

THE
WHITBY
HIGH SCHOOL



Capability
Procedure

November

2017



AIMS

We seek to fulfil the needs of learners in a caring, happy environment, enabling them to realise their true potential as young people and citizens.

We aim to enable our learners to:-

PREPARE for adult life in a happy, caring and purposeful environment

ACHIEVE their full potential regardless of individual need

CARE for everyone and encourage respect and tolerance

ENJOY education and rejoice in success



CAPABILITY PROCEDURE

THIS SECTION APPLIES TO ALL CATEGORIES OF EMPLOYEES

Why is this important?

It is inevitable that from time to time all schools will have to deal with staff capability problems. Consequently, it is important that schools adopt fair, effective and legal capability procedures.

Cheshire Standard

Each governing body **MUST** adopt and adhere to capability procedures for all staff employed at the school. Those procedures **MUST** be fair and legal. All new and existing staff **MUST** be made aware of the existence of the procedures and have access to it during school hours.

Status of this Section

The model procedures in this Section are compatible with the requirements of employment legislation and give governing bodies and headteachers frameworks for dealing with staff capability problems. The documents can be applied in any educational establishment, including Aided establishments. They have been agreed with the recognised Trade Unions/Associations.

There are two procedures in this Section -

1. Teachers

The procedure is attached.

At the request of the Government, an "Outline Capability Procedure" was drawn up by an ACAS Working Group and published in October 1997. That Procedure only relates to teachers (including Headteachers and Deputy Headteachers). The Cheshire document was reviewed, and where necessary revised, to ensure that it incorporates the broad principles embodied in the national "Outline Capability Procedure". The policy embraces ill-health and non-attendance circumstances but extends primarily to cases of capability for reasons other than ill-health.

NB The Secretary of State has a statutory power to issue guidance that governing bodies must take account of in framing their capability procedures for teachers. The Government published that statutory guidance in July 2000.

In June 2007, the County Council reviewed the Capability Policy/Procedure in consultation with the Teachers' Panel and the Headteachers' associations. All school's are required by law to have a Capability Policy/Procedure, and Governing Bodies of community schools should now adopt the updated model and make this known to all their teaching staff. Voluntary aided and foundation schools which have adopted the County Council model are also urged to adopt the updated version. The main changes are -

Clarification of the transition between the Performance Management Procedure and the Capability Procedure.

Inclusion of the procedures for referring a teacher to the **National College for Teaching and Leadership (NCTL)** in circumstances where the employer decides to cease to use the teacher's services or might have done so if the teacher had

not decided to resign.

Simplification of the movement between the Stages of the procedure.

When a recommendation for dismissal is the outcome, rather than moving to the Disciplinary Procedure, the procedures for dismissal are now incorporated in the Capability Procedure, including the procedures for hearings and appeals. This has also removed inappropriate references to disciplinary action.

2. Support Staff

The longstanding policy and procedure applies to support staff.

CHESHIRE WEST AND CHESTER COUNCIL – CHILDREN'S SERVICES CAPABILITY POLICY AND PROCEDURE - TEACHERS

1 Introduction

- 1.1 At the request of the Government, an "Outline Capability Procedure" was drawn up by an ACAS Working Group and published in October 1997. That Procedure only relates to teachers (including Headteachers, Deputy Headteachers, Assistant Headteachers, Advanced Skills, Excellent and Unqualified Teachers). It defines a lack of capability as "a situation in which a teacher fails consistently to perform his or her duties to a professionally acceptable standard."
- 1.2 This Cheshire document has been reviewed, and where necessary revised, to ensure that it incorporates the broad principles embodied in the national "Outline Capability Procedure". It sets out steps which should be followed if problems arise that appear to have their cause in the capability or competence of an employee for performing the duties for which he/she was appointed. Capability is in relation to the skills, aptitudes, health, non-attendance or any other mental or physical aspect of the individual. It is therefore distinguishable from any wilful conduct or misconduct of an employee for which the Disciplinary Procedure would be appropriate. The policy embraces ill-health and non-attendance circumstances but extends primarily to cases of capability for reasons other than ill-health.

2 Principles

This document is founded on the following principles:

- (a) To encourage a sensitive, imaginative, realistic and constructive approach to all capability circumstances by all concerned - the employee, other employees and the Head of Establishment or his/her representative.
- (b) To enable, wherever possible, the employee with a capability problem to perform satisfactorily in the contractual job.
- (c) To confirm that the responsibility for resolving capability situations rests with each Head of Establishment (or the Chair of Governors in the case of a Head of Establishment) who may wish to take advice from Schools' Personnel Consultancy and, if necessary, from the Occupational Health Adviser (OHA).

- (d) To ensure that capability difficulties are dealt with efficiently, within agreed time periods and with clear outcomes resulting at all stages.
- (e) At each stage, to involve and recognise the value of the role of the appropriate trade unions in the operation of this policy/procedure.
- (f) To recognise that whilst every effort will be made to help an individual with a capability problem, the establishment cannot guarantee to maintain employment.

