

SCHOOL NAME: Paxcroft Primary School
POLICY RATIFIED ON: January 2023
FOR REVIEW ON: January 2024



Many schools - one goal.



MODEL CAPABILITY PROCEDURE FOR TEACHING AND SUPPORT STAFF IN FOUNDATION SCHOOLS

This model procedure will apply to both teaching and non-teaching staff working in Wiltshire Schools and has been agreed with the following recognised unions: ATL, NUT, NAHT, NASUWT, ASCL, Unison and GMB

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Duties, Responsibilities and Powers of the Governing Bodies of Foundation Schools and Local Authority Advisory Rights

- i. The governing bodies of Foundation and Foundation Special Schools are the employers of the school's teaching and support staff. The Governing Body of a Foundation School therefore has the power to dismiss a member of staff at the school.
- ii. The Local Authority does not have an automatic statutory right of attendance at dismissal proceedings, but the governing body may accord the Local Authority rights to attend and give advice. Where the Local Authority is accorded such advisory rights, any advice given must be considered by those concerned before making a decision. Such an agreement must be given in writing and may only be withdrawn by notice in writing to the Local Authority.
- iii. Where such rights are accorded the Local Authority through a representative (usually an HR Advisor), has an entitlement to attend (which it may decide not to exercise), for the purposes of giving advice at all proceedings relating to any decision that someone working at the school should be dismissed. Any advice given by the HR Advisor must be considered by those concerned before a decision is made.
- iv. Where advisory rights are accorded to the Local Authority and the Local Authority decides that a Foundation school has acted unreasonably and/or unfairly in relation to an employee dismissal it reserves the right to pass on the related costs, including litigation, to the Governing Body concerned. This could include failing to take appropriate professional advice or failing to adhere to Wiltshire Council's minimum HR procedures.
- v. In addition to the above advisory rights where a Foundation school buys its HR Advisory services from the Local Authority under the *'Right choice for schools'* arrangement it is essential that the HR Advisory service is informed of all formal disciplinary proceedings and is invited to attend these for the purposes of giving advice.

1. Policy Statement

- 1.1** Governing bodies have a statutory obligation to adopt formal policies and procedures for dealing with staff performance issues (School Staffing (England) Regulations 2003). A sound standard of performance is essential for the efficient and effective management of schools.
- 1.2** This procedure is primarily concerned with ensuring that an employee whose standard of performance is unacceptable in one or more areas is clearly informed what standards are expected and receives support towards achieving those standards. This procedure should only be initiated when normal support mechanisms in the school have failed to resolve the issues.
- 1.3** It provides for an outcome which is fair and constructive. It is not intended that the procedure should replace normal communication between the Headteacher and a member of staff in the day to day running of a school, whereby comments may be made informally. It is important that staff are made fully aware of any complaint regarding their work at the time the complaint is received so that they are able to respond in a timely way.
- 1.4** This procedure is designed to help the school maintain the required employee standards of performance. It allows those who do not maintain those standards the opportunity to improve. It provides a method of dealing with any apparent shortcomings in performance and can help an employee to become effective again. It provides for matters to be dealt with in a fair and consistent manner.

1.5 This procedure is therefore recommended by Wiltshire Council for adoption by the Governing Body and following its adoption, the procedure must be made known to all staff and remain accessible to them.

1.6 Schools buying the HR Advisory service are strongly encouraged to read this procedure in conjunction with the guidance notes provided.

2. Who does this procedure apply to?

2.1 This procedure is informed by Sections 35(8) and 36(8) of the Education Act 2002, and the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009. It has been drawn up following consultation with the recognised Trade Unions and Teachers' Professional Associations. It applies to and is designed to help and encourage employees within schools with delegated budgets.

2.2 The procedure will apply to all employees of the school. This does not include contractor's employees and those who are managed centrally to work in more than one school.

