

# Capability Procedure for Support Staff Policy (excluding ill health)

Policy Version Control

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## **1.0 INTRODUCTION**

The Governing Body of Ormiston Endeavour Academy is committed to being a fair and reasonable employer and it takes this commitment seriously. It recognises that instances may arise in which management is dissatisfied with the performance of an employee and that in such cases there is a need for a formal capability procedure through which the issues can be identified without delay and appropriate action taken in a consistent manner.

The day to day supervision of staff is part of the normal management process and is outside the formal procedure for dealing with areas of poor performance. There is likely to be less recourse to the formal procedure if deficiencies in an employee's capability are brought to his/her attention at the earliest possible stage by his/her immediate manager in the course of that person's normal duties and it is intended that informal measures are adopted wherever possible.

The object of the formal procedure is to provide a framework to deal with employees whose standard of performance continues to fall short of that required by the Governing Body after any informal action. It is also designed to encourage an employee whose standard of performance is unsatisfactory, to improve.

This procedure takes account of the ACAS Code on Disciplinary Practice and Procedures in Employment, the Staffing Regulations 2003 and the Dispute Resolution Regulations 2004.

This procedure comprises two parts; notes of guidance in operating the procedure and the procedural steps.

## **2.0 SCOPE**

This procedure is applicable to support staff employed specifically for the purposes of the Academy, except those on temporary or fixed-term contracts. While the principles of reasonableness and natural justice reflected in the procedure will apply to temporary or fixed-term staff and those on probationary periods, it may be necessary to foreshorten the procedures and relevant timescales in keeping with the particular nature of the employment of staff in these categories.

## **3.0 REPRESENTATION**

An employee is entitled to be accompanied by a trade union/professional association representative, colleague, friend or other appropriate person, at all formal meetings, hearings and appeals. The employee must make his/her own arrangements for this.

There is a legal requirement to rearrange a formal meeting once, where either party or their chosen representatives cannot attend for a reason that was reasonably unforeseeable. The rescheduled meeting should normally take place within 5 working days of the original date although it is open to managers to negotiate with the employee and their representative.

## **4.0 ESTABLISHING THE CAUSES FOR CONCERN – INFORMAL STAGE**

As soon as it is identified that an employee is not performing satisfactorily, these concerns should be brought to the attention of the employee, initially on an informal basis.

The manager should arrange a meeting, whereby the employee will be given the opportunity to respond to these concerns and provide any reason(s) for why this might be, if the concerns are accepted.

The manager will investigate the poor performance and once he/she has gathered the facts and the seriousness of the problems established, there are three initial options:

- drop the matter (no case to answer or trivial);
- arrange support without using the formal procedure (coaching);

- arrange a formal interview (see section 5).

Where appropriate, the manager will arrange regular meetings with the employee to monitor and assess their performance. Letter Bi (Appendix B) can be used by the manager to invite the employee to such a meeting.

These meetings allow the manager to monitor the employee's performance, set clear performance targets, provide support and ensure the employee understands the level of improvement expected.

Where normal management support and guidance have not resulted in an acceptable level of performance, coaching within the capability procedure will aim to encourage and help the employee to improve. Coaching will include observation and assessment. A brief record of any coaching will be kept for reference.

The employee will be told:

- what improvement is required;
- how performance will be reviewed;
- the review period;
- that the formal procedure will commence if there is no or insufficient improvement.

After a period of review a firm conclusion will be reached. The options will then be either to:

- drop the matter;
- convene a formal interview.

If, following the informal meeting(s), the manager considers that formal action is necessary, he/she shall arrange for this to be undertaken in accordance with the following procedure.

Formal action for lack of capability will not normally be taken against an employee without prior investigation or without prior informal discussions about performance and the possibility of the provision of additional support/training.

Managers will keep records of any occasions where they speak informally to staff about the standard of their work and the records must indicate any action taken by the manager. Copies of any notes will be made available to the member of staff and any written comments from the member of staff will also be kept by the manager for future reference.

## **5.0 FORMAL HEARING**

If despite the informal discussions the manager is still concerned about the employee's performance then recourse the formal procedure will be necessary.

