



# Capability Procedure

Version	Date Reviewed	Reviewed by	Next Review Date



This procedure is published as part of the staffing policies for the Governing Body of Brookfield School

**In this school, the decision to dismiss an employee under the Disciplinary and Dismissal Procedure has\*/has not\* been delegated to the Headteacher. (\*delete as appropriate).**

## 1. INTRODUCTION

1.1 All employees have a responsibility to achieve a satisfactory standard of performance and should be given all necessary help and assistance to achieve the required standard. It is the responsibility of line managers and supervisors to ensure that employees are aware of the required standard through reference to Job Descriptions/Person Specifications and other job related documentation. Managers must take care to set standards, which are realistic and measurable in respect of quality, quantity, time and cost. Careful attention to recruitment, selection and training will help to minimise instances of poor performance.

1.2 Standards of performance should be monitored and discussed as a matter of course utilising normal management processes which include any routine supervision sessions and may also involve appraisal and competency assessment processes in appropriate circumstances.

1.3 Where satisfactory standards are not being achieved it is essential at the outset to have discussed any shortcomings with the employee, to have put in place any support mechanism considered necessary, to have issued any necessary oral or written instructions regarding work performance and to have identified the improvement necessary within an agreed timescale. Support mechanisms may include supplementary training, coaching, monitoring, additional supervision by an experienced employee etc. If unsatisfactory performance continues beyond this, the matter may then be addressed within this formal procedure.

1.4 Part 3 of the Education Act 2002 and its associated School Staffing (England) Regulations 2003 contains provisions relating to disciplinary and dismissal procedures. These are incorporated in these procedures.

## 2. PURPOSE

2.1 This procedure has been developed to deal with all instances where the capability of an employee to perform their duties to an acceptable standard is seriously in question. The procedure is designed to ensure that employees are dealt with equitably and consistently. It is not intended to be used where an employee's poor performance at work is the result of wilful neglect of duty, failure to carry out reasonable instructions or any other act(s) of misconduct which will be considered under the School's Disciplinary Procedure.

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- 2.2 Nothing in this procedure shall detract from the rights conferred upon an employee by the provisions of the Employment Act 2008.
- 2.3 This procedure has been written on the understanding that the capability investigation is undertaken by the Headteacher, and dismissal decisions are taken by the Disciplinary and Dismissal Committee of the Governing Body. However, in accordance with the provisions of the Education Act 2002 and its associated School Staffing (England) Regulations 2003, the Governing Body may elect to delegate the power to make initial dismissal decisions to the Headteacher. If this is the case, there will be no Disciplinary and Dismissal Committee. Instead the initial dismissal decision will be taken by the Headteacher, and the appeal referred to the full Governing Body. For further details, see Annex 3.
- 2.4 In these circumstances, to preserve the integrity of the process, the Governing Body should delegate the responsibility for the capability investigation to another member of the School Management Team, thereby leaving the Headteacher available to consider what action should be taken at the end of the formal procedure, including dismissal.
- 2.5 In such cases, any reference to the role of the Headteacher within this procedure should be taken to mean the member of the school management team responsible for the capability investigation.
- 2.6 Where an employee refuses to co-operate with any aspect of this procedure, this may be deemed to be wilful non-co-operation and may be addressed directly through the School's Disciplinary Procedure.
- 2.7 This procedure will apply to all employees, excluding those employed under School Teachers Pay and Conditions.
- 2.8 No formal action under this Capability Procedure will be taken against any Trade Union representative/shop steward until the circumstances of the case have been discussed with a full time official of the Union concerned (unless the individual concerned chooses to waive this right).
- 2.9 This procedure should not in itself be used as the basis for establishing levels of standard performance. These standards should be set using normal management/supervisory processes including the use of formal productivity measures where appropriate. This Capability Procedure should only be used to address unsatisfactory performance where normal management/supervision/competency assessment processes, including the provision of training and support mechanisms, have failed to produce the necessary improvements in performance within agreed timescales (see Paragraph 1 above).
- 2.10 Line Managers and Supervisors should recognise that a sudden deterioration in the standard of work may be due to a number of factors some of which may be temporary in nature. Efforts should be made to resolve such problems by discussion and support.

