

## **CAPABILITY OF STAFF**

**April 2023**

**Version 1.1**

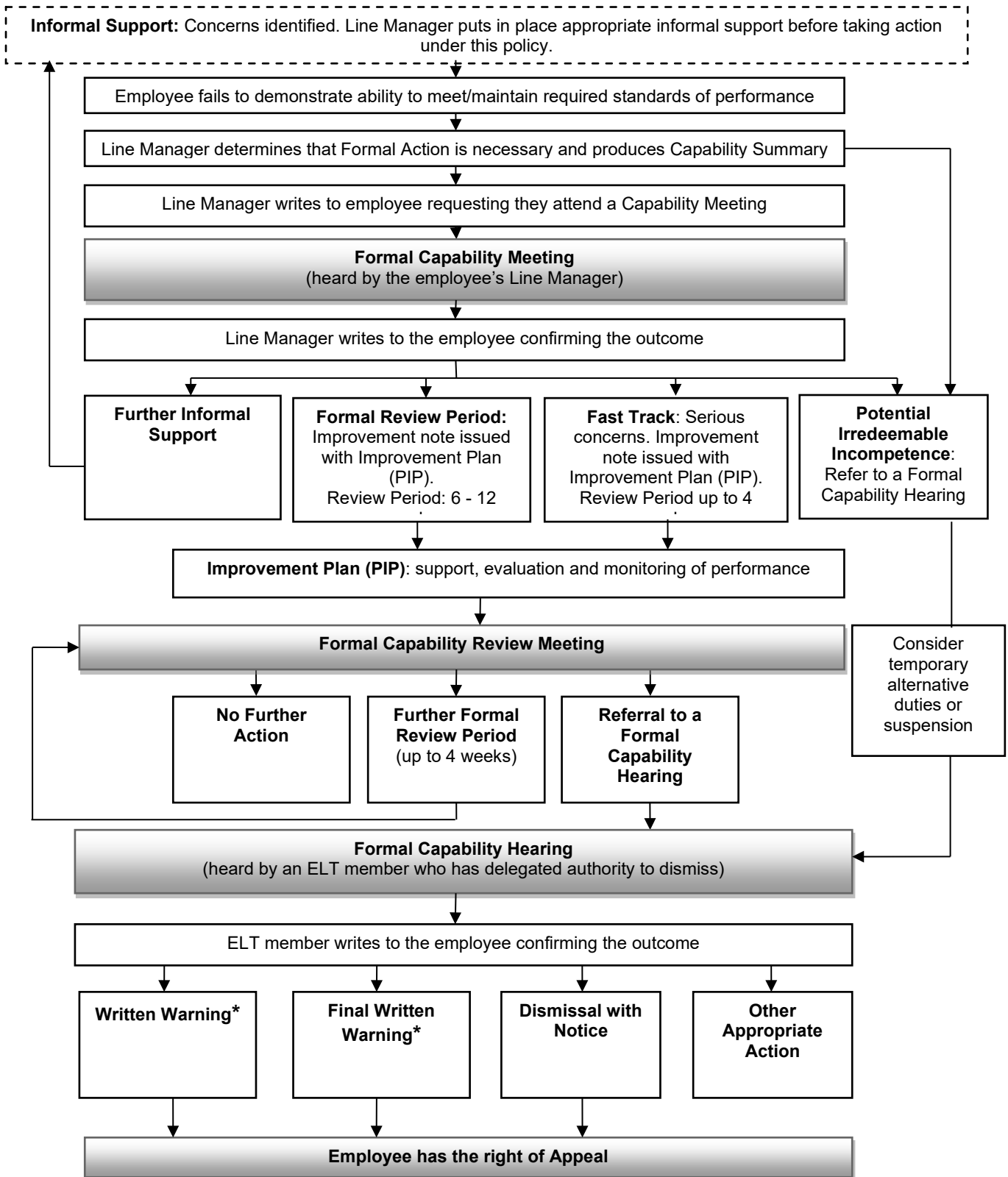
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## PROCEDURE FLOW CHART

All documents relating to this process are available upon request from the HRBP



*\*Further support, evaluation and monitoring of performance to be undertaken. Failure to reach the required standards within the agreed timeframe will result in a further Formal Capability Hearing being convened.*

## **POLICY AND PRINCIPLES**

### **1. DEFINITION**

Lack of capability is defined as an employee failing to reach or maintain the required standards of performance that their job demands.

