

Performance Capability Policy and Procedure for Support Staff

**Authority Guidelines on
Staffing Procedures for Community, Voluntary Controlled,
Community Special Schools and Early Years Centres
(and those adopted by Governing Bodies of other maintained/non
maintained schools)**

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Contents

Para	Content	Page No
1.	Policy	3
2.	Procedure	3
2.1	Introduction	3
2.2	Scope	3
2.3	Recognising Capability Issues	4
2.4	The Role of the Headteacher	4
2.5	The Role of the Governing Body	4
2.6	The Role of the Employee	5
2.7	The role of the Trade Union/work colleague	5
2.8	Confidentiality	5
2.9	Informal Stage	5
2.10	Review Meeting	6
2.11	Stage 1 Formal Capability Procedure conducted by the Headteacher	7
2.12	Format for the formal Capability Hearing	7
2.13	Outcome of formal Capability Hearing	7
2.14	Formal Review Meeting	8
2.15	Stage 2 Formal Capability Procedure conducted by the Capability Committee of the Governors	8
2.16	Formal Review Meeting	9
2.17	Stage 3 Formal Capability Procedure conducted by the Staff Dismissal Committee	10
2.18	Capability “Extreme Cases”	11
2.19	Timescales	11
3	Sick Leave whilst subject to Capability Procedure	12
4	Capability and the Grievance Procedure	12
5	Appeals Procedure	12
Appendices		
	Appendix A Sample Letter of Format for Formal Stage 1	14
	Appendix B Agenda for Formal Stage 2	15
	Appendix C Agenda for Formal Stage 3	16
	Appendix D Agenda for Appeal Hearing	17
	Appendix E Capability Procedure Flowchart	18

1. POLICY

Schools Staffing Regulations 2009 require Governing Bodies to have procedures for dealing with any lack of capability of their employees.

Lack of capability is defined as a situation in which an employee fails consistently to perform his/her duties to a professionally acceptable standard. Performance capability can be assessed by reference to skill or aptitude.

Poor Performance may arise when an employee does not have the ability to achieve or maintain the required standard no matter how hard he/she tries; e.g. an employee may have been over-promoted beyond a level of their abilities causing serious damage to their performance.

It is an employee's responsibility to ensure that his/her work performance is maintained at a satisfactory level. Where an employee's work or omission is such as to call into question his/her capability the matter should be dealt with in accordance with the provisions of this procedure.

It should be noted that it is the responsibility of the school's management team to provide appropriate assistance, support and training in order to assist the employee to carry out his/her duties and responsibilities to an acceptable standard. The nature and amount of support necessary will depend on the circumstances of the particular case.

Once an acceptable improvement in relation to the identified issue(s) has been achieved, at any stage in this procedure, the procedure should be halted and no further action taken.

The main emphasis of the procedure is to identify and assess failing standards as early as possible; to introduce a mutually agreed support programme; and to monitor and evaluate that programme to enable an employee to fully contribute to the aims of the school.

N.B. The Policy and the Procedure do not apply to issues relating to Sickness Absence Capability

2. PROCEDURE

2.1 Introduction

The following procedure sets out a framework for dealing with cases involving lack of capability or other poor performance which is considered not to be attributable to a willful disinclination by the employee to carry out his/her duties efficiently or effectively but it would be thought to be attributable to a lack of skill. In a case where it is considered that there is a willful refusal by an employee to carry out his/her duties on a proper basis, the matter should be dealt with under the school's separate disciplinary procedure.

2.2 Scope

The procedure applies to all support staff employed by the Governing Body/Local Authority to work at the school whether they are full-time or part-time.

2.3 Recognising Capability Issues

Allegations of lack of capability call into question the continued employment of an employee. Therefore full consideration must be given to resolving any such problems both by informal and formal action.

The recognition of capability issues is one of the prime responsibilities of school management. Headteachers may seek advice from the HR Provider and/or diocesan body.

Suggested methods of recognising capability problems are:

- Regular monitoring and support of performance by senior school management. Standards of performance provide a means of judging what is acceptable; they should be realistic and measurable in respect of quality, quantity, time and cost.
- Day to day management through the traditional practices of staff meetings, proper explanation of what is required, placing under a competent supervisor, training, etc.
- Regular pattern of complaints about an employee's performance.

