

Performance Concerns and Capability Policy

Policy Responsibility:	Executive Director for Trust Development
Approved by:	People & Culture Committee June 2024
Effective from:	September 2024
Review Date:	This policy will be reviewed according to The Mercian Trust's Policy Schedule outlined in its Scheme of Delegation. If there are any changes in legislation or legal requirements, an earlier review will be conducted to ensure compliance and relevance.



Increasing Opportunities
Improving Outcomes



THE MERCIAN TRUST

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1. Introduction

- 1.1 The Mercian Trust (from this point referred to as 'Our Trust') is committed to providing high quality teaching and learning. Through our workforce we aim to increase opportunities and improve outcomes for all of our pupils. Each employee will therefore be given support to ensure they are able to develop the skills they need to carry out their role, to help them continually improve their performance and to develop to their full potential, which will in turn help improve outcomes for our pupils and students.
- 1.2 Our Professional Growth Policy, whilst linked to this policy, separate out our approach to developing all staff within our Trust. This approach embeds our culture of professional responsibility and growth, and the policy can be found on our Trust website.
- 1.3 Our Professional Growth Policy outlines a cycle of setting goals, reflecting on learning as part of business as usual (BAU) and the ways in which our Trust expects colleagues to share their learning with others for the benefit of all our pupils, students and colleagues.
- 1.4 The Professional Growth Policy is separate to the processes detailed in this policy.
- 1.5 This policy sets out the arrangements that will apply if an employee falls below the levels of competence and performance that are expected of them and there is serious underperformance which fall outside of the scope of Professional Growth.
- 1.6 This policy has been designed to comply with current legislation, the ACAS Code of Practice on Disciplinary and Grievance Procedures and it also complies with the requirement for all schools including academy trusts, to have a policy that deals with capability of staff.
- 1.7 This policy has been implemented following consultation with staff and the recognised trade unions and has been formally adopted by our Trust Board.
- 1.8 This policy be amended at any time and employees will be notified of any changes.
- 1.9 Our Trust provides access for all employees to an Employee Assistance Scheme and additional support can be accessed through our Simply Health Benefit Scheme details of which can be obtained through contacting hrmatters@merciantrust.org.uk. When colleagues are involved in processes under the scope of this policy, the school or Trust will signpost them to the ways in which they can access support for their wellbeing.

2. Scope and purpose of this policy

- 2.1 The purpose of this policy is to provide a framework within which our Trust can work with employees to improve and maintain satisfactory standards of performance where serious concerns have been raised.
- 2.2 This policy will be applied where there is underperformance, and the required improvement has not been made through the informal support process. This includes situations where the staff member is either unable or unwilling to meet the performance standards expected of their role.
- 2.3 This policy applies to all employees of our Trust, including headteachers, senior leaders, teachers and associate staff, executive leaders and those working in the central team but excluding those who are in their probationary period. On successful completion of the probationary period, employees' performance concerns will be covered by this policy. It does not apply to agency workers or individuals engaged under an external contract i.e consultants.

3. Requesting support and raising early concerns

- 3.1 In the first instance, professional concerns and resulting support should normally be requested and managed informally between an employee and their line manager as part of day-to-day arrangements.
- 3.2 All employees are encouraged to have early and open dialogue with their line manager or other senior manager about their performance regarding any anticipated concerns in meeting standards and professional development to seek and agree additional support.

4. Notification and procedure for formal meetings held under sections 6-10 of this policy

- 4.1 An employee will be given at least five working days' written notice [by email or letter] to attend any formal meetings under this procedure. Day one will be the day after receipt of the written notice.
- 4.2 The written notification will also contain:
 - 4.2.1 Details of persons in attendance at the meeting.
 - 4.2.2 Sufficient information about the performance concerns and their possible consequences (including the possibility of issuing a warning or dismissal) to enable the employee to prepare to answer the case at the formal meeting.
 - 4.2.3 Copies of any written evidence.
 - 4.2.4 Copies of witness statements and details of witnesses attending (if appropriate).
 - 4.2.5 Details of the date, time and place of the meeting.
 - 4.2.6 Confirmation that an employee may request to be accompanied by a colleague or trade union representative (see 4.4).
- 4.3 Formal meetings will be conducted by the Head Teacher or other senior employee (Table 1).
- 4.4 An employee has the right to be accompanied to any formal meeting under this procedure by a companion, who may be a colleague (if they agree to be involved in the process) or a trade union representative (if they have one). Employees are entitled to request an alternative date which is within five days of the original date, if their representative is unable to attend the meeting.
- 4.5 The employee's line manager will attend the meeting to present the management case. Relevant witnesses may be called by the person conducting the meeting. Details of witnesses, including the reason why they have been called will be provided in writing to the employee and included in the invite letter, though at a minimum at least two days' notice will be given.
- 4.6 An employee may also call witnesses to a meeting and details of the witnesses, including the reason why they have been called, will be provided in writing to the employer with a minimum of at least two days' notice being given.
- 4.7 The person conducting the meeting shall determine who shall be called as a witness and may request a written statement is provided instead of attendance.
- 4.8 A formal meeting under this procedure will:

