



Staff Capability Policy and Procedure

August 2018

1. Introduction

- 1.1 At Bourton Meadow Education Trust (BMET) we recognise that our excellence as a Trust is down to our people and their ability to perform in their roles. As a direct result of this we want to ensure that all employees are supported and developed so they can achieve and deliver the best work they are able to. This procedure is designed to encourage and maintain standards of capability, efficiency and work performance.
- 1.2 This document sets out the Trust's Capability Policy and Procedure and provides a structured mechanism for management to manage an individual's work performance which is falling below an acceptable level.
- 1.3 It is important that every effort is made to follow a fair procedure at each stage in the capability process and this document sets out guidelines which should be adopted by management to ensure that this is the case.
- 1.4 Performance Management is the process for assessing the overall performance of a member of staff in the context of the individual's job description and any relevant pay progression criteria, and making plans for the individual's future professional development in the context of the School's Improvement Plan. The review is undertaken once a year and at any stage during the performance management cycle, should there be concerns, the performance management cycle is stopped and the Capability Procedure would commence.

2. Scope

- 2.1 The Policy and Procedure set out in this document applies to all academy based staff under Teachers Pay & Conditions and those staff under the terms of Bucks Pay Employment Conditions or Northamptonshire County Council Employment conditions.
- 2.2 This policy should be operated in conjunction with the Trust's Policy for Performance Management or Appraisal for teachers. (Please note this does not apply to Newly Qualified Teachers – NQTs).

3. Roles and Responsibilities

- 3.1. Each Governing Body will have ultimate responsibility for the regulation of the capability of employees in each academy, adopt an appropriate Capability Procedure, decide whether or not to collaborate with one or more other Governing Bodies within the Trust in their arrangements for dismissal and delegate to the Headteacher the authority to manage this process. Arrangements to collaborate with schools or academies beyond the Trust should be with the agreement of Trust Directors.

In the case of the capability of the Executive Headteacher, the board of directors take responsibility for the process but act in exactly the same way as is described below for the governing bodies.

- 3.2 Each Governing Body will set up three different committees:

- A Warning Appeal Committee – used when the employee appeals against any decision other than dismissal
 - A Staff Dismissal Committee – set up to hear the final stage of the Capability Procedure where the Headteacher is not able to exercise their right to dismiss as they have been involved at an earlier stage
 - A Staff Dismissal Appeals Committee – set up to hear appeals against warnings or decisions to dismiss.
- 3.4 The Governing Body will also notify the Trust Directors of any capability meeting which could lead to dismissal and arrange for Trust Directors to notify the Secretary of State whenever an employee is dismissed on the grounds of capability.
- 3.5 The Trust Directors will write to the Chair of the Governing Body if it has a serious concern about the performance of the Headteacher and will at the same time send a copy to the Headteacher. The Headteacher will be given an opportunity to make representations to the Trust Directors about the report and will have the right to be accompanied (see section 10). The Trust Directors will write to the Local Governing Body to inform them of the action they intend to take.
- 3.6 The Headteacher has the authority to give formal warnings or dismiss through this procedure. At stage 3, where dismissal is a possibility, the Headteacher should be advised by a Governor and an HR Representative. The Headteacher will also identify those senior employees who have the authority to give formal warnings.
- 3.7 **The Headteacher and/or Chair of the Governing Body will:**
- a. Set and maintain clear and fair standards of performance at work.
 - b. Deal with under performance as it arises and inform employees when their work is falling below standard.
 - c. Bring to the attention of employees the Capability Procedure.
 - d. Monitor the process when the Capability Procedure is used in relation to any employee and report any action taken under the procedure as and when required by the council.
 - e. Be aware of and refer to the Health & Attendance Policy in terms of health related poor performance and seek medical advice where appropriate.
- 3.8 **Employees will:**
- a. Work with the Headteacher to resolve any problems which are identified in relation to their performance.
 - b. Co-operate with any investigation under the Capability Procedure.
 - c. Co-operate with all reasonable management instruction whilst the performance issues are being managed