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2.11 All issues involving competence matters falling within this procedure will be treated in the strictest confidence. Any correspondence or record of action taken will be retained in the employee's personal file and will not be recorded in any other manner, for example, in a school log, where there is a risk of information being disclosed to any person who does not have a genuine reason for access to the information. All reports presented to meetings involving governors of the school will only be circulated to persons who have a genuine reason for accessing this information.

### 3. THE PROCEDURE

#### 3.1 Stage 1 – Formal Performance Interview

- (i) Where the normal management and supervision processes, including the provision of necessary support mechanisms and the issuing of any oral or written instructions about work performance, have failed to produce necessary improvements within an agreed timescale, the manager shall prepare a note clarifying how the employee's performance falls short of expected standards. The note will outline the areas of concern about the employee's performance and the consequences of that poor performance. The note will also identify actions already taken and support given to help achieve an improvement in performance.
- (ii) The manager will give the employee at least 5 days notice of the interview, explain its purpose, inform him/her of the right to be accompanied by a Trade Union representative or work colleague and provide a copy of the note. The date of the interview should be mutually agreed with the employee and his/her representative. Where this is not possible and the employee's Trade Union representative or work colleague is not available on the specified date, the interview must be postponed for up to five working days if the employee can provide a reasonable alternative time within this five day period.
- (iii) The purpose of the interview is for the manager to explain to the employee:
  - the standards of performance required;
  - how the employee falls short of achieving these standards of performance;
  - the consequences of their poor standard of performance;
  - the improvement necessary and how the employee can be helped to achieve it;
  - how improvements will be monitored or assessed and over what period;
  - that if their performance does not improve to the required standard and is not maintained, this could lead to dismissal under this Procedure

For the employee to:

- achieve a clear understanding of expectations;
- give any explanation or comment in relation to their standard of performance;
- comment on how they can be further supported to improve.

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The outcome from this Formal Performance Interview will be formally recorded in writing and a copy provided to the employee. This letter will include:

- details of realistic measurable targets to be achieved and standards of performance to be attained;
- arrangements for support/training etc
- how performance will be monitored or assessed
- timescales for improvement and review period, including setting a date for the review meeting
- cautionary advice that failure to improve to the standard of performance required could lead to dismissal.

If, at the end of the monitoring period, it is determined that the required improvement has been achieved, this will be confirmed and followed up in writing. The employee will be informed that if at any time within a 12 month period of this confirmation, performance again falls below an acceptable standard, the formal procedure will recommence at Stage 2.

If, at the end of the monitoring period, it is determined that the employee's performance has not improved to the required standards, the manager will convene a Stage 2 Second Formal Performance Interview.

### **3.2 Stage 2 - Second Performance Interview**

- (i) The employee will be advised of this meeting in writing, and given at least 5 working days notice of the meeting. The employee has the right to be accompanied by his/her trade union representative or work colleague. The date should be mutually agreed if at all possible on the basis described in Paragraph 3.1(ii) above. The Director Childrens Services or his/her nominee shall be entitled to attend for the purpose of giving advice.
- (ii) At this interview, the manager will:
  - Review overall performance over the monitoring period;
  - Identify continued areas of underperformance or any further issues which will be considered;
  - Review support mechanisms previously identified

The employee will be given the opportunity to respond to any points raised in the meeting and comment on any issues affecting performance.

