POLICY	**CAPABILITY PRODECURE SUPPORT/ASSOCIATE STAFF**
STATUS/DATE OF THIS VERSION	**DEC 2020**
APPROVED BY	**Board of Trustees October 2021**
RATIFIED BY	**19th October 2021**
REVIEW	**2022**

This policy is operated by all the schools in Unity Education Trust (as listed below).
There may be sections that are specific to one school and these will be added by the school either as an annex or in place of yellow highlighted sections below.

Any queries about the policy should be directed, in the first instance, to the Headteacher/Head of School:

- **Beeston Primary**
- **Garvestone Primary**
- **Grove House Infant**
- **Kings Park Infant**
- **Northgate High School and Dereham Sixth Form College**
- **The Pinetree School**
- **The Short Stay School for Norfolk**
- **Churchill Park**
- **Greyfriars Primary**
- **Highgate Infant School**
- **Kings Oak Infant School**
- **Wimbotsham and Stow Primary**
- **Magdalen Primary**
- **St Germans Primary**
- **Great Dunham Primary**

Contents

(Click on the headings below to jump to the relevant section)

1. Introduction and scope 2
2. Covert recordings 2
3. Formal capability interview 3
4. Dismissal Appeal stage 7
5. Post dismissal actions 8
6. Data Protection 8

This model has been subject to consultation with the recognised trade unions at County level. Any school or academy looking to adopt, or adapt and adopt, as their own should consult recognised trade unions at local level.

This policy is based on the model prepared by Educator Solutions designed for use in Multi-Academy Trusts. Educator Solutions are UET's HR advisers and the Trust refers to their procedural documents on HR InfoSpace and seeks HR guidance from them.

References below the Headteacher/Head of School should be read as CEO where the employee concerned is employed on a central role within the Trust or where the Headteacher/Head of School is the employee's direct line manager. Where the CEO is the employee's direct line manager the Chair of Trustees or another Trustee will act.

1. Introduction and scope

This procedure applies to all support staff employees in the Trust with one exception: Support staff working their probationary period would see concerns around their performance addressed through the Trust's probation procedure.

This support staff model procedure details the formal capability procedure only. The *Performance Appraisal model policy and procedure – support staff* incorporates information regarding structured, informal support, where there are performance concerns. This procedure will only be initiated where that structured support has failed or the concerns are more serious. *Capability guidance – support staff G329* provides guidance for following this procedure.

2. Covert recordings

The Governing Board believes that the covert recording of workplace meetings undermines trust between individuals.

The covert recording of any meetings or proceedings, including disciplinary and grievance hearings and appeals, by an employee potentially constitutes an act of gross misconduct. It features in the list of non-exhaustive acts of gross misconduct in the school's guidelines on conduct document. Without sufficient mitigation, the covert recording by an employee of colleagues in such a meeting may lead to the employee's summary dismissal.

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The employee will be informed of this policy position before any disciplinary, grievance or capability meeting.

Similarly, no covert recording of the deliberations of a panel at the end of any hearing may be made by an employee. This would also potentially constitute an act of gross misconduct likely to lead to the employee's summary dismissal.

In some circumstances, it may be appropriate for a meeting to be recorded but in these cases, there must be written agreement between management and employee and consent will need to be obtained by all persons who will be included in the recording. The management and employee will then be under an obligation to ensure that all recordings are processed, securely stored and used in a manner consistent with the Data Protection Act 2018.

3. Formal capability interview

A formal capability interview initiates the capability procedure. It provides an opportunity to deal with more serious problems in a structured way or to give more intensive support and monitoring where support provided as part of the appraisal process has failed to bring about the required improvement. It allows the employee to prepare a response to allegations about performance and make a case in the company of a companion.

3.1. The employee should be invited to the formal capability interview with at least five working days' notice (or seven consecutive days out of term time). The interview will be chaired by the Headteacher/ Head of School. The invitation should be in writing, making clear the purpose of the interview, confirming the date, time and venue, and giving details of others who will be in attendance (e.g. witnesses, HR Consultant). The right of the employee to be accompanied by a companion must be included.

3.2. Where representation has been notified, the companion will be consulted on the date and time of the formal capability interview although the Headteacher/Head of School should not allow undue delay in starting the formal process. The statutory guidance suggests that the process should not be delayed by more than five days for the purposes of securing representation but there should be recognition of the difficulties associated with co-ordinating diaries.

3.3. A copy of this capability procedure must be attached to the invitation along with a capability report prepared by the employee's line manager, usually the appraiser. The report must include:

- description of the problem(s)
- information about action already taken (where appropriate)
- reference to and copies of other evidence being used to confirm problems, e.g. monitoring reports.

The invitation must be handed to the employee by the Headteacher/Head of School or posted by recorded delivery.

