

# Broadwood Primary School



## Procedures for Managing Under Performance (Capability)

Last reviewed	September 2021
Reviewed by	Full Governing Body
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# Procedures for Managing Under Performance

## 1 Scope

This procedure is recommended for adoption in full by the governing bodies of all community, voluntary controlled and foundation trust schools.

Voluntary aided schools may wish to adopt the model policies provided by the Catholic Education Service (CES) or National Society respectively.

Academies may choose to adopt this model policy for use in their establishment.

## 2 Purpose

The purpose of this procedure is to ensure that schools deal with cases of under performance in an appropriate, fair and consistent way and support their employees to achieve and maintain an acceptable standard.

There are three separate parts to this procedure:

- Section A: procedure to address under performance of support staff during their probationary period;
- Section B: procedure for Early Career Teacher s failing to meet the required standards during their induction period; and
- Section C: capability procedure for support staff outside their probationary period and teachers at any stage of their employment failing to achieve an acceptable standard of performance.

## 3 Legal considerations

- **Early Career Teacher s (ECTs):** It is a statutory requirement that ECTs who wish to work in maintained schools undertake a compulsory period of induction. During the induction period the ECT has to demonstrate that they continue to meet the standards of Qualified Teacher Status (QTS) and meet all the core standards for teachers.
- **Capability procedure:** schools must have an appraisal policy for teachers and a policy covering all staff which deals with lack of capability. This model procedure meets the requirements of the DfE's model policy.
- **Dismissal on grounds of capability:** Employers need to act reasonably when dealing with issues of under performance. Capability is one of the five potentially fair reasons for dismissal in employment law but the decision needs to be reasonable based on the facts and the employer needs to have followed a fair procedure.

## 4 Roles and responsibilities

- **Governing Body:** The governing body has overall responsibility for ensuring that there are appropriate procedures in place for managing under performance/capability and that all staff are aware of them.
- **Head Teacher:** Where the governing body has delegated the responsibility for dismissal to the head teacher, s/he is responsible for making decisions that could result in the dismissal of an employee for the reason of capability.

In all cases the head teacher (or other manager) is responsible for conducting formal interviews and evaluation meetings with the employee where there are concerns about performance. This could result in the issue of warnings. S/he is also responsible for identifying the standards of performance required from the employee, ensuring that there are suitable arrangements in place for support and training and that performance is monitored and evaluated. Normally the decision to continue the procedure should be taken by the head teacher or by the line manager in consultation with the head teacher. If there is a difference of opinion, the head teacher's view should prevail. Where there are concerns about the head teacher's own performance, these responsibilities will be undertaken by the governing body and the postholder designated as Chief Education Officer should be kept informed.

- **Employee representatives:** Where an employee has the right to be accompanied to a meeting or hearing, s/he can be accompanied by a fellow worker or trade union representative. The recognised trade unions in Newcastle are ASCL, ATL, NAHT, NASUWT and NUT for teaching staff and GMB and Unison for support staff. Normally no action should be taken under this procedure against a trade union representative until the circumstances of the case have been discussed with the full-time or senior branch official of the union concerned as this may be seen as an attack on the union's functions. After the employee's permission has been obtained, the post holder designated as Chief Education Officer should be notified immediately so that discussions with the trade union can take place.
- **Local authority (LA):** School achievement partners and other specialist advisers may provide advice to the school on any aspect of this procedure and, where appropriate, assist with the process including observation, monitoring and providing support.

Where the LA has serious concerns about the performance of a head teacher, a written report must be sent to the chair of governors and copied to the head teacher. The chair must notify the LA in writing of the action s/he proposes to take.

- **Chief Education Officer:** The postholder designated as Chief Education Officer has the right for his/her representative to attend and give advice at any meeting where dismissal may be considered.

## 6 Monitoring and review

Feedback is encouraged from governing bodies and head teachers on the effectiveness of this procedure. It will be reviewed on a regular basis to ensure it is appropriate in light of recommended best practice and complies with statutory regulations. In the event of any conflict with statutory regulations, the legal provisions will have precedence over this procedure in all cases.

Governing bodies should monitor the application of this procedure, particularly to ensure that their practices comply with it and are not discriminatory.

