



## **NON-TEACHING STAFF CAPABILITY PROCEDURE**

### **Introduction and Objectives**

If a Headteacher is implementing a procedure on conduct, performance health or attendance they should follow the guidance within the procedure on which route to implement.

It is at the Headteacher's or the Governing Body's discretion to decide under which Schools' Procedure an issue should be properly dealt with. It is the expectation that good management practice will have been put into practice prior to implementation of a procedure and that advice is sought from the Education Human Resources Section or the School's personnel provider.

For the purpose of this document, capability will be assessed by reference to skill, (including qualifications) aptitude, efficiency, health or any other physical or mental quality. Lack of capability is defined as a situation in which an employee fails consistently to perform his or her duties to a professionally acceptable standard. Capability concerns may be about a single matter or a number of separate issues.

The procedure is designed to help and encourage all employees to achieve and maintain standards of capability, efficiency, attendance and work performance. The main purpose of the capability procedure is to encourage an employee, whose work performance and/or attendance is unsatisfactory, to improve. Capability action may, at its extreme, lead to dismissal.

The Headteacher or Governing Body has overall responsibility for promoting and maintaining standards of work performance and attendance. Informal oral warnings and/or guidance interviews do not form part of the formal capability procedure.

The following capability procedure has been established by the Governing Body in line with the powers given under the School Staffing Regulations 2003. In establishing these procedures, care has been taken that the procedure is consistent with the Education Act and Regulations, employment legislation and codes of practice, as well as good personnel practice. The head teacher will have the delegated responsibility to make capability action up to initial dismissal decisions, following which there will be an opportunity to appeal to a panel of governors.

The Governing Body has a responsibility to apply the provisions of this procedure fairly

and with full regard to the School Staffing Regulations 2003 (as updated).

All proceedings under this procedure shall be held in private and shall be confidential.

The submission of a grievance or a complaint of harassment or discrimination, will not suspend the operation of the capability procedure or prejudice the headteacher/governing body's right to pursue capability action against an employee. Concerns relating to capability action taken against an employee cannot be dealt with under the schools grievance procedure, but should be raised by the employee during and as part of the capability process.

### **Representation**

At all formal stages of the capability process, employees have the right to be represented or accompanied by an accredited official of a trade union or a work colleague, and should be so advised. The representative or work colleague may address the meeting and/or interview and confer with the employee but may not answer questions on their behalf.

The employee should make their own arrangements to be represented or accompanied. Where the employee's chosen trade union representative or colleague is not available at the proposed time and date, the employee may propose an alternative time. If this suggestion is reasonable and falls within 5 working days of the original date, the meeting must be postponed to that date and time.

### **Issues of Capability of Employee Representatives**

Any formal capability action being contemplated in respect of staff representatives of recognised trade unions within this procedure should not be instigated without the prior involvement of the full-time official or nominee, of the appropriate Trade Union.

### **Scope of procedure**

This procedure applies to all non-teaching staff who are permanent or fixed – term employees within the establishment of a school, whether full-time or part-time. Headteachers should use their discretion on whether to apply the procedures to long term contractors on the school's payroll.

This procedure relates to the to the work performance and/or attendance of non teaching staff

## **2. Informal Discussion**

2.1 It is recognised that many matters relating to work performance may be resolved by informal discussion without recourse to any formal procedure and that such discussion forms an important part of school management. It is recommended that such discussion is dealt with as a guidance interview (see para 2.2).

- a) Where capability concerns are identified the Headteacher shall inquire into this matter. If the capability concern(s) relate to the Headteacher, the Governing Body must appoint a suitable person whether employed at the school or not, to inquire into the matter (the Headteacher or suitable person is hereinafter known as the Investigator).
- b) The Investigator must satisfy her/himself that there is substance to the capability concern(s).
- c) If it appears to the investigator that the concern(s) are insignificant, no further action will be taken.

## **2.2 Guidance Interview**

Although not part of the capability process, a guidance interview is nevertheless a formal interview held with an employee. One manager would normally undertake the interview and can be accompanied, if required, by a personnel practitioner. The employee must be advised that either an official of a trade union or a work colleague may accompany him/her at a guidance interview.

The guidance interview should follow the following format:

- [1] outline the areas of concern to the employee and explain why their work performance or attendance is not acceptable;
- [2] ask the employee for an explanation for the area of concern;
- [3] discuss ways of resolving or overcoming the concern, e.g. guidance or training, and consider if other assistance is required;
- [4] confirm the standards of capability required and/or any targets to be reached; and
- [5] review any arrangements made at a further interview, if necessary.

The manager must keep a detailed written record of the guidance interview and any agreed outcomes.

