



**BrightTribe**  
learn grow prosper

## Capability Policy and Procedure

DATE 2018

Version 1





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## 1. Introduction

Our aim is to continually develop and improve performance, guiding employees through their careers with the Trust. Having an effective performance management process in place is one of the ways we can support our employees and deal with performance matters as they arise. This involves effective day-to-day supervision, carrying out performance management, providing development opportunities and operating a fair and reasonable capability process. The Trust understands that managing and improving performance not only helps the employee but also the pupils and ultimately the Trust's community as a whole.

This policy sets out the arrangements that will apply when an employee falls below the levels of competence and performance that are expected of them and serious concerns have been raised

This policy has been designed to comply with current legislation and the ACAS Code of Practice on Disciplinary and Grievance Procedures.

The purpose of this policy is to provide a framework within which the Trust can work with employees to improve and maintain satisfactory standards of performance where serious concerns have been raised. Consideration will be given to any known mitigating factors (including health conditions) which might explain a temporary dip in performance and similar consideration should continue to be given to such circumstances in relation to this procedure.

This policy will be applied when informal support as set out in the PM Policy has been provided and the required improvement has not been made. If the required improvement has not been made then the employee will be notified in writing that they will transition to capability.

This policy applies to all employees of the Trust including teachers and support staff, excluding those who are in their NQT year. It does not apply to agency workers. It is expected that transition from Performance Management (PM) to this policy will only apply when the PM process has failed to secure improvements in performance where concerns are raised.

This policy is reviewed annually by the Trust in consultation with the recognised trade unions. We will monitor the application and outcomes of this policy to ensure it is working effectively. The Trust seriously its responsibilities in respect of equality monitoring and will monitor the equality impact of this policy in respect of all protected characteristics as defined under the Equality Act 2010.

## 2. Overview

Formal capability should only be entered into where either of the following circumstances exists:

- a) Prior to the stages below line management have carried out informal meetings, coaching and /or action planning to address issues of underperformance in line with the Trust Performance Management Policy.

The staff member will have been aware that there are performance issues and will have had a chance to address performance

- b) Or the impact of the capability has a very serious and detrimental effect on other staff, learners or the Trust e.g. very poor exam results, retention rates or achievement.

It is important to recognise that many issues of underperformance can be, and should be, resolved without recourse to the formal Capability Procedure. The formal procedure is intended as a framework and may need to be adapted to suit the needs of each situation.

Concerns about capability should not be confused with disability. Where a member of staff has become disabled during their employment it is important to ensure that every effort should be made to retain them in their original job role through reasonable adjustments or redeploy them to a suitable alternative post, in line with the requirements of the Disability Discrimination Act 1995.

In exceptional circumstances, it may be necessary to temporarily redeploy or suspend a member of staff immediately from their normal job, e.g. staff against whom serious complaints of lack of capability and/or lack of competence have been made by students or workplace colleagues.

All staff have the right to be represented and accompanied by a representative of a trade union or workplace colleague at any stage of the formal Capability Procedure.

The capability procedure may be run in parallel with other Trust procedures as appropriate.

Notification and procedure for formal meetings

Ten working days' written notice will be given of any formal meetings under this procedure.

The written notification will also contain:

- Sufficient information about the performance concerns and their possible consequences (including either issuing a warning or dismissal) to enable the employee to prepare to answer the case
- Copies of any written evidence
- Copies of any witness statements and details of witnesses attending (if appropriate)
- Details of the time and place of the meeting
- The names of proposed attendees
- Right to be accompanied

Formal meetings will be conducted by the [Principal/Director] or other senior employee delegated this responsibility by the [Principal/Director]. An employee has the right to be accompanied to any formal meeting under this procedure by a companion, who may be a colleague or a trade union representative.

Relevant witnesses may be called by the person conducting the meeting and an employee may request that relevant witnesses are called to any formal meeting.