If the manager considers that formal action on the matter needs to follow, he/she must write to the employee notifying them of the concerns and invite them to a hearing to discuss the matter further.

The manager will arrange for a hearing in accordance with the procedure. The hearing must be arranged at a reasonable time and place at which the employee's performance can be discussed. The manager must inform the employee of his/her right to be accompanied at this hearing.

Where the manager recommends formal action including dismissal, a hearing will take place before the Principal who will adjudicate on the matter. The Principal may be accompanied by a Director(s) but the decision will rest with the Principal.

Where the Principal has been directly involved in procedures leading to a recommendation of formal action, has instigated the process or is a witness to particular conduct relevant to the action, a hearing will take place before the Finance and General Purposes Committee.

All appeals will be heard by the Governing Body Appeals Committee.

The employee will be given at least ten days' notice, in writing, of the date, time and place of any hearing. When given this notice, the employee will:

- 1) be informed of the nature and details of the alleged lack of capability;
- 2) be informed who will conduct the hearing and the names of witnesses to be called;
- 3) be told of his/her right to be accompanied at the hearing by a representative of his/her choice, ie normally the representative of a recognised trade union, or some other person, and of his/her right to call witnesses;
- 4) be supplied with a copy of any written report which is to be considered;
- 5) be given an indication of the possible outcome which would be imposed if the allegations were found to be substantiated, e.g. a formal warning or termination of employment by dismissal.

Not later than three working days before the hearing (a) the employee (i) will give the name and status of his/her representative; (ii) will give the names of any witnesses he/she intends to call and outline the evidence the witnesses will give, and (iii) may submit a written statement if he/she wishes, either direct or through his/her representative, and (b) the employee will be informed who will conduct the hearing, the names of any witnesses to be called and outline details of the evidence they will give.

At the hearing the employee and/or his/her representative may address those conducting the hearing. The employee and/or the representative may be questioned on the statements made by, or on behalf of, the employee, and the person presenting the case may be questioned by the employee and/or his/her representative on any relevant aspect of the case. Witnesses may be called by either party and opportunity will be given for them to be questioned on their statements. However, if witnesses are called by either side, every effort will be made to limit numbers to the minimum necessary for a fair hearing of the case.

The decision will normally be notified at the end of the hearing and confirmed in writing within five days. If the decision is not notified at the end of the hearing, it will be given in writing within five days of the hearing. The letter will state the grounds for the decision, confirm that the employee has a right of appeal, and state how this may be exercised (see appendix Biii). The employee shall be required to sign an official receipt to say that the letter has been received and understood.

If the decision is to dismiss the employee on the grounds of capability, he/she will be given the notice required by his/her conditions of service and contract of employment. (NB: Notice should be issued and/or dismissal will take effect following the initial decision).

It will be open to an employee to accept a proposed sanction without being subject to the full normal procedure.

## **6. APPEAL**

An employee will have a right of appeal against any action taken against him/her, and details of this right will be included in any letters confirming a warning or notification of dismissal. The employee will have up to five days from receipt of written notification of the decision in which to lodge any appeal and must submit any relevant papers which he/she will present at the appeal hearing to the committee at least three days prior to the hearing.

All appeals will be heard by the Governing Body Appeals Committee. The decision of this committee is final, subject to the employee's rights at law.

The employee will be given at least seven days' notice of the appeal hearing in writing. An appeal hearing will normally be a re-hearing and the procedure will be as for the original hearing.

New evidence, provided it is relevant to the original case, can be introduced at the appeal stage by either party. All parties' papers must be submitted to the other party and the Appeals Committee at least 3 working days before the Appeal Hearing.

The outcome of the appeal will be notified as for the original hearing, except in that there is no further right of appeal within this procedure.

An employee may forego his/her right to appeal.

## **7. WARNINGS**

### **7.1 Formal Oral Warning**

For lack of capability which is considered to be of a minor nature the employee will normally be given a formal oral warning. The employee will be advised of the reasons for the warning, the details of improvement necessary, and the support to be provided and a timescale by which improvement will be expected. The employee will also be advised that further failure to conform to the required standards could ultimately lead to dismissal.

