleagues in such a meeting may lead to the employee's summary dismissal.

The employee will be informed of this policy position before any disciplinary, grievance or capability meeting.

Similarly, no covert recording of the deliberations of a panel at the end of any hearing may be made by an employee. This would also potentially constitute an act of gross misconduct likely to lead to the employee's summary dismissal.

In some circumstances, it may be appropriate for a meeting to be recorded but in these cases, there must be written agreement between management and employee and consent will need to be obtained by all persons who will be included in the recording. The management and employee will then be under an obligation to ensure that all recordings are processed, securely stored and used in a manner consistent with the Data Protection Act 2018.

### **3. Previous action to address concerns**

Concerns about performance will initially be addressed as part of the appraisal process through which informal support and guidance will be used to help an employee reach the required standard. In those cases, this formal procedure would be used to address capability only when that support has been unsuccessful in bringing about required improvement. In some cases, where there are serious concerns about performance, or where the member of staff refuses to engage with the process, or to accept that there is a concern, the process for addressing lack of capability can be "fast tracked", so that it begins with the formal capability meeting.

### **4. Formal Capability Meeting**

A formal capability meeting initiates the capability procedure. It provides an opportunity to deal with more serious problems in a structured way or to give more intensive support and monitoring where the support provided at the appraisal stage has failed to bring about the required improvement. It allows the employee to prepare a response to concerns about performance and make a case in the company of a companion. This may provide new information or a different context to the information/evidence already collected.

#### **4.1 Invitation to the Formal Capability Meeting**

The employee should be invited to the formal capability meeting with at least five working days' notice (or seven consecutive days out of term time). The meeting will be chaired by the Headteacher. The invitation should be in writing and should contain sufficient information about the concerns about performance and the possible consequences to enable the teacher to prepare to answer the case at the formal meeting. It will also contain copies of any written evidence; the date, time and venue of the meeting, and will give details of others who will be in attendance (e.g. witnesses, HR Consultant). It will also advise the teacher of the right to be accompanied by a companion.

Where representation has been notified, the companion will be consulted on the date and time of the formal capability meeting although the process should not be unduly delayed by the accessibility of the companion. Teachers are entitled to request an alternative date within five days of the original date.

A copy of this capability procedure should be included with the invitation along with a capability report prepared by the Headteacher. The report should include:

- description of the problem(s)
- supporting evidence provided through the appraisal process (where appropriate) which identifies what the issues are, what support has been offered so far, and what progress has been made.
- reference to and copies of other evidence being used to confirm problems, e.g. reports of observations.

The invitation should be handed to the employee by the Headteacher or posted by recorded delivery. An extra copy of the invitation, report and other documentation should be provided to the employee for the purposes of passing to their companion. By agreement with the employee, the copy may be posted direct to their companion.

#### **4.2 Conducting the Formal Capability Meeting**

The format for the meeting will normally be as follows:

- The Headteacher introduces those present and confirms the purpose of the meeting.
- The Headteacher outlines the report and highlights the evidence for concerns, calling witnesses where appropriate. The Headteacher will refer to the report to identify the professional shortcomings-for example, giving details of which of the standards expected of teachers are not being met.
- Written evidence from witnesses should be provided to the employee in advance of the interview.
- The employee and/or their companion may ask questions of the Headteacher and any witnesses.
- The Headteacher's adviser may ask questions.
- The employee and/or their companion will present their case and will be able to refer to written evidence and/or call on witnesses of their own. Prior notice must be given of any witnesses called or referred to, and any written evidence circulated before the review meeting.
- The Headteacher and their adviser can ask questions.
- The Headteacher may adjourn the meeting if they decide that further investigation is needed, or that more time is needed in which to consider any additional information
- Where appropriate, the Headteacher and employee and/or companion may summarise their cases.
- The Headteacher will adjourn the interview while they decide what action to take. The employee and their companion must be informed as soon as possible- in most cases, that

will be immediately after the adjournment, and no later than five days after the review meeting.