A formal meeting under this procedure will:

- Identify performance shortcomings
- Allow an 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
- Identify what action (including support provided) has been taken to date and what the outcome was
- Where appropriate, identify and explain a support plan of action that will be available to help the employee improve performance. The employee will be given the opportunity to make an input to this support plan of action.
- Provide the employee with the support plan of action (example in Appendix 1) listing those responsible for ensuring support is provided, targets for improvement, support to be provided and when, and measures of success. It should also detail dates and times for informal review meetings with mentors, observations or other form of intervention activity
- Where appropriate, warn an employee formally that failure to improve within the set period could lead to dismissal
- Confirm the timescale 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 but the period will be reasonable and proportionate and should provide sufficient opportunity for an improvement to be made. Formal monitoring, evaluation, guidance and support will continue during this period.

The person conducting the meeting may adjourn the meeting, for example for further investigation or to consider if additional information is required. The employee may adjourn the meeting to attain further information to assist them in responding to the concerns raised. Following an adjournment, the meeting must be reconvened within 5 working days.

If at any stage the person conducting the meeting is satisfied that the employee has made sufficient improvement, the capability procedure will cease and the performance management process will re-start.

Following a formal meeting, the matters covered in above and any other relevant points will be confirmed in writing. 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.

Minutes will be taken of all formal meetings and the employee will be sent a copy following the meeting.

Where capability action is being considered against an employee who is a trade union representative the normal capability procedure should be followed. Depending on the circumstances, however, it is advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement.

## 3. Procedure

### 3.1. Formal Stage

#### 3.1.1. First Stage Formal Meeting

Formal capability meeting (Stage 1)

3.1 This meeting is intended to establish the facts. At the meeting the concerns regarding performance will be put to the employee and the employee will be able to respond to those concerns and to make any relevant representations. This may provide new information or a different context to the information/evidence already collected. The procedures are to be implemented with the intention of supporting the staff in achieving the required standards.

3.2 There are four options at Stage 1, either:

1. No further action\* or
2. Arrange additional informal support\* or
3. First written warning or
4. In exceptional circumstances for very serious cases a final written warning could be issued

\*1 & 2 are only relevant where new information, evidence, a different perspective on the information collected, or further investigation suggests that the matter is not as serious as it first seemed or there is no case to answer.

3.3 If performance is unsatisfactory a first written warning will normally be issued and will invoke the first monitoring and review period.

3.4 In cases of particularly serious concern, it is possible to move directly to a final written warning. This will invoke the second monitoring and review period immediately.

4. Monitoring and review period (1)

4.1 A performance monitoring and review period will follow the formal capability meeting (stage 1).

4.2 It is important that a timescale for improvement is set in line with the agreed support plan. This will vary according to the level and nature of improvement needed.

4.3 Formal monitoring, evaluation, guidance and support will continue during this period. At the end of the performance monitoring and review period (1), the employee will be invited to a formal review meeting (stage 2), unless they were issued with a final written warning, in which case they will be invited to a decision meeting (stage 3) (see below).

4.4 If performance is deemed to have improved but not reached the required standard a further monitoring and review period can be put in place. There will be a further formal meeting at the end of that extended monitoring and review period.

If a capability warning is given the staff member has the right to appeal this decision. Any appeal should be made within 5 working days in writing, to the senior manager of the department in which the staff member works. The senior manager will hold the appeal or appoint an appropriate manager to hear the appeal. The person holding the appeal must be more senior than the manager who issued the warning and someone not previously involved in issuing the warning. If the warning was issued by the Principal the appeal must be heard by a member of the Regional Accountability, Review and Challenge (ARC) Group. A member of HR should attend the appeal in an advisory capacity. The staff member has the right to be accompanied by a Trade Union representative or a work colleague. The meeting should not be delayed unreasonably.

### **3.1.2. Second Stage Formal Review Meeting**

The member of staff should be formally invited to this meeting and has the right to be accompanied at the meeting by a Trade Union representative or a work colleague. A member of HR team may be present in an advisory capacity. The meeting should not be delayed unreasonably.

Where, following the formal capability meeting (stage 1), the employee's performance has improved to a satisfactory level, this should be formally recognised and confirmed in writing within five working days of the meeting. Explanation should be given to the employee of the importance of sustaining this level of performance.

