



# SIR THOMAS RICH'S

## Staff Capability Procedure

**Last Reviewed:** May 2021

**Status:** This Capability Procedure and guidance takes into consideration the Education Act 2002 (Staffing Regulations 2003), the Employment Act 2002 (Dispute Resolution) Regulations 2004 and associated provisions in the Act, the Department for Education Teacher appraisal and Capability; A model policy for schools May 2012, revised in March 2019 and the ACAS Code of Practice on Discipline and Grievance Procedures. The Governing body of the school has adopted this procedure.

**Responsibility:** The school's Senior Management Team (SMT) draws up the School's Capability Procedure. It is the responsibility of the Governors' Personnel Committee to agree the principles, review the Procedure at regular intervals and monitor its implementation.

### Contents

1. Purpose and Scope
2. Principles and Guidance
  - a) Confidentiality
  - b) Consistency of Treatment and Fairness
  - c) Sanctions
  - d) Conduct of proceedings
  - e) Investigation
  - f) Right of representation
  - g) The Action Plan – targets and support
  - h) Criteria for success and monitoring
  - i) Grievances
  - j) Sickness absence during the procedure
  - k) Role of Governors
  - l) Documentation
  - m) Retention
  - n) Warnings
  - o) Dismissal
3. Informal Stage
4. Formal Capability Meeting
5. Monitoring and review period following a formal capability meeting
6. Decision Meeting
7. Appeals

### 1. Purpose and Scope

The Employment Rights Act 1996, Section 98, defines capability; "in relation to an employee, means his (her) capability assessed by reference to skill, aptitude, health or any other physical or mental quality". This procedure is intended to provide a fair and consistent process for an individual whose performance does not meet the expectation of the management of the school. This procedure applies to teachers where there is serious underperformance which the appraisal process has been unable to address. It is not intended to cover probationary periods which are dealt with under separate guidance.

Early identification of problems through performance review (appraisal) will help to avoid the need for formal capability procedures. However, the main aim of the procedure is to bring about improvement in performance through appropriate support, good management and clear expectations. In many cases an improvement can be achieved informally; however some cases require a more formal approach.

## **2. Principles and Guidance**

These should be read in their entirety before commencing the procedure.

### **a) Confidentiality**

The appraisal and capability processes will be treated with confidentiality. However, the desire for confidentiality does not override the need for the Headmaster and Governors to quality-assure the operation and effectiveness of the appraisal system. The Headmaster and Deputy Head will review all teachers' objectives and written appraisal records personally, in order to check consistency of approach and expectation between different appraisers. The Headmaster and Deputy Head will also ratify any pay recommendations that have been made.

### **b) Consistency of Treatment and Fairness**

The governors are committed to ensuring consistency of treatment and fairness. The School will abide by all relevant equality legislation, including the duty to make reasonable adjustments for disabled teachers. The School is aware of the guidance on the Equality Act issued by the Department for Education.

### **c) Sanctions**

Whilst the capability procedure is intended to give clear guidance and support toward improving performance to a satisfactory standard, it is a necessary requirement of the process to have formal stages which record warnings.

No warning will be issued without the individual being given the opportunity to respond to the concerns at a formal capability meeting. At formal stages this will also include a right of appeal.

Where, as the result of a hearing a formal warning is issued, it is important to note that salary progression may be affected under the relevant schemes for staff e.g. Salary Progression Scheme for Support Staff, Performance Related Pay for teaching staff.

### **d) Conduct of proceedings**

Due to the nature of the capability process, there is an expectation that action under the procedures will be progressive, starting at the informal stage. However, there may be occasions where the level of poor performance is serious enough to move straight to the formal procedure (see section 4 Formal Capability Meeting).

If it is demonstrable that the poor performance of the employee is putting the education or safety of the children at immediate risk, the formal capability meeting may result in a final written warning.

The responsibility for disciplinary action up to initial dismissal decisions has been delegated to the Headmaster. However, the Headmaster cannot take this decision if s/he has been directly involved in the decisions on formal warnings leading to dismissal and if this is the case then a committee of governors will be asked to conduct the meetings.

Where action is being taken against the Headmaster, a committee of governors (normally three) will conduct the formal stages. The Chairman of Governors will normally be responsible for conducting the informal stage.

### **e) Investigation**

Where there are concerns regarding the underperformance of an employee, line managers should investigate and collect evidence. They may seek advice from senior members of staff. It will normally be the responsibility of the Chairman of Governors to gather the evidence where the concerns are in respect of the performance of the Headmaster.

It is important that performance problems are clearly identified and given appropriate consideration and support at the earliest stage. The nature of the problem, its level of seriousness and cause(s), should be investigated and identified normally through structured information gathering and systematic recording.

Following the investigation and assessment, a decision must be made as to whether to drop the matter, give informal support, or in cases which require action under the capability procedure, to arrange a formal capability meeting with the employee.

#### **f) Right of representation**

An employee has the right to be accompanied at a formal capability meeting, monitoring and review meeting, or appeal hearing, by a trade union representative or workplace colleague.