Revision Record of Published Versions			
Author	Creation Date	Version	Status
HR Services	26 March 2012	1.0	Draft for consultation
	<b>12 April 2012</b>	<b>1.1</b>	<b>Amendments</b>
	26 April	1.2	Amendments
HR Services	January 2017	2.0	Update/Refresh

## Section A - Under performance during the probationary period of support staff

### A1 Application of probationary period scheme

- It is the policy of the City Council and the governing bodies of voluntary aided schools that new entrants to local government have a probationary period of six months. The purpose of probation is to assess the employee's suitability and capability to perform in their job role. A series of progress meetings should take place during the probation period.

### A2 Concerns arising during the probationary period

- If the employee's performance is not satisfactory, the head teacher must discuss this with the employee at the progress meeting and give them the opportunity to respond. Any requirements for additional training and support should be identified and an appropriate plan agreed. The head teacher should explain the arrangements that will be put in place to monitor and review the employee's performance.
- If the head teacher considers at any point during the probationary period that the employee's performance is such that they may fail their probationary period, they must warn the employee that failure to achieve an acceptable standard of performance may result in their

dismissal. If the employee does not achieve an acceptable standard, a hearing must be convened to consider terminating the employee's contract on the grounds of capability. The arrangements set out in Section D 'Holding dismissal hearings and handling dismissal appeals' below will apply.

## **Section B – Unsatisfactory progress during the induction period of Early Career Teacher**

### **B1 Application of induction period**

The arrangements that apply to the monitoring, support and assessment of ECTs during their induction period are set out in the DfE Statutory Guidance for appropriate bodies, local authorities, head teachers, school staff and governing bodies'

### **B2 Unsatisfactory progress during the induction period**

- If the ECT is not making satisfactory progress, the head teacher will ensure that there is an immediate stepping up of support systems. These may include, for example, setting more specific or shorter-term objectives, closer monitoring and recording of progress. These concerns must be communicated quickly to all those with responsibilities in the induction process including the ECT and the local authority. Action should not be delayed until a formal assessment meeting takes place.
- If there are still concerns about the ECT's progress at the next formal assessment point, the head teacher will complete the assessment form indicating that at their current rate of progress the ECT is at risk of not completing their induction satisfactorily and send it to the local authority. The report should include brief details of identified weaknesses, agreed objectives, planned support and the evidence used to form the judgement. The head teacher will explain to the ECT that if s/he fails to complete the induction period satisfactorily that s/he is no longer eligible to be employed as a teacher in a maintained school and steps will be taken to dismiss him/her on the grounds of contravention of a statutory enactment.
- If the head teacher recommends at the final assessment point that the ECT has failed to satisfactorily achieve the required standards, the head teacher must complete the relevant form and send a copy to the local authority and the ECT. The ECT may send written representations to the local authority within 10 working days.
- The local authority must decide within 20 working days of receipt of the form whether or not the ECT has satisfactorily completed their induction period or if their induction period should be extended. The local authority must write to the ECT, head teacher and NCTL within 3 working days of their decision. If the decision is that the ECT has failed

their induction or the induction period should be extended the letter must include the right of appeal to the NCTL.

- The governing body must take steps to dismiss the ECT within 10 working days from the date when the ECT gives notice that they do not intend to exercise their right to appeal or from the date when the time limit of 20 working days for appeal expired without an appeal being brought.
- If the ECT has appealed to the NCTL, the governing body must take steps to dismiss them within 10 working days of notification of the rejection of the appeal. During the time up to the notification of the outcome of the appeal the ECT must not take responsibility for a class or teach a subject to a group of children who are not also taught that subject by a qualified and experienced teacher at the school.
- If steps are taken to dismiss the ECT, a hearing must be convened to consider terminating the employee's contract on the grounds of contravention of a statutory enactment. The arrangements set out in the 'Procedure for Dismissal for Contravention of a Statutory Enactment or Some Other Substantial Reason' will apply.

### **B3 Dismissal**

- If the decision of the Local Authority (appropriate Body) is that the teacher has failed to satisfactorily complete the induction period and the teacher:
  - Gives notice that they are not appealing; or
  - The time limit of 20 working days for appealing has expired; or
  - Appeal to the NCTL but is unsuccessful

Then the employer must terminate the teacher's employment in accordance with Paragraph 18(3) of the Education (Induction Arrangements for School Teachers)(England) regulations 2008 so that the termination takes effect within the period of 10 working days.