#### **4.3 Outcome of the formal capability meeting.**

There are four possible outcomes from a formal capability meeting:

1. The matter may be dropped – this is only where new information, a different slant on the information collected or further investigation suggests the matter is not as serious as it first seemed.
2. The Headteacher may extend the informal support provided through the appraisal process. This will be appropriate in cases where the meeting has provided new information or put a different slant on evidence already collected. The Headteacher may conclude that there are insufficient grounds for pursuing the capability issue and that it would be more appropriate to address the remaining concerns through the appraisal process. In such cases, the capability process will come to an end.
3. In most other cases, the Headteacher will issue an oral or formal first written warning to the teacher, clearly stating that failure to improve within the set period could lead to dismissal.
  - An oral warning should not normally be necessary in cases where counselling has already taken place.
  - If performance is unsatisfactory a first written warning will normally be the appropriate step (which will invoke [an assessment period of up to ten weeks](#) – see 4.4 below).
4. In very serious cases this warning could be a final written warning. This would apply only to cases of particularly serious concern, where the education of children is in jeopardy. In such cases, it is possible to fast-track the process and move directly to a final written warning (which will invoke a period of monitoring and review not exceeding four weeks before final consideration or performance at a decision meeting.) In these extreme cases it will be important to consider (before a decision is made about issuing a final warning) how the employee's performance has dipped significantly if, for example they have been successfully assessed against threshold criteria.

#### **4.4 Action Plan**

Where a formal warning is issued, the Headteacher should use the remainder of the meeting to agree an action plan to:

- Identify the professional shortcomings-for example, giving details of which of the standards expected of teachers are not being met
- Give clear guidance on the improved standard of performance needed to ensure that the teacher can be removed from the formal capability procedure (this may include the setting of new objectives focussed on the specific weaknesses that need to be addressed, and success

criteria that might be appropriate and the evidence that will be used to assess whether or not the necessary improvement has been made).

- Explain any support that will be available to help the teacher improve performance
- Set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on the circumstances of the individual case but is determined by the school in each case and should not normally be less than four weeks or more than ten.
- The Headteacher will agree a date for the next formal review meeting (or decision meeting if a final written warning has been issued) and make it clearly understood that failure to improve may ultimately lead to dismissal.

The approach taken should seek agreement on all aspects of the action plan but where agreement cannot be reached the Headteacher will determine what is to be included but will incorporate any comments the employee may wish to make.

A letter, along with the agreed action plan – *Personal action plan* should be sent to the employee immediately after the formal meeting recording the outcome, the main points discussed at the meeting, confirming the decision, and where a warning is issued, giving information about the handling of the formal stage and the appeals process. The letter must state that if there is insufficient improvement in the capabilities of the employee by the end of the stated period, this could lead to further action under the formal procedure including a final written warning, no pay progression or dismissal for lack of capability.

## **5. Monitoring and review period following a formal capability meeting**

A performance monitoring and review period will follow the formal capability meeting. Formal monitoring evaluation, guidance and support will continue during this period. It will include regular observation, monitoring and evaluation of performance, with guidance, training if necessary, and support to the employee. This will include the need for regular, perhaps weekly, feedback to the employee on their progress so they can be clear on whether they are making the improvements required. It would be helpful to the process if such regular feedback is through a written note detailing where improvement has been made, and where progress still needs to be made.

If at any point during this stage the circumstances suggest a more serious problem exists, the Headteacher may take the decision to bring forward the planned formal review meeting to consider whether a final written warning should be issued sooner. If a final warning is given following such a brought forward formal review meeting, there will normally be a maximum period of four weeks allowed following that formal review meeting before a final decision meeting is held.

At the end of the monitoring and review period, the member of staff will be invited to a formal review meeting unless they were issued with a final written warning, in which case they will be invited to a decision meeting.



## 6. Formal Review meeting

The formal review meeting should be convened by the Headteacher in the same way as the formal capability meeting i.e. through invitation giving details of the time, date and place of the formal review meeting and the right to be accompanied by a companion. The invitation should be sent at least five working days (or seven consecutive days out of term time) in advance, and include a summary report detailing the following:

- the original action plan and written warning
- details of help and guidance provided and results of monitoring
- copies of evidence from observations and other relevant evidence
- a clear assessment by the Headteacher of the progress made

The format of the formal review meeting is the same as the formal capability meeting, paragraph 4. If the Headteacher is satisfied that the teacher has made sufficient improvement the capability process will cease and the appraisal process will re-start. In other cases, if some progress has been made and there is confidence that more is likely, the monitoring and review period may be extended.

