CAPABILITY POLICY AND PROCEDURE

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SECTION 1 – INTRODUCTION

1.1 Cardiff Council recognises that from time to time an employee's inability to perform to a satisfactory standard is not as a result of unacceptable conduct but due to a capability issue i.e. their ability or qualification to do their job. This policy has been developed in order to help maintain acceptable standards of job performance and to ensure the Council continues to deliver quality services to the citizens of Cardiff.

1.2 Employees have a contractual responsibility to perform to a satisfactory level and be accountable for the standard of their work and quality of services delivered .On occasions where the required level of performance is not being achieved, the employee should be managed, monitored, and supported by their manager.

Roles and Responsibilities

1.3 It is important that everyone clearly understands their roles and responsibilities within this process.

Management Responsibilities:

1.4 It is the manager's responsibility to:

a) Take into account whether the capability issue is caused or linked to factors outside the employee's control e.g. job design, unreasonable work pressures or changes in work priorities
b) Consider all available options throughout the process including job re-design, reasonable adjustments and other support interventions, e.g. additional training, mentoring, coaching, etc.
c) Seek advice on the application of the capability procedure at any stage in the process from HR People Services.
d) In consultation with HR People Services to consider whether it is appropriate to consider redeployment within a service area for an employee at any stage throughout the process. Following discussion with the employee, alternative suitable employment may be offered where it exists and whilst alignment with current salary will be sought, it cannot be guaranteed. Where redeployment within a service area cannot be found the employee can be put forward to the corporate redeployment register.
e) To advise employees of their right to be represented at all formal stages of this procedure by a Trade Union representative or a work colleague and that they have an appeal right in relation to any formal action taken as a result of this procedure.

Employee Responsibilities:

1.5 It is the employee's responsibility to:

- To improve their performance to a mutually acceptable and sustained level, failure to do so could ultimately lead to their dismissal where all other options have been exhausted.

HR People Services Responsibilities:

- The role of HR People Services in the implementation of the procedure is one of adviser and facilitator.

SECTION 2 – POLICY

Purpose

2.1 The aim of this policy and procedure is to assist employees in a positive and supportive way to secure improvement in their performance to the required standard. Its objective is to provide consistency in how employees, with widely differing responsibilities and duties, are given the opportunity to attain and maintain satisfactory levels of performance. Managers are responsible for ensuring that employees have the necessary tools to do the job and understand the performance standards required for effective and efficient services to be delivered to customers.

2.2 This policy and procedure is designed to provide a framework for a fair, consistent, supportive and constructive approach to the management of under-performance in the Council. It sets out a process within which management can respond to an employee's unsatisfactory performance at work, which is as a result of a Capability issue. It provides employees with opportunities to hear why their performance is considered unsatisfactory and offer any explanation in response to this. It also gives them the opportunity to jointly agree action plans to improve their performance through appropriate training and support and explains how their performance will be monitored and reviewed.

Who is covered?

2.3 The policy applies to all employees of the Council. It will be commended to Governing Bodies for staff within schools.

Key Principles

2.4 The overall approach to capability is supportive as the aim is to seek to bring about the required improvement without the need to introduce the more formal stages of the Procedure.

2.5 This policy is intended to intervene at the earliest possible stage to provide practical support and encouragement to secure improvement amongst employees whose performance is considered to be unsatisfactory due to capability. It provides a fair process for managing employees who may have difficulties for a number of reasons in achieving the required standards of performance at work in one or more areas of work activity. In order to minimise the stress caused by instigation of this procedure managers should ensure they adhere to the timescales within the policy and if this is not possible ensure the employee is fully advised of any delays and the reasons for the delay.

2.6 The Council recognises that an employee's work performance can vary over time and that the onset of capability problems may be outside their direct control and be symptomatic of underlying external/ home/ work

problems or other personal issues. Consequently there is a need to treat all capability issues with care, sensitivity and confidentiality and to identify and address real causes.