- (iii) If the manager considers that the employee has failed to, or has not continued to, meet the standards and objectives as set out in the written outcome of the interview and no adequate mitigating circumstances have been identified, one of the following options should be considered:
  - (a) Further formal review period

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The manager may determine that a further formal review period is necessary in which case the arrangements outlined in Section 3.1 above will apply. This formal period of monitoring may be repeated as many times as the manager deems necessary but should not normally exceed 12 months from the commencement of the formal exercise. If the required improvement is achieved, this will be confirmed in writing. The employee will be informed that if, at any time within a 12 month period of this confirmation, performance falls below an acceptable standard, the formal procedure will recommence at Stage 3. If the required improvement is not achieved, the manager will refer the matter to Stage 3. The employee will be informed in writing of this decision.

(b) Reassignment to alternative role

The manager, in consultation with the Headteacher or other appropriate person, may, in conjunction with the employee's Trade Union representative or work colleague, consider the possibility of a mutually agreed reassignment to a different post or consider a mutually agreed variation to the employee's existing contract of employment for a trial period of three months. The employee will be informed that the alternative post may be at a lower grade. If the trial is successful, the arrangements will be confirmed as permanent. If the trial fails, the manager will reconvene the formal performance review interview and will consider the other options available. Alternatively the manager may determine with the agreement of the employee that the trial period be extended by a maximum of three further months. Any search for a different post to which to reassign the employee should be completed within one month. If no acceptable post is available the manager should reconvene the formal performance review interview and consider the other options available.

Where a reassignment or a variation to the employee's contract is mutually agreed, the job description will be amended to reflect the revised duties and responsibilities and *advice sought from the Schools HR Team as to the appropriate grade/salary level for the post.*

Where a reassignment or variation to contract involves a reduction in pay, the rate of pay for the assigned post/duties will be effected three months from the date the employee's contractual variation is agreed. The three month period referred to in this paragraph includes the period of any trial. This period may be extended by up to three further months where it is agreed that the trial period should be extended by up to three further months.

(c) Stage 3 - Referral to Capability Hearing

The manager, following discussion where appropriate with the Headteacher or other appropriate person, may determine that the matter should be referred to the Disciplinary and Dismissal Committee or the Headteacher (where the Governing Body has delegated to the Headteacher the power to make initial dismissal decisions) for a capability hearing, which will give consideration to the employee's suitability for future employment. The Disciplinary and Dismissal Committee will normally comprise no fewer than three governors, although there is provision within the Education (School Government) (England) Regulations 1999 for there to be only 2 governors on the Disciplinary and Dismissal Committee in certain exceptional circumstances.

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Where the Headteacher has been directly involved in the capability process leading up to the consideration of dismissal – for example, through the direct monitoring the employee’s performance in relation to the level of performance expected and through the provision of support etc, it would not be appropriate for the Headteacher to make the initial dismissal decision. Therefore, to preserve the integrity of the capability process, referral for consideration by the Discipline and Dismissal Committee remains appropriate. However in large schools, it may be feasible, should the Governing Body elect to do so, to delegate the responsibility for the day to day monitoring of the employee under this procedure to another member of the School management team, thereby leaving the Headteacher available to consider what action should be taken, up to and including dismissal.

### 3.3 Capability Hearing

- (i) The Clerk to the Governors, the Headteacher (where the Governing Body has delegated to the Headteacher the power to make initial dismissal decisions) or other appropriate person will send a notification, in writing, to the employee informing him/her of the date, time and place of the Capability Hearing. Liaison should take place with the employee and his/her representative to ensure the hearing takes place at the earliest realistic date in accordance with the arrangements described in Paragraph 3.1(ii) above. The employee will be given at least 10 working days' notice of the hearing. The letter will contain details of the areas of competence which are to be considered and will inform the employee of his/her right to be accompanied by a trade union representative or other work colleague. The letter will advise the employee that he/she may be dismissed at the end of the Hearing. Copies of any documentation to be considered at the hearing including written reports, action plans, evidence of support and reviews and details of any witnesses to be called will be enclosed with the letter.
- (ii) If the employee wishes to present documentary evidence to the hearing or to call witnesses, details of these should be provided to the Clerk to the Governors, Headteacher or other appropriate person at least two working days in advance of the hearing.
- (iii) The Disciplinary and Dismissal Committee or the Headteacher (where the Governing Body has delegated to the Headteacher the power to make initial dismissal decisions\*) will be advised by a member of the Schools HR Team. The Clerk to the Governors or other appropriate person will produce a summary note of the Hearing.
- (iv) The procedure to be followed at the Capability Hearing (or Appeals Committee) is set out in Annex 1.
- (v) The options available to the Disciplinary and Dismissal Committee or the Headteacher are as follows:-
  - to take no further action
  - to direct that a further period of appropriate training, formal monitoring and review in accordance with the arrangements outlined in Section 3.2 should be