- 4.8.1 identify performance shortcomings, including which of the standards expected is not being met.
 - 4.8.2 allow the employee to respond to those concerns, ask questions and make any relevant representations which may provide new information or a different context to the evidence already collected.
 - 4.8.3 find out if there are any issues (both in and/or outside of work) that are affecting their performance that need to be considered.
 - 4.8.4 identify what action (including support provided) has been taken to date and what the outcome was.
 - 4.8.5 give clear guidance on the improved standard of performance needed to ensure the employee can be removed from the formal capability procedure.
 - 4.8.6 where appropriate, identify and explain any support that will be available to help the employee improve performance.
 - 4.8.7 where appropriate, warn the employee formally that failure to improve within the set period could lead to dismissal or other serious implications such as no pay progression, demotion and redeployment; and
 - 4.8.8 confirm the timescales for the monitoring and review period which will follow a formal meeting where a warning is issued. The timetable will depend on the circumstances of the individual case, though this is likely to be a six-week period, but the period will be reasonable and proportionate ensuring that the arrangements minimise the impact on workload for all parties involved and should provide sufficient opportunity for an improvement to be made. Formal monitoring, evaluation, guidance and support will continue during this period.
- 4.9 The person conducting the meeting may adjourn the meeting, for example for further investigation or to consider if additional information is required. The estimated duration of an adjournment should be communicated to all parties, especially if it requires rescheduling of the proceedings.
- 4.10 If at any stage the person conducting the meeting is satisfied that there are insufficient grounds for pursuing the capability issue or after a review period the employee has made sufficient improvement, the capability procedure will cease, and the professional growth process will re-start.
- 4.11 Following a formal meeting, the matters covered in 4.6 and any other relevant points will be summarised and confirmed in writing within 5 working days of the hearing. Where a warning has been issued, the letter will set out the length of the monitoring and review period and the procedure and time limits for appealing against the warning. If under performance occurs again, shortly after the end of the live period of the warning, our Trust reserves the right to deal with the matter at the same stage of the procedure and not return to earlier stage (including not returning to the Professional Growth Policy).
- 4.12 Minutes will be taken of all formal meetings, and employees will be sent a copy following the meeting.

How our Trust will address and respond to professional concerns and capability

5. Support Process for Professional Concerns

- 5.1 Where there are professional concerns about the performance of an employee which are deemed to be more significant than those which would be dealt with through day-to-day line management and professional development, a meeting will be arranged between the Headteacher (or a designated senior leader) and the employee.
- 5.2 The purpose of the meeting is to:
- (a) Outline the professional concern and clarification of the required standards.
 - (b) Ascertain if there are any personal or professional situations ie health and wellbeing, which are impacting on the employee's performance.
 - (c) Agree any support required to allow the colleague to return to satisfactory levels of performance.
 - (d) Agree the timescale for this support along with the indicators which will be used to assess performance. The timescale agreed will be reasonable and, in many circumstances, will be between 4 and 6 weeks with a mid-point review meeting.
 - (e) Agree who within the school or Trust will provide the required support.
- 5.3 At the end of the support period, a formal meeting will be called. The purpose of this meeting will be to either:
- (a) Confirm that professional concerns have been addressed and that performance has returned to satisfactory levels. In this situation, no further action will be taken. If similar professional concerns are raised again within a 12-month period, the school may move to a formal assessment of professional concerns (section 6) without repeating the support process outlined in section 5.
 - (b) Confirm that professional concerns remain and that sufficient progress against the agreed indicators has not been made. In this situation, a warning will be issued, and the support period will be extended. This is likely to be for a further 4-to-6-week period with a mid-point review meeting.
 - (c) Confirm that significant professional concerns remain and that progress against the agreed indicators has not been satisfactory. In this situation, the process will progress to a formal assessment of professional concerns.

6. Formal assessment of professional concerns

- 6.1 If professional concerns remain following the support outlined above, an assessment of performance will take place.
- 6.2 This assessment will be conducted by a designated senior member of staff within the school or our Trust.
- 6.3 The assessment will take place over an agreed, reasonable period of time, likely to be 4-6 weeks, and will gather information and evidence to allow the Headteacher or Executive Director to make a decision about the performance of the colleague.