3 Performance Management and Capability: Transition

- 3.1 Within Establishments it is expected that any problems with an employee's performance should be identified and responded to at the earliest time within normal school Performance Management arrangements and practices.
- 3.2 Where, however, a Head of Establishment (or Chair of Governors, in the case of the Headteacher) judges that an employee's performance requires action under formal procedures, s/he, or a Responsible Person with a delegated remit, should hold a discussion with the employee*.
- 3.3 At that discussion, the Head of Establishment/Responsible Person will tell the employee that s/he has concerns about his/her performance in the job and consider his/her responses. The Head of Establishment/Responsible Person will share with the employee the evidence from the performance management process which has prompted the decision to consider capability proceedings and consider any initial response from the employee. The Head of Establishment/Responsible Person and the employee will then have a minimum of 5 calendar days to consider and review the position.
- 3.4 If the Head of Establishment/Responsible Person concludes that the formal procedures should be invoked, s/he will inform the employee that Stage 1 will be implemented. This will be confirmed in a formal letter enclosing a copy of this Capability Procedure.

4 Stage 1

- 4.1 A Formal Interview will constitute the "date of entry into the formal procedure" - as set out in the Government's "Outline Capability Procedure".
- 4.2 The Head of Establishment/Responsible Person will arrange a date for the Formal Interview (allowing at least 5 calendar days notice) and tell the employee that s/he may be accompanied, if he/she wishes, by a trade union or other representative. These arrangements will be set out in a letter to the employee signed by the Head of Establishment/Responsible Person which will also set out, in general terms, the areas of incapability. The letter will also indicate that the Interview is being undertaken in accordance with Stage 1 of this Capability Procedure and include a copy. It will draw the aims of the Formal Interview to the employee's attention.
- 4.3 During the Formal Interview, the Head of Establishment/Responsible Person must take full account of the employee's circumstances both at work and, if appropriate, outside work. In particular, s/he should be careful to explore fully the circumstances behind an apparent lack of capability, including any disability, the outcome of the Coaching and Support

Programme offered by The Whitby High School and give the individual every opportunity to present his/her view or explanation of the situation.

4.4 The options/actions available at this stage will include:

- Further counselling, perhaps involving specialist assessment by, for example, orthopaedic consultants (arranged by the Authority) or alternative career guidance.
- Further training.
- Advice and support from within the school.
- Closer supervision for a limited period.
- Medical advice/treatment.
- Alterations/adaptations to duties/working environment consistent with the needs of the establishment and which do not change the general character of the job.
- Seeking alternative work initially within the establishment.
- Agreed and voluntary termination of contract.

4.5 A clear programme of action, e.g. target and achievement setting and timescale(s), will be set over a period of **no more than one term** or its equivalent. Review dates/meetings must also be set as part of this Stage. The establishment should keep records of all meetings/discussions which will be given to the individual either immediately or within 5 calendar days of the meeting/discussion.

4.6 If the difficulty is related to non-attendance or disability, the OHA should be involved and the employee's permission sought for the OHA to contact the general practitioner. Any medical advice should be taken into account together with all other factors.

4.7 The objective at Stage 1 is to alleviate or remove any problem and achieve an improvement to a satisfactory standard. Progress towards achieving a satisfactory standard of performance will be considered at a review meeting(s) during the course of Stage 1 and at an end of Stage 1 meeting. If at the end of this Stage (or during any Review) it becomes clear that, regardless of further action, acceptable and satisfactory performance in the job is unlikely to be achieved within the foreseeable future, the employee should be warned, formally, about his/her lack of capability and informed that Stage 2 of the Procedure will now be implemented.

4.8 This will be confirmed in the notes of any meeting and/or in a letter setting out the outcome of the meeting and the arrangements for Stage 2.

(Guidance note for 4.8: A programme of action including timescales and reviews should be set for Stage 2. Where an action plan is on-going the process and timescales will be continuous. Where there is a need to make significant changes to targets and action plans it may be necessary to hold a separate meeting to give the employee the detail of this. This should be held as soon as possible and timescales should take account of opportunity to demonstrate progress against targets.)

5 **Stage 2**

5.1 The period over which Stage 2 should take place will depend on the particular circumstances of the case. However, the duration of this Stage will **not normally exceed one term or its equivalent. In extreme cases, where it is judged that the education of**

pupils may be in jeopardy, the period given for improvement after being warned, formally, may be no more than four weeks. In such cases no further warning will be issued.

- 5.3 At this stage all options are still open (see para 4.4) but will now include in addition:
- Mutual agreement to termination/application for ill health or early retirement.
- 5.4 The Head of Establishment/Responsible Person should ensure that the programme of action is clearly recorded and shared with the employee to ensure that all concerned fully understand the issues, targets and timescales.
- 5.5 Review dates/meetings during the term, or its equivalent, will be set/notified.
- 5.6 If the Head of Establishment/Responsible Person determines, at any Review meeting, that sufficient progress has not been made, the employee will be warned, finally and formally, that unless there is an improvement (within the timescales set out in 11 below) to an acceptable and satisfactory level of performance then it may be necessary to recommend his/her dismissal on the grounds of incapability.