2.7 This Policy is complementary to the normal process of management, whereby managers allocate work, monitor performance, draw attention to areas where improvement is necessary as well as highlighting work which is done well. The Council's Personal Performance and Development Scheme is designed to allow at least annual structured discussions about performance and development and agreement on future objectives. However, managers should not wait for the reviews within this scheme to address issues of capability with an employee where they emerge.

2.8 If impairment or long term limiting health condition appears to be a contributory cause for poor performance, this will be taken into consideration and dealt with under the principles of the Equality Act 2010 where appropriate, and in consultation with HR People Services and Occupational Health. (Advice on capability in the context of the EA is contained in Appendix A.)

2.9 The basis of the policy is that it should be applied in a non-discriminatory way, irrespective of age, gender, disability, race, religion, language (including British Sign Language), or sexual orientation. The possibility that poor performance may arise from misunderstandings due to ethnic, cultural, gender, disability, or other issues should be explored and HR People Services consulted as appropriate.

2.10 This Policy and Procedure will be reviewed in light of operational experience.

Definitions

2.11 Section 98 (3)(a) of the Employment Rights Act 1996 states that "capability, in relation to an employee, means their capability assessed by reference to skill, aptitude, health or any other physical or mental quality." Section 98 (2) (A) of the Act also indicates that "incapability must relate to the work or the kind of work that the employee was employed by the employer to do."

2.12 The fundamental distinction between capability and conduct can be expressed as *"can't do"* as opposed to *"won't do",* the latter implying some degree of control, deliberation and/or choice.

Exclusions

2.13 The following circumstances will not be considered under this Policy:-

- Where failure to perform is due to wilful refusal to work satisfactorily, the Disciplinary Policy and Procedure will apply, as this is a matter of conduct.
- Cases of incapability during an employee's probationary period will be dealt with using the Probationary Period Policy and Procedure.

2.14 If at any stage in the Capability Procedure it transpires that under or poor performance is due to misconduct, the Disciplinary Procedure may be invoked.

SECTION 3 – PROCEDURE

INFORMAL PROCEDURE

Informal Stage - Capability Support Discussion

3.1. Where an employee demonstrates that they, for whatever reason, are unable to perform their duties satisfactorily, the manager should arrange a Capability Support Discussion with the employee with a view to understanding the reasons for the unsatisfactory performance and supporting and encouraging the improvement of performance to the required standard. The manager should provide the employee with a copy of the Capability Policy and Procedure in advance of the Capability Support Discussion. This is to ensure the employee understands the context of the discussion.

3.2 The purpose of the Capability Support Discussion is to:

a) Allow the manager and employee to explain their positions fully. The employee will be given every opportunity during the meeting to respond and give their explanation to the issue(s) raised in relation to their performance and any reasons why it has fallen below an acceptable standard.
b) Enable the manager to outline clearly, with examples of the unsatisfactory performance, the shortfall between the employee's current performance and the required standard and to enable the employee concerned to explain.
c) Enable both manager and employee to explore the causes of the poor performance and consider what support and help should be provided to enable the employee to improve their performance to the required level. e.g. training through the Cardiff Academy, coaching, mentoring, monitoring, learning and development opportunities, supervision, reasonable adjustments, counselling through the Employee Counselling Service, etc
d) Enable the manager to ascertain whether the capability issue is caused or linked to factors outside the employees control e.g. job design, change in work priorities or work pressures, impairment, health conditions. In addition managers must consider all available options throughout the process including job re-design, reasonable adjustments, etc
e) Enable both to agree an Improvement Action Plan setting Specific, Measurable, Achievable, Realistic and Time related targets for improvement. They should also agree a reasonable review period, appropriate to the circumstance, to allow the employee to demonstrate an acceptable and sustainable improvement in their performance. Where a specific time period is identified as relevant, e.g. end of the financial year, stocktaking, etc this will automatically be included in the review period. Periodic progress meetings will also take place within the agreed review period.

f) Also enable the manager to outline areas of work where the employee's performance is satisfactory and to explain that the satisfactory performance in these areas should be maintained throughout the review period.
g) Ensure the employee understands that where there is no acceptable and/or sustained improvement in performance (or where areas identified as satisfactory drop to unacceptable levels despite an extension to the review period) by the end of the review period Stage 1 of the Formal Capability Procedure will be implemented.