An extra copy of the invitation, report and other documentation must be provided to the employee for the purposes of passing to their companion. By agreement with the employee, the copy may be posted direct to their companion.

3.4. The format of the formal capability interview should normally be as follows:

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- The Headteacher/Head of School introduces those present and confirms the purpose of the meeting.
- The line manager outlines the review report and highlights the reasons and evidence for concerns, calling witnesses where appropriate. Written evidence from witnesses should be provided to the employee in advance of the interview.
- The employee and/or their companion may ask questions of the line manager and any witnesses.
- The Headteacher/Head of School and their adviser may ask questions.
- The employee and/or their companion will present their case and will be able to refer to written evidence and/or call on witnesses of their own. Prior notice must be given and written evidence circulated before the review meeting.
- The line manager, the Headteacher/Head of School and their adviser can ask questions.
- Where appropriate, the line manager and employee and/or companion may summarise their cases.
- The Headteacher/Head of School will adjourn the interview while they decide what action to take. The employee and their companion must be informed as soon as possible, and no later than five days after the review meeting. Normally, information will be given after the adjournment.

3.5. The interview may provide new information or put a different slant on evidence already collected. If it becomes clear that further investigation is needed the interview should be adjourned for an appropriate length of time to allow this to happen.

3.6. There are four options at the formal capability interview:

1. drop the matter
2. structured support - counselling/informal coaching (except where already undertaken within the appraisal process without improvement)
3. oral or first written warning
4. final written warning

One and two are only relevant where new information, a different slant on the information collected, or further investigation suggests the matter is not as serious as it first seemed.

The third and fourth options are relevant in any case where continued concern about the standard of performance is justified. The decision on which level of warning to issue will depend on the level of seriousness of the problem:

- An **oral warning** should not normally be necessary in cases where counselling has already taken place.
- If performance is unsatisfactory a **first written warning** will normally be the appropriate step (which will invoke an assessment period of up to ten weeks).
- In cases of particularly serious concern, perhaps where the finances or security of the school are in jeopardy, it is possible to move directly to a **final written warning** (which will invoke an assessment period not normally exceeding four weeks). In these extreme cases it will be important to consider (before a decision is made about issuing a final warning) how the employee's performance has dipped significantly if, for example, they have recently passed a probationary period or had a successful appraisal assessment (if an appraisal scheme is in place).

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3.7. Any decision on the level of warning should be made after all the facts and any representations from the employee and/or companion have been considered. The Headteacher/Head of School should adjourn the meeting briefly to consider the appropriate option before delivering a decision to the employee.

3.8. Where a formal warning is issued, the Headteacher/Head of School should use the remainder of the meeting to agree an action plan to:

- identify the professional shortcomings
- give clear guidance on the improved standard of performance needed to end the capability procedure
- explain the support that will be available, and how performance will be monitored over the following weeks and that it will end in an evaluation meeting
- depending on the level of warning issued, to identify the timetable for improvement and agree a date for the next/final evaluation meeting
- make it clearly understood that failure to improve may ultimately lead to dismissal.

3.9. A letter, along with the agreed action plan, should be sent to the employee immediately after the formal interview recording the outcome, the main points discussed at the meeting, confirming the decision, and where a warning is issued, giving information about the handling of the formal stage and the appeals process. The letter must state that if there is insufficient improvement in the capabilities of the employee by the end of the stated period, this could lead to further action under the formal procedure including dismissal for lack of capability.

3.10. Any appeal against a warning must be submitted within five working days (or seven consecutive days out of term time), and ideally heard within ten working days (or 14 consecutive days out of term time) of notification of appeal, and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered. This appeal is heard by an appeal committee.

3.11. First assessment stage

Weeks one to ten (up to ten weeks, no less than four) – Regular observation, monitoring and evaluation of performance, with guidance, training if necessary, and support to the employee. This will include the need for regular, perhaps weekly, feedback to the employee on their progress so they can be clear on whether they are making the improvements required. It would be helpful to the process if such regular feedback is through a written note detailing where improvement has been made, and where progress still needs to be made.

This timescale is not prescriptive. It will depend on the role and the tasks required. For some groups of staff ten weeks may be too long. An assessment period could be anywhere from four to ten weeks, it will be for the Headteacher to decide what the most appropriate timescale would be.

If at any point during this stage the circumstances suggest that a more serious problem exists, the Headteacher/Head of School may take the decision to bring forward the planned evaluation meeting to consider whether a final written warning should be issued sooner. If a final warning is given following such a brought forward evaluation meeting, there will normally be a maximum period of four weeks allowed following that meeting before a final evaluation meeting is held.