Note: A guidance interview for poor attendance is usually appropriate when sickness absence falls below the standard required by the school. Where an employee is

not at work, through sickness or absence, it may not be possible to fully monitor targets set in guidance interviews, indeed it may not be possible to hold guidance interviews due to the employee's poor attendance. Efforts should still be made to meet with the employee to discuss the capability concerns e.g. home visit. If this is not practical then the capability concerns should be put to the employee in writing and a written response requested.

## **2.4 Referral to Occupational Health**

- a) The investigator should consider referral to the Occupational Health Service at any stage if there are concerns that there may be an underlying medical problem causing or contributing to the poor work performance, not necessarily identified through ill-health absence. The Occupational Health Service should be made fully aware of the reason for the referral, with examples of poor work performance outlined briefly. Details of the duties of the post should also be provided for information as this will assist the medical practitioner in coming to a view over the employee's fitness to undertake some or all the duties of the post.
- b) Following careful consideration of the medical report the investigator will establish from this whether or not the employee has a related underlying medical reason, and if so, how likely it is to improve and over what period of time. Other options may be considered after taking advice from the Occupational Health Service and reaching a mutual agreement with the employee concerned. Possible options should include:
  - o Temporary adjustment to duties/workload/hours with timescales for review.
  - o Job redesign (temporary or permanent).
  - o Demotion (temporary or permanent).
  - o Short term reasonable time off to attend Guidance and support or other 'Support Service' e.g. for drug or alcohol dependency.
  - o Provision of guidance, target setting, training with purpose and time limits stipulated.
  - o Medical redeployment or ill health retirement (subject, where relevant e.g. for drug or alcohol dependency).
- c) Provision of guidance, target setting, training with purpose and time limits stipulated.
- d) Medical redeployment or ill health retirement (subject, where relevant subject to confirmation by the Occupational Health Physician).

## **2.5 Formal Capability Procedure**

If after a specified period of support, monitoring and evaluation, the employee has still failed to satisfy the attendance targets and/or performance standards required, the investigator may decide to proceed with the formal capability procedure:

If the Investigator is satisfied that the concerns warrant a hearing, they will inform the employee and a capability hearing will be arranged. In all cases concerns about capability should already have been raised with the employee, usually through guidance interviews. No capability action will be taken against an employee unless and until the issue has been carefully investigated.

- b) The employee shall be informed in writing of the following:
1. The date & time of the hearing, giving at least ten working days notice from date of the letter.
  2. The specific nature of the concerns over the employee's capability.
  3. Their right to respond in writing to the concerns within 7 days of the receipt of the letter.
  4. Their right to provide other written documentation in support of his case and name witnesses within 7 working days of the receipt of the letter.
  5. Their right to representation, the responsibility to arrange for this lies with the employee.
  6. Names of management witnesses and the person presenting the case.
  7. All supporting documents to be used as evidence by management including records of guidance interviews and Occupational Health Service reports and a copy of the Schools Capability Procedure.
  8. Likely outcome if concerns are proven i.e. warnings, decision to remove from the school.
  9. That the hearing may proceed in their absence if no acceptable reason is offered to the capability panel as to why the employee and/or representative cannot attend.
- b) The notice shall be sent by recorded delivery, or delivered by hand to the employee.

### **3 Conduct of Formal Capability Panel**

- 3.1 The capability panel will be chaired by the Headteacher. Governors may be panel members. Where the head has been directly involved in the procedures leading to capability action, has instigated the proposal to dismiss in question (or the head teacher is being considered for capability action) the initial decision can be delegated to one or more governors but where possible should be delegated to at least three governors
- 3.2 When a capability concern is to be considered it shall be heard by a panel of no less than three, they may be joined by a representative of the Strategic Commissioning Authority or nominees.
- 3.3 In exceptional circumstances, where it is not reasonably practicable to comply with the requirement for a minimum of three panel members, the membership of any subsequent appeal committee will comprise no more/less members than on the original capability panel.

- 3.4 The Chair of Trustees and/or their representative may attend the meeting at which the capability complaint is considered for the purposes of giving advice. Any advice given by the Chair must be considered by those concerned before a decision is made; but they will not be party to the decision. A human resources adviser engaged by the school may also attend to provide advice to all present.
- 3.5 If the employee fails to attend the hearing the case will be heard in their absence, unless the capability committee agrees to postpone the hearing to a later date having received acceptable reasons.
- 3.6 The capability panel should have before them copies of the complaint and all relevant papers including those submitted by the employee concerned.
- 3.7 At the hearing, the capability panel will decide whether late evidence from either side will be accepted. The views of both sides should be heard when considering whether to accept late evidence, along with general considerations of reasonableness and fairness. If late evidence is accepted in the form of written documentation, the hearing will normally be adjourned for a brief period to provide reading time.
- 3.8 The hearing will be aimed at enabling the Capability Panel to come to a decision as to what has taken place and then to make a decision about the appropriate action and/or sanction.
- 3.9 The Panel must provide an opportunity for both sides to put their case fully and make sure that both sides have a fair and reasonable hearing. In particular the Capability Panel must allow both sides the opportunity to attend, to be represented, to be accompanied by a Trade Union representative or work colleague (as appropriate), to bring witnesses and to put questions about matters, relating to the evidence only, to witnesses brought by the other side. Witnesses should only be called into the room to give evidence and answer questions, after this they should leave the room immediately.