3.3 A brief note of the outcome of the Capability Support Discussion and the Improvement Action Plan will be produced, agreed and a copy to be retained on the personal file.

Review Period

3.4 The length of a review period will depend upon the nature of the capability issue, the duties of the role, the improvements agreed as necessary and the support and development to be provided. Timescales should be sufficiently reasonable for the employee to demonstrate that they are capable of achieving and sustaining acceptable and improved levels of work performance. As a general rule, review periods will normally be up to one calendar month. In exceptional circumstances a review period of three months may be agreed. The length of the review period at each stage will most likely vary, taking into consideration the circumstances of each case. Within the agreed review period progress meetings will be held. Ideally the timescale should be agreed with the employee and should be reasonable and achievable. Where an employee improves their performance in one area but other areas drop to unacceptable levels then an extension to the review period should be considered.

Informal Procedure- Progress Meetings

3.5 If, at the final progress meeting it is demonstrated that the employee's performance has improved and is satisfactory, the manager should acknowledge this and the employee should be encouraged to sustain the progress made. Ongoing performance should then be monitored and managed in line with the day to day responsibilities of the manager and through the Council's Personal Performance and Development Scheme.

3.6 Towards the end of the review period if it is clear that the employee's performance still falls below the required standard and the issues have previously been raised and addressed through the informal stage of the process, the formal stage of the procedure (stage 1) will be entered into.

FORMAL CAPABILITY PROCEDURE

Stage 1 Formal Capability Hearing

3.7 Where the employee fails to improve sufficiently following the informal review period, a formal Capability Meeting will be arranged by the manager. The purpose of this is to consider the capability issue and decide what further action needs to be taken. The employee will be notified in writing at least **7 calendar days** in advance of the meeting of the following:

a) that this is a Stage 1 formal Capability Meeting
b) the date, time and place of the meeting
c) confirmation of the actions agreed under the informal procedure
d) A summary of the performance concerns to be discussed
e) the right to be accompanied
f) a copy of the Capability Policy and Procedure will have been provided at informal stage
g) That ultimately, if sustained levels of improvement in performance are not achieved, redeployment may be considered or dismissal could be a potential outcome of the later stages of the process

3.8 Normally, the meeting should be held within **14 calendar days** of the end of the review period under the Informal Stage.

3.9 The purpose of the Stage 1 formal Capability Meeting is to:

a) Revisit details and discussions held under the informal capability procedure
b) Enable both manager and employee to explain their respective positions fully including any new information. The employee must be given every opportunity during the meeting to respond and give their explanation to the issues raised in relation to their performance
c) Enable the manager to explain clearly the shortfall between the employee's performance and the required standard and provide details of the unsatisfactory performance
d) Jointly explore the causes of the unacceptable level of performance and determine any action and support that can be provided
e) Enable the manager to ascertain whether the capability issue is caused or linked to factors outside the employees control e.g. job design, change in work priorities or work pressures. In addition managers must consider all available options throughout the process including, Job Re-design, Reasonable Adjustments
f) Make it clear to the employee what level of performance is required and obtain the employee's commitment to reaching the required standard
g) Provide the employee with an opportunity to explain why they are not performing to the level expected and allow the manager to listen to any explanations given by the employee

