

# Isle of Wight Council

# **CAPABILITY PROCEDURE**

## **June 2017**

References to “The Council” in this policy shall apply to Medina House School.

References to “Elected Members” in this policy shall apply to Governors of Medina House School.

References to “senior managers/managers” in this policy shall apply, as appropriate, to the Headteacher, Assistant Headteacher and members of the SLT.

References to “policies/procedures” in this policy shall apply to policies and procedures approved by the governors of Medina House School.

**IWC Policy - Adopted by Governors on .....**

**Signed ..... Matt Atkins Chair of Governors**

**Review Date: January 2022**

# 1 Document Information

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0.6	January 2013	Final Version
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0.8	September 2016	Updated to reflect changes to guidance on fluency in English
0.9	June 2017	General review and update to reflect appropriate Manager to hear the case and the decision made by Full Council on 17 May 2017 to refer appeals against dismissal back to Senior Managers.
1.0	December 2018	Updated wording around data protection legislation.

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## 3 Introduction

### 3.1 The Purpose of the Procedure

The purpose of the Capability Procedure is to provide a framework through which managers can work with you to achieve, maintain and improve your performance and sickness absence records, and to encourage and support where necessary.

The aim of the Capability Procedure is to ensure that employees of the Isle of Wight Council / Schools are treated fairly and consistently.

### 3.2 Capability – A Definition

For the purposes of this procedure, capability is defined as:

*“Where a member of staff is failing to carry out their responsibilities or duties in a satisfactory manner, either due to a lack of ability, aptitude, inadequate training, lack of experience, or for any other reason.”*

**Appendix A** outlines examples of capability concerns.

### 3.3 The Scope of the Procedure

This procedure applies to all employees of the Isle of Wight Council and is non-contractual. For clarification this also includes:

- all employees of the Isle of Wight Fire and Rescue Service who are covered by Grey or Gold book conditions;
- all School support staff;
- Chief Officers.

It does not apply to the Chief Executive, teachers, contractors or agency workers.

The procedure does not apply to cases involving misconduct, or unsatisfactory performance during a probationary period of service. In such cases reference must be made to the Disciplinary Procedure or the Probationary Procedure respectively.

### 3.4 Health or Other Personal Issues

Where health issues or disability could be an underlying cause of poor performance, your line manager may consider a referral to Occupational Health, your GP, or any other source of information that may provide additional useful information in order to support you. Further information can be found in the attendance management policy and procedure. Where other personal issues could be involved (eg. bereavement), your manager may need to facilitate access to other sources of support for you such as the council’s employee assistance programme. HR can assist your manager in deciding whether the capability procedure is the appropriate route.

### 3.5 Dismissal

You will not normally be dismissed for performance reasons related to capability without previous warnings. However, in serious cases of gross negligence, or in any case involving you if you have not yet completed your probationary period, dismissal without previous warnings may be appropriate.

## 4 Flowchart of the Procedure

(The numbers against each heading refer to the relevant section of the procedure.)

### Deciding on appropriate action

The Line Manager should make a judgement on the seriousness of the issues and whether they should proceed straight to the formal procedure.

### Informal Action (5)

#### (5.1) Informal action

The line manager attempts to address the capability issue with the employee by meeting and discussing the capability issue, and agreeing an Improvement Action Plan where appropriate.

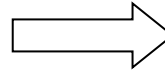


#### (5.2) Reviewing performance

The line manager meets with the employee to review progress.

**Q Has the required improvement been achieved?**

YES



No further action necessary

NO



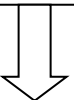
### Move to the formal procedure (6)

The line manager meets with HR to discuss case and agree any further action.



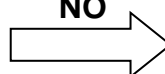
#### (6.1) Stage 1: First Capability Review Hearing

The manager invites the employee to attend a first capability review hearing. The appointed manager / panel hears the case, (see Appendix B for details of proceedings) and decides what, if any, further action should be taken. A decision is made and the appointed manager / panel confirms in writing to the employee within five days (not including weekends or bank holidays). The employee has the right of appeal.