There are two options at Stage 2, either:

- No further action because the employee's performance has improved sufficiently
- Final written warning

Where, following the formal capability meeting and despite appropriate support mechanisms having been put in place, the employee's performance remains unsatisfactory, a final written warning may be issued. At this point the employee will be advised that if there is insufficient improvement in performance it could lead to their dismissal.

Again, the main focus of the meeting should be to explore ways of supporting the employee to improve their performance to an acceptable level.

#### **Monitoring and review period (2)**

A performance monitoring and review period will follow the formal review meeting (stage 2).

It is important that a timescale for improvement is set in line with the agreed support plan. This will vary according to the level and nature of improvement needed.

Formal monitoring, evaluation, guidance and support will continue during this period. At the end of the further monitoring and review period (2), the employee will be invited to a final formal review meeting (stage 3).

If performance is deemed to have improved but not reached the required standard, a further monitoring and review period can be put in place. There will be a further formal meeting at the end of that extended monitoring and review period.

If a final capability written warning is given, the staff member has the right to appeal this decision. Any appeal should be made within 5 working days in writing, to the senior manager of the department in which the staff member works. The senior manager will hold the appeal or appoint an appropriate manager to hear the appeal. The person holding the appeal must be more senior than the manager who issued the warning and someone not previously involved in issuing the warning. If the warning was issued by the Principal the appeal must be heard by a member or ARC Group (as above). A member of HR should attend the appeal in an advisory capacity. The staff member has the right to be accompanied by a Trade Union representative or a work colleague. The meeting should not be delayed unreasonably.

### **3.1.3. Final Stage Meeting**

If there is no evidence of improved performance, or the impact of the capability has a very serious and detrimental effect on the Trust, other staff, learners or the Academy, the staff member should be invited to a formal final stage meeting. The meeting should be conducted by the Principal or a senior Trust representative and a senior member of HR team, together with the member of staff. The member of staff will be advised of their right to be accompanied by a Trade Union representative or a work colleague. Final formal review meeting (Stage 3)

6.1 Where, following the formal review meeting (stage 2), the employee's performance has improved to a satisfactory level, this should be formally recognised and confirmed in writing within five working days of the meeting. Explanation should be given to the employee of the importance of sustaining this level of performance.

6.2 There are two options at Stage 3, either:

- No further action because the employee's performance has improved sufficiently
- Proceed to a hearing

6.3 Where, following the formal review meeting (stage 2) and despite appropriate support mechanisms having been put in place, the employee's performance remains unsatisfactory, a

Decision Meeting will take place, during which the employees ongoing employment with the Trust will be considered. At this point the employee should be aware that if there is insufficient improvement in performance, it could lead to their dismissal.

6.4 Again, the main focus of the meeting should be to explore ways of supporting the employee to improve their performance to an acceptable level.

6.5 The Trust must be informed of any circumstance which, if they lead to a Decision Meeting, might lead to the dismissal of the employee.

### **3.1.4. Hearing**

7.1 The hearing will usually be conducted by a Panel of governors not previously involved in the case, which could include the Principal and or a representative from the Trust.

7.2 The employee will receive notification of the meeting at least five working days notice. The employee and their representative will be provided with relevant documentation to enable them to prepare for the meeting.



The employee should be reminded to provide any documentation on which he or she wishes to rely at least 5 five working days' before the hearing taking place. Neither party will be able to use any evidence not previously provided at the hearing Meeting.

7.3 Names of any witnesses from both sides should be circulated in advance and all witnesses should be asked to provide a written statement for inclusion with the documents to be used at the hearing Meeting.

7.4 There are three options at the Decision Meeting, either:

- No further action because the employee's performance has improved sufficiently
- Redeployment to an alternative role
- Dismissal

7.5 If performance remains unsatisfactory, a decision will be made that the employee should be dismissed, or redeployment will be considered. Normal delegation rules apply to the power of dismissal.