Note: Serious instances of unacceptable behavior would be dealt with using the procedure identified in section 2.20. Before taking any action, Headteachers may contact their HR provider to seek advice.

2.4 The Role of the Headteacher

- Introduction of methods to recognise capability issues.
- Defining appropriate method of investigation which may include the nomination of a member of the school's management team to carry out the informal stages of the Procedure on behalf of the Headteacher.
- Identification of appropriate support, monitoring and evaluation programmes by the school. Responsibility for both the informal and formal stages of the Capability Procedure, including the recording of agreed objectives and support plans.
- Ensuring all employees have an up to date job description, normally agreed by the employee and appropriate to the post they occupy, setting out their duties and responsibilities.

2.5 The Role of the Governing Body

- To nominate a committee who will deal with capability issues which could be included within the remit of another Committee if so desired.
- The Capability Committee shall consist of 2 or 3 members of the Governing Body (excluding the Headteacher) who have not previously been involved in the case, or have any other involvement, e.g. relationship to the employee subject to capability action.

- To nominate a Staff Dismissal Committee and a Staff Dismissal Appeal Committee. Both to consist of 2 or 3 named members of the Governing Body who have not previously been involved in the case, or have any other involvement.

2.6 The Role of the Employee

- The employee should cooperate fully with the capability procedure, including attendance at any meetings and hearing/appeals.
- The employee is responsible to contact and liaising with Trade Union representatives or work colleague.

2.7 The Role of the Trade Union/ work colleague

- Where appropriate the Trade Union representative or work colleague is responsible for supporting the employee through the Capability process including representation at relevant meetings.

2.8 Confidentiality

The procedure must at all times be dealt with on a **professional and confidential** basis and members of the Capability and Staff Dismissal Committees should have regard to the following key points:

- During a hearing no view can be reached until the representations from all parties have been taken into account.
- Governors involved in hearings should report any attempts to influence them by anybody and declare as early as possible any issues which could be perceived as undermining their impartiality.
- Records need to be kept, detailing the action taken and the reasons for it, whether an appeal is lodged, its outcome and any subsequent developments. These records should be carefully **safeguarded** and kept **confidential**.

2.9 Informal Stage conducted by School Management

Informal action is the discussion that takes place within the school and the forms of support introduced to assist the employee in improving his/her performance.

There will be occasions when it is appropriate for an employee's performance to be discussed with him/her as part of normal day-to-day school management. However, where there is continuing concern it will be necessary to proceed with the Procedure.

Where an employee's underperformance gives cause for concern, the Headteacher or the employee's line manager should collate evidence. Once the facts are gathered and the seriousness of the problem established, consideration should be given to one of the following options:

- Consideration of reasonable adjustments where appropriate
- If a health condition is identified at this stage consider a referral to Occupational Health
- No further action required

- Training and support (including support plan)
- Further informal action

The headteacher/line manager should have a meeting with the employee and discuss the following, in order to produce a support plan:

- Confirmation that he/she is now in the informal stage.
- Any perceived under performance
- What improvements are necessary to achieve an acceptable level of performance.
- Explore any training requirements and appropriate support
- Any personal reasons that are contributing to the problem.

A record of the meeting and the agreed support plan should be made and kept for future reference. This should be dated and include the following:

- A clear summary of the future performance expectations.
- Specific guidance, where appropriate, upon the improvements considered necessary.
- Support and training to be put in place
- Details of arrangements for reviewing progress, including the time scale to be observed.
- Signatures by both parties on the support plan
- Review date on the support plan

The timetable will depend on the circumstances of the individual case but in straightforward cases could be between four and ten weeks. It is for the school to determine the set period. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place.

The support plan should be monitored at regular intervals with careful notes taken and a copy of the notes should be given to the employee as soon as is reasonably possible. This process should be undertaken in collaboration with the employee who at each stage should have the opportunity to contribute to the further development of the plan.

The employee should be informed that failure to undertake his/her duties attached to the post to an acceptable standard by the time of the next agreed meeting would necessitate formal procedures under the School's Capability Procedure and could ultimately lead to dismissal.

2.10 Review Meeting

The follow up meeting should discuss improvements and any further support required. The employee may choose to be accompanied by a trade union representative or a work colleague if they so wish.