Should the employee's representative be unavailable at the time proposed for any of these meetings, the employee or his/her representative must inform the employer so that an alternative date can be arranged, if possible within five working days of the original date. If it is necessary for the availability of the parties, a date outside of the five days may be agreed but the rearranged date must not put any undue delay on the procedure.

Where the procedure is being considered against a trade union representative, the case should be discussed, after obtaining the employee's agreement, with a senior trade union representative or permanent union official.

#### **g) The Action Plan – targets and support**

If it is considered necessary at the informal stage and usually at the formal stage an action plan will be put in place to improve underperformance. Action plans are developed to individual circumstances and will vary, but would normally include clear expectations regarding performance (targets), the criteria for success, time scales and the support which has been agreed.

Whilst it is for the Headmaster / senior leader / line manager to determine the targets, it is important for the employee to understand what is required to achieve success and to help identify ways in which they can be supported. Any support agreed should form part of the action plan and will normally be for the school to organise. Examples of support for consideration:-

- Mentoring – either internal or external to the school (to enable the employee to work with confidence with a mentor, details of any meetings are confidential and no record of any meetings is required)
- Visits to other schools – focus to be agreed prior to visit
- Training courses
- Specific support from colleagues in other educational settings
- Observing other colleagues in School
- Whole school development opportunities
- Working with a mentor in School
- Observations – which should focus on both strengths and areas for development

#### **h) Criteria for success and monitoring**

Monitoring should include observations of a range of the duties and functions that are causing concern and should be spread over the evaluation period. Only persons with the appropriate training, skills or expertise should undertake observations. Whilst observations will normally be notified in advance, there may be circumstances where, due to the nature of the concerns, the Headmaster / senior leader / line manager decides that an unannounced observation is necessary. Where this is determined, it will be referred to in the action plan.

An objective record of the monitoring should be kept and used to assist with the evaluation of performance. It is advisable that brief notes, recording any actions, should be kept of any meetings agreed as part of the process, whether monitoring or supportive. Copies of any notes will be given to the employee at the end of the meeting or as soon as possible following the meeting. This enables an accurate and objective record to be available for any review meeting.

It is important that feedback on observations is given verbally and in writing. Whilst the observer may need time to reflect on what has been seen, it is important to recognise that the individual needs to receive feedback at the earliest opportunity. Normally, verbal feedback on any observations should be made within two working days, and written feedback within five working days of the observations.

## **i) Grievances**

Where a member of staff raises a grievance during the capability procedure the capability procedure may be temporarily suspended in order to deal with the grievance. Where the grievance and capability cases are related it may be appropriate to deal with both issues concurrently.

## **j) Sickness absence during the procedure**

If during the procedure the employee becomes absent due to ill-health, the Headmaster may contact the School's HR adviser, to ensure that the best course of action is followed. The individual concerned is advised to contact their trade union representative for further advice about absence and the procedure.

Where an employee is unwell, the School will take a considerate and sympathetic approach to the situation. However, sickness absence should not normally delay any part of the formal stage of the capability procedure. If during the procedure a member of staff is signed off as medically unfit for work, the employee should be referred immediately for Occupational Health assessment, including in the referral, details of the process and the stage reached in the procedure.

Where an employee is absent at the time of a scheduled meeting, the employer should act reasonably to offer a suitable alternative date, and the employee has to make a reasonable attempt to attend the meeting. However, where the employee continues to be unable to attend any meetings, the School may proceed in the employee's absence if delay would otherwise compromise the maximum time set aside for the procedure or where the employee's absence record is also a cause for concern. The employee's representative may attend on behalf of the employee where s/he is unable to attend and alternative times have been considered. Following any meeting taken in the employee's absence, the decision and the reasons for it should be communicated in writing to the employee, along with the right of appeal and any time-scales if appropriate.

## **k) Role of governors**

Governors should not normally be involved with a capability procedure. The exception to this is where governors are involved in considering an appeal against a warning, or where the procedure is against the Headmaster.

Where the procedures involve action against the Headmaster, the Chairman of Governors must ensure that there are sufficient governors available to carry out the functions of any capability or appeals hearings with impartiality. Knowledge of a situation does not necessarily constitute prejudice. However, involvement in a case will exclude any governor from the decision or appeals process.

## **l) Documentation**

When a decision is taken to move to a formal capability meeting, the employee will be notified in writing, enclosing information on:

- Where and when the formal capability meeting will take place, giving appropriate notice.
- That it is a formal capability meeting as detailed in the procedure (enclose a copy).
- The areas of performance which are causing concern.
- Who will be attending the interview.
- The right to be accompanied by a trade union representative or workplace colleague (the additional copy of the correspondence is for the representative).

Copies of any supporting information that the School may refer to at the formal capability meeting should be enclosed with the letter. The School should not assume that copies of documents already given to the employee are still in his/her possession. A final bundle of documents for a dismissal hearing should be made available to all parties no later than three working days prior to the hearing.

The employee should provide any documentation for consideration as soon as possible prior to the formal capability meeting. For a hearing to consider dismissal, the employee is expected to follow the same time scales as the employer, allowing the School sufficient time for the documents to be collated, paginated and distributed at least three working days prior to the dismissal hearing.