**Q WAS A FURTHER IMPROVEMENT REVIEW PERIOD SET AT THE HEARING?**

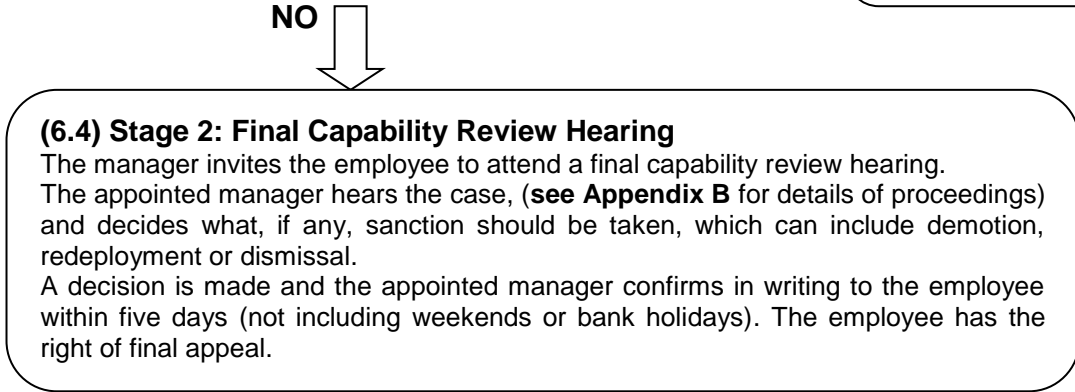
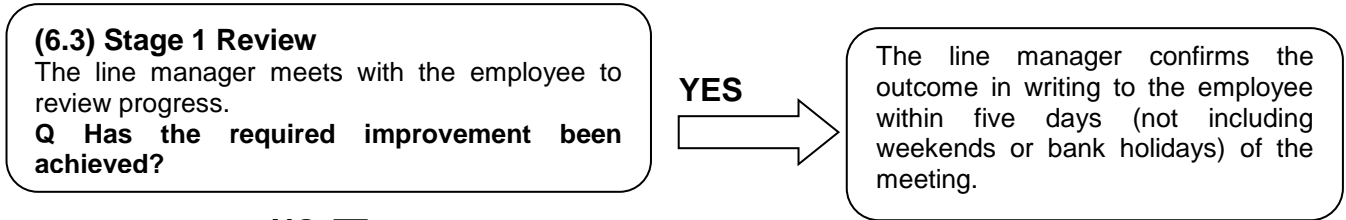
NO