6 Resolution

- 6.1 At the Final Review meeting, the Head of Establishment/Responsible Person will need to decide whether:
- The standard of performance is acceptable and likely to be maintained;
- OR
- It seems likely that, despite the action taken, the required performance will not be achieved in the contractual post or an alternative post within the establishment.
- 6.2 Where, at the Final Review meeting, sufficient improvement has not been achieved or is considered unlikely, the Head of Establishment/Responsible Person, accompanied by his/her adviser(s), will inform the employee at the interview that, having regard to all the circumstances, the situation appears to justify termination on the grounds of lack of capability. He/she should be invited to respond.
- 6.2 During an adjournment of the interview, the Head of Establishment/Responsible Person should discuss the case with his/her adviser(s) and consider the options available. These will be:
- Voluntary termination on appropriate terms;
 - A recommendation for dismissal with notice to: a) the Headteacher, where the IDD has been delegated to the Headteacher or b) the Governing Body, where the IDD has not been delegated to the Headteacher, the Headteacher is “tainted” or the Headteacher is the subject of the procedure.
- 6.3 If the outcome is a recommendation to dismiss, then the employee will be suspended from duty immediately. The procedures to be applied will be -
- a) where the IDD has not been delegated to the Headteacher, the Headteacher is “tainted” or the Headteacher is the subject of the procedure, those set out in Section 7; or

- b) where the IDD has been delegated to the Headteacher and s/he is not tainted, those set out in Section 8.
- 6.4 The teacher will be informed of the obligation on the employer to make a referral to the NCTL (see paragraph 13 below).

7. Dismissal by Governing Body - Procedure

(NB: A separate Dismissal Procedure applies to staff dismissed for reasons other than incapability.)

- 7.1 The referral of a case to the Governing Body will be heard by a Staff Dismissal Committee of the Governing Body.

NOTE: The **“Staff Dismissal Committee”** should include, by law, at least 3 members of the Governing Body. Where there are insufficient governors who have not been involved in any previous action or decision connected with the dismissal, the decision should be delegated to two governors. The existing Staffing/Personnel Committee may be re-constituted to perform this function.

It will also be necessary to establish a **“Staff Dismissal Appeal Committee”** to hear any appeal in respect of a decision taken under this procedure. This must consist of at least three governors who have not been involved in any previous action or decision connected with the dismissal (i.e. it must exclude members of the Staff Dismissal Committee). Where insufficient such governors are available, the appeal may be heard by two governors, but there should be no fewer than the number that made the initial decision. (Membership of these Committees is subject to the restrictions on persons taking part in proceedings of governing body meetings and committees set out in the relevant school government regulations.)

- 7.2 Where a Governing Body Hearing is to be convened the employee will be informed by letter from the Clerk to the Governing Body or other appropriate agency, e.g. Local Authority. The letter will enclose a copy of this Procedure and advise him/her of:

the place and time of the Hearing
details of the alleged incapability
the right to be accompanied by a trade union official or other representative of his/her choice
the right to call witnesses

The letter will either be handed to the employee or sent by recorded delivery and first class post. Reasonable time (a minimum of ten calendar days) must be allowed between the receipt of the letter and the Hearing so as to allow the employee to prepare his/her case.

- 7.3 The conduct of the Dismissal Hearing will be as set out in Appendix 1 to this Procedure.

- 7.4 The Governing Body Committee/Panel may dismiss the employee or may impose a lesser sanction e.g. demotion/relegation or no sanction at all.

- 7.5 The decision of the Staff Dismissal Committee will be confirmed by letter, signed by the Chairman of the Staff Dismissal Committee who conducted the Hearing, which will either be handed to the employee or sent by recorded delivery and first class post.

In the case of a dismissal the letter will state:

- (i) The reasons for this and the right of appeal; and
- (ii) The date from which the dismissal will take effect.

In the case of alternative sanctions being agreed the letter will state:

- (i) The decision of the Hearing and the action being taken;
- (ii) The reasons for this; and
- (iii) the right of appeal.

7.6 In schools where the LA has advisory rights, the Director of Children's Services or her/his representative will attend when a dismissal is being considered. The GB will consider any advice given before making a decision to dismiss.

7.7 The Headteacher (except where s/he is the person concerned) may also be present at all stages when a dismissal is being considered but not at the decision stage as s/he had made the recommendation and would have either presented the case direct or been present throughout the Hearing.

8. Dismissal by Headteacher

(NB: A separate Dismissal Procedure applies to staff dismissed for reasons other than incapability.)

8.1 Where the Headteacher has delegated power to take the initial dismissal decision (IDD), the employee will be called to a formal Hearing chaired by the Headteacher.

8.2 The employee will be informed by letter from the Clerk to the Governing Body or other appropriate agency, e.g., Local Authority. The letter will enclose a copy of this Procedure and advise him/her of:

- the place and time of the Hearing
- details of the alleged incapability
- the right to be accompanied by a trade union official or other representative of his/her choice
- the right to call witnesses

The letter will either be handed to the employee or sent by recorded delivery and first class post. Reasonable time (a minimum of ten calendar days) must be allowed between the receipt of the letter and the Hearing so as to allow the employee to prepare his/her case.

8.3 The conduct of the Dismissal Hearing will be as set out in Appendix 1 to this Procedure.

8.4 The Headteacher may dismiss the employee or may impose a lesser sanction i.e. demotion/relegation

8.5 The decision of the Headteacher will be confirmed by letter, signed by the Headteacher, which will either be handed to the employee or sent by recorded delivery and first class post.

In the case of a dismissal the letter will state:

- (i) The reasons for this and the right of appeal; and
- (ii) The date from which the dismissal will take effect.

In the case of alternative sanctions being agreed the letter will state:

- (i) The decision of the Hearing and the action being taken;

- (ii) The reasons for this; and
- (iii) the right of appeal.

8.6 In schools where the LA has advisory rights, the Director of Children's Services or her/his representative will attend when a dismissal is being considered. The Headteacher will consider any advice given before making a decision to dismiss.

9. Appeals

9.1 If the outcome of the Capability Procedure is not dismissal, but the employee wishes to appeal because of dissatisfaction with the manner of application of this Procedure, the school's Grievance Procedure should be used. (Its use will not be allowed to affect the timescale in the Capability Procedure although the outcome could do so.)