- 6.4 The means of assessment will be agreed in the meeting and may include, but not be limited to;
- (a) Lesson observations
 - (b) Work scrutiny
 - (c) Other evidence routinely collected as part of quality assurance processes.
 - (d) Discussions with line managers
 - (e) Other reasonable methods of assessment relevant to the role of the employee.
- 6.5 At the end of the agreed assessment period, the senior member of staff will provide a written report for the Headteacher or Executive Director recommending whether the professional concerns are significant and substantiated. If this is the case, the process will progress to the formal capability meeting (Stage 1)
- 6.6 If the concerns are not significant and substantiated, the employee will be notified, and the process will cease.

7. Formal capability meeting (Stage 1)

- 7.1 If, following the assessment of professional concerns, we consider that there are serious performance concerns, the employee will be invited to a formal capability meeting to establish the facts and give the employee the opportunity to respond before formal action is taken.
- 7.2 Where a warning is issued at Stage 1, this will usually be a first written warning.
- 7.3 However, in very serious cases or in cases where performance issues have been dealt with previously under the formal capability procedure and there are still concerns, this could be a final written warning. The implications in relation to pay progression will be set out in writing.
- 7.4 The warning will normally remain active for 12 months from the end of the monitoring and review period. During this time any further performance concerns will be considered at the next stage of the process (Stage 2). After the active period the warning will remain on an employee's personnel file but will be disregarded in deciding the outcome of any future capability proceedings, subject to the provision of 5.3 above (not returning to earlier stage).
- 7.5 Monitoring & Review Period (1)
- 7.5.1 A performance monitoring and review period, likely to be 4-6 weeks, will follow the formal capability meeting. Formal monitoring, evaluation, guidance, and support will continue during this period. The member of staff will then be invited to a formal review meeting, unless they were issued with a final written warning, in which case they will be invited to a decision meeting (see below).

8. Formal review meeting (Stage 2)

- 8.1 If the person conducting the formal review meeting decides that sufficient progress and improvement has been made, then the capability procedure will cease, and the professional growth process will continue.
- 8.2 If the person conducting the formal review meeting decides that some progress has been made and there is confidence that more is likely, it may be appropriate to extend the monitoring and review period.

- 8.3 If no, or insufficient improvement has been made during the monitoring and review period, the employee will receive a final written warning. A further Monitoring and Review Period will follow in accordance with 5.3.
- 8.4 The warning will normally remain active for 12 months from the end of the further monitoring and review period. During this time any further performance concerns will be addressed at the next stage of the process (Stage 3). After the active period the warning will remain on an employee's personnel file but will be disregarded in deciding the outcome of any future capability proceedings, subject to the provision of 5.3 above (not returning to earlier stage).
- 8.5 Monitoring and Review Period (2):
- 8.5.1 At the end of the further monitoring and review period, the employee will be invited to a decision meeting.
- 8.5.2 At this stage and by agreement with the employee, instead of progressing to a decision meeting it may be appropriate to consider whether there is an appropriate vacant post and if so whether this may be more suited to the capabilities of the employee. If there is a vacant post which is agreed is suitable, this would be a permanent change in role and if the alternative post is at a lower salary level, the substantive lower salary would apply. The capability procedure would cease on commencing in the new post and the professional growth process would re-start.

9. Decision meeting (Stage 3)

- 9.1 The decision meeting will usually be conducted by the Head Teacher (if they have not previously been involved) or a panel of Trust governors not previously involved in the case, which could include the Head Teacher – See Table 1. Dismissal is a possible outcome of a decision meeting. The employee has the right to be accompanied.
- 9.2 If an acceptable standard of performance has been achieved during the further monitoring and review period, the capability procedure will end, and the professional growth process will re-start.
- 9.3 If performance is deemed to have improved but not reached the required standard a further monitoring and review period can be imposed. There will be a further decision meeting at the end of that extended monitoring and review period.
- 9.4 If performance remains unsatisfactory and of serious concern, a decision will be made that the employee should be dismissed. Normal delegation rules apply, outlined in table 1, to the power of dismissal.

10. Appeal

- 10.1 If the employee feels that the decision to dismiss them or other action taken against them (including warnings) is wrong or unjust, they may appeal. An employee should appeal in writing to the Head Teacher or as listed in Table 1 setting out the grounds for appeal within five working days of the decision. Day one will be the first working day after electronic delivery of the decision or two working days after the decision if the letter is posted.
- 10.2 Appeals will be heard without unreasonable delay and, where possible, at an agreed date, time and place. The same arrangements for notification and right to be accompanied by a companion will apply as set out in section 4.