During the review meeting a firm conclusion should be reached. The options at this point will be either:

- No further action required

- Extend the period of the support plan where there are clear extenuating circumstances
- Move to formal Capability Procedure (Stage1)

2.11 Stage 1 Formal Capability Procedure conducted by the Headteacher

The formal Stage 1 Hearing initiates the formal capability procedure, and provides an opportunity to address serious concerns in a more structured way.

The employee has the right to be accompanied by a trade union representative or a work colleague.

At least five working days' notice will be given of the Formal Capability Hearing;

See Appendix A for format of letter.

2.12 Format for the formal capability hearing

During the hearing the Headteacher will:

- Identify the performance issues
- Allow the employee or his/her representative to respond to the concerns, provide new information and put a different perspective on the evidence collected
- Give clear guidance on the improvement of performance needed to ensure that the employee can be removed from formal capability procedures
- Discuss the support that has been made available to help the employee improve their performance
- Discuss the timetable for improvement and explain how performance has been monitored and reviewed.

NB The Headteacher may also adjourn the hearing to obtain further information, or where more time is needed to consider any additional information.

2.13 Outcome of Formal Capability Hearing

Based on the information reviewed in the formal capability hearing, the Headteacher may decide to:

- Revert back to the support plan
- Issue a formal warning which may be an oral, written or final written warning, based on the nature and seriousness of the concerns. (A Final Written Warning may be issued where the concerns are so extreme that the education and/or health and/or wellbeing of pupils are seriously compromised)
- Formally warn the employee that failure to improve within the set period could lead to dismissal.

Notes will be taken of formal hearing. Where a warning is issued, the employee will be informed in writing of the matters covered in the bullet points above and given information about the timing and handling of the review stage and the procedure and time limits for appealing against the warning.

2.14 Formal Review Meeting

A performance monitoring and review period will follow the formal capability hearing. Formal monitoring, evaluation, guidance and support will continue during this period. The employee will 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 hearing with the Staff Dismissal Committee.

At least five working days' notice will be given and the notification will give details of the time and place of the meeting and will advise the employee of their right to be accompanied by a trade union/professional association representative or a work colleague.

During the formal review meeting a firm conclusion should be reached. The options at this point will be either:

- No further action required where sufficient improvement has been made
- Extend the period of the support plan where there are clear extenuating circumstances or some progress has been made
- Move to formal Capability Procedure (Stage 2) where no or insufficient improvement has been made.
- Where a Final Written Warning was issued at the Stage 1 hearing and there is no or insufficient improvement, the matter may be referred to the Staff Dismissal Committee.

NB where the employee has been absent due to sickness, it may be appropriate to extend the review period (see section 3)

Notes will be taken of formal meetings.

2.15 Stage 2 Formal Capability Procedure conducted by the Capability Committee of the Governors

Documentation from both parties should be given to the Capability Committee **3 working days** prior to the Capability Hearing to allow the committee members to be better informed about the issues of the case.

The Capability Committee may request the provision of additional evidence and/or the attendance of relevant third parties. The employee may also request the attendance of relevant third parties.

See Appendix A for format of letter.

In the case of a capability hearing being conducted with an employee who is an accredited official of a recognised trade union/professional association,

consultation should take place prior to the above letter being sent with a senior official of their trade union.

During the Hearing

The Capability Committee may request the provision of additional evidence and/or attendance of relevant third parties. The employee may also request the attendance of relevant third parties.

The Agenda for the Hearing is included in Appendix B.

The decision of the Capability Committee should be one of the following:

- No further action required where sufficient improvement has been made
- Extend the period of the support plan where there are clear extenuating circumstances or some progress has been made
- To change the duties of the employee as appropriate.
- To impose a written warning or a final written warning.

The Capability Committee should confirm the decision in writing as soon as is reasonably practical to the employee (copy to trade union representative and the Director of Children's Services), detailing the identified capability issue(s) and the action taken plus the employee's right of appeal to the Staff Appeals Committee of the Governing Body.

The employee can appeal against the decision of the Capability Committee by sending a written appeal for the attention of the Clerk to the Governors within 10 days of receiving confirmation of the warning (see "Appeals Procedure").

2.16 Formal Review Meeting

At least five working days' notice will be given and the notification will give details of the time and place of the meeting and will advise the employee of their right to be accompanied by a trade union/professional association official or a work colleague.