### **7.2 Formal Written Warning**

If the poor performance is considered to be more serious, or if there has been a further failure to conform to the required standards following an oral warning, the employee will normally be given a written warning setting out the nature of the poor performance and outlining the possibility of dismissal if insufficient improvement takes place.

### **7.3 Final Written Warning**

If there has been further incidence of poor performance or failure to improve performance significantly following the previous warning, a final warning may be issued.

If the facts of the case so warrant, the employee may be given a final written warning that failure to improve performance within a specified period will lead to dismissal.

In each case a record of the employee's poor performance and a summary of the hearing, together with the warning will be placed on the employee's personal file. The employee will be furnished with two copies of the warning and will sign and return one copy as a record to confirm that it has been received and understood.

## **8.0 REVIEWS**

Following the issuing of a warning, the employee will be interviewed by the manager/investigating officer once each month for the following three months. In appropriate circumstances further reviews, at longer or more frequent intervals may be required until the warning expires. At these interviews the progress of the individual will be reviewed, advice given, and consideration given to the provision of training facilities which might help him/her improve his/her performance. A summary record of the interviews, and any advice given, will be given to the employee concerned and placed on his/her personal file.

## **9. DISMISSAL**

If the hearing panel has determined that an employee should be dismissed, the employee should be given the notice required by his/her conditions of service and contract of employment. Notice should be issued and/or dismissal will take effect following the initial decision.

In the event of a dismissal taking place, the chair of the relevant panel/committee will arrange for written notice to be given terminating the contract of employment.

## **APPENDIX 1: Notes of Guidance for the Operation of the Capability Procedure for Support Staff**

### **1.0 INTRODUCTION**

These notes are intended to include the steps that can be taken to improve poor performance. The steps indicated concentrate on management's role as well as the performance of the employee. The steps are not meant to be punitive and their primary objective is to improve an employee's performance to the required standard. Use of the formal Capability Procedure and ultimately dismissal should be seen as a last resort.

It is important for action to be taken when there are concerns about an employee's performance. This is because, invariably, it can affect the service offered by the Academy and can have a damaging effect on the morale of work colleagues.

It is not always the case that the employee is at fault for poor performance and the Academy has obligations to employees to ensure that the necessary support and guidance is available to them to achieve good performance.

### **2.0 INTERPRETATION**

Any question as to the interpretation or application of the procedure shall be determined by the Local Governing Body.

In the procedure the following expressions have the meanings assigned to them as indicated:

- 'days' shall mean the working days of Monday to Friday and include the days on which the communication is sent and received;
- 'capability' shall be read to include matters related to the standard of performance of the employee for reasons other than of ill-health;
- 'manager' or 'management' shall be taken to be reference to any person exercising their managerial responsibilities.

### **3.0 TIME LIMITS**

The time limits which apply in the procedure may be subject from time to time to reasonable variations by agreement of both parties.

### **4.0 RESPONSIBILITIES OF MANAGEMENT**

It is the responsibility of the Local Governing Body to:

- define and communicate fair, consistent and objective procedures for responding to problems of work performance;
- ensure that systems are in place for the proper induction, day to day management and performance management of staff to ensure that minor capability issues are dealt with effectively without recourse to the formal procedure;
- ensure that appropriate capability procedures are in place, are monitored and reviewed regularly and are implemented in a fair and consistent manner;
- consult staff regarding these procedures prior to adoption;
- establish where appropriate a Local Governing Body appeals committee.

It is the responsibility of the Principal and/or other managers to:

- ensure that there are clear job descriptions and clearly defined expectations;
- ensure that standards of work are established and monitored;
- ensure that information is communicated to (and understood by) staff;
- ensure appropriate induction and training for staff;

- have regard to the level of posts held and the basic expectations of staff at that level;
- offer informal coaching to staff;
- set targets and performance standards;
- identify performance problems and give them appropriate consideration and support at the earliest possible stage;
- formally address capability problems when alternative action is inappropriate or has failed to produce a significant and lasting improvement in the performance of individual staff;
- develop performance management initiatives;
- apply performance standards consistently across all staff in particular groups;
- take all reasonable steps to provide the appropriate aids and adaptations where staff have a disability.