9.2 An employee has the right to appeal against dismissal under this Procedure which will be dealt with in accordance with Appendix 2. Appeals must be made, in writing, stipulating the grounds of the appeal, within ten calendar days of receipt of the letter confirming the action.

9.3 The conduct of the Appeal Hearing will be carried out in accordance with Appendix 1 to this Procedure. i.e. as a full re-hearing of the case by the Staff Dismissal Appeal Committee or other Group (excluding any governor involved at an earlier stage)

9.5 At any appeal the employee has the right, if they so wish, to be accompanied by a trade union official or other representative of his/her choice.

10. County Council

10.1 If the school is a maintained school other than an Aided or Foundation school, and provided the employee is employed to work solely at the school, and a decision to dismiss is taken, the Appeal Group will notify the County Council in writing of its decision and the reason for it.

The County Council will, before the end of 14 calendar days beginning with the date on which the notification under this paragraph is given, either give him/her such notice terminating his/her contract of employment with the County Council as is required under that contract.

If the employee is not employed solely to work at the school the County Council shall require him/her to cease to work at the school.

10.2 If the school is an Aided or Foundation school, and a decision to dismiss is taken, the Appeal Group will notify and require the Chairman of the Governing Body to either give the employee such notice terminating his/her contract of employment with the school as is required under that contract.

10.3 If a subsequent appeal reverses the decision the withdrawal or termination notice may be rescinded. In cases where the contract is terminated without notice, the termination may be rescinded if an appeal is upheld.

11. Timescales

- 11.1 In the event of a decision being reached to implement the formal capability procedures, action over both Stages should be taken over no more than two terms or their equivalent.
- 11.2 In some cases it may be necessary to:
- a) condense or shorten the process, at either the Formal Interview (para. 4.3) or at a Review meeting which may be either a scheduled meeting or one convened because of a change of circumstances or escalation of problems/difficulties;
- OR
- b) extend the timescale, by no more than half a term, or its equivalent, at either Stage.

12. Non-attendance/Ill Health/Disability

- 12.1 Where application of Procedures results in absence of the employee the advice of the OHA should be obtained immediately as to how long the absence could be expected to last.
- 12.2 The possibility of unavoidable termination on grounds of non-attendance/ill-health may be appropriate in certain circumstances. Initial consideration must be given about the future, in advance of the expiry of full pay under the sick pay scheme.
- 12.3 Where an employee has become temporarily incapable of performing in the job, this should be dealt with as part of the informal process.
- 12.4 In dealing with an employee who has a disability as defined in the DDA, the school/County Council will comply with the requirements of the Act.

13. National College for Teaching and Leadership (NCTL)

By law, where an employer -

- (a) has ceased to use a registered teacher's services on grounds relating to his professional incompetence; or
- (b) might have ceased to use a registered teacher's services on such a ground had the registered teacher not ceased to provide those services,

the employer must report the facts of the case to the NCTL and provide them with certain information in relation to the registered teacher.

Therefore, where a registered teacher is dismissed for incompetence, the County Council must refer the case to the NCTL. The County Council must also refer the case to the NCTL when the teacher leaves his/her job while within formal capability procedures (from Stage 1 onwards), but subject to an assessment that their case was of a seriousness which made dismissal a possibility. Therefore, a teacher may not be referred to the NCTL if s/he leaves his/her job while within formal procedures but improving, and it was considered improbable that dismissal would have been the outcome.

Following a referral, the NCTL will then consider the case under its disciplinary functions. This may lead to reprimands, conditional registration orders, suspension orders or prohibition orders. Action by the NCTL may affect the ability of a teacher to teach in the maintained sector.

CONDUCT OF HEARINGS

The procedure to be adopted at any Hearing will normally be:

- 1 There are three possible different circumstances -
 - a) The Headteacher has delegated power to dismiss -
A Hearing involving a member of staff will be conducted by the Headteacher's representative (up to Dismissal stage). A dismissal hearing will be conducted by the Headteacher, provided s/he is not "tainted", in which case b) below will apply.
 - b) The Headteacher does not have delegated power to dismiss -
A Hearing involving a member of staff will be conducted by either the Headteacher or his/her representative (up to Dismissal stage) or a Committee/Panel of the Governing Body or the Staff Dismissal Committee of the Governing Body (See paragraph 7 of the Policy and Procedure) in the case of a referral/recommendation for Dismissal, constituted in accordance with Paragraph 7.1 of the main document.
 - c) The Headteacher is the subject of the procedure -
A Hearing will be conducted by a Committee/Panel, or the Staff Dismissal Committee of the Governing Body (See paragraph 7 of the Policy and Procedure) in the case of a referral/recommendation for Dismissal, constituted in accordance with Paragraph 7.1 of the main document.
- 2 The person or group conducting the Hearing may be assisted in the conduct of the Hearing by one or more advisers, who may be from the Authority's staff.
- 3 The person/group conducting the Hearing will satisfy himself/herself/themselves that the employee understands the purpose of the Hearing, the nature of the incapability and the possible implications arising from it.
- 4 The case against the employee will be presented normally by the Responsible Person/Headteacher (or the Chairman of Governors or his/her representative where the Headteacher is the subject of the Hearing) who will describe the case and the presentation may include witnesses, written statements or other documents where these are considered necessary.
- 5 The employee and/or representative will be given the opportunity to question the presenting officer as well as any witnesses who may have given evidence.
- 6 The employee or his/her representative will then be invited to respond to the case as presented. The employee may also produce witnesses, written statements or other documents in support of his/her case. (Where it is the intention to submit written Statements of Case these must be exchanged by both sides at least five calendar days prior to the hearing.).