7.6 By agreement with the employee, it may be appropriate to consider whether there is a vacant post and if so whether this may be more suited to the employee's capabilities. If there is a vacant post which we agree with the employee is suitable for them to redeploy to, 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 performance management process would re-start.

7.7 The employee will be informed in writing as soon as possible of the decision normally within five working days. If the decision is to dismiss, the employee will receive in writing the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and the right to appeal.

### **3.2. Appeal**

Members of staff have the right to appeal against action to dismiss under the Capability Procedure. The appeal should be made in writing to the Principal or senior Trust staff member. Written notice of an intention to appeal, and the grounds on which it is based should be submitted within 5 working days of the date of action. Appeals against action taken will be held by a panel consisting of the Principal (unless involved in the dismissal), or senior manager or deputy (not previously involved in the case) or a member of the ARC Group. A member of HR will be present in an advisory capacity. Where Academy senior managers/Principal have already been involved in the process the panel will exist of two ARC Group members who have previously not been involved in the process.

## **4. Sickness**

If at any stage long term sickness absence appears to have been triggered by the commencement of this procedure, the case will be dealt with in accordance with the Trusts Attendance Policy. In these circumstances the capability procedure may be postponed until the employee returns to work.

The employee will be referred immediately to the occupational health service to assess their health and fitness.

If at any stage an employee is absent for a short term during this procedure, occupational health may be asked to assess the employee's fitness to return to work and or attend meetings. The capability procedure may be extended for a period of up to four weeks with agreement with the employee.

## 5. General Principles underlying this policy

ACAS Code of Practice on Disciplinary and Grievance Procedures

This policy will be implemented in accordance with the provisions of the ACAS Code of Practice.

Confidentiality

The capability process will be treated confidentially. However, the desire for confidentiality does not override the need for the Trust to quality-assure the operation and effectiveness of the performance management system.

Consistency of Treatment and Fairness

The Trust are 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. The Trust is aware of the guidance on the Equality Act issued by the Department of Education (DfE).

Grievances

Where an employee raises a grievance during the capability procedure the procedure may be temporarily suspended in order to deal with the grievance and capability cases are related it may be appropriate to deal with both issues concurrently.

Monitoring and Evaluation

The Drive Team will monitor the operation and effectiveness of the academy's performance management arrangements and report to the Trust as required. In developing, applying and evaluating this policy we will monitor the impact on different groups of people with protected characteristics in line with the academy's Equal Opportunities Policy. This will ensure that what we do is done fairly.

Retention

The Trust will ensure that all written capability records are retained in a secure place. It is the manager's responsibility to ensure HR has a copy of all relevant documents. All records will be kept no longer than is necessary in accordance with the GDP Regulations.

## Appendix 1 - Format for capability hearings

Hearings may be conducted by the [Principal/Director] or other senior employee delegated this responsibility by the [Principal/Director] this person will act as the hearing chair. (The Decision Meeting will usually be conducted by a Panel of the Drive Team not previously involved in the case, which could include the Principal and or a representative from the Trust.)

During any capability hearing conducted by the Trust the following will take place:

### Introduction

The hearing chair will introduce the hearing, and explain its purpose and how it will be conducted:

- PURPOSE: to consider the information collated in relation to performance, identify what support has been provided, including informal action, to give the employee the opportunity to comment on this information and to make a decision on what action to take (including the issuing of a formal warning or dismissal as appropriate).

The parties present at the hearing will introduce themselves and confirm their respective roles in the hearing. The employee will be reminded that they are entitled to be accompanied, if they wish, by a fellow worker or trade union representative of their choice.

### Confirmation of policy

The hearing chair will state that the hearing is being conducted in line with the Trusts Capability Procedure and confirm that a written record of the hearing will be made.

If any witnesses are to be called at the hearing, the hearing chair will confirm who will be attending.

### Summary of case

The hearing chair will go through the information that has been collated. In addition they will summarise the process followed to date and the steps that have been taken to assist the employee in improving his/her performance.

### Presentation of management case (or this could be conducted by the hearing chair)

The line manager will be asked to summarise the concerns regarding performance making reference to the employee's job description and performance against objectives/targets set. Reference to any relevant standards or policies should also be made. They will be asked to explain the process followed, any improvement during the process and why a hearing has been called. Evidence should be presented to support the management case.