h) Decide what action should be taken if the employee's comments are not satisfactory
i) Agree an Improvement Action Plan setting Specific, Measurable, Achievable, Realistic and Time (S.M.A.R.T.) related targets for improvement
j) Offer additional help and support to enable the employee to improve their performance. The range of interventions include e.g. training through the Cardiff Academy, coaching, mentoring, monitoring, learning and development opportunities, (as distinct from training) supervision, reasonable adjustments, job redesign, counselling through the Employee Counselling Service, etc.
k) Agree a specific time period, appropriate to each circumstance, to allow time for the employee to demonstrate an acceptable and sustainable improvement in their performance. Periodic reviews will take place within the agreed timescale.
l) Also enable the manager to outline areas of work where the employee's performance is satisfactory and to explain that the satisfactory performance in these areas should be maintained throughout the review period.
m) Advise the employee that where there is no acceptable and sustained improvement in performance (or where areas identified as satisfactory drop to unacceptable levels despite an extension to the review period) by the end of that period, Stage 2 of the formal capability procedure will be invoked.
n) Ensure that minutes and a note of the outcome of the 1st formal capability meeting and the Improvement Action Plan is produced, agreed and retained on the personal file.

3.10 The employee and/ or their trade union representative will have the opportunity to raise any points which need to be considered, including an explanation for the inability to meet the required standard of ongoing poor performance.

3.11 Where the manager considers that the explanation provided is unacceptable, they may issue a written warning and advised of their right of appeal. The warning will be confirmed in writing and issued to the employee within 7 calendar days of the meeting and a copy retained in the employee's personal file.

3.12 Within this letter, employees must be informed of:

a) the performance concerns that were discussed and the standards which they are expected to achieve
b) any key comments or concerns raised by the employee
c) a copy of the Improvement Action Plan – listing the ways in which the manager will help them to attain a satisfactory level of performance i.e. details of any training and support interventions to be provided
d) the time scale within which this is expected to happen, plus a date on which the employee's performance will be reviewed (refer to Review Meeting section above)

e) the implications of not achieving a sustained improvement (or where areas identified as satisfactory drop to unacceptable levels despite an extension to the review period) i.e. progression to next Capability stage and potentially a Final Written Warning
f) The employee should be made aware that dismissal or redeployment are a potential option if performance does not improve to the required standard
g) A written warning containing details of improvements sought and appeal rights

3.13 If at the final progress meeting the employee's performance is considered to have improved to the required standard a letter confirming this will be sent to the employee and a copy placed on their personal file. This will remain current for a period of 12 months from the date of Stage 1 meeting.

3.14 If, at the end of the review period it is demonstrated that the employee's performance has failed to improve to the required standard the manager will proceed to Stage 2 of the formal procedure.

Stage 2 – Formal Capability Hearing

3.15 Where there is no or any significant improvement, a Stage 2 Formal Capability Meeting will be convened by the manager. The purpose of this is to review the employee's performance since the Stage 1 meeting and decide what further action needs to be taken. The Stage 2 Formal Capability Meeting will normally be led by the same manager who held the stage 1 meeting. The employee will again be notified at least **7 calendar days** in advance of the meeting, in writing of the following:

a) that this is a stage 2 formal Capability Meeting
b) the date, time and place of the meeting
c) a summary of the performance concerns discussed to date
d) the procedure to be followed at the interview
e) the right to be accompanied

3.16 During the meeting the employee's performance since the Stage 1 meeting should be reviewed. The meeting must be conducted as outlined in paragraph 3.9 and in a manner that enables both manager and employee to explain their cases fully. The employee should be asked for their comments on progress and the support they have received. Outstanding performance concerns should be clearly explained by the manager and SMART targets for improvement, plus any support measures should be agreed and recorded in the Improvement Action Plan. The employee must be given ample opportunity during the meeting to respond and give their explanation of the issues raised in relation to their performance.

