



Supporting Employee Capability Policy

| DOCUMENT CONTROL | |
|-------------------------------|--|
| Owner: | Head of Human Resources Business Services |
| Document Control: | HR Business Support |
| Date Live From: | June 2017 |
| Review/Approval Group: | PPRG and Executive Team/Area Partnership Forum |
| Last Reviewed: | September 2016 |
| Review Due/Cycle: | Every 2 years |

1. Introduction

- 1.1 It is the aim of NHS 24 to ensure that all staff members are treated in a fair and equitable manner and with dignity and respect in accordance with the organisational values set out in the NHS Scotland Workforce 2020 Vision Plan.
- 1.2 All staff members are required to perform the duties of their post to an acceptable standard. Where such standards are not met, a formal process should only be followed where there is no other alternative. In all cases the primary objective must be to assist and support the staff member to improve to the required standard. Dismissal on grounds of capability should only be considered as a last resort.
- 1.3 Nothing within this policy is intended to prevent the normal process of supervisory control whereby managers allocate work, monitor performance, draw attention to errors and poor quality, and, as importantly, highlight work done well. This ongoing process may include informal assistance in achieving improvement to the required standard of work for the particular post. Such discussions are not part of the formal procedure outlined in this policy, with formal interviews and representation not being appropriate to this everyday ongoing process.
- 1.4 When performance concerns become apparent, action is required in the interests of both NHS 24 and the staff member. A failure to deal with it may adversely affect colleagues and standards of patient care.
- 1.5 Performance concerns in relation to supervisors and managers require immediate attention from senior management. The temptation to ignore such concerns, just because an individual is a manager, may have adverse consequences for the service. Staff members managed by an ineffective line manager may perceive that raising such concerns with senior management will have repercussions for them. These individuals may become frustrated and there exists the potential for them to leave or become demotivated.
- 1.6 This policy has been developed in partnership with trade unions/professional organisations. It reflects the best practice identified in, and meets the minimum standards set out in, the *Management of Employee Capability Partnership Information Network (PIN) Policy*. The policy also reflects relevant current employment legislation.

2. Scope

- 2.1 This policy applies to all directly employed staff, including bank/temporary staff and NHS 24 staff on secondment. It does not apply to matters concerning the professional competence of medical and dental staff. Nor does this policy apply in the case of capability issues relating to ill-health impacting upon attendance.

- 2.2** In the case of capability issues relating to staff groups who require to be professionally registered, NHS 24 has in place a mechanism to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise. Staff members must be advised in advance of any such referral being made. Decisions in relation to ongoing professional registration as a result of such issues will be for the relevant statutory regulatory body to determine. However, this policy will apply in relation to those capability issues in so far as they relate to an individual's employment within NHS 24.

3. Definition

- 3.1** This policy applies in the case of issues of capability (i.e. where a staff member is lacking in some area of knowledge, skill or ability, resulting in a failure to be able to carry out the required duties of the post to an acceptable standard). It does not apply in the case of issues of conduct. A distinction must be drawn between a genuine lack of capability and unsatisfactory performance that is attributable to wilful refusal on the part of the staff member to perform to the standards of which they are capable. This would be a question of "won't do" rather than "can't do" and, as a matter of conduct, should be dealt with under NHS 24 policy 'Management of Staff Conduct'.

However, it is recognised that it may not be clear at the outset whether a matter is one of conduct or capability, and therefore it may be that the approach to be followed requires to be changed in the course of managing such matters.

- 3.2** This policy does not apply in the case of issues of capability related to ill health impacting on attendance. Such issues would be managed under NHS 24 policy 'Promoting Attendance Management'.
- 3.3** The Acas Guide on Disciplinary and Grievances at Work (March 2014), defines capability as "an employee's ability or qualification to do their job".

The Employment Rights Act 1996 states that "capability" is "assessed by reference to skill, aptitude, health or any other physical or mental quality". It also indicates that, where an employee is dismissed on grounds of capability, it must relate to "capability ... for performing work of the kind which he was employed by the employer to do". The "work of the kind which they were employed by the employer to do" must be determined in accordance with employee's current contractual obligations and job description.

4. Aims of Policy

- 4.1** This policy will ensure that capability issues are dealt with in a fair and consistent manner. The policy provides:
- Assistance to staff members to improve wherever possible when such issues arise;

- Firm but fair and consistent means of dealing with capability issues without recourse to the Management of Staff Conduct Policy; and
- A means of resolving capability issues where improvement in the current job is unachievable.

4.2 In order to achieve these aims, the following principles and values apply:

- This policy will be the sole route for dealing with issues of capability other than for matters of ill health related to attendance;
- This policy will be appropriately communicated to all staff and will be made readily accessible to them;
- NHS 24 Recruitment and Selection policy will be applied effectively so as to ensure that only suitable candidates are appointed to posts and therefore prevent potentially avoidable capability issues from arising;
- All staff members will be made aware of the standards of performance required, and of the need to perform acceptably to those standards;
- Good performance, and special effort by individuals and teams, will be acknowledged, encouraged and reinforced;
- Issues of capability will be addressed at the earliest opportunity and (except in more serious cases) on an informal basis in the first instance before resorting to the formal procedure;
- Issues of capability will be addressed fairly, consistently and confidentially, irrespective of the position/level within NHS 24 of staff members with whom such matters arise;
- Issues of capability will be addressed in a supportive manner, with every opportunity to improve within the current role being offered, and where such improvement is not achievable and sustainable, consideration will be given to exploring suitable alternative employment opportunities. Termination of employment on grounds of capability will only ever be a last resort;
- Joint training on the policy will be provided for managers and trade union/professional organisation representatives using a partnership model, in order to ensure that relevant staff are sufficiently skilled and competent in implementing the process;
- Appropriate HR advice will be available to managers involved in implementing the process;
- At all stages of the formal procedure, a staff member will be entitled to be accompanied by a trade union/professional organisation representative or current NHS 24 work colleague (recognising that, by agreement of all parties,

it may be helpful to additionally allow an individual to be accompanied during the informal stage);