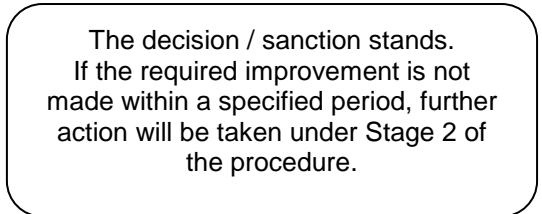
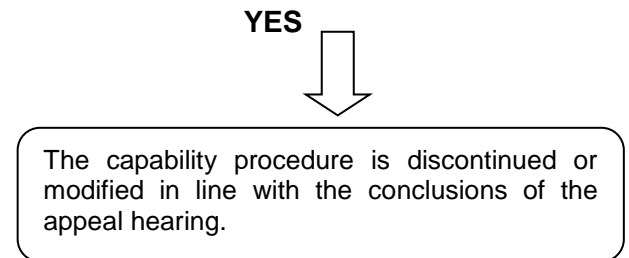
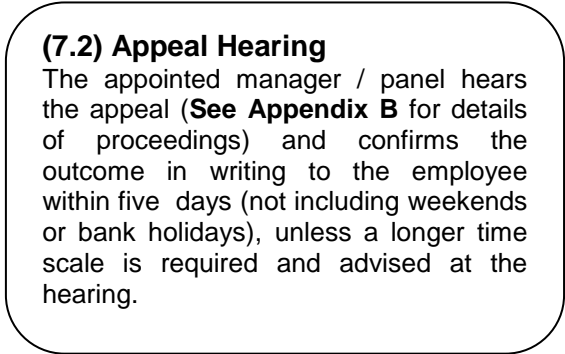
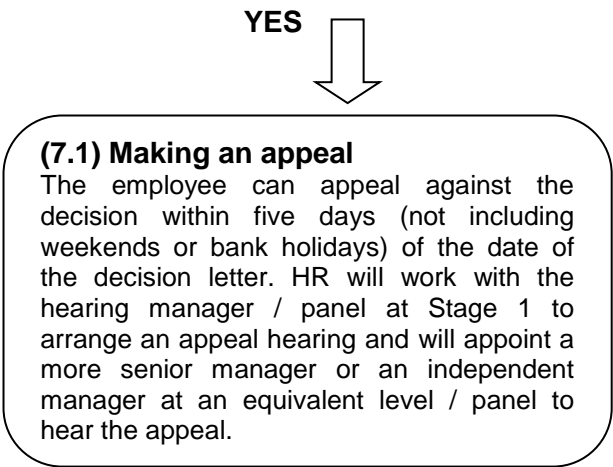
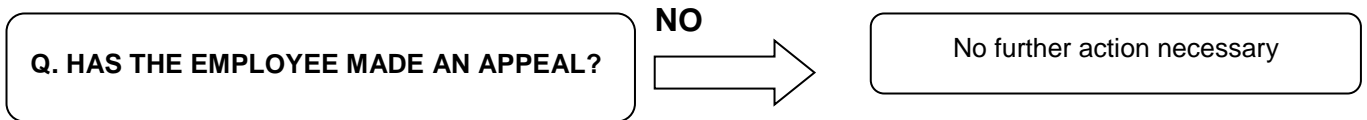
No further action necessary

YES





**Appeal (7)**



## 5 Informal Action

### 5.1 Addressing Capability Issues Informally

Where health issues or disability could be an underlying cause of poor performance, your line manager may consider a referral to Occupational Health, your GP, or any other source of information that may provide additional useful information in order to support you. Further information can be found in the attendance management policy and procedure. Where other personal issues could be involved (eg. bereavement), your manager may need to facilitate access to other sources of support for you such as the council's employee assistance programme. HR can assist your manager in deciding whether the capability procedure is the appropriate route.

Capability issues should normally be dealt with informally between you and your manager as part of the day-to-day management process.

The first action will be for your manager to determine whether the poor performance is a capability issue or misconduct of some kind. If the latter, this should be addressed via the disciplinary procedure.

Your manager's role is to:

- Meet with you to explain the problem and discuss the performance issue in detail. Factual examples of unsatisfactory performance should be given.
- Give you the opportunity to explain your performance.
- Investigate the matter further as necessary, to identify the causes of the poor performance. This could include lack of skills, insufficient training, lack of support, volume of work, inadequate resources, lack of communication, problematic working relationships, or mitigating circumstances of some kind.
- Outline the required standard of performance, explain the apparent shortfall and define the improvements required.
- Agree any further appropriate action to address the shortfall in performance with you, including additional support e.g. coaching, mentoring, more regular supervisions, development and / or training.
- Define a timescale for monitoring and reviewing progress. Where appropriate, this review period may be included within a structured written Improvement Action Plan (IAP: **see Appendix C**) developed with you, which will also include establishing a monitoring process. A copy of the IAP paperwork will be given to you.
- Explain that lack of improvement in performance may result in formal action under this procedure.
- Your manager should confirm the above points to you in writing.



## 5.2 Reviewing Performance

If your work performance has improved to the required standard during the review period, your manager should meet with you to inform you of this. This should be confirmed to you in writing within five days (not including weekends or bank holidays) of the meeting.

If your performance does not reach the required standard by the end of the review period, your manager will meet with you to explain the shortcomings and allow you to respond. Your manager may decide to extend the performance review period if they feel that this could address the problem satisfactorily. However, if your manager considers that you have failed to attain the required performance standard without justifiable reason, and / or the poor standards are likely to continue, the matter will be referred to the formal stage of this procedure (see **6: Formal Procedure**).