The Chair will open the proceedings by:

- stating the purpose of the hearing
- introducing all present;
- saying how the hearing will be conducted and any time constraints which may apply;
- confirming that all have the same documentation;
- confirming the number and names of witnesses attending on both sides;
- asking for any points of clarification to be stated;
- reading the capability allegations and asking whether the employee accepts the facts.

If the allegation(s) is/are accepted then the Panel should proceed immediately to hear mitigation.

The Chair will then ask each side to present their case and is responsible for ensuring that all presentations, evidence and questions are relevant and

questioned if any area is unclear.

The order of the proceedings is as follows:

- The Management representative presents their case
- Any witnesses to support the case are called one at a time,
- Questions are asked of the witnesses (first the panel, then the employee or their representative),
- The panel and the employee side ask questions on the presentation, if necessary, witnesses are dismissed but are asked to remain in the building in case they need to be recalled (unless this is agreed to be unnecessary),
- The employee presents their case in response to the Manager's presentation.

On completion of the presentations, the Chair will ask each side to summarise their case and the evidence submitted. No new evidence can be submitted at this point.

The hearing will be adjourned at the deliberation stage, in order to allow for further investigation if the Committee feels that there are points, which need clarification. Opportunity may be given to re-examine the evidence/witnesses.

### **3.9 EMPLOYEE'S ABSENCE AT CAPABILITY INTERVIEWS**

Should an employee fail to attend a capability interview, the panel will have to consider whether or not to proceed in their absence. In doing so, the panel should take into account:

- any reasons given by the employee or their representative for non attendance;
- whether the employee had received sufficient and adequate notice of the interview; and
- whether the employee had been informed that the interview may proceed in their absence.

In most cases, particularly when the individual has not attended due to sickness, it is advisable to allow at least one postponement. The length of the postponement may need to take account of the need for the employee to arrange representation, prepare their response to the concern raised and capability action recommended and the general circumstances surrounding the case. The individual should be informed in writing that the interview will proceed on the new date and advised that if unable to attend in person, s/he should brief a representative or submit written representations.

In cases where there are grounds for believing that the employee is deliberately and unreasonably delaying the capability process by refusing to attend a hearing, personnel advice should be sought.

(See also the Guidance Note on "Representation" for details of the statutory right and time limits of an employee to postpone capability meetings and/or interviews).

When neither the employee nor their representative attends and the proceedings continue, it is recommended that the process be adjourned after the line manager's

presentation is completed. The employee should then be sent a copy of the notes of the interview thus far and any new documentary evidence

presented, and offered the opportunity to submit a statement in response (including mitigation). This statement can be given in person at the reconvened interview or in writing if the employee remains unable or unwilling to attend.

Where an employee is represented in their absence, it is recommended that the representative is asked to obtain a note signed by the employee authorising him/her to speak and act on their behalf.

#### **4. THE DECISION**

- 4.1 All parties other than assigned officer(s) advising the committee shall withdraw when the committee considers its decision.
- 4.2 Having considered all the evidence, the committee shall propose appropriate capability action as necessary, the level of formal action will be determined by the seriousness of the concern(s). The decision will be given orally to the employee in the presence of their representative and will also be confirmed in writing, with a copy to the representative.
- 4.3 The formal action arising from a Capability Hearing may be:
  - a) No further action
  - b) The decision of the panel may be to give a further period of time for improvement. Timescales used for improvement will greatly depend on the severity of the incapability involved. In extreme cases, other than incapability due to ill-health, the headteacher (or nominee) will be asked to issue a formal warning to demand that improvements in performance be made and/or targets and standards be met within a clearly specified timescale. The period given for improvement after the date of a formal warning will be no more than four weeks. If standards are not met the employee will be suspended and a further formal capability hearing arranged.
  - c) Where there are underlying medical reasons (that have been established through referral to the Occupational Health Service):
    - Temporary adjustment to duties/workload/hours
    - Explore Job Redesign
    - Medical redeployment (dependent on suitable vacancies being available)
    - Determination to cease working at the school, decision to terminate with notice, where attendance is unacceptable and unlikely to improve to an acceptable standard, and where the employee has not been certified as 'permanently unfit' by the Occupational Health Service Doctor.
    - Decision to cease working at the school, to terminate employment on the grounds of ill-health (medical/ill health retirement), where the employee has been certified as 'permanently unfit' by Occupational Health Service Doctor. Where there is no possibility of improvement within the



foreseeable future and where the employee is not fit for alternative employment (i.e. redeployment is not an option).