Examples of lack of capability include but are not limited to:

- Failing to meet reasonable deadlines for tasks, projects, reports, etc.
- Regularly producing work, which is sub-standard, inaccurate, badly presented or poorly organised
- Failing to carry out key areas of job responsibilities, effectively and consistently
- Failing to meet the relevant professional standards, e.g. Teachers' Standards
- Failing to provide effective leadership and management, where applicable
- Poor practice regarding child/adult safeguarding
- Physical factors that are not disability or health related but prevent the employee from undertaking all aspects of their job.

### **2. PURPOSE**

This policy should be used to address poor performance in a fair, supportive, effective and consistent way. The aim of the policy is to effect sustained improvement in an employee's performance to enable them to meet their contractual obligations. For the avoidance of doubt, this document does not form part of your terms and conditions of employment.

### **3. APPLICATION AND EXCLUSIONS**

This policy is based on good practice to ensure a consistent and effective approach. The application of this policy will be fair, equitable, and objective and will not discriminate either directly or indirectly on the grounds of an employee's gender, age, disability, gender re-assignment, marital or civil partnership status, pregnancy, maternity status, race (including colour, nationality and ethnic or national origins), religion or belief, sex and sexual orientation.

### **4. DETERMINING WHO WILL HEAR THE MATTER**

#### **4.1 Formal Capability Meeting**

Where there are concerns about an employee's performance and action is to be taken in accordance with this policy, the employee's Line Manager should usually deal with the matter. In Ventrus Multi Academy Trust if the matter relates to the CEO, the Chair of Trustees will be responsible for this procedure.

The Line Manager/Chair of Trustees will be responsible for arranging the meeting, writing to the employee and arranging for a suitable person to attend to take notes.

#### **4.2 Formal Capability Hearing**

In Ventrus this is likely to be a member of the Executive Leadership Team (ELT), in accordance with their delegated responsibilities.

The ELT member will be responsible for arranging the Hearing, writing to the employee and arranging for a suitable person to attend to take notes.

### **5. TIME LIMITS**

The time limits included in this policy may be varied by mutual agreement. The policy refers to a number of 'days' within which certain actions/events are to occur. A 'day' is defined as any Monday to Friday excluding public holidays as defined by ACAS.

### **6. BEING ACCOMPANIED**

The Employee Relations Act 1999 determines that an employee has a statutory right to request to be accompanied at any Disciplinary or Grievance Hearing. To invoke that right an employee must make a reasonable request to the employer to be accompanied by either:

- a paid official from a recognised trade union/professional association
- an official of a trade union/professional association whom the union/association has reasonably certified in writing as having experience of, or as having received training in acting as an employee's companion at Disciplinary or Grievance Hearings
- an appropriate work colleague.

Friends/family members are not permitted, unless they fall under the above criteria, and it is agreed as appropriate. It would not normally be reasonable for an employee to be accompanied by a work colleague or trade union/professional association representative whose presence would prejudice the Hearing and/or was from a remote geographical location if someone suitable and willing was available on site.

If an employee's chosen representative is not available on the day proposed for the Hearing, the employee can propose an alternative time and date within the following five working days of the original proposed date.

## 7. NON-ATTENDANCE

If an employee fails to attend a meeting or Hearing through circumstances beyond their control, such as certified illness, an alternative time and date may be offered. Alternatively, they may submit a written statement or nominate a representative to attend on their behalf.

Where an employee is persistently unable or unwilling to attend the meeting/Hearing without good cause, it will proceed in their absence and a decision based on the evidence available will be made.

## 8. INFORMAL SUPPORT

Line Managers should normally ensure that support has been put in place to address any concerns surrounding an employee's performance, prior to using this policy. The Line Manager should be clear with the employee what the concerns are and what they need to achieve in order to meet the required standards of performance. The informal discussions should be dated and recorded for future reference and may be confirmed in writing. The employee should be given a reasonable timeframe to improve, the timeframe should be discussed with a member of ELT (3 months is suggested). A Staff Support Tracker (**SST**) is available to document the informal support.

Where there are concerns about an employee's performance following a reasonable period of informal support, it is recommended that the Line Manager completes a short report (**R1**) to summarise the outcome of the informal review period. This will then be discussed at an informal review meeting with the employee.

Following the informal review meeting, if it is decided that a more formal approach is required, the Line Manager should use **letter IR1** to put the outcome of the meeting in writing. This letter will also outline concerns and advise the employee that the formal stages of this policy are to be applied.

If the poor performance is thought to be health or disability related, medical advice should be sought through Occupational Health before any formal action is taken.