## **5.0 RESPONSIBILITIES OF STAFF**

It is the responsibility of members of staff to:

- achieve a satisfactory level of work performance;
- seek help with any work problems they may have;
- co-operate with any investigation by management into their capability;
- demonstrate the level of commitment required to effect improvement where their performance is unsatisfactory;
- attend any discussion, investigation or hearing into their capability;
- take all reasonable steps to maintain and update their level of appropriate skills.

## **6.0 TRADE UNION OFFICIALS**

No action in respect of an employee's lack of capability should normally be taken against a recognised shop steward, or other accredited official of a trade union recognised by the Local Governing Body, until the circumstances of the case are discussed with a senior trade union representative or full-time official of the trade union concerned.

This is a matter of courtesy, recognising the trade union's legitimate interests in such a sensitive situation and as a checking mechanism to ensure that an employee's performance has not been affected by their legitimate trade union activities.

## **7.0 ATTENDANCE AT HEARINGS RELATING TO THE PROPOSED DISMISSAL OF A MEMBER OF STAFF**

The Principal is entitled to attend, for the purposes of giving advice, presenting the case and/or giving evidence, all proceedings of the Staff Dismissal Committee or Dismissal Appeal Committee relating to any dismissal of staff, but the Principal is not entitled to vote on the matter.

## **8.0 REPRESENTATION**

Meetings outside of the capability procedure are intended to be informal, one to one discussions. However, some employees may request that they be accompanied by a trade union representative or colleague. Such requests for moral support should be allowed where practicable.

Employees must be allowed representation at all formal meetings and hearings. The onus is on the manager to offer the employee the opportunity of being represented, though it is the responsibility of the employee to make arrangements for his/her representation.

The role of the representative may be to:

- assist the employee in presenting his/her case;
- respond on behalf of the employee;
- confer with the employee during proceedings.

It is however down to the employee to determine the role of his/her representative

## **9.0 INFORMAL STAGE**

When an employee's standard of performance is called into question, an appropriate manager (the investigating officer) should conduct such investigation as he/she considers necessary. This should include discussing concerns about the employee's performance with the employee and giving him/her the opportunity to state his/her case before further action is considered. This may include one or a combination of the following:

- providing additional support/training to the employee;
- providing additional informal coaching to the employee;
- formal action;
- dropping the matter if no genuine cause for concern is perceived.

The purpose of the investigation is to gather sufficient information to determine whether or not the matter needs to be pursued formally at a hearing. Where appropriate, the employee will be given ample opportunity to state his/her case and the investigation may involve interviewing witnesses, other relevant parties and taking statements

All reasonable effort will be made to complete the informal investigation without delay.

If, following the investigation, the manager considers that formal action is necessary he/she shall arrange for this to be undertaken in accordance the procedure.

Managers should keep records of any occasions when they speak informally to staff about their standard of work and the records should indicate any action taken by the manager. Copies of any notes should be given to the employee and any written comments from employees should also be kept by the manager for future reference.

## **10.0 FORMAL ACTION**

If, in consequence, the investigating officer considers formal action on the matter needs to follow, he/she must write to the employee notifying them of the concerns and invite them to a hearing to discuss the matter further.

No person involved in the investigatory stage should take part in making decisions at any subsequent hearing/appeal hearing. The Principal should not attend to give advice to the hearing panel if he/she has had an involvement in the case, although he/she may attend to present the management's case and/or to give evidence.

In either instance, those determining upon the action to be taken should bear in mind the need to satisfy the test of reasonableness in all the circumstances. Account should be taken of the employee's record and other relevant factors.

Where an employee has agreed in writing to a proposed sanction, it may not be necessary for the investigating officer to carry out a lengthy investigation. Any hearing in these circumstances would be to consider the performance called into question in relation to the employee's admittance and any mitigation they wish to put forward.

It will be open to an employee to accept a proposed sanction without being subject to the full normal procedure.

In calling an employee to a formal hearing, an indication should be given as to the possible penalty which would be imposed if the poor performance has not improved sufficiently, e.g. the issuing of a formal warning or the termination of employment by dismissal.