4. Principles

- 4.1 The Policy and Procedure contained within this document is founded on the following principles:
- a. To ensure that employees know what performance standards are expected of them.
 - b. To ensure that performance standards are reasonable and achievable taking into account the employee's working hours, job descriptions and contractual terms.
 - c. To primarily help and encourage employees to improve unsatisfactory performance rather than impose sanctions wherever possible.
 - d. To provide appropriate development, training and support to assist with the above.
 - e. To ensure that it is understood that matters dealt with by way of the Capability Procedure are different from instances of misconduct.
 - f. To ensure that a fair structured process is applied consistently, that the employee's account is heard, that they are informed of their right to be accompanied, and that any formal steps taken are confirmed in writing stating clearly a right of appeal.
 - g. To ensure that matters are dealt with as quickly and reasonably as possible.
 - h. Not to discriminate against any individual in the application of this policy and procedure on the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, maternity and pregnancy, race, religion or belief, sex, sexual orientation, or other grounds protected in law (e.g. part-time worker status, trade union membership or HIV positive status).

5. The Law and Legal Implications

- 5.1 This policy takes account of the Employment Rights Act 1996 in ensuring that all employees are aware of the Capability Procedure and takes into account the ACAS Code of Practice which states that action should not be taken unless the case is fully investigated and the facts are promptly and fully established. The Teaching and Higher Education Act 1998 and Education Act 2002 places a responsibility on a council or trust to report dismissals on the grounds of capability as the Secretary of State can place restrictions such as suspension from teaching for up to 2 years or to issue a reprimand about future performance.
- 5.2 It is important to note that all those involved in managing the capability process are aware of the scrutiny under which actions may be placed if the matter does proceed to an employment tribunal.

- 5.3 Even where there is no real dispute as to the facts of a case and an employee is admitting incapability, there still needs to be a reasonable investigation and the importance of following the Capability Procedure cannot be overstated.
- 5.4 A dismissal by reason of capability will normally be considered fair if the employer has:
- a. Set reasonable standards of performance
 - b. Made these clear to the employee
 - c. Warned of the consequence of failing to meet them
 - d. Given support, training or both
 - e. Given reasonable time for improvement
 - f. Considered redeployment or other alternatives to dismissal

6. What Could Constitute a Capability Matter?

- 6.1 A capability matter arises when there are work concerns about an individual employee who is failing to carry out responsibilities or duties in a satisfactory manner and those failings are due to the employee's skills, aptitude and/or any other physical or mental quality. Capability cases may arise due to lack of professional awareness, inability to cope with what is considered reasonable workloads or being unable to meet identified standards. It may also be an inability to prioritise work, insufficient training or difficulty in adapting to change. In all these cases there must be facts to support these concerns which clearly demonstrate that acceptable standards of performance in carrying out the employee's role are not being met.

7. Procedure (See Section 7 of the Capability Toolkit for Managers for further details)

- 7.1 If at any stage in the informal or formal procedure an employee disputes the basis on which the concerns over capability have been raised, management should carry out an investigation in order to ascertain the facts. The results of this should then be reported to the employee concerned.
- 7.2 Although normal capability standards apply to the conduct of Trade Union officials who are employees, no action under the formal procedure identified below shall be taken against such officials until the circumstances of the case have been discussed with HR and a full time official of the Union concerned.
- 7.3 **Informal Procedure:**

Informal Capability meeting (or in the case of teachers Interim Review meeting) – Conducted by the Line Manager

The employee should be made aware that there are concerns about their performance, informed of what those concerns are and provided with constructive advice to assist in

overcoming those concerns. If possible reference should be made to notes of supervision meetings / or lesson observations where concerns have previously been highlighted and the employee should be provided with examples where their work has not met a satisfactory standard. Agreement should be reached about what support is required in order to improve performance to an acceptable standard and what the employee's commitment and responsibilities are towards achieving these standards. It should be clearly stated that failure to reach these performance standards, which will be determined via the objectives that are set, will result in the formal procedure being invoked. In some cases where the concern is so significant it may be acceptable to move straight to the formal stage.