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undertaken. If this subsequently results in a further hearing, the case will be considered again by the Disciplinary and Dismissal Committee or the Headteacher.

- where the Disciplinary and Dismissal Committee or the Headteacher forms the view that the employee is not capable of undertaking the duties of his/her post, the Committee may:-

- (a) require the Headteacher on behalf of the School to seek alternative employment within the school which may include demotion\*. Where a suitable alternative post is identified the Disciplinary and Dismissal Committee or the Headteacher Hearing should be reconvened and the post should be offered to the employee, normally on a three month trial basis (but with the Committee/Headteacher having the option of prescribing that the trial should be for a maximum of up to six months if it considers this to be appropriate). If the trial is successful, the arrangements will be confirmed as permanent. If the level of performance at the end of the trial period is below the standard required, the Disciplinary and Dismissal Committee or the Headteacher Hearing will be reconvened in order to determine what action should be taken. In these circumstances, the Committee/Headteacher may proceed with dismissal. Also in circumstances where the offer of a trial has been declined by the employee, without, in the Committee/Headteacher's view, reasonable cause, the Committee/Headteacher should proceed with dismissal. Where no suitable alternative employment is found within a one month period, the Disciplinary and Dismissal Committee or the Headteacher Hearing should be reconvened and the dismissal effected with due notice from the date of the reconvened hearing.
- (b) Dismiss the employee from the service of the School, with due entitlement to the statutory/contractual period of notice.
- (vi) An oral decision will be given by the Disciplinary and Dismissal Committee/Headteacher wherever possible on the day. This will be confirmed in writing within three working days and this notification will summarise the main reasons for the decision. This notification will also set out the right of appeal against the decision.
- (vii) Where a decision is taken to dismiss the employee, the full contractual period of notice will be given and details for the employee's right of appeal will be set out. In the event of an appeal being registered, the period of notice will continue to run. If the appeal hearing is after the date of dismissal and the appeal is successful, the employee will be reinstated retrospectively to the date of dismissal.

#### **3.4 Right of Appeal**

- (i) An appeal must be made in writing to the Clerk to the Governors within five working days of receipt of the official notification of the Disciplinary and Dismissal Committee/Headteacher's decision.

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- (ii) An appeal against a decision of the Headteacher or Disciplinary and Dismissal Committee will be considered by an Appeals Committee of the Governing Body comprising no fewer than three Governors. The Appeals Committee will include no fewer members than the Disciplinary and Dismissal Committee. No member of the Disciplinary and Dismissal Committee will be a member of the Appeals Committee of the Governing Body. The appeal will be heard by the Appeals Committee as quickly as possible and wherever practicable no later than 20 working days from of the date of the receipt of notification of appeal.
  
- (iii) The Appeal date will be determined in accordance with the arrangements set out at Paragraph 3.1(ii) above and will provide a minimum of five working days notice of the date, time and place of the hearing. The documentation considered by the Disciplinary and Dismissal Committee/Headteacher together with the written decision will be placed before the Appeals Committee which will be advised by a member of the Schools HR Team.
  
- (iv) The appeal hearing will follow the same format as that used in the Disciplinary and Dismissal Committee or the Headteacher Hearing outlined in Paragraph 3.3.
  
- (v) The following decisions are open to the Appeals Committee:
  - (a) Disallow the appeal and uphold the original decision of the Disciplinary and Dismissal Committee/Headteacher.
  