### **m) Retention**

The School will ensure that all written appraisal records are retained and stored in a secure place in line with their Retention and Disposal Policy

### **n) Warnings**

Where following a formal capability meeting or review meeting, a decision has been taken to issue a formal warning, this will be notified to the employee in writing. The letter should contain:

- The reason for the decision.
- The level of warning and its duration.
- Expected improvement, including time-scales and support (action plan).
- Consequences of a failure to improve or to make satisfactory progress.
- The impact, if any, on pay
- Right of appeal.

Any formal warning will normally be considered spent after a specified period, determined at the time of the warning. As a guideline, a period of one calendar year would normally be considered appropriate for a formal written warning.

### **o) Dismissals**

Any notice period will be in accordance with the employee's contractual arrangements, or the statutory period, whichever is greater.

## **3. Informal Stage**

Support and informal coaching should aim to encourage and help the employee to improve to a satisfactory standard. Any meetings to discuss concerns should be supportive and conducted discreetly with the employee being given an opportunity to respond to the concerns raised. If it is suspected that the employee's health may be affecting performance, a referral will normally be made to the School's Occupational Health provider, detailing the concerns.

Following the discussion, if it is considered necessary to take the matter further, an action plan should be put in place together with the date when progress will be reviewed. A copy of the action plan, the date for review and notes of the meeting should be given to the employee, together with a copy of this procedure, as soon as possible but no later than five working days after the meeting, allowing time for support to be arranged. It should be made clear to the employee that the formal procedure will commence if there is a failure to make satisfactory improvement. A period of four to eight weeks would normally be appropriate for the informal stage. Employees are encouraged at this stage to contact their trade union representative for advice.

Where an employee fails to co-operate with, or accept the support, s/he should be advised that the formal procedure may be instigated.

At the review meeting, taking into consideration any evidence, a decision should be made on whether to drop the matter, to extend the informal stage, or to convene a formal capability meeting.

## **4. Formal Capability Meeting**

At least five working days' notice will be given of the formal capability meeting. The notification will contain sufficient information about the concerns about performance and their possible consequences to enable the employee to prepare to answer the case at a formal capability meeting. It will also contain copies of any written evidence, the details of the time and place of the meeting and will advise the employee of their right to be accompanied by a companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

This meeting is intended to establish the facts. It will be conducted by the Chairman of Governors (for Headmaster capability meetings), the Headmaster or member of SMT (for other teachers) and Line Managers for support staff. The meeting allows the employee accompanied by a companion if they wish, 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/evidence already collected.

The person conducting the meeting may conclude that there are insufficient grounds for pursuing the capability issue and that it would be more appropriate to continue to address the remaining concerns informally or through the appraisal process. In such cases, the formal capability procedure will come to an end. The person conducting the meeting may also adjourn the meeting, for example if they decide that further investigation is needed, or that more time is needed in which to consider any additional information.

In other cases, the meeting will continue. During the meeting, or any other meeting which could lead to a formal warning being issued, the person conducting the meeting will:

- identify the professional shortcomings, for example which of the standards expected of teachers are not being met; the areas of performance which are causing concern.
- 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 need to be addressed, any 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 employee improve their 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 should normally be eight weeks. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place; and
- warn the employee formally that failure to improve within the set period could lead to dismissal. In very serious cases, this warning could be a final written warning.

Notes will be taken of formal meetings and a copy sent to the member of staff. Where a warning is issued, the member of staff will be informed in writing of the matters covered in the bullet points above and given information about the timing and handling of the review stage and the procedure and time limits for appealing against the warning.

## **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. 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 (see below).

### **Formal review meeting**

As with formal capability 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 employee of their right to be accompanied by a companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

If the person conducting the meeting is satisfied that the employee has made sufficient improvement, the capability procedure will cease. In other cases:

- If some progress has been made and there is confidence that more is likely, it may be appropriate to extend the monitoring and review period;
- If no, or insufficient improvement has been made during the monitoring and review period, the employee will receive a final written warning.

As before, notes will be taken of formal meetings and a copy sent to the employee. The final written warning will mirror any previous warnings that have been issued. Where a final warning is issued, employee 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 employee will be invited to a decision meeting.

## **6. 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 employee of their right to be accompanied by a companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

If an acceptable standard of performance has been achieved during the further monitoring and review period, the capability procedure will end and the appraisal process will re-start. If performance remains unsatisfactory, a decision, or recommendation to the Governing Body, will be made that the member of staff should be dismissed or required to cease working at the school.

The employee 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.

## **7. Appeals**

If a teacher feels that a decision to dismiss them, or other action taken against them, is wrong or unjust, they may appeal in writing against the decision within five days of the decision, setting out at the same time the grounds for appeal. Appeals will be heard without unreasonable delay and, where possible, at an agreed time and place. 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 and a copy sent to the employee.

The appeal will be dealt with impartially and, wherever possible, by managers or governors who have not previously been involved in the case.

The employee will be informed in writing of the results of the appeal hearing as soon as possible.