## **11. APPEAL PROCEDURE**

The employee has a right of appeal against formal oral or written warnings or against an extension of the typical time limit for warnings (see section 13). The employee also has a right of appeal against dismissal. The employee must set out the grounds for any appeal in writing within five days of receiving a written notification of the action to be taken.

The appeal should be heard by the Appeals Committee of the Local Governing Body. The employee should be given at least seven days' notice of the hearing in writing. The decision of the appeal hearing, if not given at the end of the hearing, should be conveyed to the employee within three days of the hearing. No member of the original hearing panel may be a member of the subsequent appeal hearing.

Nothing in the procedure shall prevent a member of staff agreeing to forego a right of appeal.

## **12.0 RECORDS**

It is important in the interests of both the Academy and the employee, to keep written records throughout the informal and formal capability process.

Any records relating to capability proceedings should be carefully safeguarded and kept confidential. Should any action to remedy lack of capability, in the event, be found to be unwarranted, any written reference thereto should be removed from the employee's personal file and the employee notified accordingly.

Notes of hearings and meetings with the employee will be taken and shared with him/her.

Details of any formal action, including any warnings will be retained on the employee's personal file. Sanctions will be disregarded after the expiry of their life.

Details of any ongoing capability action and/or sanctions may be referred to in an employee reference requested of the Academy. Only such information as has been discussed with the employee will be referred to.

## **13.0 TIME LIMITS**

Typically, the validity of warnings will be considered to have expired after one year, provided that no further warnings have been issued and no further action, on the grounds of capability, has been taken against the employee during that period. However, the time limits for warnings will normally be tailored to the duties of the post held and a reasonable period in which performance can be measured. The employee may seek confirmation from the manager that details of a warning will be disregarded after the end of the relevant period.

## **14.0 EMPLOYEES' RIGHTS**

14.1 Nothing in the procedure purports to take away any rights an employee may have under employment legislation or, except as may be implicit in the taking or consequences of action within the procedure, under nationally or locally negotiated conditions of service relevant to the employee's contract of employment.

## FAIR CAPABILITY DECISIONS

### A RECOMMENDED FRAMEWORK COMMENDED TO ADJUDICATORS

This form should be completed by each individual member of the appeal committee.

Academy .....

Name .....

Date .....

### Part 1

#### Evidence/Reason

1. Do I genuinely believe that the employee has a lack of capability affecting their ability to meet the requirements of his/her role?

Yes No

2. Have I reasonable grounds on which to sustain that belief on the balance of probabilities (i.e. is it more likely than less likely that the employee has a lack of capability)?

Yes No

3. Has there been as much investigation as is reasonable in the circumstances and have the requirements of the capability procedure been properly complied with up to this point?

Yes No

If the answers to questions 1,2 and 3 in Part 1 above are 'Yes', this will amount to a finding that the employee has an underlying capability issue.

Do not begin Part 2 until you have fully completed Part I.

### Part 2

#### Evidence/Reason

4. Have I paid sufficient regard to any explanation put forward by, or on behalf of, the employee?

Yes No

5. Have I had regard to any mitigating circumstances, if any, put forward by, or on behalf of, the employee (and any response to these by the management representative)?

Yes No

6. What is an appropriate sanction to apply in the light of the relative seriousness of the poor performance ?

- no formal sanction;
- informal advice;
- oral warning;
- written warning (1st, 2nd);
- final written warning;
- dismissal with notice;
- summary dismissal.

Yes No

7. Is this decision within the band of reasonable responses in the circumstances?

Yes No

8. If the circumstances (including the mitigating factors) are indistinguishable from one or more earlier/concurrent proceedings against employees in a similar position to this employee, is the decision I am contemplating reasonably consistent with decisions in those instances?

Yes No

9. Is the decision I am contemplating free from bias against the employee related to his/her sex (including gender reassignment), racial origin or other factors?

Yes No

## APPENDIX B: Sample Letters

### Bi – Invite to Informal Capability Meeting

Dear

Following our recent conversation on (insert date of conversation) I am writing to confirm the arrangements for the meeting we discussed at that time.