During the formal review meeting a firm conclusion should be reached. The options at this point will be either:

- No further action required where sufficient improvement has been made
- Extend the period of the support plan where there are clear extenuating circumstances or some progress has been made
- Move to formal Capability Procedure (Stage 3) where no or insufficient improvement has been made.

NB where the employee has been absent due to sickness, it may be appropriate to extend the review period (see section 3).Notes will be taken of formal meetings and a copy sent to the member of staff.

2.17. Stage 3 Formal Capability Procedure to be conducted by the Staff Dismissal Committee

The Staff Dismissal Committee can only reach the decision to dismiss the employee following the issue of a prior final warning by the Capability Committee, unless it is a Serious Incapability “extreme case” (see section 2.20).

NB The Director of Children’s Services, or their nominated officer and the Authority’s Head of Legal Services (or his nominated representative) will be invited to attend the hearing of the Staff Dismissal Committee and of the Staff Dismissal Appeal Committee.

See Appendix A for format of letter.

A copy of the above letter should be forwarded by the Headteacher to the Clerk to Governors and to the Director of Children’s Services or his nominated officer well in advance of the hearing.

In the case of a capability hearing being conducted with an employee who is an accredited official of a recognised trade union/professional association, consultation should take place prior to the above letter being sent with a senior official of their trade union.

During the Hearing

The Staff Dismissal Committee may request the provision of additional evidence and/or attendance of relevant third parties. The employee may also request the attendance of relevant third parties.

The Agenda for the hearing is included in Appendix C.

The decision of the Staff Dismissal Committee should be one of the following:

- No further action required where sufficient improvement has been made
- Extend the period of the support plan where there are clear extenuating circumstances or some progress has been made
- To change the duties of the employee as appropriate.
- To re-issue a written warning
- To impose a final written warning.
- To dismiss

The Staff Dismissal Committee should confirm the decision in writing as soon as is reasonably practical to the employee (copy to trade union representative and the Director of Children’s Services), detailing the identified capability issue(s) and the action taken plus the employee's right of appeal to the Staff Appeals Committee of the Governing Body.

The employee can appeal against the decision of the Staff Dismissal Committee by sending a written appeal for the attention of the Clerk to the Governors within 10

days of receiving confirmation of the warning (see “Appeals Procedure”).

NB The Director of Children’s Services, or his nominated officer and the Authority’s Head of Legal Services (or his nominated representative) will be invited to attend the hearing of the Staff Dismissal Committee and of the Staff Dismissal Appeal Committee.

Where the decision of the Staff Dismissal Committee is that an employee should cease to work at the school, a copy of the written notification to the employee setting out the reasons for the decision must be sent to the Director of Children’s Services and must include the employee’s right of appeal.

Under the Schools Staffing (England) Regulations 2009 such a decision is classified as an initial dismissal decision (IDD). Dismissal and notice period will be effective from the IDD although the employee still has the right of appeal against the decision.

The Local Authority will terminate the employee’s employment within 14 days for community schools. If the employee is successful at appeal he/she will be reinstated.

Where an employee has been issued with a notice of dismissal, it may be appropriate for the employee to remain off site on normal pay until the notice period has expired.

Where an appeal is lodged but the decision to dismiss is upheld, the Local Authority will dismiss without notice within 14 days of the IDD.

Termination of the contract of employment on the grounds of performance capability will be with notice pay.

2.18 Serious Incapability "Extreme Cases"

In extreme cases where the education of pupils is jeopardised, the period given for improvement after the date of a formal warning will be **no more than four weeks**. Undue delay may not always be in the interest of all parties.

The Headteacher may propose that an employee’s performance is considered as Serious Incapability “extreme case” where the education of pupils is jeopardised and/or health and/or wellbeing of pupils are seriously compromised, and refer the matter to the Staff Dismissal Committee.

In such extreme cases formal procedures would commence immediately at Stage 3 of the Formal Capability Procedure. A right of appeal is available to an employee under the school’s Capability Procedures.

2.19 Timescales

The timescale is normally no more than two terms for the informal procedure and normally no more than two terms for an improvement once formal procedures have been activated. The timescales adopted will be in accordance with the seriousness of the lack of capability of the employee and/or other factors which may lead to unavoidable delays. Consideration needs to be given to whether the problem is a specific or broader professional difficulty, whether it is of very recent concern or spanning a longer period of time.

