

## Capability Policy



<b>Version</b>	<b>01/24</b>
<b>Name of Policy Writer</b>	<b>EducateHR Ltd</b>
<b>Last Updated</b>	<b>January 2024</b>
<b>Next Review Due</b>	<b>January 2025</b>

<b>Contents</b>	<b>Page</b>
1. Introduction .....	3
2. Purpose and scope.....	3
3. Representation.....	3
4. Overlapping capability and grievance cases .....	3
5. Sickness.....	4
6. Suspension.....	4
7. Record keeping .....	4
8. Informal capability .....	5
9. Formal capability .....	6
10. Monitoring and review period following a formal capability meeting .....	7
11. Formal review meeting – first assessment stage .....	7
12. Final review meeting – second assessment stage .....	8
13. Dismissal hearing .....	8
14. Appeals .....	9
15. References.....	9
16. Other policies and procedures .....	10

## **1. Introduction**

- 1.1 This policy sets out the capability procedure for the academy. It applies to all employed staff whose performance has given rise to serious concerns regarding their ability to discharge their duties effectively.
- 1.2 This procedure should be used where evidence leads to concern that an employee is consistently failing to reach appropriate professional standards through lack of capability, aptitude, skill, or ability.
- 1.3 Situations involving issues such as misconduct, refusal to follow instructions, negligence or wilfully deficient performance should more appropriately be dealt with under the academy's Disciplinary Policy.

## **2. Purpose and scope**

- 2.1 The purpose of this policy is to ensure, by setting out the framework for a clear and consistent approach to management of the process, that a fair procedure is in place which will be applied equally in respect of all employees in situations where concerns have arisen in relation to capability.
- 2.2 The procedure outlined in the policy is applicable to any member of staff (including the headteacher) whose performance gives rise to serious concerns. If the concerns relate to the headteacher, the chair of governors, supported by HR advice, will nominate an appropriate individual to deal with the matter.
- 2.3 The term 'working days', where used in the policy, should be interpreted in relation to the appropriate pattern of work for the individual concerned (for example term time working).

## **3. Representation**

- 3.1 Employees have a statutory right to be represented by a recognised trade union representative or work colleague at hearings/meetings which could result in a sanction (such as a formal warning) being issued. The academy extends this right to all capability review meetings.
- 3.2 An employee may not be represented in such a meeting by a work colleague who has a conflict of interest.
- 3.3 The trade union representative or work colleague should be allowed to address the hearing to present and/or sum up the employee's case, to respond on behalf of the employee to any views expressed at the meeting, and to confer with the employee during the hearing.
- 3.4 No formal action will be taken in respect of an employee who is a recognised trade union representative until (following agreement with the individual concerned) the circumstances of the case have been discussed with an official of their trade union. If the individual does not wish their trade union official to be involved, capability process should continue.

## **4. Overlapping capability and grievance cases**

- 4.1 If a grievance is raised by an employee after capability proceedings against them have commenced, and the grievance relates to the capability case (unrelated cases can

proceed in parallel), a decision will be taken **either** to suspend the grievance until after the capability issue has been dealt with **or** to hear the grievance at the capability hearing.

- 4.2 Only in exceptional circumstances will a capability hearing be suspended to deal with a grievance that has been raised after capability process has commenced.
- 4.3 Depending upon the nature of the grievance, the headteacher may need to consider bringing in another manager to continue to hear the capability case.
- 4.4 It is advisable that an HR Advisor is present at all formal capability (and/or grievance) hearings to support management and/or governors as appropriate.

## **5. Sickness**

- 5.1 If sickness absence appears to have been triggered by the commencement of the formal capability procedure, the case will be dealt with in accordance with the academy's Attendance Management Policy.
- 5.2 Where appropriate, a referral to occupational health will be instigated. This will be to assess the member of staff's health and fitness both for continued employment and in relation to whether it is appropriate to continue with monitoring or formal procedures.