7.4 **Formal Procedure:**

FIRST CAPABILITY REVIEW STAGE– Conducted by the Line Manager

(A possible outcome at the end of this stage is a first formal warning)

7.4.1 **First meeting**

Where the informal route has been unsuccessful in addressing performance the employee should be invited to attend a First Capability Review meeting. The principles remain the same as at the informal stage; the employee should be made aware of exactly what the concerns surrounding their conduct are and provided with the relevant evidence of unsatisfactory performance. The objective should be to resolve the capability issues. At the meeting a Performance Improvement Plan is discussed, agreed and recorded (see the Toolkit for pro forma). Time-scales are drawn up and agreed by both parties, in particular specific objectives should be set to be met with an identified period (the "review period"). The length of the review period will be whatever is considered reasonable with consideration given to the training or development required. Management should evaluate what training and support would assist the employee and discuss this with them. Ongoing feedback should be given to the employee about their progress towards meeting the objectives set. The employee should be made aware of the possibility that their case may progress to the next stage of the Capability Procedure and ultimately may lead to dismissal.

7.4.2 **Follow up meeting**

Following the agreed first review period the employee should attend a further meeting to discuss whether the objectives have been met. If the identified objectives are not met then a first Formal Warning should be issued within 5 working days of this review meeting. All warning letters should identify the precise nature of the capability issue and confirm the employee's right of appeal within 10 working days of the date of the decision letter.

7.4.3 Where the employee has not met the objectives set or where there is no appeal or the appeal has been unsuccessful, the line manager should then move to the second capability review stage.

7.4.4 **SECOND CAPABILITY REVIEW STAGE – Conducted by the Line Manager**

(A possible outcome at end of this stage is a final warning)

In the event that concerns still exist about the employee's capability, after issuing of the first formal warning, another capability meeting should be held. The steps detailed in 7.4.1 (the first meeting) and 7.4.2 (the follow up meeting) should be followed. In particular a second review period should be agreed and objectives set using the employee's Performance Improvement Plan. If it is established after this second review period that the objectives on the Performance Improvement Plan have not been met, or improvements have not been sustained, then a final written warning should be issued and if there is no appeal or the appeal is unsuccessful, the line manager should then move to the third capability review stage.

7.4.5 THIRD CAPABILITY REVIEW STAGE – Conducted by the Line Manager

(A possible outcome at the end of this stage is to progress to the Performance Capability Hearing)

In the event that concerns still exist about the employee's capability, after issuing of the final warning, another capability meeting should be held. The steps detailed in 7.4.1 (the first meeting) and 7.4.2 (the follow up meeting) should be followed. In particular a third review period should be agreed and objectives set using the employee's Performance Improvement Plan.

After this review period and if the agreed objectives have not been met, the line manager should advise the employee that a Performance Capability Hearing will be convened. This may be conducted by the Headteacher (if the Headteacher has not been involved at a previous stage) or the Staff Dismissal Committee. The employee must be advised at this stage that the hearing may lead to a dismissal.

7.4.6 Performance Capability Hearing– Conducted by Headteacher OR Staff Dismissal Committee (where the Headteacher has been involved at a previous stage)

(A possible outcome at the end of this stage is dismissal)

At this stage a hearing needs to be convened and both parties (management and the employee) will be given the opportunity to state their case and present evidence and mitigation. This hearing will determine whether there are any further actions the academy can take to assist the employee to continue to be employed in this role or if the employment should be terminated due to the employee's incapability to do the job they were employed to do. If the outcome of the hearing is that no further steps can be reasonably taken to assist the employee in performing their role to a satisfactory standard a letter informing the employee of the dismissal should be issued. The letter should contain the employee's right to appeal the decision.

For avoidance of doubt the statutory dismissal and disciplinary procedure will apply to the third meeting and HR advice should be sought to ensure that this is complied with.