2.3 This procedure does not apply where there are matters of:

- **misconduct**; which is dealt with under a separate procedure adopted by the Governing Body, this procedure should be used if it is clear that the employee is capable of reaching the required standard and has actively not done so;
- **grievance** which is dealt with under a separate procedure adopted by the Governing Body;
- **ill health** for which there is a separate procedure adopted by the Governing Body, the ill health procedure should be used if there is good reason to believe that the employee's inability to meet set standards is linked to a medical issue;
- **bullying, harassment, discrimination and/or victimisation** which are dealt with in the first instance, under the Dignity at Work Policy.

3. Who is responsible for maintaining standards of performance?

3.1 The Governing Body has the overall responsibility for ensuring the standards of the school are maintained, with powers to delegate to the Headteacher responsibilities up to and including initial staff dismissal decisions. Under the Education Act 2002 School Staffing (England) Regulations 2003, the Headteacher should be given the delegated responsibility to make decisions up to the initial dismissal decision, (except in certain circumstances, see 3.2 below) following which there is an opportunity to appeal to a panel of Governors. Dismissal and notice periods are effective from the date of the initial dismissal decision. Should the appeal be successful reinstatement will also be from the original date with no break in continuity.

3.2 Headteachers may therefore lead the process of making the initial dismissal decision unless the following circumstances apply:

- the Headteacher is unwilling to perform these functions and their previous history at the school did not include any such responsibilities.
- the Headteacher has been directly involved in capability procedures leading to dismissal, has instigated a proposal to dismiss or has made judgements on performance.

- 3.3 In situations where it is not appropriate for the Headteacher to perform these functions (see paragraph 3.2 above), the staffing committee of the Governing Body will be responsible for the process of making such decisions.
- 3.4 The Governing Body should nominate three of its members, who are not staff members to form the staffing panel and a different three Governors, to form the appeals panel. No member of the governing body may form part of the panel if they have a direct pecuniary interest in the matter. Where the Chair of Governors acts as critical friend to the Headteacher they should not sit on the panel.
- 3.5 HR will offer advice at all stages of these procedures to client schools. It is strongly recommended that Head Teachers seek advice from an HR Advisor (Schools) as early as possible. However where action under the formal stages of the procedure is being considered advice from the LA must be sought. The LA is normally represented by an HR Advisor (Schools).

4. What are the principles?

- 4.1 It is important that staff are made aware of the school's standards and expectations of performance and the possible consequences of falling below this.
- 4.2 Employees should be encouraged to seek the advice of a trade union or professional association at an early stage. At the formal stage of the procedure the employee will be informed of their right to be accompanied at meetings by a work colleague or trade union representative. The accompanying person can address the meeting but not answer questions on behalf of the employee.
- 4.3 The employee will have the right of appeal against any formal warning under this procedure.
- 4.4 The procedure ensures that at all stages the employee will be heard in good faith and that there is no pre judgement of the outcome of any particular review meeting. The use of one stage of the procedure does not mean the next stage follows automatically. When the employee achieves the standard of performance required, there will be a further period of monitoring to ensure the improvement is maintained. The procedure may be suspended during this period and re-invoked if performance lapses to an unacceptable standard. When it is necessary to re-invoke this procedure, this will be at the stage which applied at the time the procedure was suspended.
- 4.5 The procedure will be withdrawn when improvements in performance have been both achieved and maintained and will be confirmed in writing.
- 4.6 Where the Headteacher is the subject of the procedure, the Chair of the Governing Body or other designated Governor, will replace the Headteacher in initiating any action which has to be taken. In such cases the Chair of Governors should notify and contact their HR Advisor (Schools) for advice before any action is taken.
- 4.7 For the purposes of this procedure "Headteacher" means the most senior member of staff who has management responsibility for the employee concerned.

- 4.8** It is recognised that an employee being supported through this procedure is likely to find the situation stressful, the Headteacher should make the employee aware of the wellbeing services available. Full details are available on 'Schools HR Online'.
- 4.9** Where there is a performance concern and this procedure has been invoked it would be usual to suspend the normal performance management process.