Your manager may decide to hold a capability review hearing under the formal procedure at an earlier stage if there are serious concerns about your performance and its impact on the work and / or team.

NB: Your line manager will keep a record of all conversations with you and will also retain examples of where the capability issue is evidenced.

## 6 Formal Procedure

*(Please also refer to Capability Procedure – Additional Guidance on [iwight.com](http://iwight.com) / Wightnet: Documents.)*

Your manager should arrange a meeting with HR at this stage to discuss the case and agree any further action.

NB: Stage 2 of the procedure may be invoked where there is serious incapability, even if it is the first occurrence.

### 6.1 Stage 1 – First Capability Review Hearing

At the end of the informal review period, or if the poor performance is sufficiently serious to necessitate taking more formal action immediately, your manager will:-

- agree with HR an appropriate person to hear the case (see 6.1.1 below);
- arrange a hearing date and venue, ensuring that the appropriate people are available to attend (ie the person(s) hearing the case and their administrative support and an HR Adviser);
- prepare all documentation that will be referred to at the hearing, including any previous action taken and a management statement.;
- write a covering letter to you inviting you to a formal capability review hearing, providing at least seven days' notice (not including weekends or bank holidays). The letter must contain enough information about the nature of the poor performance to enable you to prepare your case. The letter will also give details of the likely outcome if it is decided at the hearing that your performance fails to meet the required standards.

The hearing will consider any written representations from you and / or your representative. You will be given the opportunity to provide any supporting evidence to the person(s) hearing the case at least three days (not including weekends or bank holidays) prior to the capability review hearing date.

You and your line manager will receive copies of any evidence to be presented to the person(s) conducting the hearing by the other party at least two days (not including weekends or bank holidays) prior to the hearing.

You have a right to be accompanied at the hearing by your trade union representative or a work colleague. You must take all reasonable steps to attend the hearing. Account will be taken of any reasonable adjustments required under the Equality Act 2010.

Where either you and / or your work colleague / representative is unable to attend the hearing and provides a genuine reason for failing to attend, the hearing will be reconvened within five days (not including weekends or bank holidays) of the original hearing date, or on another date which is mutually agreed by the parties. In circumstances where you are unable to attend a hearing for a genuine reason (eg ill health), your chosen representative may attend the hearing in your absence and they will be provided with the opportunity to present your case. You will also be allowed to make written submissions in your absence. If you and / or your representative are persistently unable or unwilling to attend a hearing, the hearing will take place in your absence and a decision will be made.

The procedure for the hearing will normally follow the procedure outlined at **Appendix B**.

### 6.1.1 Appropriate Person(s) to Hear the Case

The hearing should be chaired by a senior manager who has not previously been closely involved with the case (e.g. your line manager's manager, Service Manager, Headteacher). When a possible sanction to be considered is dismissal, a manager no lower than Deputy Chief Officer or Headteacher level must hear the case (or Area Manager in the instance of the Fire Service).

In schools, the Headteacher will normally hear the case, however, where a Headteacher has been directly involved in the case in some way, the matter will be referred to a panel of Governors.

In the case of a Chief Officer, a Panel of Members will conduct the hearing. The Panel should include no fewer than three elected Members and should not include any Member or officer with direct involvement in the matter.

### 6.2 At the Hearing

The manager, Headteacher or Panel of Members conducting the hearing will:

- fully investigate the evidence presented by your manager and you;
- provide you with the opportunity to state your case fully, including an explanation of your performance and / or any mitigating factors;
- make a judgement as to what, if any, further action should be taken.

The chairperson conducting the hearing may adjourn proceedings if this is considered to be necessary and you (and your trade union representative or work colleague) will be informed of the period of any adjournment. If further information is to be gathered, you will be allowed a reasonable period of time, together with your work colleague or representative, to consider the new information prior to the reconvening of proceedings.

As soon as possible after the conclusion of the hearing, the person chairing the hearing will convey the decision verbally to you and the manager who presented the capability case.

