



PERFORMANCE CAPABILITY PROCEDURES FOR SUPPORT STAFF

**Section 8 of Authority Guidelines
on Staffing Procedures for Community,
Voluntary Controlled and Special Schools**

SECTION 8

PERFORMANCE CAPABILITY PROCEDURES FOR SUPPORT STAFF

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8.5 PERFORMANCE CAPABILITY PROCEDURE - SUPPORT STAFF IN SCHOOLS (EXCLUDING METRO CATERING STAFF)

a) i) INTRODUCTION

Lack of capability is defined as a situation in which an employee fails consistently to perform his/her duties to a professionally acceptable standard. Performance capability can be assessed by reference to skill or aptitude.

The following procedure sets out a framework for dealing with cases involving incapability or other poor performance which is considered not to be attributable to a willful disinclination by the employee to carry out his/her duties efficiently or effectively, but which is thought to be attributable to a lack of skill, or health. In a case where it is considered that there is a willful refusal by an employee to carry out his/her duties on a proper basis, the matter should be dealt with under the school's separate disciplinary procedure.

It is an employee's responsibility to ensure that his/her work performance is maintained at a satisfactory level. Where an employee's work or omission is such as to call into question his/her capability the matter should be dealt with in accordance with the provisions of this procedure.

It should be noted that it is the responsibility of the school's management team to provide appropriate assistance, support and training in order to assist the employee to carry out his/her duties and responsibilities to an acceptable standard. The nature and amount of support necessary will depend on the circumstances of the particular case. Whenever appropriate there will also be support from LA officers.

Once an acceptable improvement in relation to the identified issue(s) has been achieved, at any stage in this procedure, the procedure should be halted and no further action taken.

The main emphasis of this procedure is to identify and assess failing professional standards as early as possible; to introduce a mutually agreed support programme; and to monitor and evaluate that programme to enable an employee to fully contribute to the aims of the school.

This recommended procedure is subject to the provisions of Education Legislation.

N.B. For Absence Capability issues refer to Section 11 – Management of Sickness Absence.

ii) **Poor Performance**

Poor Performance may arise when an employee does not have the ability to achieve or maintain the required standard no matter how hard he/she tries; e.g. an employee may have been over-promoted beyond a level of their abilities causing serious damage to their performance.

iii) **Recognising Capability Problems**

The recognition of capability problems is one of the prime responsibilities of school management. Headteachers should expect appropriate support from the LA and/or diocesan body.

Suggested methods of recognising capability problems are:

- ◆ Regular monitoring and support of performance by senior school management. Standards of performance provide a means of judging what is acceptable; they should be realistic and measurable in respect of quality, quantity, time and cost.
- ◆ Day to day management through the traditional practices of staff meetings, proper explanation of what is required, placing under a competent supervisor, training, etc.
- ◆ Regular pattern of complaints about an employee's performance.

Note: Serious instances of unacceptable behavior would be dealt with using the procedures identified in section b(vii) below. Before taking any action, Headteachers should contact an appropriate LA HR Officer.

iv) **The Role of the Headteacher**

- ◆ Introduction of methods to recognise capability problems.
- ◆ Defining appropriate method of investigation which may include the nomination of a member of the school's management team to carry out the informal stages of the Procedure on behalf of the Headteacher.
- ◆ Identification of appropriate support, monitoring and evaluation programmes by the school.
- ◆ Liaison with LA via the school's SIP and/or Diocesan Representative.
- ◆ Responsibility for both the informal and formal stages of the Capability Procedure, including the recording of agreed objectives and support programmes.
- ◆ Decision on whether to give a general overview of possible capability problems to the Chair of Governors, bearing in mind the Chair of

Governors will not then be allowed to sit on an Appeal Panel or to participate formally in any further procedures.

- ◆ Issuing all employees with a job description, normally agreed by the employee and appropriate to the post they occupy, setting out their duties and responsibilities.

v) **The Role of the Governing Body**

To nominate a committee who will deal with all capability issues which could be included within the remit of another Committee if so desired.

The Capability Committee shall consist of not less than 3 but no more than 5 members of the Governing Body (excluding the Headteacher) who have not previously been involved in the case, or have any other involvement, e.g. relationship to the employee subject to capability action.