3.17 At the meeting, employees must be reminded of:

a) the standards of performance which are expected of them
b) the areas in which they are continuing to fall short
c) the ways in which the manager will help them to attain a satisfactory level of performance i.e. details of any training and support which is to be provided
d) agreed actions required by the employee to improve performance
e) the time scale within which this is expected to happen, plus a date on which the employee's performance will be reviewed
f) the areas of work where the employee's performance is satisfactory and to explain that the satisfactory performance in these areas should be maintained throughout the review period
g) What will happen if the standard is not met (or where areas identified as satisfactory drop to unacceptable levels despite an extension to the review period) i.e. progression to the next stage Capability Hearing where the potential could be dismissal or redeployment.

3.18 Minutes and a note of the outcome of the 2nd stage formal capability meeting and the Improvement Action Plan will be produced, agreed and retained on the personal file

3.19 The employee will be issued with a final written warning (as per the requirements listed in paragraph 3.12) and advised of their right to appeal.

3.20 If at the end of the review period the employee's performance is evidenced to have improved to the required standard, a letter confirming this will be sent to the employee and a copy placed on their personal file. This will remain current for a period of 24 months from the date of Stage 2 meeting.

3.21 If, at the end of the review period it is demonstrated that the employee's performance has failed to improve to the required standard the manager will proceed to Stage 3 of the formal procedure.

Stage 3 – Formal Capability Hearing

3.22 Where there is still no or insufficient improvement, a Capability Stage 3 Formal Hearing will be convened which will be heard by an Operational Manager or senior nominated officer. The employee will again be notified at least **7 calendar days** in advance of meeting, in writing, of the following:

a) that this is a Stage 3 formal Capability Hearing the outcome of which could potentially be dismissal or redeployment within the service area
b) the date, time and place of the hearing
c) a summary of the performance concerns to be discussed
d) the procedure to be followed at the hearing

e) the right to be accompanied by a Trade Union representative or work colleague

3.23 The Hearing will normally be held within **14 calendar days** of the end of the review period and will be conducted in a manner that enables both manager and employee to explain their cases fully in accordance with the principles of natural justice. The employee will be given every opportunity during the hearing to respond and give their explanation to the issues raised in relation to their performance.

3.24 The employee will be advised that they still have not met the required standard, and they will be provided with evidence to support this.

3.25 Due consideration will be given to whether there are suitable alternative vacancies, within the service area (and if not in line with the Councils Redeployment Policy and Procedure) which the employee would be competent to fill. Any additional training that will be required in order for the individual to fulfil the new role, if accepted must also be considered.

3.26 Where there are no suitable vacancies, the employee must be advised that whilst vacancies have been reviewed, none are suitable and there is now no alternative but to dismiss them.

3.27 If it is decided that there has been little or no improvement the employee will be issued with notice of dismissal on the grounds of capability and advised of their right to appeal.

Appeals

3.28 Appeals must be made in writing within 7 calendar days of the decision being communicated in writing and submitted to the officer who made the decision.

3.29 The appellant must indicate the grounds of their appeal and provide further explanation as to why. These grounds could be:

a) on the basis that the decision was unfair, unjustified or inappropriate,
b) on the basis that the capability procedure was not followed correctly
c) on the basis that new information has come to light

3.30 The Officer to whom the appeal letter is addressed is then required to forward this to their line manager to arrange an appeal hearing (where possible) within 14 calendar days. If an appeal hearing cannot be organised within 14 calendar days, the appellant and Trade Union representative must be advised in writing of the delay together with the reasons and an alternative date offered. There is no further right of appeal.

SECTION 4 – RELEVANT DOCUMENTS

All relevant letters are accessed via DigiGov

Appendix A

CAPABILITY POLICY AND PROCEDURE

IMPROVEMENT ACTION PLAN

Name: _____ Service Area: _____ Employee No:_____

Job Title: _____ Grade: _____

Following the Capability Support Discussion/ Capability meeting the Improvement Action Plan is to enable both Headteacher and employee to agree and set Specific, Measurable, Achievable, Realistic and Time related targets (SMART) for improvement. A reasonable review period, appropriate to the circumstance, should also be agreed to allow the employee to demonstrate an acceptable and sustainable improvement in their performance. Periodic progress meetings will also take place within the agreed review period.