### **B4 Relationship with capability procedure**

- Where the ECT's performance is judged to be seriously affecting the education of children, the head teacher may instigate the capability procedure in Section C at any stage before the end of the induction period. This is subject to the following:
  - the ECT's performance has been monitored;
  - the ECT has been clearly advised about the aspects of their practice which are causing concern and understands the improvements that are expected;
  - a reasonable time-limited period of at least four weeks of structured support/training, monitoring, evaluation and evidence gathering has taken place, giving the ECT an opportunity to improve; and

- the ECT has been given an informal warning that failure to improve may lead to entry to the formal capability procedure and that this could result in their dismissal.
- The induction support programme continues in parallel with the capability procedure.
- Dismissal may take place before the end of the induction period. If steps are taken to dismiss the ECT, a hearing must be convened to consider terminating the employee's contract on the grounds of capability. The arrangements set out in Section D 'Holding dismissal hearings and handling dismissal appeals' below will apply.

## **Section C - Capability procedure for teachers and support staff**

### **C1 Instigating the capability procedure**

- **It is very important that concerns about under performance are raised in the appraisal process and the teacher is given an opportunity to improve prior to the matter being dealt with as part of the capability procedure.**
- This procedure applies only to teachers (including head teachers) and support staff about whose performance there are serious concerns that the appraisal process has been unable to address. This includes where:
  - concerns about performance have been raised under the appraisal process but the employee has not achieved an acceptable standard of performance following a period of support and monitoring;
  - concerns about performance are such as to question the employee's overall satisfactory execution of their duties;
  - the employee expresses discontent or indifference in relation to concerns about their performance in the appraisal process;
- Where the Capability Procedure is instigated, this operates instead of the appraisal process.

### **C2 Formal Capability Meeting**

#### **C2.1 Formal Meeting**

- a) The Formal Meeting initiates the Capability Procedure. This meeting is intended to establish the facts. At least five working days' notice (or seven consecutive days out of term- time) of the interview will be given. The employee has the right to be accompanied at the meeting by a trade union representative or fellow worker. The notification will contain sufficient information about the concerns about performance and their possible consequences to enable the teacher to prepare to answer the case at a formal capability meeting. It will also contain copies of any written evidence.

- b) The meeting will be conducted by the Chair of Governors (for head teacher capability meetings) or head teacher (for other teachers).
- c) At the meeting the employee will be given opportunity to respond to concerns about their performance. If it becomes clear that further investigation is needed, the meeting should be adjourned for an appropriate length of time.
- d) During the meeting, the person conducting the meeting will:
- identify the professional shortcomings, for example which of the standards expected of teachers are not being met;
  - give clear guidance on the improved standard of performance needed to ensure that the employee can be removed from formal capability procedures (this may include the setting of new objectives focused on the specific weaknesses that 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 in straightforward cases could be between 4 and 12 weeks 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.
- e) At the end of the interview the person conducting the meeting should adjourn the meeting and consider all the evidence including representations from the employee. S/her should then decide to either:
- drop the matter if the concerns are unfounded or ensure that the issues are addressed under the appraisal process, if appropriate;
- OR**
- issue a Written or Final Written Warning where the concerns about the standards of performance are justified.
- f) The decision about which level of warning to issue will depend on the seriousness of the problem. If performance is unsatisfactory a Written Warning should normally be issued. In cases of particularly serious concerns, a Final Written Warning may be issued.
- g) If the level of warning issued is a Written Warning the person conducting the meeting should identify the timescale for improvement and set a date for a Formal Review Meeting at the end of the Monitoring and Review Period. (See Section C2.2); if a Final Written Warning is issued the person conducting the meeting should identify the timescale for improvement. (See Section C2.3)



- h) A letter must be sent to the employee within five working days of the formal interview stating the level of the warning issued and the timescale for improvement. This should record the main points discussed at the meeting eg points in C2.1 d) above and include the right of appeal.
- i) The employee must submit any appeal to the chair of governors within five working days of receiving the letter (or seven consecutive days out of term time). The appeal should be heard within 10 working days of receipt of the appeal (or 14 consecutive days out of term time) and must not interrupt the progress of the procedure.

## **C2.2 Monitoring and Review Period following a formal capability meeting**

- It is for the school to determine the set period. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place.
- The length of the Monitoring and Review Period will depend on the circumstances of the individual case. In most cases, 10 to 12 weeks should be sufficient. In the more serious cases this may be as little as 4 – 6 weeks.
- If good progress is being made the head teacher or person managing the case can decide to extend the timescale for improvement. Any changes must be recorded in writing.
- During the Monitoring and Review Period regular observation, monitoring and evaluation of the employee's performance will take place with guidance, training and support provided to the employee, as appropriate. This should be reasonable and proportionate to the seriousness of the case
- Feedback and guidance to help the employee improve should be offered. Interim review meetings should take place during this stage and employees can attend these meetings with a work colleague or Trade Union representative
- The period for improvement may be shortened during this stage, if appropriate, eg, where the matter becomes more serious or where there is a lack of co-operation etc.