If no, or insufficient improvement has been made during the monitoring and review period the teacher will receive a final written warning. Formal monitoring, evaluation, guidance and support will continue for a further (four week) period. Arrangements for this should be explained at the meeting. At the end of the period of monitoring and review, the teacher will be invited to a decision meeting.

As before, notes will be taken of the formal meeting and a copy sent to the member of staff. The final written warning will mirror any previous warnings that have been issued. Where a final warning is issued, the teacher will be informed in writing that failure to achieve an acceptable standard of performance (within the set timescale) may result in dismissal and given information about the handling of the further monitoring and review period and the procedure and time limits for appealing against the final warning. The teacher should be clear that a decision meeting, at which consideration of dismissal is an option, will follow once the final written warning is issued.

## 7. Decision Meeting

As with formal capability meetings and formal review meetings, at least five working days' notice will be given and the notification will give details of the time and place of the meeting and will advise the teacher of the right to be accompanied by a companion. The invitation to attend should include a summary report which includes the outcome of the formal review meeting, as well as all the information referred to in the process so far – including:

- the original action plan and any written warnings
- details of help and guidance provided and results of monitoring
- copies of evidence from observations and other relevant evidence
- a clear assessment by the Headteacher of the progress made

The invitation to a decision meeting should make it clear who will be in attendance and who has the authority to dismiss. It is expected that in most cases, authority to dismiss has been delegated to

the Headteacher and the Headteacher therefore conducts the decision meeting and makes the decision about dismissal. The decision meeting will follow the same format as the formal capability meeting (paragraph 4).

If authority to dismiss has not been delegated, the decision meeting is conducted before a Staff Dismissal Committee, comprising of three Advisors (or two where there is a shortage of eligible Advisors) and the Headteacher makes a recommendation to the Committee. The procedure for a capability hearing, *Disciplinary, Dismissal and Appeal Committee hearings procedure P303b*, should be followed. If an acceptable standard of performance has been achieved during the further monitoring and review period, the capability procedure will end and the appraisal will re-start.

If performance remains unsatisfactory, a decision, (or recommendation to the Advisory Board), will be made that the teacher should be dismissed or required to cease working at the school. The teacher will be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

Where an employee has a grievance about the way in which the procedure has been conducted this will be dealt with as part of the appeals procedure. Only in exceptional cases will agreement from the Trust be given to pause the process and deal with the grievance via the grievance procedure.

### **7.1 Decision to dismiss**

The decision to dismiss will be made by the directors.

### **7.2 Dismissal**

Once the Directors have decided that the Teacher should no longer work at the school, the Directors will formally dismiss in writing within 14 days of the date of the notification.

## **8. Appeals**

If the employee appeals a formal warning, or a decision to dismiss, they must do so within five working days (or seven consecutive days out of term time) of the issuing of the warning or dismissal decision.

The appeal should be ideally heard within ten working days (or 14 consecutive days out of term time) of notification of appeal, and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered.

Any appeal submitted by an employee will normally be heard by a panel of three independent representatives (the Appeal Committee).

Notice of at least five working days (or seven consecutive days out of term time) must be given for an Appeal Committee hearing. The invitation to an appeal hearing should include details of the time, date, venue and who will be in attendance, as well as the employee's right to be accompanied by a companion. A copy of the relevant paperwork referred to in the process must be issued with the invitation.

The outcome of the Appeal Committee hearing must be confirmed in writing to the employee within five working days. If the Appeal Committee confirms dismissal, the teacher has no further right of appeal.

## **9. Passing information to prospective employers**

Effective from 1 September 2012, revisions to the School Staffing Regulations (England) 2009 mean that schools are required by law to pass on information, to prospective employers in other maintained schools or academies, about teachers and Headteachers who have been subject to formal capability procedures within the last two years. This is likely to be requested by the prospective employer as part of the request for a reference.

## **10. Data Protection**

The school processes any personal data collected during the capability procedure in accordance with its data protection policy. Any data collected is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the capability procedure. Inappropriate access or disclosure of employee data constitutes a data breach and should be reported in accordance with the school's data protection policy immediately. It may also constitute a disciplinary offence, which will be dealt with under the school's disciplinary procedure.