After the hearing has been concluded, the hearing manager will inform you in writing of the conclusions of the hearing within five days (not including weekends or bank holidays).

If the conclusion is that your performance is satisfactory, the chairperson will confirm that the formal process has been concluded. Your line manager may still be required to monitor your performance through the Personal Development Review and regular one-to-one sessions. If an issue of capability arises again your manager may re-institute this procedure.

If the case against you is upheld, the chairperson will issue a formal written warning which will make clear what performance improvement is required, the timescale in which this must be achieved and the consequences of failing to show the required improvement within the set timescale. The warning will give details of possible sanctions if performance does not improve, which could include dismissal.

The chairperson may also recommend further support and / or training to be undertaken by you during this period. You will be informed of your right of appeal to a named relevant person and the time period in which you must make the appeal.

Your line manager will be required to monitor your subsequent performance and hold periodic review meetings with you. Your manager will keep notes of these meetings, detailing the assessment of progress and any further agreed actions; a copy of these notes will be forwarded to you.

### 6.3 Stage 1 – Review

If a review period was established at Stage 1 and this has been completed, your line manager will meet with you to discuss your progress and decide whether sufficient progress has been achieved.

### 6.4 Stage 2 – Final Capability Review Hearing

If you have failed to make sufficient progress to achieve the required standard, or where your performance is sufficiently serious to warrant instigation of the formal procedure at Stage 2, a final Capability Review Hearing will take place.

Stage 2 hearings will be chaired by a manager no lower than Deputy Chief Officer, or Headteacher level (or Area Manager in the instance of the Fire Service). In the case of Chief Officers the hearing will be held by a Panel of Members and the Panel must not include any Members who sat on the previous Panel.

The preparation, information and conduct of the hearing will be same as at Stage 1.

If the person / Panel conducting the hearing upholds a finding that you have not shown the required improvement, further sanctions may be imposed which could include demotion, redeployment or dismissal. The hearing should not impose a sanction which would involve you returning to your current post.

Where the outcome is dismissal, your employment will be terminated for the reason of capability, namely the inability to properly perform those duties required of the post or where there is no reasonable prospect that this may change in the future. The termination will normally be with full notice or payment in lieu of notice, except in cases of gross negligence where dismissal could be without notice, or payment of notice.

Where redeployment is recommended, a dismissal notice will be issued, however, during your contractual notice period every effort will be made to find suitable alternative employment. If a redeployment opportunity is taken, the pay and conditions of the new post will apply, ie there will be no salary protection. If no suitable alternative is found during the notice period, your employment will end at the end of your notice period.

You will be informed of your right of appeal to a named relevant person and the time period in which you must make the appeal. The date that any dismissal takes effect will not be delayed pending the outcome of an appeal. However, if the appeal is successful, the decision may be revoked with no loss of continuity or pay, and you may be reinstated to your post or to a suitable alternative, under the redeployment policy.

**NB: Any dismissal of school staff within Community and CE Controlled schools must be confirmed by the named Director responsible for Schools.**

## 7 Appeal

### 7.1 Making an Appeal

You have the right to make an appeal against any sanction imposed at any stage of the formal capability procedure, including dismissal. The request for an appeal must be made in writing to HR or in the case of schools, to the Clerk to the Governors.

The appeal must be made within five days (not including weekends or bank holidays) of the date of the decision letter at Stage 1 or Stage 2 and must state clearly the grounds upon which an appeal is being made. Save in exceptional circumstances, you may only make an appeal on the following grounds:

- the decision: the evidence did not support the conclusion of the manager; and / or
- the penalty: this was too severe given the circumstances of the case; and / or
- new evidence: evidence has come to light since the hearing and was not reasonably available at the time of that hearing; and / or
- it is considered that the capability procedure was not followed correctly.

The appeal will normally take place within fifteen days (not including weekends or bank holidays) of receipt of your written notice of appeal or on a date which is mutually agreed by the parties.