## **6. Suspension**

- 6.1 If at any stage in this procedure (following appropriate investigation and consideration of the evidence) a decision is reached by the headteacher or senior leadership team that the employee's continued presence in the academy constitutes either:
  - a risk to the individual's own health, safety, and welfare; or
  - a risk to the health, safety, and welfare (including academic welfare) of pupilsthen that employee may be suspended from duty (without prejudice).
- 6.2 Suspension is an option to be considered by the employer which represents a neutral act. The employee is entitled to receive contractual pay throughout any period of suspension.
- 6.3 Suspension should only be imposed after due consideration of the facts and should be reviewed at regular intervals to ensure it is not unnecessarily protracted. The period of suspension should always be kept to a minimum.
- 6.4 If suspension is deemed appropriate, the employee must be notified in writing, explaining the reasons and the conditions attached.
- 6.5 An appropriate senior manager at the academy should always be nominated by the employer to act as a point of contact during the period of suspension, and the employee should be provided with the name of this individual, and details of how they can be contacted.

## **7. Record keeping**

- 7.1 Written records should be made of all interviews with the employee in relation to capability process and of any action taken following such an interview. Such records should be added to the employee's file.

- 7.2 Employees should be given copies of notes of meetings and reports. Any observations of work should be documented in a similar manner and copies provided to the employee.
- 7.3 Formal warnings relating to capability should be disregarded if the capability process has been discontinued following improvement.

## **8. Informal capability**

- 8.1 Where there are concerns that an employee may be underperforming, the headteacher (or senior manager) should investigate and collect evidence. The chair of governors must make appropriate arrangements for this to be done if it is the performance of the headteacher which is in question.
- 8.2 Concerns may arise from normal monitoring, complaints, supervision sessions, work reviews or other sources. A meeting should be arranged to discuss the issues, at which the employee is entitled to be accompanied by a trade union representative or work colleague.
- 8.3 Relevant information to be taken into consideration during the meeting may include length of service, details of previous training, notes of lesson observations, complaints about the employee's work etc.
- 8.4 The aim of the informal meeting will be to:
- assess the seriousness of the situation
  - explain standards of performance required
  - outline the shortcomings in reaching those standards
  - explore reasons for the shortcomings
  - give the employee an opportunity to respond
  - provide appropriate help and support (such as opportunities to observe good practice, training, etc)
  - outline the time allowed for improvement.
- 8.5 Following representations and consideration there are three options available to the headteacher (or senior manager):
- i. decide the employee is working at an acceptable level and drop the matter
  - ii. arrange a period of support (without using the formal procedure)
  - iii. arrange a formal interview to initiate the formal approach for more serious cases.
- 8.6 Where improvement is thought possible outside the formal procedure (such as in option ii. above) a support plan should be agreed. The detail of the support plan may be agreed during the initial meeting or, alternatively, a separate meeting may be scheduled to discuss this at greater length.
- 8.7 The period of support should not go on too long. A typical length for a support plan would be around 6 weeks, but the duration should reflect the seriousness of the situation. Feedback and instruction should be given to help the employee improve their performance. If more serious concerns arise, or if the employee expresses discontent or indifference to the support offered, the formal procedure should be commenced.
- 8.8 On completion of the period of assessment outlined in the support plan, a firm conclusion should be reached by the headteacher or senior manager.

- 8.9 If the headteacher or senior manager is satisfied that the employee is now working to the required standards, the employee will be informed in writing that informal capability no longer applies.
- 8.10 If the headteacher or senior manager is not satisfied that the employee is now working to an acceptable standard then they should convene a formal interview (or 'formal review meeting') to discuss the issue of capability with the employee.