### **C.2.3 Formal Review Meeting**

- No notice of the Formal Review Meeting is required at the end of this stage if the date was set at the Formal Meeting. If not notice requirements are in accordance with C2.1 a) above.
- At the end of the Formal Review Meeting the head teacher or person managing the case should adjourn and consider all the evidence. If the person conducting the meeting is satisfied that the teacher has made sufficient improvement, the capability procedure will cease and the appraisal process will re-start. 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 teacher will receive a final written warning.
- Where a Final Written Warning is issued, the head teacher will use the remainder of the meeting to set out the arrangements for the Final Assessment Stage in accordance with C2.1 d) above.
- A letter must be sent to the employee within five working days of the meeting in accordance with C2.1 h) above.
- If the employee wishes to appeal they must do so in accordance with C2.1 i) above.

### **C2.4 Monitoring and Review Period (after final written warning)**

- The Monitoring and Review Period takes place for 4-6 weeks immediately after the Formal Capability Meeting. Alternatively this stage takes place immediately after the Formal Meeting where the employee was issued with a Final Written Warning at that meeting.
- Monitoring, observation, assessment and training and support will be in accordance with C2.2 above.
- At the end of this stage the Head Teacher (or other person managing the case) should review the position and decide whether the employee is operating at an acceptable level of performance or whether there is still continued concern about the employee's performance.

### **C.2.5 Dismissal Hearing**

- If there is still continued concerns a hearing to consider the employee's dismissal on the grounds of capability should be arranged. See Section D 'Holding dismissal hearings and 'handling dismissal appeals'

### **C3 Previous warnings**

Where an employee has previously been subject to capability proceedings, and it becomes necessary to instigate the capability procedure again, it may be appropriate to convene a formal meeting and issue a final written warning.

### **C4 Retention of Records**

Schools must provide information on request to any schools to which a teacher or head teacher has applied to work, in order to confirm whether they have been the subject of capability procedures in the previous 2 years. Records will therefore be maintained for a period of 2 years.

### **C5 Recording Warnings**

Where a formal warning is issued and no appeal is received or the appeal is rejected, the head teacher must ensure that this is entered into Manager Self Service (MSS) for the purposes of equalities monitoring.

## **Section D - Holding dismissal hearings and handling dismissal appeals**

### **D1 Notification of dismissal**

- is proposed to dismiss them and offer the employee an opportunity to make representations to the person(s) to whom initial dismissal decisions are delegated. Notice of at least 5 working days (or 7 consecutive days out of term time) must be given for a dismissal hearing. The employee must be informed that they have a right to be accompanied by a trade union representative or fellow worker.
- Any papers that the management representative wishes the delegated person(s) to consider at the hearing must be circulated to all parties at least 5 working days before the hearing (or 7 consecutive days out of term time). A list of any witnesses that the management representative wishes to call must also be provided.
- Any papers and a list of witnesses from the employee must be circulated to all parties prior to the hearing.

### **D2 Dismissal hearing**

- A suggested format for the dismissal hearing is included in Annex 2 below.

- The hearing is an opportunity for the employee to present their views and ask questions of the delegated person(s) considering the dismissal and any management representative.
- Both the employee and the management representative may present and ask questions of witnesses in order to further explain their case. Witnesses should only be present for so long as they are giving evidence or answering questions.
- In reaching a decision to dismiss, the delegated person(s) must satisfy themselves that they have considered all actions short of dismissal (including redeployment) and have no reasonable alternative but to dismiss.

### D3 Confirming the outcome of the hearing

- Following the hearing the delegated person(s) must inform the employee (and their representative) in writing of their decision and reasons for it within five working days. If the decision is to dismiss the employee, the letter must set out the employee's right to submit an appeal to the chair of governors within five working days (seven consecutive days out of term time).