Date action agreed	SMART Improvement actions agreed	Timescales/Target dates for improvement	Agreed review date	Review meeting comment

Improved: ☐ **Not Improved (proceed to next stage in Capability Procedure)** ☐

Signed: (Manager)_____ **Date:** _____

Signed: (Employee) _____ **Date:** _____

Appendix B

Equality Act Guidance under Capability Procedure

1. The Council recognises that disabled people can face discrimination and disadvantage in the workplace and society. The skills and experience of disabled employees are highly valued and the Council is committed to addressing this by removing access barriers, challenging discrimination and implementing best employment practice.

2. An employer must not discriminate against an employee who becomes impaired or has a long-term limiting health condition that impacts negatively on the employee's capability to carry out the job. Managers need to find out from employees who are performing poorly, if this is due to an impairment or long-term limiting health condition affecting their work. This will also be the case when an employee has a stable impairment, but the nature of their employment changes.

3. An issue of capability which arises due to an employee having a disabling condition that falls under the scope of the Equality Act 2010, must be treated in accordance with its provisions. An employee would not be exempted on grounds of disability from having the capability procedure applied. However, every possible "reasonable adjustment" to their employment, to help bring performance up to an acceptable level would need to be explored, before it could be applied.

4. Reasonable Adjustments in this context refers to a range of possible actions, for example, changes to working hours or patterns, adjustments to job content, provision of appropriate equipment and a move to alternative, more suitable work. This is not an exhaustive list, and what can and should be considered will depend on the individual circumstances of each case.

5. Examples of reasonable adjustment:

Modify the job

- Rearrange working methods
- Give certain tasks to another employee
- Provide practical aids or adaptations to premises or equipment
- Allow the person to work at different times
- Allow the person to work at a different place

Allow time to readjust

- Trial period to assess ability in modified job
- Trial period to assess ability in new job
- Period working from home
- Gradual build up to full time hours
- Additional training

Change of job

- Move to a different , more suitable vacant post

6. Reasonable adjustment to the employees existing job must be explored before any move to alternative employment is considered. Moving an employee to other employment without first considering reasonable adjustment to their current job could amount to disability discrimination.

7. The manager will need to consult the disabled employee at appropriate stages regarding their needs and what adjustments may help to resolve the problem.