- 10.3 The appeal will be dealt with impartially – see TABLE 1 in line with our Trust’s arrangements for appeals.
- 10.4 If an employee is appealing against dismissal, the date on which dismissal takes effect will not be delayed pending the outcome of the appeal. However, if the appeal is successful, the employee will be reinstated with no loss of continuity or pay.
- 10.5 The employee will be informed in writing of the results of the appeal hearing as soon as possible. Following the appeal hearing the panel may: (a) confirm/uphold the original decision; (b) revoke/overtake the original decision; or (c) substitute a different penalty.
- 10.6 There is no further right of appeal against the sanction or dismissal within our Trust.

11. Sickness

- 11.1 If long term sickness absence appears to have been triggered at any stage of this procedure, the case will be dealt with in accordance with our Trust’s Sickness Absence Policy.
- 11.2 The employee will be referred immediately to the occupational health service to assess their health and fitness for continued employment and the appropriateness or otherwise of continuing with monitoring or formal procedures. Any capability process may be paused whilst an employee is on sick leave and only restarted at the same stage or from the beginning dependent on the length of absence after any phased return.
- 11.3 In some cases, it may be appropriate for monitoring and/or formal procedures to continue during a period of sickness absence.

12. General principles underlying this policy

- 12.1 **Confidentiality** - The capability process will be treated confidentially. However, it needs to be recognised that, in supporting employees through this process, some degree of information sharing is likely to be necessary to quality-assure the operation and effectiveness of the process.
- 12.2 **Consistency of Treatment and Fairness** - Our Trust is committed to ensuring consistency of treatment and fairness. It will abide by all relevant equality legislation, including the duty to make reasonable adjustments for disabled employees. Our Trust Board is aware of the guidance on the Equality Act issued by the Department for Education.
- 12.3 **Grievances** - Where a member of staff raises a grievance during the capability procedure, the capability procedure may be temporarily suspended in order to deal with the grievance. Where the grievance and capability cases are related, it may be appropriate to deal with both issues concurrently, and at the same meeting.
- 12.4 **Retention and Data Protection** - The Local Governing Body and Head Teacher will ensure that all written records are retained in a secure place. As part of the application of this policy, our Trust may collect, process and store personal data in accordance with our Data Protection Policy. We will comply with the requirements of Data Protection Legislation (being the UK General Data Protection Regulation and Data Protection Act 2018) and any implementing laws, regulations and secondary legislation, as amended or updated from time to time. Records will be kept in accordance with our Workforce Privacy Notice, our Retention and Distribution Policy and in line with the requirements of the Data Protection Legislation.

13. Review and monitoring of the policy

- 13.1 This policy is reviewed and where appropriate amended annually by the People and Culture Committee (PCC).
- 13.2 We will monitor the application and outcomes of this policy to ensure it is working effectively. An annual anonymised report will be provided to the PCC meeting No.4 detailing:
- The number of staff who have been subject to this policy across our Trust within the preceding twelve months, including analysis by school.
 - Data showing the outcomes reached at each stage of the policy, with applied equality monitoring.
 - Data showing the number of appeals which have been heard, with outcomes and applied equality monitoring included.

14. Table 1

Employee	Investigating Office	Deciding Manager (Hearing Chair)	Advisor(s) to the Deciding Manager	Appeal Panel	Advisor(s) to the Appeal Panel
Teacher	Senior leader from own school or another school in our Trust	Headteacher or Senior Leader from the Central Team	Trust-appointed HR Advisor	2x LGB Governors 1x Trust representative	Trust-appointed HR Advisor
Leadership Spine	Senior leader from own school or another school in our Trust	Headteacher or Senior Leader from the Central Team	Trust-appointed HR Advisor	2x LGB Governors 1x Trust representative	Trust-appointed HR Advisor
Deputy Head (or second most senior member of staff who deputises for the HT)	Senior Leader from within our Trust Central Team or Headteacher from another school in our Trust	Headteacher or Senior Leader from the Central Team	Trust-appointed HR Advisor	2x LGB Governors 1x Trust representative	Trust-appointed HR Advisor
Associate Staff	Senior leader from own school or from within our Trust central team.	Headteacher or Senior Leader from the Central Team	Trust-appointed HR Advisor	2x LGB Governors 1x Trust representative or 2x Trustees 1x Trust representative	Trust-appointed HR Advisor
Headteacher or Trust Executive Leader	Senior assessor with appropriate experience and seniority appointed by the CEO	CEO	Trust-appointed HR Advisor	3x Trustees	Trust-appointed HR Legal Advisor
CEO	Independent Senior assessor appointed by the Chair of our Trust	3x Trustees	Trust-appointed HR Advisor	3x Different Trustees	Trust-appointed HR Legal Advisor

15. Procedure Flowchart