- d) Where there are non-medical reasons, or where it has been established, after referral to the Occupational Health Service, that there is an unnecessary high level of sickness absence:
- Improve performance/attendance
  - Transfer (efficiency)
  - Issue Warnings (in addition to the above)
  - Written Warning: To be given in cases of a serious nature or where there is an accumulation of poor work performance. (Expires after 9 months)
  - Final Written Warning: To be given in those cases where the nature of the concern is considered to be insufficiently serious to justify termination but sufficiently serious to warrant only one written warning. This warning may be the first and last and may be implemented at any stage according to the seriousness of the concern(s), i.e. there does not have to be an earlier record of capability action. (Expires after 9 months).
  - Supplementary Management Action: Accompanying the above warnings, eg withholding of allowances/benefits/increments, demotion (where applicable and within national agreements), recovery of monies, etc.
  - Determination to cease working at the school: Some concerns will be sufficiently serious to warrant a decision that the employee should cease working at the school without the employee having received any prior warnings. In other cases a decision to cease working at the school will be appropriate where there have been earlier warnings to which the employee has not made an adequate response. It should be noted, however, that when a capability committee determines that an employee should cease working at the school, it must be confident that all reasonable measures have been explored which could lead to improvements in performance and/or attendance standards required. Where a decision to cease working at the school is felt to be the likely outcome, the Director of Schools Services, or nominee, must be notified in good time to allow him/her to attend the capability hearing for the purpose of giving advice.

Notice of dismissal will be issued only by the Chair of Trustees within 14 days of receipt of the notification of the decision of the committee.

Copies of warning letters shall be placed in the employee's record, only after the employee has been sent copies of them. When such letters are placed in the record, the period of time for which they will form part of the record, shall be set out as shown in paragraph 4.3 (c).

Employment tribunals have established that there may be exceptional circumstances where it is not appropriate for capability warnings to be disregarded, even though they have expired. Examples of where expired warnings may still have some relevance in future capability action and should therefore remain live would be: where an employee's capability record shows that the employee maintains a satisfactory level of work performance or attendance only for as long as warnings are active and a definite pattern can be shown to have built up; and where an employee

is claiming to have an exemplary capability record since their first day of employment.

## **5. APPEAL**

- a) The purpose of the Trustees Appeal is to consider the decision made by the initial hearing, questioning the management presenter and/or consideration of any new evidence or mitigating circumstances presented by the employee.
- b) The Appeal Panel may alter, nullify or confirm the decision.
- c) Employees may appeal against capability action if they wish.
- d) Notice of appeal must be received within ten working days of receipt of the decision letter. This time limit will be strictly observed.
- e) Arrangements for the appeal will be made on receipt of the appeal request. Wherever possible the appeal should be heard within 20 working days of the lodging of the appeal and the employee should have at least 10 working days notice of the Appeal Hearing.

### **5.1 The Appeals Committee**

- a) An Appeals Committee should be formed from the Board of Trustees to include no fewer members of the board than that of the Capability Panel whose decision is subject to appeal. The Appeal Committee may also include an assigned Education and Culture Department LEA representative provided that they shall not be entitled to vote in any proceedings of the Committee.
- b) No member of the Capability Committee, the decision of which is subject to appeal, shall be a member of the Appeal Committee.
- c) All papers presented to the hearing, together with the decision of the Chair of the Capability Committee and any subsequent correspondence must be available to the Appeals Committee. Any new evidence, which the employee wishes to introduce, should be copied to all parties at least ten days in advance of the Appeal Hearing.
- d) The Appeals Committee will consider the grounds for the appeal, pay particular attention to any new evidence that has been introduced by the employee and hear representations from both management and the employee or representative in order to determine whether the decision of the hearing was fair and reasonable in view of the evidence available.
- e) The decision of the Appeals Committee is final and binding on all parties and, once made must then be notified to Spa Education Trust in writing.

## **6. RECORDS**

The maintenance of meaningful and contemporaneous records are essential, particularly if it is taken outside the employer's domain by an employee, e.g. referral to an Employment Tribunal. The manager / committee dealing with the concern should ideally be accompanied by a note-taker for future reference. Notes are not necessarily verbatim, and there is no requirement for agreed minute. It should be noted that consideration by an employment tribunal may be an extended time after the matter was considered internally.

Records should be held in a secure and confidential manner, often the issues raised by an employee are particularly sensitive and it is essential that information is shared on a need to know basis only.

Documentation which should normally be retained includes:

- correspondence with employees on dates of meetings, etc;
- contemporaneous notes of meetings;
- information collated by the Manager /panel hearing the complaint or used to assist in making a decision;
- confirmation of the decision, or other supplementary correspondence;
- clarity on how decisions were reached.