Where witnesses are school or County Council employees they should be given reasonable time off with pay to attend the Hearing.

- 7 The presenting officer will be given the opportunity to question the employee, his/her representative and any witnesses called in his/her defence.
- 8 At any stage during the Hearing the person/group conducting the hearing and any adviser(s) may ask questions of the employee, the presenting officer or such other persons, as they may consider appropriate in order to ascertain the facts and arguments.
- 9 The presenting officer will then be invited to make a closing statement not introducing any new material.
- 10 Finally the employee or his/her representative will be given the opportunity to make a closing statement also without introducing any new material.
- 11 Both parties will withdraw to allow the person/group conducting the Hearing to review and consider the evidence in conjunction with any advisers.
- 12 The person/group conducting the Hearing will then recall both parties to inform them of his/her/their decision. The decision should normally be announced personally to the parties as soon as it is possible on the day of the hearing. If it is not possible to make a decision immediately the parties should be informed of this. In any event a decision must be made and communicated to the employee within five calendar days of the hearing. The decision should be confirmed in writing and delivered to the employee either by hand or recorded delivery and first class post with a copy to the trade union or other representatives and the presenting officer.

APPEALS

1. Appeal against dismissal

- 1.1 Appeals must be made, in writing, stipulating the grounds of the appeal, within ten calendar days of receipt of the letter confirming the action. In order to deal with the appeal expeditiously the hearing will normally take place within 28 calendar days of the appeal being lodged.

The employee will be given in writing a minimum of 7 calendar days notice of the time and place of the hearing, and will be allowed to be represented by either their trade union representative or other representative of their choice. The procedure for the hearing will be circulated in advance.

- 1.2 An appeal against a decision to dismiss an employee will be heard by a Staff Dismissal Appeal Committee of the Governing Body, with full delegated powers. (See paragraph 7 of the Policy and Procedure.)

- 1.3 The Appeal Group will either:

- (i) Confirm the decision to dismiss the employee; or
- (ii) Withdraw the decision to dismiss the employee; or
- (iii) Vary the decision and take alternative action(s) in accordance with the Procedure.

- 3 The decision of the Appeal Group will be final and binding.