To nominate a Staff Dismissal Committee and a Staff Dismissal Appeal Committee. Both to consist of 2 or 3 named members of the Governing Body who have not previously been involved in the case, or have any other involvement (see section 6 – Disciplinary Procedures).

vi) **Confidentiality**

The procedure must at all times be dealt with on a **professional and confidential** basis and members of the Capability and Staff Dismissal Committees should have regard to the following key points:

- ◆ During the hearing no view can be reached until the representations from all parties have been taken into account.
- ◆ Any information received outside of the process, prior to the hearing, must be discounted.
- ◆ Governors involved in hearings should report any attempts to influence them by anybody and declare as early as possible any issues which could be perceived as undermining their impartiality.
- ◆ Only the final decision should be reported to third parties.

Records need to be kept, detailing the action taken and the reasons for it, whether an appeal is lodged, its outcome and any subsequent developments. These records should be carefully **safeguarded** and kept **confidential**.

b i) **The Procedure**

Allegations of lack of capability call into question the continued employment of an employee, therefore, full consideration must be given to resolving any such problems both by informal and formal action. **Informal action is the discussions that take place within the school and the forms of support introduced to assist the employee in improving his/her performance.** Any subsequent formal action would be as set out under item (iv) below.

The following procedure sets out a framework for dealing with cases involving lack of capability or other poor performance which is considered not to be attributable to a willful disinclination by the employee to carry out his/her duties efficiently or effectively.

ii) **Scope**

The procedure applies to all support staff excluding Metro Catering staff employed by the Governing Body/LA to work at the school whether they be full-time or part-time.

iii) **Informal Capability Procedure Conducted by School Management**

There will be occasions when it is appropriate for an employee's performance to be discussed with him/her as part of normal day-to-day school management. However, where there is continuing concern it will be necessary to proceed to the following stages of the Informal Capability Procedure.

The following informal procedure should normally be achieved in no more than two terms but should be halted once an acceptable improvement in relation to the identified issue(s) has been achieved.

Stage 1

The employee should be made aware he/she is now in the informal capability procedures.

The employee has a right to be accompanied by a trade union representative or work colleague if they so wish.

During discussions any perceived under performance should be pointed out to the employee and discussed thoroughly. Clear guidance must be given as to what improvements are necessary to achieve an acceptable level of performance.

The Headteacher (or his/her representative) should explore any training requirements, or any personal reasons that are contributing to the problem. This should be a two-way conversation.

Every effort should be made to solve any difficulties or problems by informal means at this stage, but a record should be made of improvements agreed, steps recommended to achieve them and timescale for improvement both by the Headteacher (or his/her representative) and the employee. (A copy of this record should be kept by both the Headteacher (or his representative) and the employee, bearing in mind improvements should be achieved in no more than two terms.)

Stage 2

The follow up meeting should discuss improvements and any further support required. The employee has a right to be accompanied by a trade union representative or a work colleague if they so wish.

If there has not been an improvement in relation to the identified issue(s), or an acceptable level of improvement, the Headteacher (or his/her representative)

should discuss and agree with the employee concerned, and a LA HR Officer an appropriate support programme.

The support programme should be monitored at regular intervals with careful notes taken and a copy of the notes should be given to the employee as soon as is reasonably possible. This process should be undertaken in collaboration with the employee who at each stage should have the opportunity to contribute to the further development of the programme.

The employee should be informed that failure to undertake his/her duties attached to the post to an acceptable standard by the time of the next agreed meeting would necessitate formal procedures under the School's Capability Procedure and could ultimately lead to dismissal.

The Headteacher (or his/her representative) must be satisfied that the following points are confirmed in writing to the employee during this process:

- The support programme decided.
- A clear summary of the future performance expectation.
- Specific guidance, where appropriate, upon the improvements considered necessary.
- Details of arrangements for reviewing progress, including the time scale to be observed.
- A reminder that relevant records should be kept by all parties.

In the event of a decision being taken to move to the formal Capability Procedure the employee should be advised that this would be the only evidence that would be used.

iv) **Formal Capability Procedure Conducted by the Capability Committee of the Governors**

Documentation from both parties should only be given to the Capability Committee 3 working days prior to the Capability Hearing to allow the committee members to be better informed about the issues of the case.