## 9. Formal capability

- 9.1 The formal review meeting represents the initial stage of the formal capability procedure. It provides an opportunity to deal with more serious problems in a structured manner.
- 9.2 At least five working days' notice should be given of the review meeting, and the right to be represented by a trade union representative or work colleague will be outlined in the letter of invitation. The letter should also outline the possible consequences (including dismissal) should capability proceedings lead to a conclusion.
- 9.3 The invitation letter will also contain sufficient information about specific concerns relating to performance to allow the employee to prepare a response to any allegations raised.
- 9.4 The formal review meeting allows the employee to respond to concerns about their performance and to make any relevant representations. This may provide new information or a different context to the information or evidence already collected.
- 9.5 Should it become clear that further investigation is needed, the formal review meeting may be adjourned for an appropriate length of time. The person conducting the meeting may also choose to adjourn the meeting if more time is needed in which to consider any additional information that has been presented.
- 9.6 At the conclusion of the formal review meeting, a decision should be made once all the facts of the case, including representations from the employee, have been considered. The headteacher or senior manager should adjourn the meeting briefly before delivering their decision to the employee.
- 9.7 If it is determined that the employee is not working to an acceptable and appropriate level, a **formal warning** will be issued, and this will be the start of the formal capability process. (NB If unsatisfactory performance is sufficiently serious, for example where poor behaviour management skills or repetition of unacceptable professional practice are putting the safety, education or welfare (including academic welfare) of pupils in jeopardy, it may be appropriate to move directly to a final written warning.)
- 9.8 Where a formal warning is issued, the headteacher or senior manager should use the remainder of the meeting to:
- identify the professional shortcomings (for example where the expected standards are not being met)
  - give clear guidance on the improved standard of performance needed to ensure that the employee can be removed from formal capability procedures
- (this may include the setting of new objectives focused on the specific weaknesses that have been identified and which require to be addressed, any success criteria which may be appropriate and any criteria which will be used to assess whether the necessary improvement has been made)*

- explain in further detail the support and supervision to be provided (including the focus of any further lesson observations) and the feedback that will be available to help the employee improve their performance
- set out the timetable for improvement (including setting a date for the next review meeting) and explain how performance will be monitored and reviewed  
*(the timetable will depend on the circumstances of the individual case and should be proportionate, providing sufficient opportunity for an improvement to take place – this may, for example, specify a minimum of six weeks)*
- advise the right of appeal (within five working days of notification)
- make it clearly understood that failure to improve could lead to dismissal.

9.9 Notes will be taken of formal meetings and a copy provided to the employee. Where a warning is issued, the employee will be informed in writing of the matters covered in the above bullet points.

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

10.1 A monitoring and review period will follow the formal capability meeting. Formal monitoring, evaluation, guidance, support and feedback will continue during this period.

10.2 If, during the first stage of assessment, the circumstances suggest a more serious problem a decision can be made to convene early feedback meetings. Equally, if it becomes clear that there is a lack of employee engagement to achieve improvement, the assessment period may be reduced in length.

## **11. Formal review meeting – first assessment stage**

11.1 At least five working days' notice will be given (although ideally the date will have been agreed at the first formal meeting to instigate capability process). The notification will give details of the time and place of the meeting and will advise the employee of their right to be accompanied.

11.2 At the end of the assessment period, if the person conducting the meeting is satisfied that the employee has made sufficient improvement, the capability procedure will cease.

11.3 In other cases:

- if some progress has been made during the monitoring and review period and there is confidence that more improvement is likely, it may be appropriate to extend the duration of the monitoring and review period
- if no, or insufficient, improvement has been made during the monitoring and review period, the employee will either:
  - i. receive a final written warning with an appropriate review period – such as, for example, a minimum of 4 weeks; or
  - ii. (in those cases where the employee has already received a final written warning) a recommendation will be made that the employee should be dismissed (for details of dismissal hearing see below).

11.4 As before, notes will be taken of formal meetings and a copy provided to the employee. Any final written warning will mirror previous warnings that have been issued.

- 11.5 Where a final written warning is issued, the employee will be informed (in writing) that failure to achieve an acceptable standard of performance within the set timescale may result in dismissal.
- 11.6 The employee will also be given written information about the handling of the further monitoring and review period and the procedure and time limits for appealing against the final warning.
- 11.7 It may be appropriate at this stage to consider redeployment to an alternative post more suited to the employee's capabilities (normally this will be at a lower grade). If redeployment is deemed appropriate pay protection will not apply.