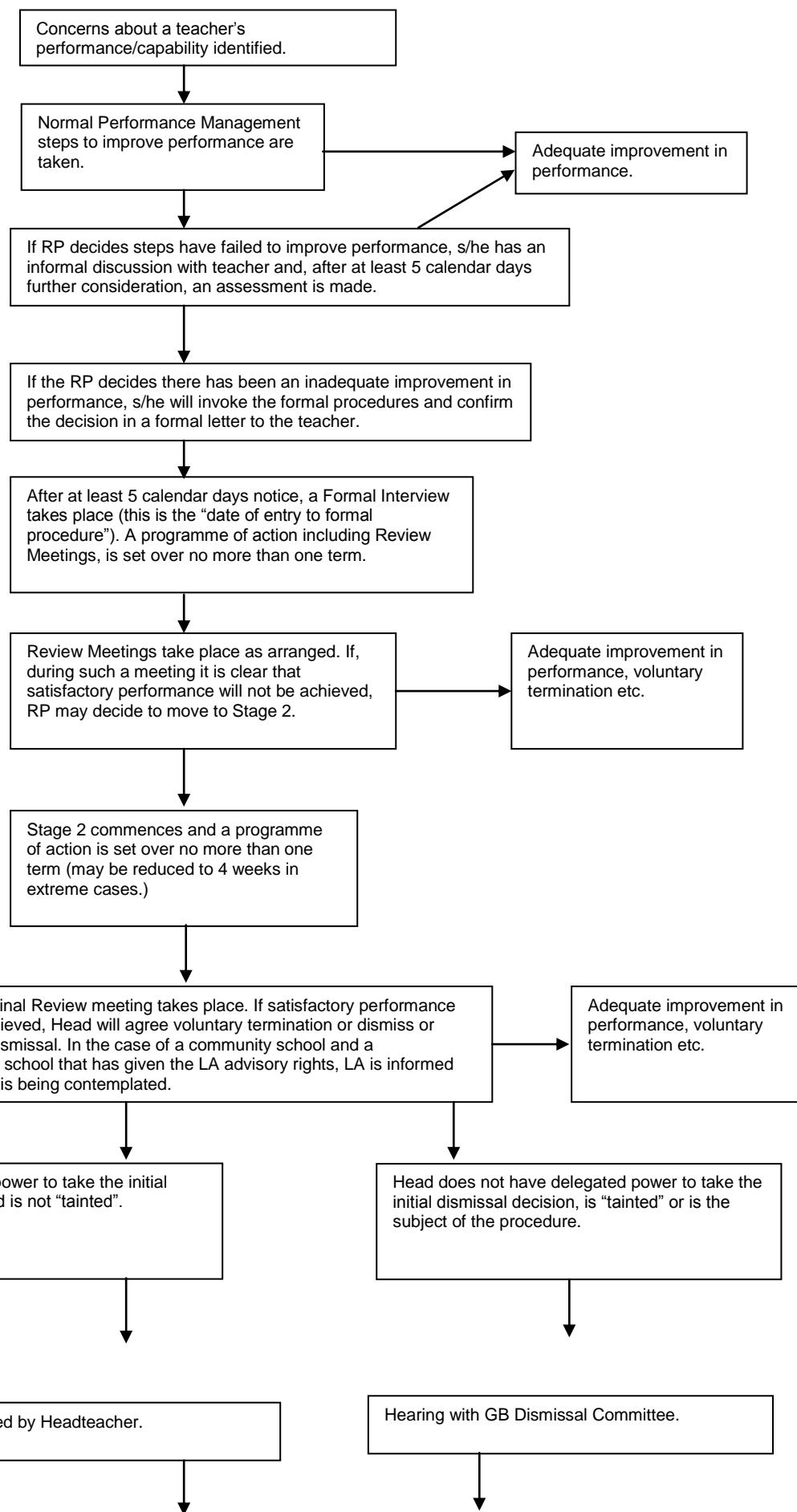
2. Application Of The Procedure

If the outcome of the Capability Procedure is not dismissal, but the employee wishes to appeal because of dissatisfaction with the manner of application of this Procedure, the school's Grievance Procedure should be used. (Its use will not be allowed to affect the timescale in the Capability Procedure although the outcome could do so.)

*** If the Headteacher has delegated power to make an initial dismissal decision ("IDD") and s/he is not "tainted", s/he will normally delegate the role, in case s/he ultimately needs to hear a recommendation for dismissal.**

TEACHERS' CAPABILITY PROCEDURES

Performance Management



Moving Forward Together

If decision to dismiss: a) Community school - instruct LA to terminate employment and notify NCTL. b) Foundation/VA school – terminate employment and notify NCTL.



Any Appeal against dismissal heard by Appeal Committee of GB.

RP = Responsible person (e.g. Headteacher, manager or governor). If the Headteacher has delegated power to make the initial dismissal decision and s/he is not “tainted”, s/he will normally delegate the role, in case s/he ultimately needs to hear a recommendation for dismissal.

CHESHIRE WEST AND CHESTER- EDUCATION DEPARTMENT

CAPABILITY POLICY AND PROCEDURE – SUPPORT STAFF

1 Introduction

This document which can apply to all employees in educational, establishments sets out steps which should be followed if problems arise that appear to have their cause in the capability or competence of an employee for performing the duties for which he/she was appointed. Capability is in relation to the skills, aptitudes, health or any other mental or physical aspect of the individual. It is therefore distinguishable from any wilful conduct or misconduct of an employee for which the Disciplinary Procedure would be appropriate. The policy embraces ill-health circumstances but extends also to cases of capability for reasons other than ill-health.

2 Principles

2.1 This document is founded on the following principles:

- (a) To encourage a sensitive, imaginative, realistic and constructive approach to all capability circumstances by all concerned - the employee, other employees and the Head of Establishment or his/her representative.
- (b) To enable wherever possible the employee with a capability problem to perform satisfactorily in the contractual job.
- (c) To confirm that the responsibility for resolving capability situations rests with each Head of Establishment or his/her representative who may wish to take advice from the Education Group Personnel Officer and, if necessary, from the County Medical Health and Safety Adviser.
- (d) To ensure that capability difficulties are dealt with efficiently, within agreed time periods (according to circumstances) and with clear outcomes resulting at all stages.
- (e) At each stage to involve and recognise the value of the role of the appropriate trade unions in the operation of this policy/procedure.
- (f) To recognise that whilst every effort will be made to help and retain an individual with a capability problem, the establishment cannot guarantee to maintain employment.

3 Normal Establishment Arrangements

3.1 Arrangements within Establishments should be such that any problems with an employee's performance are identified at the earliest time. As soon as any apparent difficulty arises the Departmental Head should have an informal discussion with the employee. This discussion will concentrate on:

- Exploring the extent to which a problem exists (and the information which has prompted the discussion).
- Examining the employee's Job Description/assigned duties.

- The standards of job performance required.
 - Shortcomings in reaching these standards.
 - Exploring possible reasons for shortcomings.
 - Reaching agreement on how and when acceptable performance might be achieved.
- 3.2 Full account must be taken of the employee's circumstances both at work and, if appropriate, outside work. In particular, the Departmental Head should be careful to explore fully the circumstances behind an apparent lack of capability and give the individual every opportunity to present his/her view or explanation of the situation. The employee may be accompanied at the discussion, if he/she wishes, by a trade union or other representative.
- 3.3 The options available at this stage will include:
- Further counselling, perhaps involving specialist assessment by, for example, orthopaedic consultants (arranged by the Authority).
 - Further training.
 - Advice and support from within the Establishment.
 - Closer supervision for a limited period.
 - Medical advice/treatment.
 - Alterations to duties consistent with the needs of the establishment and which do not change the general character of the job.
 - Seeking alternative work initially within the establishment.
- 3.4 A clear programme of action including review dates must be agreed between the Departmental Head and the individual/representative. Nothing need be put in writing to the employee at this point but the establishment should keep some record of the discussions which will be made available to the individual.
- 3.5 If the difficulty seems to be related to health, the County Medical Health and Safety Adviser (CMHSA) should be involved and the employee's permission sought for the CMHSA to contact the general practitioner. The medical advice should be taken into account with all other factors.
- 3.6 The object at this stage is to alleviate or remove the problem after adequate time has been allowed for improvement or assessment (having regard to the review dates in paragraph 3.4). If however at this stage it becomes clear that regardless of further action, acceptable performance in the job cannot be achieved within the foreseeable future, and in any event if no improvement occurs after a period of time, the matter should be referred to a higher level. The employee should be told that this will be done and that a formal interview with someone more senior in the establishment will follow.
- 3.7 The procedure set out below will follow any unsuccessful remedial action taken under these normal establishment arrangements.