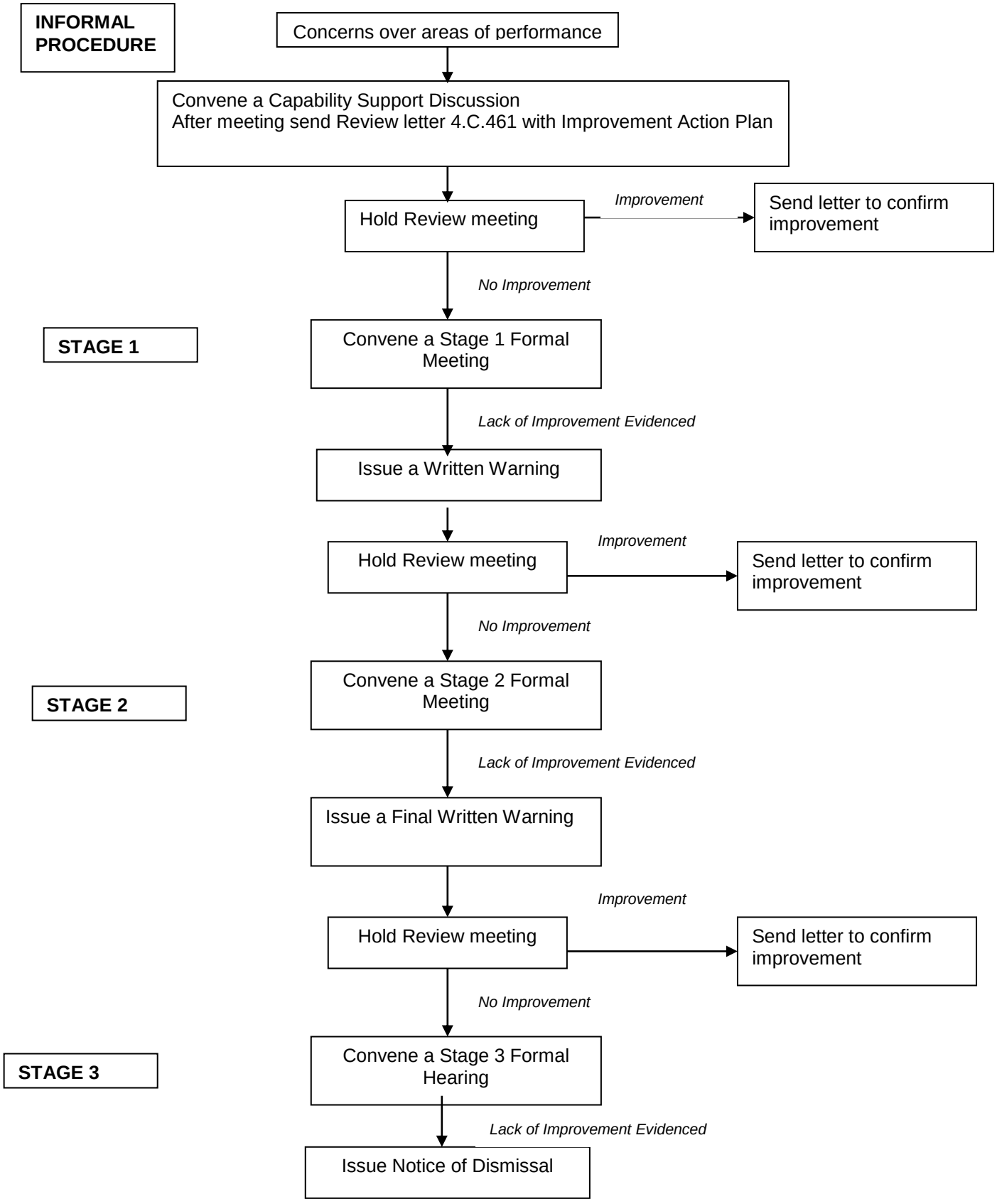
8. Following reasonable adjustment, appropriate arrangements must be made to supervise and monitor the employee's continuing performance, usually by the employee's immediate superior, with the employee being required to co-operate in the monitoring process

9. If, after allowing 3 months for improvement it is considered that the employee has still failed to achieve a satisfactory level of performance, the case should be reviewed in consultation with the employee, to ensure that all reasonable adjustments that are possible in the circumstances have been undertaken. If all relevant reasonable adjustments have been made, then consideration must be given to:

    a) a further (maximum 3 month) period to allow improvement (where it is considered that the necessary improvement could be achieved in this time)
    b) Instigation of any normal Council procedures that would apply in the case including the Capability Procedure

10. Where it is found that further practicable reasonable adjustments could be made and are likely to result in improved performance, these must be implemented and step 9 repeated. Where a further 3 month period for improvement is allowed, but the necessary improvement is not achieved 9b) would apply.

11. Specialist advice and guidance and practical help with the cost of reasonable adjustments is available from the Disability Employment Advisor at the Job Centre General advice and guidance is also available from the Equalities Team and HR People Services. Access to Work can also provide support.

CAPABILITY FLOWCHART Appendix C

This flow diagram shows the Capability Procedure in its **simplest** form and should be used in association with the full Capability Policy and Procedure and accompanying draft letters.