## **12. Final review meeting – second assessment stage**

- 12.1 At least five working days' notice will be given (although ideally the date will have been agreed previously at the first assessment meeting). The notification will give details of the time and place of the meeting and will advise the employee of their right to be accompanied.
- 12.2 If an acceptable standard of performance has been achieved during the second assessment stage, the capability procedure will end. It may well be that if the employee has demonstrated some improvement, an extension to the second assessment period may be considered appropriate.
- 12.3 However, if performance remains unsatisfactory, a recommendation will be made to the appropriate authority (which may be either the headteacher or the governing body's staff dismissal committee – see below) that the employee should be dismissed.
- 12.4 Where dismissal is felt to be appropriate, the employee will be informed that they will be referred to either the headteacher or the governing body's staff dismissal committee (whichever is applicable) with a recommendation for their dismissal.
- 12.5 Where the headteacher has been delegated (by the governing body) authority to dismiss, they may proceed with the dismissal hearing, but only if they have remained impartial throughout the entire capability process.
- 12.6 Where the headteacher has not been delegated this authority **or** has not remained impartial throughout the entire capability process, the dismissal can only be affected by the governing body's staff dismissal committee.
- 12.7 If the headteacher is not hearing the case for dismissal, the governing body should arrange for a staff dismissal committee to hear the case. This committee will normally comprise three governors not previously involved in the matter.

## **13. Dismissal hearing**

- 13.1 The employee must be given at least five working days' notice of the potential dismissal hearing.
- 13.2 At the hearing management will present their case to the staff dismissal committee (or the headteacher\*) and will recommend the employee's dismissal. Following this the employee and their companion may make representation to the committee (or the headteacher) for consideration.



*\*The headteacher may only be involved in hearing the case at this stage if they have delegated management of the earlier stages of the capability process and have therefore had no previous involvement in the process.*

- 13.3 The outcome of the dismissal hearing will normally be notified to the employee at the end of the hearing. The decision must be confirmed in writing (and this must be sent by recorded delivery where the outcome is dismissal).
- 13.4 Where the outcome is dismissal, the letter should inform the employee of the clear reason(s) for dismissal and the date of termination of employment. It must also advise them of the right of appeal and to whom an appeal (in writing) should be submitted.

## **14. Appeals**

- 14.1 Appeals against formal warnings or dismissal must be made within five working days and should be heard within ten working days of notification of appeal. If this timescale cannot be accommodated this must be communicated to the employee.
- 14.2 Appeals against a formal warning or dismissal must be lodged in writing with the chair of governors, stating the specific grounds for appeal. The appeal will be dealt with impartially and, wherever possible, by governors who have had no previous involvement in the matter.
- 14.3 Where monitoring and reviewing would otherwise be continuing, these should not be halted while an appeal is pending.
- 14.4 The same arrangements for notification and right to be accompanied by a companion will apply as with formal capability and review meetings and, as with other formal meetings, notes will be taken (an additional person should be present in the meeting to carry out this role) and a copy provided to the employee.
- 14.5 Appeals should be restricted to considering any irregularities of procedure, any relevant new evidence not previously available or the reasonableness of the decision made. The test that should apply (as to whether a decision was or was not reasonable) is whether the decision was so unreasonable that it was one which no other person(s) of equivalent authority could have chosen to take.
- 14.6 In determining the outcome of the appeal, three possible options are available to the committee. These are to:
- i) confirm the original finding and confirm the penalty or sanction;
  - ii) confirm the original finding but substitute a different (lesser) penalty or sanction; or
  - iii) revoke the original finding (and thus revoke the penalty or sanction).
- 14.7 The decision of the appeal committee will be communicated in writing to the employee within a reasonable timescale following the appeal hearing (usually within five working days).
- 14.8 The decision of the appeal committee is final, and this represents the conclusion of the capability process.

## **15. References**

- 15.1 References requested for former and current employees should be accurate and fair and must not be misleading.
- 15.2 The referee (and/or the employer) may be liable for negligence if loss is caused as a result of the employer's failure to exercise reasonable care in the preparation of the reference (in other words if the information contained in the reference is inaccurate or misleading).
- 15.3 All references for staff who have left employment by the academy following a formal capability process (within the last 2 years) must therefore include this information.

## **16. Other policies and procedures**

- 16.1 This policy will be supported by the following policies and procedures:
- Attendance Management Policy
  - Disciplinary Policy