3. Sick Leave whilst subject to the Performance Capability Procedure

Should an employee take sick leave whilst subject to Performance Capability Procedures, particularly where they attribute it to be work related, they should be referred to the Occupational Health provider.

In such circumstances either the capability procedure should continue where monitoring and assessment of performance has reached a stage where the absence of the employee would not significantly affect the outcome or the sickness absence procedure should be triggered. Capability Procedures should not be put "on hold" indefinitely and the Governing Body (or the Headteacher) must make reasonable and responsible judgements as to when to progress these matters if the monitoring and assessment of performance has been omitted through absence.

Reasonable steps should be made to enable an employee to attend all discussions outlined in this Procedure, but where an employee is unable to attend, these may proceed in the employee's absence, if delay would otherwise compromise the maximum time set aside for the Procedure. In such circumstances the employee should be made aware that a decision may be made in their absence. A full account of the discussions should be provided in a letter confirming the decision taken.

The Governing Body would be entitled to consider absence due to sickness as forming part of the Capability submission.

4. Capability and the Grievance Procedure

Governors should note that no procedure should automatically take precedence over another. Complaints from an employee under the school based Grievance Procedure should not, as a general rule, be taken as a justification for delaying the Capability Procedure. Equally the Grievance Procedure should not be delayed by the Capability Procedure.

5. Appeals Procedure

The following sets out the format for the school's Appeals Committees.

N.B. In the case of a decision made by the Staff Dismissals Committee, the appeal must be heard by the Staff Dismissals Appeal Committee.

5.1 The Appeals Committee

Membership;

- An Appeals Committee must be made up of named governors who were not involved in the decision of the relevant first committee.
- The Director of Children's Services (or his nominated officer – and the Authority's Head of Legal Services (or his nominee) should be invited to attend the hearing and should be sent copies of all documents to be considered during the hearing.
- The size of the Appeals Committee can be no less than the original relevant Committee.
- The Appeals Committee has the power to decide an appeal against decisions taken by the Headteacher or relevant Committee. They have the powers to:

❖ Confirm the decision made by the Headteacher or relevant Committee

- ❖ Impose a lesser penalty or
- ❖ Dismiss the case.

5.2 Procedure

- Appeals must be made in writing, giving reasons for the appeal, by the employee within **10 working days** of receipt of the letter confirming the action taken. The letter should be sent to the **Clerk of the Governing Body**.
- An appeal will be heard by the relevant Appeals Committee.
- An appeal against a decision that an employee shall cease to work at the school can only be heard by the Staff Dismissals Appeal Committee.
- The employee has the right, if they so wish, to be accompanied by a trade union representative or a work colleague.
- The employee shall be given at least **5 working days'** notice of the time, date and venue of the Appeals Hearing and will, at the same time, be supplied in writing with a further copy of the statement of the decision previously taken.
- If, as a result of the appeal, or for any other reason, a sanction is withdrawn, any written record of the matter will be expunged from the employee's file.
- Documentation from both parties should be given to the Appeal Committee at least 3 working days prior to the Appeal Hearing to allow the Committee members to be better informed about the issues of the case.

The Agenda for the Appeal Hearing is included in Appendix D.

Format of Formal Performance Capability letter

RE: FORMAL CAPABILITY HEARING (specify Stage)

I refer to our review meeting on regarding your performance, where I confirmed that you will move to the Formal Capability Procedure. I would like you to attend a formal capability hearing on (date) at (time) in my office.

The content of the hearing will be to discuss the following issues which I have previously discussed with you, that is:-

1. (List the issues which are causing concern)
- 2.
- 3.

I enclose copies of relevant documentation, including the support plan and relevant paperwork to enable you to prepare.

Please provide me with copies of any documents that you intend to refer to at the hearing **not less than 5 working days before the hearing.**

You have the right to have a representative of a Trade Union or a work colleague with you at this hearing if you so wish.