The Capability Committee may request the provision of additional evidence and/or the attendance of relevant third parties. The employee may also request the attendance of relevant third parties.

The formal Capability Procedure allows a period of no more than two terms for an improvement to be achieved.

Stage 3

Unless the Headteacher is satisfied on the basis of the evidence which has been submitted to him/her that no further action need to be taken, he/she should deal with the matter in the following manner:

Headteacher's letter to the employee

- The employee should be notified by the Headteacher in writing and (unless varied by mutual agreement) given a minimum of **ten working days** notice that the hearing is to be heard by the Capability Committee under the terms of the School's Performance Capability Procedure. Only in exceptional circumstances should the hearing take place out of term time. The time chosen should also take into consideration the balance between an employee's working life and other factors.
- The employee is entitled to be represented by a trade union representative or a work colleague and this entitlement should be included in the above letter.
- The above letter should also include full details of the previously identified capability issues, including copies of any documentation to be used.
- The employee should also be advised in the above letter that he/she is able to request the attendance of third parties to substantiate any points they may wish to make in respect of the identified capability issue(s). Persons to be called by the Headteacher should be listed in the letter.
- The employee should also be advised that he/she should send to the Headteacher copies of any documents that he/she intends to refer to at the hearing together with a list of third parties requested to attend **not less than 5 working days before the hearing**.
- A copy of the above letter should be forwarded by the Headteacher to the Correspondence Clerk of the Governing Body and to the Director of Children's Services or his nominated officer well in advance of the hearing.
- In the case of a capability hearing being conducted with an employee who is an accredited official of a recognised trade union, consultation should take place prior to the above letter being sent with a senior official of their trade union.
- The Director of Children's Services, or his nominated officer, must be invited to attend the capability hearing for the purpose of giving advice. The Capability Committee must consider any advice given before reaching a decision.

During the Hearing

The Capability Committee may request the provision of additional evidence and/or attendance of relevant third parties. The employee may also request the attendance of relevant third parties.

- The Headteacher to put the case and call third parties if appropriate.
- The employee (or his/her representative) to ask questions of the Headteacher and third parties.

- The members of the Capability Committee to ask questions of the Headteacher and third parties.
- The employee (or his/her representative) to put his/her case and to call third parties if appropriate.
- The Headteacher to ask questions of the employee and/or his/her representative and third parties.
- The members of the Capability Committee to ask questions of the employee and/or his/her representative and third parties.
- The Headteacher to sum up.
- The employee (or his/her representative) to sum up.
- The Chairperson of the Capability Committee may adjourn the proceedings at any stage if it appears necessary or desirable. If adjourning for the purpose of enabling further information to be obtained he/she should specify the nature of that information. Any adjournment should normally be for a stated period.
- Following the summing up, both parties, together with their representatives and any third parties called, will withdraw. **Note: Third parties should only be present when giving evidence and should withdraw immediately afterwards.** If it is necessary to recall one of the parties for further information before a decision is taken both parties should be recalled if possible. The Director of Children's Services or his nominated officer, should remain during the Capability Committee's deliberations.
- On completion of the Capability Committee's deliberations the Chairperson should ask the employee and his/her representative to return and should announce the decision of the Capability Committee and the capability action, if any, to be taken.
- The decision of the Capability Committee should be one of the following:
 - a) To confirm the matter is being dismissed or cannot be substantiated and direct that all reference to the matter be removed from his/her records.
 - b) To change the duties of the employee as appropriate.
 - c) To impose a written warning or a final (or combined first and final) written warning.
- The Chairperson should also give an explanation for the decision and should explain the employee's right of appeal under the procedure.
- The Capability Committee should confirm the decision in writing as soon as is reasonably practical to the employee (copy to trade union representative and the Director of Children's Services), detailing the identified capability issue(s) and the action taken plus the employee's right of appeal to the Staff Appeals Committee of the Governing Body.

If a warning has been imposed the employee should be asked to acknowledge, in writing, that a warning has been given.