Any witnesses for the management case are called at this point and will be asked questions by the hearing chair and the employee.

Employee responds to the information or witnesses

The employee will be given full opportunity to respond to the information presented and to present any evidence that indicates that performance is to the required standard [and to raise points about any information provided by witnesses.]

The employee can refer to any information they have provided in their defence.

Any witnesses for the employee are called at this point and will be asked questions by the hearing chair and line manager.

The line manager or hearing chair may ask questions of the employee based on the information they have presented.

#### Summing up

The line manager sums up the management case.

The employee sums up their case.

#### Adjournment

The meeting will be adjourned in order for the hearing chair to make a decision.

#### Decision is delivered

The hearing chair will reconvene the hearing and inform the employee of the outcome. The hearing chair may choose to convey the decision in an alternative way to the employee and if this is the case should inform the employee of this prior to adjourning the hearing to make the decision. The hearing chair will inform the employee that the outcome of the hearing will be confirmed in writing.

#### Possible outcomes include:

- No further action as it is determined based on the evidence that the employee is working to the required standard. Performance to be managed through the performance management process.

Or

- Where performance is not to the required standard, issue a warning with a review period and revised objectives [at the hearing, dismissal with notice is a possible option]

The hearing chair will inform the employee that they will have the right to appeal against any warning issued or dismissal and this must be made within 10 working days of the decision.

The hearing chair will close the meeting.

Appeal hearings will follow a similar format as set out but the employee will set out the grounds for appeal first. There would be no further right of appeal

## Appendix 2 - Capability monitoring and review programme pro-forma (Electronic copy is available separately)

This pro-forma should be completed following a capability hearing where a warning has been issued. The pro-forma sets out the monitoring and review programme to be followed prior to a decision on whether to go to the next stage of the process.

<b>Name of employee</b>	
<b>Job Role</b>	
<b>Name of line manager (who has responsibility for oversight of process and providing support)</b>	
<b>Line manager's Job Role</b>	
<b>Date of start of monitoring and review period</b>	
<b>Date of end of monitoring and review period</b>	
<b>Performance concerns - details of the concerns that were identified at the capability hearing and what will be put in place to support the required improvement</b>	<p>Performance concern:</p> <p>Objective:</p> <p>Success criteria:</p> <p>How will this be evidenced:</p> <p>Support to be provided:</p> <p>Relevant Teachers' Standard to be targeted during support plan (where applicable):</p>
<b>Date set for meeting at the end of the monitoring and review period</b>	
<b>Summary and next steps</b>	