5. Raising a Grievance

- 5.1** Where an employee raises a grievance during a capability process the process may be temporarily suspended in order to deal with the grievance. Where the grievance and capability concerns are related it may be appropriate to deal with both issues concurrently. A discussion will therefore take place between school management, Human Resources and the employee (normally through their trade union representative or directly if they are not represented) about whether or not the capability procedure should be suspended so that the grievance issues can be dealt with separately under the grievance procedure or whether the grievance should be raised by the employee at relevant capability interviews, reviews, hearings or appeal.
- 5.2** Suspending the capability procedure because a grievance has been raised would normally take place when:
- There is an allegation that management have failed to follow procedure;
 - There is possible discrimination.

6. Capability Procedure – Informal Stage

- 6.1** The Headteacher will convene a meeting with the employee. At the meeting the Headteacher will outline the performance shortcomings, the performance standards required and the timeframe over which improvement will be expected and how this will be measured and monitored. This will be confirmed in writing. It is important that the employee is made aware of the consequences of the failure to improve. If the employee requests to be accompanied at this stage their request should not be unreasonably denied.
- 6.2** The employee must also be given a copy of this procedure.
- 6.3** In discussion with the employee the Headteacher will also decide on the support and help that will be put in place. The nature of the shortcomings will determine the nature of the help and support to be provided. This could include:
- Mentoring and/or coaching
 - Provision of suitable training
 - Management and / or peer support
 - Review of commitments
 - Appropriate equipment.
- 6.4** The employee must be supported for a period of time which is reasonable considering the post, the nature of the shortcoming (s) and the employee's length of service before a decision is taken to move to the formal stage; this would normally be between four and twelve weeks. Timescales set may be subsequently extended.

- 6.5 Where the employee's performance improves to the standard required the employee should be informed of this and also reminded of the need to maintain the improved standard. The procedure may be suspended on the understanding that it will be re-invoked if performance becomes unsatisfactory at any time in the future.
- 6.6 When the employee demonstrates s/he is maintaining the improved standard, s/he should be informed in writing that the procedure is being withdrawn.

7. Capability Procedure – Formal Stage

- 7.1 If, after monitoring and support provided within the informal stage, the employee's performance remains unsatisfactory the Headteacher will arrange a further meeting with the employee. This is the first meeting in the formal stage of the procedure.
- 7.2 The employee is informed of his/her right to be accompanied by a trade union representative or workplace colleague.
- 7.3 The employee must be given at least ten working days written notice of the meeting and confirmation of the nature of the concerns and any accompanying documents that will be referred to at the meeting, including a further copy of the procedure.
- 7.4 At the meeting the employee will be given an opportunity to comment on the concerns and to ask any questions.
- 7.5 The Headteacher will then consider what action s/he proposes to take. The Headteacher will inform the employee both verbally and in writing. The options at this stage of the procedure are:
- As a result of the discussions the Headteacher considers that the employee's performance has reached the required standards, and therefore, after a monitoring period of three to six months, can withdraw the procedure if performance continues to be satisfactory. Performance that deteriorates once the monitoring period has ended should be managed by recommencing the capability procedure from the beginning.
 - The employee has made some progress, therefore extend the period within the formal stage, setting a new date for review.
 - The employee's performance has not reached the required standard, and therefore issue a first written warning. This will be followed up in writing.
- 7.6 The letter informing the employee of the warning must state:
- That it is a first written warning
 - Which aspects of the employee's performance must improve
 - What support will be available
 - What timescales and against what targets and criteria the employee's performance will be assessed (normally the timescale allowed will be between four and twelve weeks)
 - That failure to meet the required standards may lead to further action within the capability procedure which could include dismissal.
 - The date of the end of the assessment period when a review meeting will be held
 - Their right to appeal against the decision.

7.7 At the review meeting at the end of the assessment period or monitoring period (this is the second meeting in the formal stage of the procedure) the Headteacher will discuss the employee's performance with them. Following this discussion, the Headteacher will decide whether;

- The employee's performance has reached the required standards throughout the monitoring period and the procedure can be concluded. Performance that deteriorates once the monitoring period has ended should be managed by recommencing the capability procedure from the beginning.
- The employee's performance has reached the required standards, and therefore, after a monitoring period of three to six months, withdraw the procedure if performance continues to be satisfactory.
- The employee has made some progress, therefore extend the period, setting a new date for review. Repeat paragraph 7.7 of the procedure at the next review.
- The employee's performance has not reached the required standard or deteriorated, and therefore issue a final written warning, setting a date for review.