I would like to meet you at (insert date and time of meeting) in (insert location) and a member of the Human Resource Schools Team will accompany me

The purpose of this meeting is to discuss the continuing concerns we currently have in relation to your performance as (insert job title), particularly in relation to:

- a) <ACADEMY TO COMPLETE>
- b)

and to give you every opportunity to respond to those concerns. I anticipate that it will be helpful to establish some informal targets during this meeting as well as agreeing a programme of support for you.

Whilst this meeting is an informal one it is covered by the provisions of the Academy's capability procedure. Therefore, if you wish, a representative of your professional association or some other person may accompany you.

I should be grateful if you would confirm by (insert date) whether you will be able to attend this meeting and, if you wish to be accompanied please let me know by whom.

Yours sincerely

## Bii – Invite to Capability Hearing

Dear

### CAPABILITY HEARING

I write to inform you that you are invited to attend a capability hearing on (date) at (time), at (venue).

The purpose of the capability hearing is to consider a report of poor performance on your part, namely that (.....details.....)

(or) exact details of the concern are outlined in the enclosed report.

It is your right to be accompanied at the hearing by a representative of a recognised trade union or some other person and it is also your right to call witnesses. It is your responsibility to arrange for your representative and witnesses to attend the hearing.

Should you decided to exercise the above rights you should notify the Principal at least 3 working days in advance of the hearing, the name and status of your representative and the names of your witnesses and a brief outline of the evidence they will present.

Subject to the same notice, the Academy will inform you of the names of the persons conducting the hearing and the names of witnesses the Academy will call, together with a brief outline of the evidence they will give.

(or)

The Hearing will be conducted by the Principal/Local Governing Body Disciplinary/Dismissal Committee (names). The Academy will call the following witnesses (include brief outline of evidence they will give) (or) will not be calling any witnesses. I will be accompanied at the hearing by (name) from (Advisors).

You may if you wish, submit a written statement either direct or through your representative addressed to the Principal/Chairman of Local Governing Body. This must be received by the Chairman at least 3 working days in advance of the hearing.

You should be aware that one (the) possible outcome(s) of the hearing is (are) (no further action, formal oral warning, formal written warning, final written warning, dismissal).

Please also find enclosed a copy of the Academy's capability procedure for your information.

Please contact the Principal/Chairman of Local Governing Body the first instance regarding any matters relating to this document.

Yours sincerely etc.

### **Biii – Outcome of Capability Hearing**

Dear

CAPABILITY HEARING (DATE)

I am writing to confirm the outcome of the capability hearing held on (date).

On the basis of the evidence presented, I/we found the poor performance substantiated. In particular I am satisfied that (detail areas of poor performance).

I/we took into consideration the mitigating circumstances put forward by you, namely: (detail mitigation)

Notwithstanding the above, however, I/we have decided that you are (given a formal oral/written warning /dismissed) (length of warning/required future conduct/date of dismissal).

You have the right to appeal to the Local Governing Body Disciplinary/Dismissal Appeal Committee and should you wish to exercise this write you should write to the Chair of the Local Governing Body within 5 working days of receipt of this letter, clearly setting out the grounds for your appeal.

Yours sincerely etc.

**Biv – Standard Letter – Agreed Outcome**

Dear

Agreement between (employee) and (name) Academy

I am writing to confirm the outcome of the meeting which you attended on.....and at which you were accompanied by your representative.

The purpose of the meeting was to consider that: (enter details)  
and to agree, in the light of your acceptance of these allegations, an appropriate outcome.

The purpose of this letter therefore is to confirm that you have been issued with a (type of warning) which will run from the date of this letter for a period of 'x' months for future capability purposes.

During the meeting, you accepted the allegations made against you and, at the end of the meeting you indicated your acceptance of this warning.

I must advise you that any further misconduct could lead to further action being taken against you, which, if substantiated, could result in dismissal.

On the basis that you have accepted the above misconduct and given that this agreement is a mutually acceptable outcome between both parties, you have accepted that you will forgo your right of appeal.

It is accepted by both parties that all matters which have arisen during the course of this meeting are confidential and should continue to be treated as such.

Could you please sign and date a copy of this letter to signify that you are in agreement with the above, and return to (name).

Yours sincerely etc.

Signed (Employee) ..... Date.....

Signed (Principal) .....Date.....