- The employee can appeal against the decision of the Capability Committee by sending a written appeal for the attention of the Correspondence Clerk to the Governors within 10 days of receiving confirmation of the warning with a copy to the Director of Children's Services (see 8.6 – "Appeals Procedure").

v) **Final Warning Assessment**

Once the period covered by the final warning has expired and an assessment has taken place and the outcome is that the employee has not improved, the employee must be suspended **with pay**, pending the arranging of a **Staff Dismissal Committee** (see section 6 – Disciplinary Procedure).

vi) **Cease to work at the school decisions by the Staff Dismissal Committee**

The Staff Dismissal Committee can only reach this decision following the issue of a prior final warning by the Capability Committee.

NB The Director of Children's Services, or his nominated officer and the Authority's Head of Legal Services (or his nominated representative) will be invited to attend the hearing of the Staff Dismissal Committee and of the Staff Dismissal Appeal Committee.

If the Staff Dismissal Committee propose that the employee cease to work at the school, the employee (or his/her representative) should be given the opportunity to make representations with respect to the proposal.

- Where the decision of the Staff Dismissal Committee is that an employee should cease to work at the school, a copy of the written notification to the employee setting out the reasons for the decision must be sent to the Director of Children's Services and must include the employee's right of appeal.

Under the Education Act 2002 such a decision is classified as an initial dismissal decision (IDD). Dismissal and notice period will be effective from the IDD although the employee still has the right of appeal against the decision.

- The LA will terminate the employee's employment within 14 days. If the employee is successful at appeal he/she will be reinstated. It is possible for an appeal to be conducted within the notice period.
- An employee who has been issued with a notice of dismissal could be potentially damaging to the school, pupils and individual teachers. In order to avoid such situations, the employee should be suspended on **full** pay until the notice period has expired.

Where an appeal is lodged but the decision to dismiss is upheld, the LA will dismiss without notice within 14 days of the IDD unless the employee submits a resignation before the end of the 14-day period.

vii) **Capability - "Extreme Cases"**

Undue delay may not always be in the interest of all parties. In extreme cases where the education of pupils is jeopardised, the period given for improvement after the date of a formal warning will be **no more than four weeks**.

Any proposal that an employee's performance was an "extreme case" where the education of pupils was jeopardised would only be accepted as such by the LA under the following conditions:

- a) the Headteacher will make this proposal supported by a member of the school's Management Team.
- b) the Director of Children's Services or his nominated officer does, through his/her personal observation and report, confirm the Headteacher's recommendation.

In such extreme cases procedures would commence immediately (as detailed in b(iv) and a final capability warning would be issued with a period of no more than four weeks being given for a significant improvement to take place. A right of appeal is available to an employee under the school's Capability Procedures.

viii) **Timescales**

In b(iii) the timescale is normally no more than two terms for the informal procedure; and in b (iv) normally no more than two terms for an improvement once formal procedures have been activated. The timescales adopted will be in accordance with the seriousness of the lack of capability of the employee. Consideration needs to be given to whether the problem is a specific or broader professional difficulty, whether it is of very recent concern or spanning a longer period of time.

This should not be seen as a four-term procedure.

ix) **Sick Leave Whilst Subject to Capability Procedures**

Should an employee take extended sick leave whilst subject to Capability Procedures, especially where the illness is brought on by the job, they will automatically be referred to the Authority's Independent Occupational Health Consultant.

In such circumstances either the capability procedures should continue where monitoring and assessment of performance has reached a stage where the absence of the employee would not significantly affect the outcome or ill-health procedures should be triggered. Capability Procedures should not be put "on hold" indefinitely and the Governing Body (or the Headteacher) must make reasonable and responsible judgements as to when to progress these matters if the monitoring and assessment of performance has been omitted through absence.

Reasonable steps should be made to enable an employee to attend all discussions outlined in this Procedure, but where an employee is unable to attend, these may proceed in the employee's absence, if delay would otherwise

compromise the maximum time set aside for the Procedure. In such circumstances a full account of the discussions should be provided in a letter confirming the decision taken.

The Governing Body would be entitled to consider absence due to sickness as forming part of the Capability submission.

x) **Capability and the Grievance Procedure**

Governors should note that no procedure should automatically take precedence over another. Complaints from an employee under the school based Grievance Procedure should not, as a general rule, be taken as a justification for delaying the Capability Procedure. Equally the Grievance Procedure should not be delayed by the Capability Procedure.

8.6 **Appeals Procedure**

The following sets out the format for the school's Appeals Committees.