The decision will be followed up in writing.

7.8 At the review meeting at the end of the assessment period or monitoring period (this is the third meeting in the formal stage of the procedure) the Headteacher will discuss the employee's performance with them. Following this discussion the Head teacher will decide whether;

- The employee's performance has reached the required standards throughout the monitoring period and the procedure can be concluded. Performance that deteriorates once the monitoring period has ended should be managed by recommencing the capability procedure from the beginning.
- The employee's performance has reached the required standards, and therefore, after a monitoring period of three to six months, withdraw the procedure if performance continues to be satisfactory.
- The employee has made some progress, therefore extend the period, setting a new date for review. Repeat paragraph 7.8 of the procedure at the next review.
- The employee's performance has not reached the required standard or deteriorated, and therefore issue a final written warning, setting a date for review.
- The employee's performance has deteriorated and therefore arrange a Staffing Panel as detailed in paragraph 7.9 – 7.11 below.

The decision will be followed up in writing.

7.9 Staffing Panel (Hearing)

The employee will be:

- given at least ten working days written notice,
- advised of the right to be accompanied by a workplace colleague or trade union representative,
- informed of the nature of concerns, and
- provided with all relevant evidence that will be discussed at the hearing.

The Headteacher will present the evidence for the areas of concern, the process followed and the support and training given and make recommendations.

The employee will be given the opportunity to respond.

The panel of governors will consider the evidence regarding the employee's performance and consider the recommendations and determine whether:

- To dismiss the employee with notice
- To give the employee further time to improve
- To consider whether alternative employment is available within the school and can be offered to the employee (see paragraph 7.10 below)
- To withdraw the procedure

The decision must be confirmed in writing within five days of the hearing. If the decision is dismissal then the employee must be notified of his/her right to appeal.

7.10 If redeployment is possible it is unlikely to be equivalent employment. Any offer of reasonable redeployment will be made in writing and the employee will be given reasonable time to consider the offer. Following acceptance of redeployment salary will be paid at the appropriate rate for the post regardless of any previous salary paid in any previous post. Redeployment will only be made to an established current vacancy. The school is not obliged to create a post for the employee.

8 Right of Appeal

An employee may lodge an appeal in writing against any formal capability warning against them under this procedure to the Clerk to the Governing Body within 10 working days of the date on which they receive the confirmation of the action. The appeal will be heard by the appeals panel of the Governing Body in accordance with the schools agreed appeals procedure.

9 Written Records

A record of the documentation relating to the case will be retained and will include:

- The details of the shortfall in performance standards
- The employee's views
- Any grievances raised during the capability process
- Findings made and actions taken and by whom
- The reason for actions taken
- Whether an appeal was lodged
- The outcome of the appeal
- Subsequent relevant developments
- Notes of any formal meetings
- Records will be treated as confidential and be kept in accordance with the Data Protection Act 1998 so that an employee has the right to request and have access to relevant information but, in certain circumstances the School may consider it appropriate to withhold some.

10. Related policies and other information

A comprehensive toolkit is provided only to client schools of the HR Advisory service to support this Capability Policy and Procedure:

Appendix 1 – Guidance notes for managers

Appendix 2 – Process flow-chart

Appendix 3 – Tips for meetings

Appendix 4 – Model action plan

Appendix 5 – Model staffing panel report

Appendix 6 - Guidance notes for employees

Appendix 7 – Setting targets

Appendix 8 – Sample letters

See other HR policies referred to at **2.3** where these are more relevant to the issues raised including:

- [Grievance Policy and Procedure](#)
- [Disciplinary Policy and Procedure](#)
- Ill health Policy and Procedure
- Dignity at Work Policy;

11. Equalities Impact Assessment

This policy has had an equality impact assessment conducted by a joint equality impact assessment panel and the results of these assessments are published on the Wiltshire Council website. If on reading this procedure you feel there are any equality and diversity issues, please contact an HR Advisor (Schools) who will, if necessary, ensure the policy/procedure is reviewed.