4 Procedure

Stage 1

- 4.1 The senior person (Deputy or Head of Establishment) will notify the employee of the formal interview referring specifically to this policy and giving (in addition to date, time and place) details of who will be present; full but concise written details of the lack of capability or competence; the right to be accompanied by a trade union or other representative; the right to ask individuals (to be notified to the senior person in advance) to give supporting information. The notice should be sent at least 10 calendar days in advance of the interview and, if requested, with a copy to the trade union or other representative.
- 4.2 At the interview, the senior person will receive from the Departmental Head and any other appropriate sources details of the lack of capability and other relevant background information. The employee/representative will explain his/her position, be entitled to question any statements and comment generally.
- 4.3 After the interview (or during an adjournment) both parties will leave. In their absence the senior person will review the situation fully and decide what action to take or recommend. At this stage all options are still open (see para 3.3) but will now include in addition:
 - Mutual agreement to termination/ill health or early retirement.Review dates should be mutually agreed between the senior person and the individual/representative at the conclusion of the interview.
- 4.4 There will be circumstances where a firm and realistic indication of what will follow could help remedy a situation where the employee is failing to adopt a realistic attitude to his/her problems.
- 4.5 The senior person should ensure that the outcome of the interview and any action to be taken is clearly recorded and that all concerned understand the situation.
- 4.6 Thereafter, the application of the action decided should be monitored and discussed with the employee regularly at further review meetings (if necessary) until the senior person is satisfied that either:-
 - The standard of performance is acceptable and likely to be maintained.OR
 - It seems likely that despite action taken, the required performance will not be achieved in the contractual post or an alternative post within the establishment.

The period over which this monitoring should take place will depend on the particular circumstances of the case.

Stage 2

- 4.7 Where, after a period of time, sufficient improvement is considered unlikely the senior person, who may take advice from the Education Group Personnel Officer, will hold a further formal interview (arranged and held as in paragraph 4.1) with the employee. The employee should be told at the interview that, having regard to all the circumstances, the

situation appears to justify termination on the grounds of lack of capability. He/she should be invited to respond.

4.8 Immediately after the interview, the senior person should discuss the case with the Education Group Personnel Officer and consider the options available. These will be:-

- Voluntary termination on appropriate terms.

OR

- A recommendation to the Governing Body for dismissal with notice

OR

- pay in lieu of notice.

The power to dismiss is vested in the Governing Body of the Establishment.

4.9 If the outcome is a recommendation for dismissal then the Disciplinary Procedure will be applied.

5 III Health

5.1 The effect of ill health on employment can take a variety of forms from prolonged sick leave or frequent but short absences, to chronic conditions which affect capability but which have little effect on attendance. Full medical advice must be sought and regular and sensitive contact maintained with an employee (or if necessary, with a relative) on extended sick leave. The possibility of unavoidable termination should be raised only if appropriate. Firm decisions about the future must be taken well in advance of the expiry of full pay under the practice on sickness payments.

5.2 Where an employee has become temporarily incapable of performing in the job, he or she may need rehabilitation within the establishment and a flexible approach should be adopted towards this option. This could involve adapting duties/hours temporarily or providing temporary alternative work. Such measures must be kept under regular review and their efficacy fully assessed. During rehabilitation, the employee will remain contracted to the original job and pay/conditions of service will be treated according to the particular circumstances of the case.

5.3 It must be recognised that there will always be ill health cases where the nature of the illness makes rehabilitation most unlikely. In these circumstances the only course may be termination on the grounds of ill health (if necessary after a period of sheltering) without the application of all stages of the procedure. This course should only be pursued in full liaison with the County Medical Health and Safety Adviser and the appropriate trade union.

6 Special Budget & Supernumerary Employment

A very small Special Budget is available to help, in part or in whole, with rehabilitation costs and the employment of disabled persons, where the establishment finds it impossible to meet these costs. Requests should be made to the Education Group Personnel Officer.

CAPABILITY POLICY AND PROCEDURE – SUPPORT STAFF COMMENTARY

This Commentary has been produced for the Head of Establishment and should be read/applied in a way appropriate to your particular position in a capability or competence situation. You should read the commentary in conjunction with the document.

Introduction

- 1 Always make sure you have full information and history to judge whether you are dealing with capability or, for example, a situation that may need disciplinary action. Incapability means not doing the job to the standards required because of an innate lack of ability or skills or a health problem and not, for example, because of lack of interest. These standards should be clear to all concerned and agreed (explicitly or implicitly) between your establishment management and the employee. As a Department Head or Head of Establishment you cannot complain about poor performance if the standards aren't clear and generally accepted.
- 2 A capability situation probably follows from either changes in the job e.g. new technology; new targets; enforced changes in curriculum, or changes in the individual (e.g. ill health; handicap; problems at home; boss problems; getting older). In capability cases, the reaction of the individual is to a large extent involuntary. It may be necessary first to overcome the barrier of acceptance that a problem exists. He/she may regret the situation and may well want to change - but needs help. Wilful acts of commission or omission are almost always absent, although they may appear in some isolated circumstances.
- 3 If you use disciplinary action where the problem is incapability, the situation will probably get worse. Anxiety and frustration will compound the existing problems. There is no point in warning someone to improve if they, quite simply, cannot do the job better or need constructive help to do it better. But it must be said that if an individual will not co-operate within the capability policy then appropriate disciplinary action may have to be considered.