HR will work with the person who conducted the previous capability review hearing to arrange the appeal hearing. The appeal will be heard by a more senior manager than the person who conducted the previous capability hearing, where possible, or by an independent manager at an equivalent level. In the case of schools, the appeal will be heard by an appeals committee consisting of three governors, who will not have been involved in any part of the proceedings to date.

In the case of Chief Officers, the right of appeal will be to another panel of elected members.

HR or the Clerk to the Governors will write to you to invite you to attend an appeal hearing. You will have the right to be accompanied by a trade union representative or work colleague. You must take all reasonable steps to attend. Account will be taken of any reasonable adjustments required under the Equality Act 2010.

Where either you and / or your companion / representative is unable to attend the hearing and provides a good reason for failing to attend, the hearing will be reconvened within five days (not including weekends or bank holidays) of the original hearing date or on another date which is mutually agreed by the parties.

The appeal hearing will consider any representations from you and / or your representative. You must provide any supporting evidence for the basis of your appeal to HR or the school's Clerk to the Governors, at least seven days (not including weekends or bank holidays) prior to the appeal hearing date.

The manager or the chair of the panel who made the decision at the previous hearing will be required to attend the appeal hearing to respond to the grounds of the appeal. They may call the manager who presented the case at the capability review hearing as a witness.

All parties will receive copies of the evidence to be presented at the appeal hearing at least two clear working days prior to the hearing.

The procedure for the hearing will normally follow the procedure outlined at **Appendix B**.

## 7.2 At the Appeal Hearing

The appeal manager or committee will:

- consider all the evidence, including any new evidence presented;
- determine whether the grounds for the previous capability sanction were valid;
- determine whether the sanction should remain the same, or should be increased, reduced or removed.

The chairperson conducting the hearing may adjourn proceedings if this is considered to be necessary and you (and your work colleague or representative) will be informed of the period of the adjournment. If further information is to be gathered, you will be allowed a reasonable period of time, together with your work colleague or representative, to consider the new information prior to the reconvening of proceedings.

As soon as possible after the conclusion of the appeal hearing, the person chairing the hearing will convey the decision verbally to you and to the manager who presented the case at the hearing.

The decision will be confirmed in writing to you by the appeal manager within five days (not including weekends or bank holidays) of the hearing; you will also be informed of the reasons for the decision and that the decision is final.

## 7.3 Keeping Formal Written Records

If a formal hearing takes place, HR will keep a written record of the case, which will include:

- The nature of the case.
- What was decided and any actions taken, including a copy of any Improvement Action Plans.
- The reason for the actions.
- Whether an appeal was lodged.
- The outcome of the appeal.
- Any relevant subsequent developments.

Records will be kept no longer than necessary in accordance with data protection legislation.

Where applicable, copies of meeting records will also be given to you during the procedure, however, in certain circumstances (for example to protect a witness) some information may need to be withheld.

## 8 Appendix A – Examples of Capability Concerns

The following examples outline the different categories of poor performance that may lead to action being taken against you under this Capability Procedure. It should be noted that this may relate to one or a combination of the different categories outlined below, or others not specified here.

- Poor quality of work, below the expected standard that has been communicated to employees.
- Low output, below the expected standard that has been communicated to employees.
- Consistent / repeated failure to meet deadlines, agreed objectives or targets.
- Consistent / repeated inability to recognise common problems and find appropriate solutions.
- Consistent / repeated failure to accept changing work priorities.
- Consistent / repeated unreasonable inflexibility in team working.
- Despite appropriate guidance and support, a continuing inability to adapt to change (e.g. changes in work practices and / or targets).
- A demonstrable lack of skill, knowledge and / or ability to learn, despite appropriate coaching, training and support.
- Despite support and training, a continuing inability to converse at ease with customers and provide advice in accurate spoken English (not caused by a disability that affects speech, or a regional or international accent).
- Unacceptable levels of sickness absence precluding the capacity to undertake the requirements of the role.

NB: This is not an exhaustive list.

## 9 Appendix B – Order of Events at a Formal Capability Hearing

The purpose of a formal capability hearing will be to establish the facts about the employee's performance and decide what, if any further action should be taken.