## PROCEDURE

### 9. CAPABILITY SUMMARY

Following the informal review meeting, the Line Manager must produce a Capability Summary (R2) outlining the unsatisfactory performance and the support/adjustments that have been put in place to assist the employee.

In cases where an employee is already subject to a live warning due to performance concerns, further performance concerns may be directly referred to a Formal Capability Hearing, at which stage a decision may be made regarding their continued employment.

## 10. FORMAL CAPABILITY MEETING

Where formal action is necessary, the Line Manager will write to the employee (**letter F1**) advising them of the concerns and informing them that they are required to attend a Formal Capability Meeting. The letter should confirm the details of the formal meeting (date, time, venue, who will be in attendance etc.), the possible outcomes of the meeting, the employee's right to be accompanied, the timescale for them to submit any documentation to be considered and that the meeting may take place in the employee's absence if they fail to attend without providing a satisfactory reason. A copy of the Capability Summary and a copy of this policy should also be sent to the employee. The employee will be given at least five days' notice, in writing, of the meeting.

At the meeting, the Line Manager must:

- tell the employee where their performance is not meeting the required standards and outline what these standards are
- confirm what support has been put in place to assist the employee and explore any further options which may support them
- give the employee the opportunity to respond and advise of any issues preventing them from meeting the required standards, including any mitigating factors
- carefully consider the employee's response.

The Line Manager should consider all the information and come to a decision regarding the most appropriate course of action. Where an Improvement Plan (**PIP**) is required, there should normally be a review period set of between 6 -12 weeks. In cases where there are serious concerns, the review period can be for a fast track period of up to 4 weeks.

Following the meeting, the Line Manager will normally write to the employee within five days to:

- confirm that further informal support is required but that this will be outside of this policy, **or**
- issue an improvement note to inform the employee that if they fail to meet the required standards within the review period, this may result in a referral to a Formal Capability Hearing, at which stage a determination may be made regarding their continued employment, **and** attach a copy of the Improvement Plan (PIP) and confirm a date for the Formal Capability Review meeting (See paragraph 13 regarding points for consideration when issuing the letter), **or**
- in cases of potential irredeemable incompetence, confirm that the matter is being directly referred to a Formal Capability Hearing, at which stage a decision may be made regarding their continued employment.

## 11. FAST TRACK REVIEW PERIOD

Where there are serious concerns about an employee's performance, this should be clearly evidenced within the Capability Summary and consideration given to a review period not exceeding 4 weeks.

## 12. IMPROVEMENT PLAN

Where an Improvement Plan (**PIP**) is required following a Capability meeting, Line Managers should ensure that it includes clear, measurable and realistic objectives. Details of any support, guidance and training being put in place to assist the employee should also be recorded, together with relevant timescales.

## 13. POTENTIAL IRREDEEMABLE INCOMPETENCE

In exceptional circumstances, cases may arise in which the inadequacy of the employee's performance is potentially so seriously lacking that the situation is irredeemable within a reasonable period of time. In such cases, the matter may be referred directly to a Formal Capability Hearing.

## 14. FORMAL CAPABILITY REVIEW MEETING

Following the Formal Capability Meeting, the Line Manager will have written to the employee advising them of the concerns and informing them that they are required to attend a Formal Capability Review Meeting. The letter should confirm the details of the Formal Capability Review Meeting (date, time, venue, who will be in

attendance etc.), the possible outcomes of the meeting, the employee's right to be accompanied, the timescale for them to submit any documentation to be considered and that the meeting may take place in the employee's absence if they fail to attend without providing a satisfactory reason. An updated copy of the Capability Summary should also be sent to the employee.

Where a review period applies, this meeting will involve the Line Manager meeting with the employee to formally review their performance against the Improvement Plan (PIP) in accordance with the agreed timeframe.

The outcomes available are:

- No further action required as performance has improved to the required standards and there is evidence that the employee is likely to sustain this. The employee should be informed that if similar concerns arise within the next 12 months a further Capability meeting may be convened.
- Where performance has improved materially but not yet to the required standards, a further Formal Review Period may be required, up to a maximum of 4 weeks, (unless there are exceptional circumstances where this would not be possible) which will be followed by a further Formal Capability Review Meeting. An updated improvement note should be issued to inform the employee that if they fail to meet the required standards within the further review period, this may result in a referral to a Formal Capability Hearing, at which stage a determination may be made regarding their continued employment **and** attach a copy of the updated Improvement Plan (**PIP**) and confirm a date for the further Formal Capability Review meeting (See above in this paragraph 13 regarding points for consideration when issuing the letter).
- The matter will be referred to a Formal Capability Hearing as there has been insufficient improvement (see paragraph 14 regarding points for consideration when issuing the invite letter).