Principles

- 4 These are the spirit and thrust of the policy and procedures. Always bear these principles in mind, especially when the recommended procedures are adapted to fit particular circumstances. Always aim to be flexible and season consideration with common sense.

Normal Establishment Arrangements

- 5 It is recognised that, in some establishments the 'Department Head' and the 'senior person' (see 3.1) may well be the same person. This is probably so in small primary schools.

Where possible, however, (particularly in secondary schools) there could well be a role for Faculty Heads or Heads of Department in the early stages of a perceived capability problem.

- 6 The key words are 'identified at the earliest time'. It is essential to spot failings early and take positive action to remedy or explore the situation further. Talk to the individual and

get the relevant facts and a feeling for the situation - at work and off the job. Seek to help. Keep conversations informal and friendly. Aim to achieve full and effective performance in the present job, even if some (maybe temporary) changes to the job are needed.

- 7 Reflect on all possible solutions before coming to decisions - think laterally. Use other sources of help - especially an informal chat with the County Medical Health and Safety Adviser if appropriate. If it is appropriate to involve the union, do so; they may be able to help you to resolve situations and bring a different perspective to a problem.
- 8 Reach clear agreement with the individual on actions and dates/time/periods. Ensure all concerned understand the criteria for success. Support other colleagues who are affected - they can help you, but only if they feel involved and have knowledge of the situation. Double check that the individual knows what is expected of him/her. Put this in writing if necessary - and always do so if there is any doubt that the individual has not understood the situation, or appreciated possible outcomes.
- 9 Seek to help - but always be realistic both to yourself and to others as to possible outcomes. Explain what happens next - good and bad. Make concise notes for yourself. Don't make promises that may not be fulfilled or which are not within your power to fulfil. Generally, be wary of raising expectations in an effort to help. It may only make things worse in the longer term.
- 10 Keep a close eye on the situation and check on progress. Take care to avoid 'out of sight out of mind' because the problems may re-appear again eventually (and worse!).

Procedure

Stage 1

- 11 Your normal departmental structure should cope with most cases. Once you are into the procedure proper (Paragraph 4.1 onwards) you have far less control of the situation. Attitudes will tend to harden. Flexibility will evaporate. Change is hampered. The employee begins to achieve 'a reputation' which may well precede him/her and hamper future efforts to help. If the formal procedure cannot be avoided, be very aware of these situational changes and do what you can to counter their effects. It is a formal procedure, but apply it in a friendly manner and keep control of your part of the action. You are still seeking to help.
- 12 Always be mindful that when a formal and jointly agreed procedure is involved, mistakes may well be noted, e.g. by the union and may be used in evidence against you later (e.g. at an appeal or tribunal).
- 13 Make sure that the individual knows that the Capability Policy and Procedures are being applied and that he/she has a copy. Spell out the stage in the procedures that has been reached.
- 14 The senior person dealing with the case, i.e. Head of Establishment or Deputy may vary from case to case or may be the same person for all cases. The Head of Establishment should decide this.

- 15 When you write under paragraph 4.1, don't omit any significant aspect of the lack of capability/competence. It would be unfair to the individual and could be prejudicial to your case in the longer term.
- 16 Be concise - give the kernel of any shortcomings and relate it to any relevant written document of which the employee should have been aware. Using written sources reduces the problems of uncertainty and consequent argument.
- 17 The Head of Establishment or Deputy dealing with the case should approach it with an open mind and not have any preconceptions or prejudices. At the hearing keep control and be scrupulously fair to all parties. Situations such as this can easily get out of hand and become noisy. Have the order of proceedings and stick to it. Prepare yourself carefully for the hearing.
- 18 Remember - you are still seeking to help - be friendly and constructive but realistic - especially about possible outcomes, if all does not go well. Keep a concise note of everything said. Specify next procedural steps and dates/time periods at the conclusion of the interview. Then give yourself time to think, reaching decisions quickly during an adjournment. It can be unfair and also arouse suspicions, to delay unduly reaching a decision after the hearing.
- 19 Explain decisions to all parties in person and seek agreement to actions. Confirm the situation in writing fully.
- 20 Then monitor progress regularly and discuss this with the supervisor. Application of the formal procedure doesn't rule out informal progress chats with the employee. But don't prejudice later formal discussions and keep a note for yourself of all discussions (with dates and places).

Stage 2

- 21 First talk to the Education Group Personnel Officer or other personnel agency which you use at your establishment.
- 22 Take great care to get the procedure for the interview right - be scrupulously fair and thorough. Given the seriousness of the situation now, delay in coming to a decision after the interview is nearly always inevitable. Don't act hastily. Take advice again.
- 23 Give the individual a specified time in which to respond.
- 24 Keep in touch with your advisers.
- 25 This is the end of the procedure. The following expands on the remaining parts of the Policies/Procedures.
- 26 III-Health

The views of the County Medical Health and Safety Adviser should always be sought in a capability case with an ill-health aspect. Encourage or where appropriate direct the employee to seek advice from and/or attend an interview with the CMHSA.

Special Budget

The limited budget is intended for short term help only. Always check with the Education Group Personnel Officer in advance if you think that the Special Budget may be able to help.