### D4 Notice

- If the decision of the dismissal hearing is that the employee should be dismissed, appropriate notice must be issued to the employee. Community schools should notify the local authority which will issue notice to the employee within 14 days. Voluntary aided and Foundation Trust schools must issue the notice letter themselves.
- The period of notice to which employees are entitled is as follows:
  - **Support staff:** the greater of statutory notice of one week's notice per year of continuous service up to a maximum of 12 weeks or contractual notice of one month;
  - **Teachers:** the greater of statutory notice of one week's notice per year of continuous service up to a maximum of 12 weeks or contractual notice of two months if ending on 31 December or 30 April or three months if ending on 31 August;
  - **Head Teachers:** the greater of statutory notice of one week's notice per year of continuous service up to a maximum of 12 weeks or contractual notice of three months if ending on 31 December or 30 April or four months if ending on 31 August.
- Where an employee is already under notice, for example because they have a fixed-term contract and notice was provided in the original appointment letter, there is no requirement to issue additional notice unless the contract will end earlier than expected.

- Where an employee is dismissed and no appeal is received or the appeal is rejected, the head teacher must ensure that this is entered into Manager Self Service (MSS) for the purposes of equalities monitoring.

## **D2 Handling appeals against dismissal**

- If the employee appeals against the decision, the school should notify the employee in writing of a date for the appeal hearing within five working days of receipt of the appeal (seven consecutive days out of term time). At least five working days' notice (or seven consecutive days out of term time) should be given to the employee of the appeal hearing and they should be informed of the right to be accompanied by a trade union representative or fellow worker.
- Any papers that the management representative or employee wishes to refer to at the hearing must be circulated to the appeals panel prior to the hearing. Any new written evidence not previously provided for the dismissal hearing by management or the employee must be circulated to all parties.
- The appeal hearing can take place during the employee's notice period. If they are successful in their appeal, notice will be rescinded. Exceptionally, the appeal hearing may be held after the dismissal has taken effect. If the employee is successful in their appeal, they will be reinstated from the original date of dismissal.
- The decision of the appeals panel must be confirmed in writing to the employee within five working days of the hearing; the panel's decision is final and there is no further right of appeal.

## **Annex D1: Suggested Format of the Dismissal Hearing**

The normal format of a dismissal hearing is described below; for an appeal hearing items (2) and (3) are reversed. The chair of the hearing has discretion to vary the order of proceedings.

Requests for a brief adjournment of the hearing by any party should not be unreasonably refused.

### **1 Introduction**

The chair introduces the person(s) to whom initial dismissal decisions have been delegated, asks others in attendance to introduce themselves, and explains the order of proceedings and checks that everyone has the relevant documents.

### **2 Management Case**

- **Statement of case:** The management representative puts forward any relevant points that they wish to bring to the attention of the delegated person(s).
- **Presentation of witnesses:** If the management representative wishes to present witnesses they may do so at this point. All parties will have the opportunity to ask questions of witnesses. This begins with the management representative followed by the employee and/or their representative and finally the delegated person(s) and their adviser. Witnesses will only remain at the hearing for so long as they are giving evidence or being questioned.
- **Questions to management representative:** All parties will have the opportunity to ask questions of the management representative. This begins with the employee and/or their representative and finally the delegated person(s) and their adviser.

### **3 Employee Case**

- **Statement of case:** The employee (or their representative) puts forward any relevant points that they wish to bring to the attention of the delegated person(s).
- **Presentation of witnesses:** If the employee or their representative wish to present witnesses they may do so at this point. All parties will have the opportunity to ask questions of witnesses. This begins with the employee or their representative, followed by the management representative and finally the delegated person(s) and their adviser. Witnesses will only remain at the hearing for so long as they are giving evidence or being questioned.

- **Questions to employee:** All parties will have the opportunity to ask questions of the employee. This begins with the management representative and finally the delegated person(s) and their adviser.

**4 Questions to both sides from delegated person(s) and adviser**

The delegated person(s) and their adviser may ask questions of both parties.

**5 Summing up by management representative**

The management representative should provide a summary of their case, highlighting the keys points that they wish the delegated person(s) to consider.

**6 Summing up by employee (or representative)**

The employee or their representative should provide a summary of their case, highlighting the keys points that they wish the delegated person(s) to consider.

**7 Adjournment**

The delegated person(s) (with their adviser in attendance) consider in private the information put forward at the hearing and reach a decision.

**8 Decision**

Where practical the parties should be informed of the decision directly by the chair of the hearing. This must be subsequently confirmed in writing with sufficient detail to enable all parties to understand the decision and the reasons for it.