The Line Manager will normally write to the employee within five days of the Formal Capability Review Meeting to confirm the outcome.

## 15. FORMAL CAPABILITY HEARING

Where an employee is required to attend a Formal Capability Hearing, the ELT member will notify the employee in writing giving at least five days' notice of the Hearing. The letter should confirm the details of the Hearing (date, time, venue, who will be in attendance etc.), the possible outcomes of the Hearing, the employee's right to request to be accompanied, the timescale for the employee to submit any documentation to be considered and that the Hearing may take place in the employee's absence if they fail to attend without providing a satisfactory reason.

An updated copy of the Capability Summary outlining the unsatisfactory performance and the actions taken to try and secure performance improvement must be sent to the employee with the letter.

At the Hearing, the employee will be given the opportunity to respond to the performance issues outlined in the Capability Summary and to present their case. The ELT member will then adjourn the Hearing to make their decision.

The outcomes available are:

- Where the employee is found to be performing unsatisfactorily, to issue a formal written warning, outlining the shortcomings in performance, the improvement required and the timescale for achievement. The employee should be informed of who will undertake the monitoring, the review date and details of any support, including training, that will be provided. The employee should be informed that failure to improve within the timeframe set would normally result in convening a further Formal Capability Hearing which could lead to a final written warning or dismissal. Unless specified otherwise, a formal written warning will cease to be live for further formal capability purposes after six months.
- Where the employee's unsatisfactory performance is sufficiently serious, to move directly to issuing a final written warning, outlining the shortcomings in performance, the improvement required and the timescale for achievement. The employee should be informed of who will undertake the monitoring, a review date and any support, including any training that will be provided. The employee should be informed that

failure to improve within the timeframe set would normally result in convening a further Formal Capability Hearing which could lead to dismissal. Unless specified otherwise, a final written warning will cease to be live for further formal capability purposes after twelve months.

- where the inadequacy of the employee's performance is so extreme, or if the employee has already received a final written warning within the last twelve months, they may be issued with Dismissal with Notice as they are incapable of performing the job for which they have been employed. Where the decision is taken to dismiss the employee, the ELT member should ensure that any previous warnings (if applicable) are not out of time.
- Other Appropriate Action to secure performance improvement.

The ELT member will reconvene the Hearing and confirm their decision verbally unless valid reasons exist not to do so and will usually then write to the employee within five days to confirm their decision.

If the decision is to dismiss the employee, the appropriate period of notice should be issued in accordance with the employee's contract of employment. Where a warning/final written warning or dismissal is the outcome, the employee must be informed of their right of appeal.

## **16. APPEAL**

If an employee wishes to appeal against the decision from the Formal Capability Hearing, they must do so in writing, stating the grounds for their appeal, within five days of receiving the written outcome.

An employee may appeal on the following grounds:

- the sanction given was too harsh given the circumstances
- the procedure was not fairly or correctly applied
- new information has come to light that would directly affect the decision made at the Formal Capability Hearing.

The written appeal should be sent to the Human Resources Business Partner (HRBP). The HRBP will then arrange for the appeal to take place.

In Ventrus Multi-Academy Trust, the Chief Executive Officer (CEO) will hear the appeal. The appeal should be heard without unreasonable delay. A minimum of five days' notice will be given to allow for preparation.

The outcome of an Appeal Hearing may be:

- to refer the matter back to the ELT member if significant new information/evidence is provided, which was not available previously, and may change the original decision
- conclude a procedural irregularity occurred and determine whether this had an impact on the decision-making process and outcome. If so, decide an appropriate sanction and make a recommendation to rectify the situation
- uphold the appeal and determine an alternative sanction/appropriate course of action
- reject the appeal and confirm that the original decision stands.

The decision will be given verbally to all parties at the end of the Appeal Hearing unless a valid reason exists not to do so, and it will normally be confirmed in writing to the employee within five days. An appeal is not a re-Hearing of all of the facts but to determine if the original decision was reasonable given the circumstances. The process ends with the decision of the CEO.

## **ADDITIONAL INFORMATION**

### **17. HR ADVICE**

The Ventrus HRBP can provide advice and support to any Line Manager or ELT member involved in the application of this policy at any stage. This includes attendance at meetings/Hearings where required.