N.B. In the case of a decision made by the Staff Dismissals Committee, the appeal must be heard by the Staff Dismissals Appeal Committee.

a) i) **The Appeals Committee**

Membership An Appeals Committee must be made up of named governors who were not involved in the decision of the relevant first committee.

The Director of Children's Services (or his nominated officer – and the Authority's Head of Legal Services (or his nominee) should be invited to attend the hearing and should be sent copies of all documents to be considered during the hearing.

Size Can be no less than the original relevant Committee.

Powers To decide an appeal against decisions taken by the Headteacher or relevant Committee. To confirm that decision, to impose a lesser penalty or to dismiss the case.

ii) **Procedure**

- Appeals must be made in writing, giving reasons for the appeal, by the employee within **10 working days** of receipt of the letter confirming the action taken. The letter should be sent to the **Clerk of the Governing Body**.
- An appeal will be heard by the relevant Appeals Committee.
- An appeal against a decision that an employee shall cease to work at the school can only be heard by the Staff Dismissals Appeal Committee.

- The employee has the right, if they so wish, to be accompanied by a trade union representative or any other person of their choice.
- The employee shall be given at least **10 working days** notice of the time, date and venue of the Appeals Hearing and will, at the same time, be supplied in writing with a further copy of the statement of the decision previously taken.
- If, as a result of the appeal, or for any other reason, disciplinary action is withdrawn, any written record of the matter will be expunged from the employee's file.
- Documentation from both parties should only be given to the Appeal Committee 3 working days prior to the Appeal Hearing to allow the Committee members to be better informed about the issues of the case.

iii) During the Hearing

- The Headteacher or Chair of the relevant first committee to put the case and call witnesses if appropriate.
- The employee (or his/her representative) to ask questions of the Headteacher or Chair of the relevant first committee and witnesses.
- The members of the Appeals Committee and the Director of Children's Services (or his nominated officer) to ask questions of the Headteacher or Chair of the relevant first committee and witnesses.
- The employee (or his/her representative) to put his/her case and to call witnesses if appropriate.
- The Headteacher or Chair of the relevant first committee to ask questions of the employee and/or his/her representative and witnesses.
- The members of the Appeals Committee and the Director of Children's Services (or his nominated officer) to ask questions of the employees and/or his/her representative and witnesses.
- The Headteacher or Chair of the relevant first committee to sum up.
- The employee (or his/her representative) to sum up.
- The Chairperson of the Appeals Committee may adjourn the proceedings at any stage if it appears necessary or desirable. If adjourning for the purpose of enabling further information to be obtained he/she should specify the nature of that information. Any adjournment should normally be for a stated period.
- Following the summing up, both parties, together with their representatives and any witnesses called, will withdraw.

Note: Witnesses should only be present when giving evidence and should withdraw immediately afterwards.

If it is necessary to recall one of the parties for further information before a decision is taken both parties should be recalled if possible. The Director of Children's Services (or his nominated officer) and the Head of Legal Services (or his nominee) should remain during the Appeals Committee's deliberations.

- The Appeals Committee may announce its decision to the Headteacher and/or the employee and his/her representative personally or subsequently in writing. Whichever method is chosen both parties should be informed in a like manner. A decision notified orally should be confirmed in writing by the Clerk to the Governors.
- The employee should be requested to acknowledge in writing receipt of any warning issued under any part of the procedure.