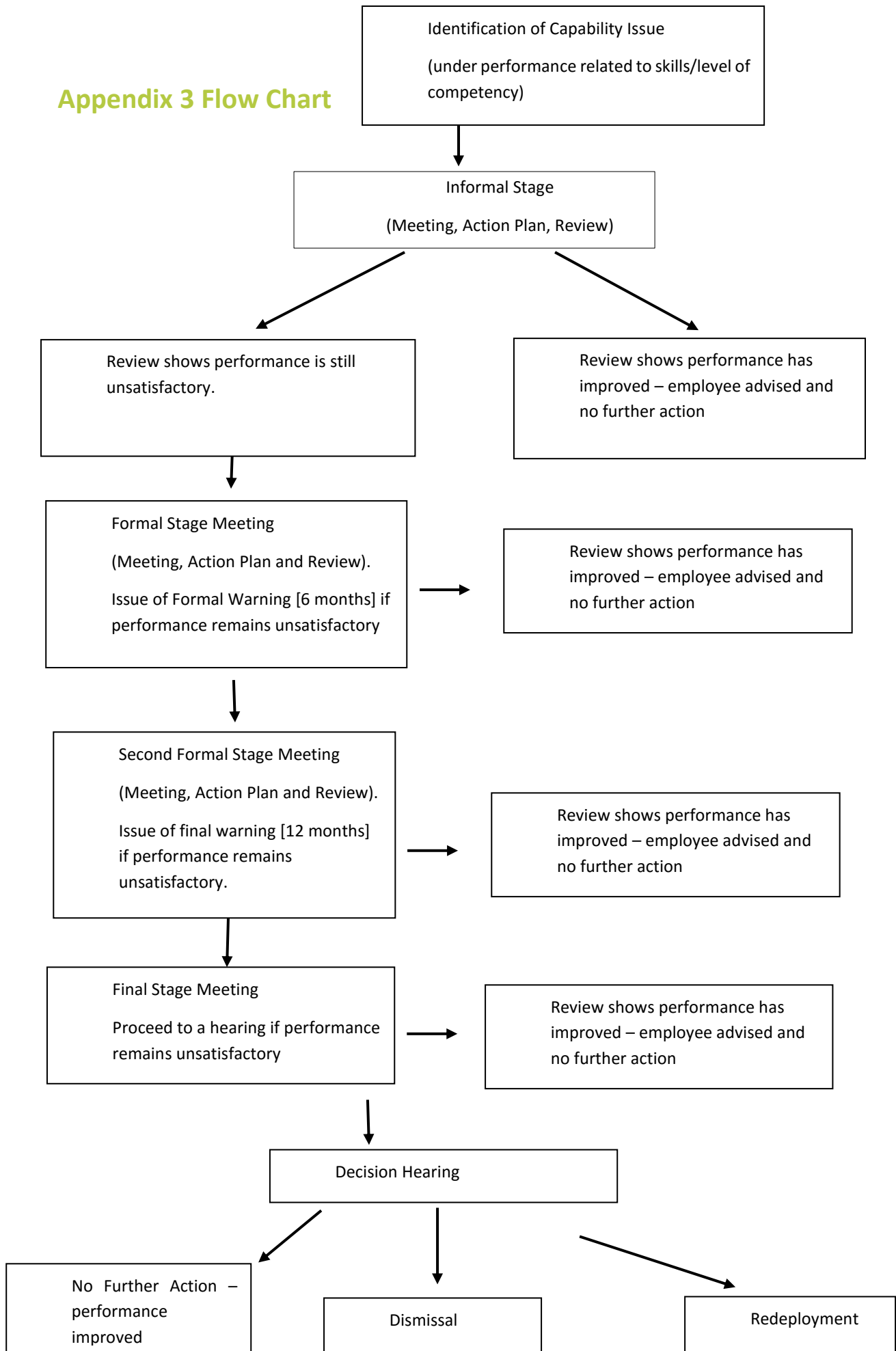
<b>Employee comments</b>	
<b>Employee's signature</b>	
<b>Date</b>	
<b>Line manager's comments</b>	
<b>Line manager's signature</b>	
<b>Date</b>	
<b>State the implications of failure to meet targets.  (including moving to next stage of capability procedure)</b>	

**FOLLOW UP [6] WEEK REVIEW**

<b>Name of employee</b>	
<b>Job Role</b>	
<b>Name of line manager  (who has responsibility for oversight of process and providing support)</b>	
<b>Line manager's Job Role</b>	
<b>Performance concerns - details of the concerns that were identified at the capability hearing and what will be put in place to support the required improvement</b>	<p>Performance concern:</p> <p>Objective:</p> <p>Success criteria:</p> <p>Relevant Teachers' Standard to be targeted during support plan (where applicable):</p> <p>Progress to date:</p>

<p><b>Summary and next steps</b></p> <p>Confirm next steps – options:</p> <p><i>1 Performance to the required standard – refer back to performance management under performance management process</i></p> <p><i>2 Performance shows some improvement - extend monitoring and review period programme</i></p> <p><i>3 Performance not to the required standard – move to next stage of capability procedures – inform employee</i></p>	
<p><b>Employee comments</b></p>	
<p><b>Employee's signature</b></p>	
<p><b>Date</b></p>	
<p><b>Line manager's comments</b></p>	
<p><b>Line manager's signature</b></p>	
<p><b>Date</b></p>	

## Appendix 3 Flow Chart







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