## **18. REPORTING OBLIGATIONS**

### **18.1 Professional Bodies**

Where there are performance concerns about an employee which could potentially call into question their professional registration, e.g. a Social Worker registered with the Health and Care Professions Council (HCPC), Line Managers should ensure that they follow the appropriate procedure for reporting concerns to the relevant Registered Body. This will ensure that the body can investigate the individual's ability to carry out their professional duties or take other appropriate action in the circumstances. Further information on making a referral can generally be found on the professional body's website. Where a referral is necessary, this should be made at the start of the formal process.

In addition, e.g. for employees registered with the Care Quality Commission (CQC) or HCPC, employees are responsible for ensuring that they adhere to the individual reporting requirements of their professional body, where they are subject to formal capability procedures.

### **18.2 Disclosure and Barring Service (DBS) (previously the ISA)**

The primary role of the Disclosure and Barring Service (DBS) is to help employers make safer recruitment decisions and prevent unsuitable people from working with vulnerable groups, including children.

The Safeguarding Vulnerable Groups Act (SVGA) 2006 places a duty on employers of people working with children or vulnerable adults to make a referral to the DBS where an employer has dismissed or removed a person from working with children or vulnerable adults (or would or may have if the person had not left or resigned etc) because the person has:

- been cautioned or convicted for a relevant offence; or
- engaged in relevant conduct in relation to children and/or vulnerable adults, i.e. an action or inaction (neglect) that has harmed a child or vulnerable adult or put them at risk of harm; or
- satisfied the Harm Test in relation to children and/or vulnerable adults i.e. there has been no relevant conduct (i.e. no action or inaction) but a risk of harm to a child or vulnerable adult still exists.

The referral will enable the DBS to consider whether or not the individual should be barred from working with children and/or vulnerable adults and should be made as soon as possible after an employee has been dismissed or removed from working with children or vulnerable adults (or would have been if they had not resigned). Further information about making a referral can be found [here](#)

## **19. SUSPENSION AND OTHER ALTERNATIVE ARRANGEMENTS**

In cases of serious or irredeemable incompetence, the Line Manager in consultation with an ELT member, will determine whether it is necessary to temporarily remove some of the employee's duties. The ELT member should consider if suspension from duty is necessary.

This may be necessary where there is a potential risk to children or vulnerable adults; to the political, financial and/or legal reputation of the service; to the service provision, and/or because of a need to protect all parties, including the employee.

Suspension will be on normal pay, should be as brief as possible and kept under review. The reasons for the suspension must be stated clearly to the employee and confirmed in writing. Where an employee has been suspended, this can only be retracted by an ELT member.

Where it is necessary to gather further information regarding an employee's performance, it may be necessary for the Line Manager to send an employee home. In such circumstances a decision about whether or not to suspend should then be made by an ELT member as soon as possible.

## **20. MANAGEMENT RESPONSIBILITIES**

Line Managers are required to ensure that each employee is aware of this policy, understands the performance standards that are required of them and the consequences of not meeting these. Action should be taken consistently to identify concerns and reinforce performance standards before it becomes necessary to take formal action. Line Managers are required to manage the process effectively, fairly and reasonably.

## **21. EMPLOYEE RESPONSIBILITIES**

Employees have a contractual responsibility to carry out the requirements of their job to a satisfactory standard and in line with any standards set by their appropriate professional body. Employees have a responsibility, where necessary, to take any steps required to improve their performance. Employees must take all reasonable steps to attend meetings as required and adhere to this policy.

## **22. PROFESSIONAL STANDARDS**

In this policy where there is reference to “relevant professional standards” this refers to any standards applicable to the post(s) and the career stage of the post holder (e.g. the Teachers’ Standards are applicable to all teachers, the Headteachers’ Standards are applicable to Headteachers).

## **23. FORMAL ACTION AGAINST TRADE UNION/PROFESSIONAL ASSOCIATION REPRESENTATIVE**

Although the usual performance standards must apply to trade union/professional association representatives, no formal action within this policy will be taken against an employee who is an accredited representative, nor will suspension normally be applied, until the circumstances of the case have been discussed with a paid official nominated for such purposes by the trade union/professional association concerned.

## **24. RAISING A GRIEVANCE DURING THE APPLICATION OF THIS POLICY**

If an employee is currently being managed under this policy and has a complaint related to either the person applying it and/or its application, the employee will raise a complaint under this policy which will be investigated. It may be necessary to suspend the application of the policy while the complaint is being looked into. Any delay to the application of this policy to deal with an employee’s complaint should not exceed 10 days.