7.5 Fast Track Capability cases – Particularly serious cases of incapability may be fast tracked. Cases suitable for the fast track procedure are those where it becomes clear that

an acceptable level of improvement is beyond the ability of the person assessed, or where there is a lack of co-operation with suggested methods to achieve improvement. In those circumstances it may be appropriate to deal with a case in a shorter time scale than would normally be envisaged, i.e. 4 weeks or less.

- 7.6 It is necessary to distinguish between capability issues which should be dealt with under the procedure and the exceptional circumstances where a capability issue may be dealt with under the Conduct and Discipline Policy. Where a performance error or defect is so serious that it causes extremely detrimental consequences (e.g. serious breach or failure to provide a safe working environment for children, young people and vulnerable adults or employees) and it has been brought about either willfully or as a result of severe negligence or carelessness on the part of the employee then the principles and policies in this procedure will not apply. Instead the principles and procedure for serious misconduct, as outlined in the Conduct and Discipline Policy, should be followed and this should involve a full investigation in line with the procedure identified in the Conduct & Discipline Policy. Where serious incapability of this nature is suspected your HR Service should be contacted for advice before proceeding.
- 7.7 Other than the specific instance identified above, it may be the case that it is an employee's misconduct alone which is causing unacceptable performance and in those circumstances the Conduct and Discipline Policy will apply.
- 7.8 If ill-health or a disability is affecting an individual's performance the employee should raise this with their manager so that this may be taken into account. If an employee is considered to have a disability then the case should be referred to HR and particular consideration will be given to whether reasonable adjustments can be made to enable the employee to maintain their job and improve performance.
- 7.9 **Alternatives to Dismissal**

Where an employee is facing the possibility of dismissal by reason of capability the following options should be considered:

- **Redeployment** to another post within the Trust. This is an option where the employee is judged capable of carrying out another job at their current or lower grade and where they agreed to take on the new job. If it is a lower grade post there would be no protection of salary. Redeployment into an alternative post is dependent on a suitable post being available which may be in open competition with other staff.
- **Demotion within the same job.** This is a possibility where the employee is not thought capable of working at their current grade but where the duties can be amended to reflect a lower grade and they agree to the amendments. There will be no salary protection on demotion.
- **Voluntary Early Retirement or retirement on the grounds of efficiency of the service.** This is only suitable in certain cases and your HR provider should be contacted for advice before proceeding.

8. Appeals

8.1 If an employee wishes to appeal against any formal action taken against them under the above stages they must do so in writing within 10 days of written notification of the decision.

Appeals may be raised on one or more of the following grounds:

- Procedure – a failure to follow procedure has had a material effect on the decision
- Decision – the evidence did not support the conclusion of the hearing officer
- Warning – too severe given the circumstances of the case
- Alternative action – should (or should not) have been considered

8.2 The employee should send their letter of appeal, together with the grounds of the appeal, to the Warning Appeal Committee or Staff Dismissal Appeal Committee, named in the letter confirming the outcome. If the employee, for whatever reason, appeals outside of the specified time limit they should include with the letter of appeal an explanation why the appeal is being presented late. In such circumstances the decision as to whether to hear the appeal or not shall rest with the relevant Committee (see above).

8.3 Once an appeal has been received in writing, an appeal hearing will normally be convened promptly, allowing at least 10 working days written notice of the hearing.

8.4 An appeal against a first warning will be considered by the Warning Appeal Committee who will review all the papers that were presented at the original meeting.

8.5 An appeal against a final written warning will be heard by the Warning Appeal Committee.

8.6 An appeal against a decision to dismiss will be heard by the Staff Dismissal Appeal Committee

8.7 At an appeal against a final warning or dismissal, where the grounds of the appeal are based on the severity of the disciplinary sanction alone, the role of the Warning Appeal Committee/Staff Dismissal Appeal Committee shall be to conduct a review of the case.

8.8 Where the grounds of the appeal are broader than an appeal against the sanction, the role of the Warning Appeal Committee / Staff Dismissal Appeal Committee shall be to conduct a re-hearing of the evidence and submissions made when the initial decision was taken, plus to consider all matters raised which are related to that decision whether or not they were known to the Headteacher/Chairman at the time the decision was made.