The format for the formal capability hearing will normally be as follows:

1. The Chairperson leading the hearing will introduce the parties and then explain the purpose of the hearing and how it will be conducted. The Chairperson will state that the hearing is being conducted as part of the council's / school's formal capability procedure and confirm that a written record of the hearing is being made.
2. The Chairperson will invite the manager to state the case against the employee. The Chairperson, Committee or Panel members, and the employee, and / or their representative or work colleague, may ask any questions about the circumstances of the allegations in order to establish all the relevant facts, background and surrounding circumstances.
3. The Chairperson will then invite the employee to state their case. With the employee's approval, or in the absence of the employee, the employee's representative may do this on their behalf. The Chairperson, Committee or Panel members, and the manager may ask any questions in order to establish all the relevant facts, background and surrounding circumstances.
4. At any point during the hearing, the Chairperson may adjourn the proceedings if it appears necessary or desirable to do so, including for the purpose of gathering further information. Any party may also make a request to the Chairperson for an adjournment at any time during the hearing.
5. Once all the evidence has been heard, the Chairperson will ask the manager and then the employee to sum up the key points of their evidence.
6. The Chairperson will try to reach a decision on the same day as the hearing. If this is not possible, however, the Chairperson will inform the employee of their decision within five days (not including weekends or bank holidays). The Chairperson will confirm their decision in writing to the employee.
7. The Chairperson will inform the employee of their right to appeal against the outcome of the hearing.

### Order of Events for an Appeal Hearing

The purpose of an Appeal Hearing will be to establish whether any of the grounds for the appeal should be upheld or not.

The order of events will be the same as for the formal capability hearing above, except that at (2) the Chairperson will invite the employee to state the grounds for their appeal first and at (3) the manager will then state their case.



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If the decision taken at a Stage 2 final capability hearing is upheld by the appeal hearing, this decision will be final and there will be no further right of appeal.

## 10 Appendix C – Protect-Personal – Improvement Action Plan

Name of Employee:

Job Title:

Service:

Name of Line Manager:

1. Does the employee hold an up-to-date copy of their:

- |  |          |
|--|----------|
| a. Job description/job summary               | YES / NO |
| b. Person specification/generic role profile | YES / NO |
| c. Personal Development Review/CPD record    | YES / NO |

2. Summarise the nature and extent of the improvement required:

3. Summarise any new objectives and targets set for the employee:

4. Summarise any proposed new learning activities and / or personal support to assist the employee to achieve the required performance standard(s):

5. Outline the timescale in which the performance standard(s) must be achieved by the employee:

6. Outline the monitoring process during the review period (e.g. 1:1 progress discussions):

7. Summarise any other issues raised:

Line Manager's signature:

Date:

Employee's signature:

Date:

## 11 Glossary of Terms

<ul style="list-style-type: none"> <li>• <b>Non-Contractual</b></li> </ul>	<p>The procedure does not form part of employees' contracts of employment.</p>
<ul style="list-style-type: none"> <li>• <b>Probationary Period</b></li> </ul>	<p>A specific period of employment at the beginning of an employee's contract, during which both the employee and the organisation decide if the job is suitable for the employee and the employee is suitable for the job.</p>
<ul style="list-style-type: none"> <li>• <b>HR</b></li> </ul>	<p>Human Resources.</p>
<ul style="list-style-type: none"> <li>• <b>Occupational Health</b></li> </ul>	<p>An external agency which provides a medical and health advisory service to the Council and its employees.</p>
<ul style="list-style-type: none"> <li>• <b>Employee Assistance Programme</b></li> </ul>	<p>An external agency which provides impartial and confidential advice and support to employees and their family members.</p>
<ul style="list-style-type: none"> <li>• <b>Gross Negligence</b></li> </ul>	<p>A conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable injury or harm to persons, property, or both.</p>
<ul style="list-style-type: none"> <li>• <b>Sanction</b></li> </ul>	<p>An action which constitutes a penalty of some kind e.g. demotion, dismissal.</p>