If an employee has an unrelated concern, problem or complaint, then the employee should use the Grievance Policy. As the matter is unrelated, there will be no need to put any process currently being applied on hold as the complaint can be dealt with in parallel.

## **25. CONFIDENTIALITY**

Any parties affected by, or involved in the application of this policy will be expected to maintain an appropriate level of confidentiality. Breaches of confidentiality will be taken seriously, especially if they hinder the application of the policy. Failure to maintain confidentiality may result in action being taken under the Disciplinary Policy.

Disclosure of information may also be a breach of the Data Protection Act (2018) and may lead to action being taken under the provisions of that Act, in addition to actions being taken under the Disciplinary Policy.

## **26. RECORDING OF INFORMATION**

A written record must be made of all meetings held during the application of this policy. Those involved in each meeting will be provided with a copy of any records made.

The Line Manager will ensure there is a record of the process which should include all statements, records and evidence. All records will be retained confidentially, securely and in accordance with the Data Protection Act (2018).

## **27. SUPPORT FOR EMPLOYEES**

Employees are encouraged to seek support from their trade union/professional association in the first instance. Procedural guidance relating to this policy is available from the Ventrus HRBP [ssamuel@ventrus.org.uk](mailto:ssamuel@ventrus.org.uk)

There are a number of different places where employees can access support, please contact your Headteacher or the Ventrus HRBP [ssamuel@ventrus.org.uk](mailto:ssamuel@ventrus.org.uk)

## **INFORMATION FOR SCHOOLS ONLY**

### **28. ADOPT THE POLICY**

This policy was adopted by the Trustees of Ventrus Multi Academy Trust on 27.11.13.

### **29. CONSULTATION**

This policy is provided following consultation with trade unions/professional associations and will apply to all employees as well as those contracted to a school, where this policy has been adopted. Should the Trustees wish to make changes to this model policy, the required consultation must be undertaken with the County Officers of the recognised trade unions/professional associations.

This policy supersedes all previous capability policies.

### **30. DELEGATED RESPONSIBILITIES**

In line with School Staffing (England) Regulations 2009, the Trustees must determine who has delegated responsibility for Hearings, which may lead to dismissal, as part of this policy:

Hearings will be delegated to ELT members.

Appeal Hearings will be heard by the CEO regardless of the delegation above.

#### **Issuing/Retracting Notice of Dismissal**

Where an appeal against dismissal is upheld, the notice issued to employee will be retracted and the employee will be reinstated.

### **31. OFSTED ASSESSMENT OF A TEACHER'S PERFORMANCE**

The assessment of a teacher's performance as a result of an Ofsted inspection cannot be used exclusively to invoke this policy. Such information may be used as evidence alongside other evidence the Line Manager (or Chair of Trustees where this relates to the CEO) has about an employee's performance.

### **32. EMPLOYMENT REFERENCES**

Where a teacher leaves employment within two years of being managed under this policy, Headteachers providing references to prospective employers must communicate the duration in which the teacher was managed under formal capability and the outcome.

## APPENDIX 1 POLICY HISTORY

Policy Date	Summary of change	Contact	Version/ Implementation Date	Review Date
27.11.13	New Policy Date of consultation with recognised Trade Unions – November 2012 and September 2013	HR ONE	27.11.13	
25.4.14	Replaced reference to Counselling with Employee Assistance Programme and contact details. Formal Review Meeting changed to Formal Capability Review Meeting within flowchart (in line with Policy). Reference to contents of letter added to para.14.	HR ONE	25.04.14	
9.12.14	Model Policy adapted for Primary Academy Trust's Management Structure	J Stuart	15.12.14	
17.3.15	Further amendments to reflect the Leadership Structure of the PAT	J Stuart	17.3.15	March 16
Mar18 V1.0	Revised policy to reflect the Trust's Leadership structure and terminology	SL Nov 17	March 18	2020
Nov 20	Revised policy to reflect and clarify the Trust's Leadership structure and terminology, flow chart also updated to correlate more accurately with the policy contents	SS Nov 20	Dec 20	Dec 21
Feb 23	Clarity provided on the outcome of the informal review period. Clarity on documentation to be used. Updated links throughout.	SS	Feb 2023	Feb 2024
May 23	Sentence added: <i>2. Purpose For the avoidance of doubt, this document does not form part of your terms and conditions of employment.</i>	KB	18 <sup>th</sup> May 2023	Feb 2024