Yours sincerely

Headteacher'

Agenda for the formal Stage 2 Capability Hearing

- The Headteacher to put the case and call third parties if appropriate.
- The employee (or his/her representative) to ask questions of the Headteacher and third parties.
- The members of the Capability Committee to ask questions of the Headteacher and third parties.
- The employee (or his/her representative) to put his/her case and to call third parties if appropriate.
- The Headteacher to ask questions of the employee and/or his/her representative and third parties.
- The members of the Capability Committee to ask questions of the employee and/or his/her representative and third parties.
- The Headteacher to sum up.
- The employee (or his/her representative) to sum up.
- The Chairperson of the Capability Committee may adjourn the proceedings at any stage if it appears necessary or desirable. If adjourning for the purpose of enabling further information to be obtained he/she should specify the nature of that information. Any adjournment should normally be for a stated period.
- Following the summing up, both parties, together with their representatives and any third parties called, will withdraw. **Note: Third parties should only be present when giving evidence and should withdraw immediately afterwards.** If it is necessary to recall one of the parties for further information before a decision is taken both parties should be recalled if possible. If in attendance the Director of Children's Services or his nominated officer, should remain during the Capability Committee's deliberations.
- On completion of the Capability Committee's deliberations the Chairperson should ask the Headteacher, the employee and his/her representative to return and should announce the decision of the Capability Committee and the capability action, if any, to be taken.
- The Chairperson should also give an explanation for the decision and should explain the employee's right of appeal under the procedure.

Agenda for the Stage 3 Capability Hearing

- The Headteacher to put the case and call third parties if appropriate.
- The employee (or his/her representative) to ask questions of the Headteacher and third parties.
- The members of the Staff Dismissal Committee to ask questions of the Headteacher and third parties.
- The employee (or his/her representative) to put his/her case and to call third parties if appropriate.
- The Headteacher to ask questions of the employee and/or his/her representative and third parties.
- The members of the Staff Dismissal Committee to ask questions of the employee and/or his/her representative and third parties.
- The Headteacher to sum up.
- The employee (or his/her representative) to sum up.
- The Chairperson of the Staff Dismissal Committee may adjourn the proceedings at any stage if it appears necessary or desirable. If adjourning for the purpose of enabling further information to be obtained he/she should specify the nature of that information. Any adjournment should normally be for a stated period.
- Following the summing up, both parties, together with their representatives and any third parties called, will withdraw. **Note: Third parties should only be present when giving evidence and should withdraw immediately afterwards.** If it is necessary to recall one of the parties for further information before a decision is taken both parties should be recalled if possible. If in attendance, the Director of Children's Services or his nominated officer, should remain during the Capability Committee's deliberations.
- On completion of the Staff Dismissal Committee's deliberations the Chairperson should ask the employee and his/her representative to return and should announce the decision of the Staff Dismissal Committee and the capability action, if any, to be taken.
- The Chairperson should also give an explanation for the decision and should explain the employee's right of appeal under the procedure.

Agenda for the Appeal Hearing

- The Headteacher or Chair of the relevant first committee to put the case and call witnesses if appropriate.
- The employee (or his/her representative) to ask questions of the Headteacher or Chair of the relevant first committee and witnesses.
- The members of the Appeals Committee and the Director of Children's Services (or his nominated officer) to ask questions of the Headteacher or Chair of the relevant first committee and witnesses.
- The employee (or his/her representative) to put his/her case and to call witnesses if appropriate.
- The Headteacher or Chair of the relevant first committee to ask questions of the employee and/or his/her representative and witnesses.
- The members of the Appeals Committee and the Director of Children's Services (or his nominated officer) to ask questions of the employees and/or his/her representative and witnesses.
- The Headteacher or Chair of the relevant first committee to sum up.
- The employee (or his/her representative) to sum up.
- The Chairperson of the Appeals Committee may adjourn the proceedings at any stage if it appears necessary or desirable. If adjourning for the purpose of enabling further information to be obtained he/she should specify the nature of that information. Any adjournment should normally be for a stated period.
- Following the summing up, both parties, together with their representatives and any witnesses called, will withdraw.
Note: Witnesses should only be present when giving evidence and should withdraw immediately afterwards.
- If it is necessary to recall one of the parties for further information before a decision is taken both parties should be recalled if possible. The Director of Children's Services (or his nominated officer) and the Head of Legal Services (or his nominee) should remain during the Appeals Committee's deliberations.
- The Appeals Committee may announce its decision to the Headteacher and/or the employee and his/her representative personally or subsequently in writing. Whichever method is chosen both parties should be informed in a like manner. A decision notified orally should be confirmed in writing by the Clerk to the Governors.

Capability Procedure Flowchart