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Week 10 (up to ten no less than four) – **Evaluation meeting**
The purpose of this meeting is to assess performance over the previous weeks. The evaluation meeting should be convened by the Headteacher/ Head of School by circulating, at least five working days (or seven consecutive days out of term time) in advance, a summary report which contains:

- the original target setting letter
- details of help and guidance provided and results of monitoring
- copies of evidence from observations and other relevant evidence
- a clear assessment by the Headteacher/Head of School of the progress made
- confirmation of the employee's right to be accompanied by a companion.

If it is found that the level of performance has been satisfactory and confidence that it can be sustained, the capability procedure can end with a confirmation letter from the Headteacher. Within a reasonable time-frame, if the employee's performance becomes unsatisfactory again (in the same way that it was before), the employee would re-enter this procedure at the point where they left it i.e. consideration as to whether a final written warning is issued (see below).

If it is found that performance continues to be unsatisfactory a **final written warning** should be issued. Formal monitoring, evaluation, guidance and support will continue for a further (four week) period. Arrangements for this should be explained at the meeting. The decision and main points of the meeting must be recorded in a letter to the employee. The employee must be told clearly that failure to achieve an acceptable standard by the final evaluation meeting and decision meeting (second assessment stage), with confidence that it can be sustained, may result in dismissal. Any appeal against the final written warning must be made within five working days (or seven consecutive days out of term time), and ideally heard within ten working days (or 14 consecutive days out of term time) of notification of appeal, and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered.

3.12. Appeals against warnings

Any appeal submitted by an employee regarding a first written warning or final written warning will be heard by the Appeal committee although this can be reduced to a minimum of two where a governing board has a shortage of eligible governors.

Notice of at least five working days (or seven consecutive days out of term time) must be given for an Appeal committee hearing.

The Trust's Disciplinary, Dismissal and Appeal Committee hearings procedure should be followed for appeal hearings. The outcome of the Appeal Committee hearing must be confirmed in writing to the employee within five working days.

3.13. Second assessment stage

Weeks 10 – 14 (up to 10 –14, no less than 4 – 8) Regular monitoring and evaluation of performance, with guidance, training if necessary, and support to the employee.

Week 14 (up to 14, no less than 8) – **Final evaluation and decision meeting** to report the assessment of performance over the previous weeks.

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The final evaluation meeting should be convened by the CEO by circulating, at least five working days (or seven consecutive days out of term time) in advance, details of the time and place of the meeting and will advise the employee of the right to be accompanied by a companion. A summary report will also be sent which contains:

- the original target setting letter
- details of help and guidance provided and results of monitoring
- copies of evidence from observations and other relevant evidence
- a clear assessment by the Headteacher/Head of School of the progress made
- confirmation of the employee's right to be accompanied by a companion.

The invitation to a final evaluation and decision meeting should make it clear who will be in attendance and that it is the CEO who has the authority to dismiss. The final evaluation and decision meeting will follow a similar format as the formal capability interview (section 3).

If it is found that performance has been satisfactory, and there is sufficient confidence that it can be maintained, the capability procedure can end here. Within a reasonable time-frame, if the employee's performance becomes unsatisfactory again (in the same way that it was before), the employee would re-enter this procedure at the point where they left it i.e. consideration as to whether the employee will be dismissed.

If performance remains unsatisfactory, a decision will be made that the employee should be dismissed or required to cease working for the Trust. The employee will be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

4. Dismissal Appeal stage

If the employee appeals the decision the appeal should be considered by an appeals panel, with delegated authority, who have had no involvement in the decision that is being appealed.

The paperwork referred to in 3.12 should also be provided when calling an appeal hearing along with a copy of the outcome statement from the decision meeting. Again, the employee should be given five working days' notice along with confirmation of their right to be accompanied by a companion.

A copy of the information sent to the employee should be passed to each member of the Appeal committee and their adviser in advance of the hearing.

Any appeals panel should consist of three trustees (different to those on the panel who made the decision to dismiss, if applicable). The same number of Trustees should be on the appeal panel as were on the staff dismissal committee, where this was used.

Notice of at least five working days (or seven consecutive days out of term time) must be given for an Appeal Panel.

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The outcome of the hearing must be confirmed in writing to the employee within five working days. If the Appeal committee confirms dismissal, the employee has no further right of appeal.

5. Post dismissal actions

Where the capability of an individual is such that it may make them unsuitable to work with children, a referral to the Disclosure Barring Service (DBS) may be appropriate. The HR Consultant supporting the Trust through the dismissal process will give appropriate advice. There is currently no requirement to make referrals to any other agencies where a member of support staff is dismissed for lack of capability.

6. Data Protection

The Trust processes any personal data collected during the capability procedure in accordance with its data protection policy. Any data collected is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the capability procedure. Inappropriate access or disclosure of employee data constitutes a data breach and should be reported in accordance with the Trust's data protection policy immediately. It may also constitute a disciplinary offence, which will be dealt with under the Trust's disciplinary procedure.

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