8.9 The Appellant shall be given notice in writing of the venue, date and time of the appeal hearing. Copies of any documents relevant to the case including documents which were not before the Headteacher/Chairman and which are intended for consideration at the appeal hearing will be exchanged at least 5 working days in advance of the hearing.

8.10 The Warning Appeal Committee/Staff Dismissal Appeal Committee hearing the appeal have a broad discretion. They may uphold the decision of the hearing, revoke it in its entirety or substitute a lesser or a greater penalty. For example, substitute a final written warning for a dismissal.

8.11 The effect of a successful appeal against dismissal will be that the employee is reinstated and their continuity of employment is preserved.

9. Dealing with Absence - Please refer to the Health & Attendance Policy

9.1 There is a clear distinction between the employee's inability to perform his/her job and the effect of persistent or long term sick leave on his/her role. The latter scenario is not to be confused with the employee failing to perform the role to an acceptable and satisfactory standard. For all cases involving extended sick leave please refer to the Health & Attendance Policy.

9.2 In cases where you suspect health is a mitigating factor in the poor performance and on further medical investigation this proves not to be the case then the Capability Procedure should be followed.

9.3 In cases where long-term sickness appears to have been triggered by the commencement of the formal Capability Procedure, Occupational Health advice should be sought. In general terms a sympathetic and considerate approach should be taken but this should not necessarily preclude a decision to terminate employment on capability due to ill-health. However, it will still be necessary to give the employee the opportunity to improve their performance.

9.4 In the cases of ill-health where dismissal is being considered, this process should be dealt with at the third Capability Review Meeting stage.

10. Right to Representation

10.1 At any of the formal capability review meetings an employee has a right to be accompanied by their trade union representative or work colleague and they should be informed of this. In the context of any informal meeting representation is acceptable if both parties agree to this.

11. Probationary Periods - for more detailed guidance see the Toolkit.

11.1 **Teachers:** there is no probationary period for teachers. The employee should be made aware of any concerns in performance using the Capability Procedure.

11.2 **Overseas Qualified Teachers:** there is no probationary period for Overseas Qualified teachers. The employee should be made aware of any concerns using the Capability Procedure.

11.3 **Newly Qualified Teachers (NQTs):** NQT status requires the academy to provide a statutory one year induction which includes a 1st term, 2nd term and 3rd term formal assessment. During each term the academy must be able to demonstrate that they have followed a full induction process, detailed support and mentor training. The 3rd term, if successful, will include a full and final recommendation to the National College for Teaching and Leadership.

If the induction has not been successful the academy must be able to demonstrate very clearly where the teaching and learning has not been adequate. The NQT will have the right of appeal against any decision not to confirm them in post.

11.4 **Support Staff:** The purpose of a probationary period is to provide a supportive environment in which a new employee's suitability for employment is being fairly assessed. The intention is that new employees are able to settle in quickly and begin making a contribution to the Academy. With that in mind during the probationary period the employer and the employee will work together to achieve the following:-

- providing a full and developmental induction, that is planned to meet both the individual's and the organisation's needs
- setting clear outcomes for and expectations of personal performance
- ensuring open communication about performance
- providing appropriate training and support
- managing performance/capability issues promptly, effectively and fairly

11.5 The procedure to be used is as follows, given that we seek to ensure that employees are able to settle in and make a contribution to the academy:

- Induction
- First Review meeting at 10 weeks
- Final Review meeting at 20 weeks –confirmation or non-confirmation of appointment.
- Appeal to Staff Dismissals Committee

Induction and First Review will be managed by the line manager or Headteacher. Final Review meeting will be managed by the Headteacher or Chair of Governors.

11.6 Agency staff are dealt with separately and via their substantive employer.

11.7 In the case of misconduct during the probationary period please refer to the Conduct and Discipline Procedure.

Review Date: August 2019

Trust Director signature:

Name

Date