b) Cease to Work at School Decisions by the Staff Dismissals Committee

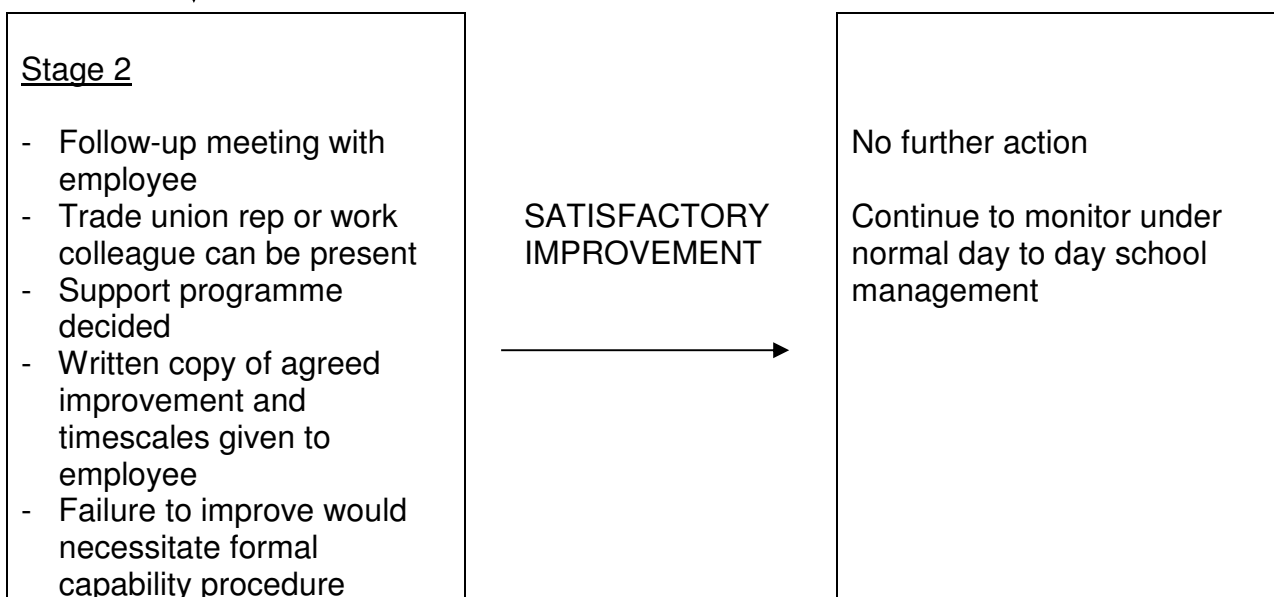
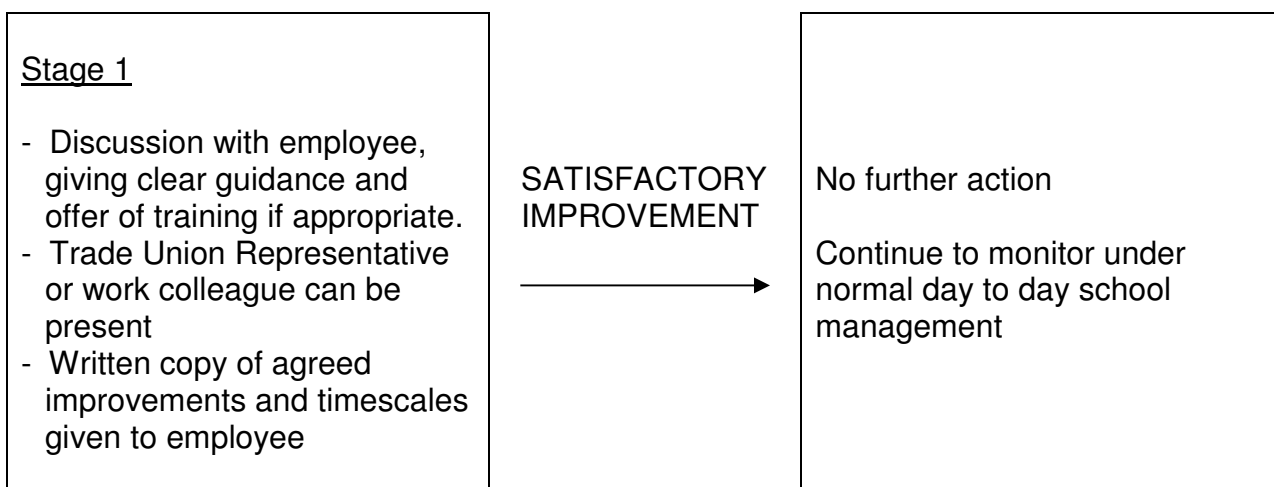
Termination of the contract of employment will be with pay in lieu of notice or without notice if the circumstances are such that the Authority is entitled to do so by reason of the employee's conduct, i.e. if gross misconduct has occurred.

In the case where an employee is not employed to work solely at the school, the LA will withdraw the employee from work at the school and consider the need to dismiss from other employment with the LA.

CAPABILITY PROCEDURE



Informal Capability Procedure (No more than two terms)



Formal Capability Procedure (No more than two terms)