  - (b) Allow the appeal and reinstate the employee to his/her former position.
  
  - (c) Reinstatement the employee to his/her former position with a recommendation for a further period of target setting, monitoring and review.
  
  - (d) Consider the possibility of a suitable alternative post in accordance with the principles set out in Paragraph 3.3(v)(a) above.

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ANNEX 1

**CAPABILITY HEARING/APPEALS PROCEDURE**

1. The following procedure is appropriate for any level of hearing including appeal.

NOTE: The Director of Children's Services or his nominee must be advised of any action which may result in dismissal and will be entitled to attend any Hearing/Appeal for the purpose of giving advice. The Headteacher or Disciplinary and Dismissal Committee have a duty to consider the advice of the Director of Children's Services before reaching a decision to dismiss.

2. PROCEDURE AT THE HEARING

- (a) The case against the employee will be presented by the Headteacher or other appropriate person (the presenter of the report) who will be entitled to call witnesses and present documentation to support the case.

Witnesses will only normally be present for the period during which they are required to give evidence directly to the Hearing

- (b) The employee and/or his/her representative and the person/Committee hearing the case will be entitled to question the presenter of the report and any witnesses called.
- (c) The employee and/or his/her representative will be entitled to present a statement of case and will be entitled to call witnesses to support the case.
- (d) The presenter of the report and the person/Committee hearing the case will be entitled to question the employee and any witnesses called.
- (f) The presenter of the report will have the opportunity to make a closing statement (No new evidence may be introduced at this stage)
- (g) The employee and/or his/her representative shall then also have the opportunity to make a closing statement (No new evidence may be introduced at this stage)
- (h) At the conclusion, all parties will withdraw except the person/Committee conducting the hearing, and if present, the Director of Children's Services representative and Clerk to the meeting who will deliberate in private. Should any parties need to be recalled to clarify any points of uncertainty, both sides should return notwithstanding that the point giving cause for concern relates to one party.
- (i) The parties will be informed of the decision and the employee will be given written confirmation of the decision, within 5 working days, which will also indicate any right of appeal.

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ANNEX 2

**ADDENDUM TO CAPABILITY PROCEDURE**

**School Staffing (England) Regulations 2003 – Delegation to Headteacher of authority to make initial dismissal decisions.**

These Regulations allow for Governing Bodies to delegate authority to make initial dismissal decisions to Headteachers. Therefore, the Headteacher becomes responsible for all initial disciplinary action up to and including dismissal.

Governing Bodies will need to take a decision as to whether they wish to delegate this responsibility. They need to bear in mind that the statutory guidance accompanying the Regulations specifies a series of circumstances where such an arrangement may not be appropriate. These are as follows:

- A Headteacher who is unwilling to accept this function and who has hitherto not been required to do so. The position could be reviewed on the appointment of a successor Head.
- Where the Headteacher has been directly involved in the disciplinary process leading up to the consideration of dismissal – for example, through investigating the alleged misconduct. Experience shows that this is invariably the case and therefore, referral for consideration by the Discipline and Dismissal Committee preserves the integrity of the disciplinary process. However, in large Schools, it may be possible to delegate the responsibility for investigation to another member of the management team, thereby leaving the Headteacher available to consider, what disciplinary action, up and including dismissal, should be taken. Appeals against disciplinary action should still be considered by the Appeals Committee.
- Where the Governing Body of a school with a religious character (i.e. Voluntary Aided, Foundation and Voluntary Controlled Schools) has agreed that Governor involvement will serve to preserve this character. Therefore, advice should be sought from the relevant Diocesan Authority.
- Where the Headteacher is themselves subject to disciplinary or capability procedures.
- Where the CSA may have made representations to the Chair of Governors on the grounds of serious concerns about the performance of the Headteacher.

Where a Governing Body does decide to delegate the authority to make initial dismissal decisions, they are strongly advised to consult with staff and their professional associations before finally confirming their decision.

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