- A different and ideally more senior manager will be involved at each stage to ensure greater fairness within the procedure (through the introduction of a “fresh pair of eyes”) and to enable the identification of additional support measures not previously considered at an earlier stage of the process, thereby helping to ensure that all potential support measures have been identified and exhausted before any decision is taken to progress to the final stage of the procedure;
- The staff member’s immediate line manager will be involved throughout the procedure in order to ensure consistency. Beyond the informal stages their role will be to support and monitor progress against the identified supported improvement plan and to advise on such progress at any subsequent formal stage of the procedure; and
- This policy will be subject to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The policy will be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

4.3 Early intervention, when poor performance is identified, is encouraged, enabling a supportive approach to be taken, ideally at an informal level in the first instance.

4.4 Problems should be identified and discussed with the staff member as soon as possible. Managers and staff members should work together to define the problem, agree a course of action to resolve it and agree what monitoring mechanisms will be used.

4.5 If a staff member is known to have a disability or discloses a disability in the course of discussions with management then specialist advice should be sought from HR and/or the Occupational Health Department.

Consideration should be given as to whether making reasonable adjustment could have a positive impact (see paragraph 5.2, point 6).

Reasonable Adjustment is a key part of the Equality Act (2010) and can be central to enabling a disabled person to retain their employment (refer also to paragraph 5.2).

The following areas should be taken into account when considering making reasonable adjustment:

- How effective the adjustment would be in overcoming the disadvantage
- How practicable it is to make the adjustment

- The financial and other costs incurred by the employer and the extent of any disruption to activities
- The extent of the employer's financial and other resources
- The availability of financial and/or other assistance in making the adjustment
- The nature of the employers and size of undertaking.

4.6 It should be noted that the Capability Process is not a means of dealing with attendance management issues relating to staff, which should be addressed through the existing framework of NHS 24 policy 'Promoting Attendance Management'.

5.0 Roles and Responsibilities

5.1 Staff Members will:

- Ensure they are aware of the standards of performance expected of them, and that they seek further guidance if unclear;
- Try, to the best of their ability, to meet the expected standards;
- Approach their manager at the earliest opportunity where they are having difficulties meeting the expected standards of performance; discuss and identify areas of concern with the manager and jointly agree SMART objectives to achieve the necessary standards (see paragraph 6.4)
- Work with managers on any agreed supported improvement plan
- Comply with any support / monitoring mechanisms put in place; and
- Raise concerns with the appropriate manager where they perceive others not to be performing to the expected standards

5.2 Human Resources will:

- Develop and deliver, in partnership, training on this policy for managers and trade union/ professional organisation representatives
- Advise managers on the correct implementation of this policy and:
- Support staff members by providing advice on this policy
- Ensure that a member of the Human Resources Department is present during all formal stages of the capability procedure.

- Ensure that NHS 24 Occupational Health Service provides timely and comprehensive guidance to managers and support to staff members following any referral which requires to be made in the course of managing capability issues; and,
- Specifically in the case of capability issues relating to ill-health which are impacting on performance, secure Occupational Health advice as to whether the staff member concerned may be considered as having a 'disability' under the Equality Act 2010 and if so, obtain Occupational Health advice on all potential reasonable adjustments which should be considered (seeking advice from external organisations where necessary). Advice on reasonable adjustments will include advice regarding adjustments to the existing job role; or whether suitable alternative employment should be considered and if so, any restrictions as to the type of role or adjustments which would be required to be made to a role in order to ensure suitability (and thereby avoid similar capability issues arising in future).

The role of the Human Resources Department in the capability procedure is one of adviser and facilitator.

5.3 Managers

It is the responsibility of the line manager to identify areas of concern in the staff member's performance standards and address these areas of concern with the staff member, referring to any incidents and/or written documentation if appropriate. Agreement should be reached with the staff member and the manager at the earliest stage how to address these issues and what training, coaching or mentoring is required to achieve the necessary standards.

Managers will:

- Ensure that they fully comply with the provisions of NHS 24's Recruitment and Selection Policy;
- Ensure that all staff for whom they are responsible are made aware of the standards of performance required;
- Ensure that such staff are made aware of and have access to this policy;
- Ensure that they monitor staff performance on an ongoing basis;
- Ensure that they effectively apply the appropriate personal development planning and review/appraisal process in respect of such staff;
- Ensure that good performance, and special effort by individuals and teams, is acknowledged, encouraged and reinforced;

- Ensure that they are fully aware of and comply with the provisions of this policy, identifying and dealing with issues which arise in a fair, consistent, confidential, timely and supportive manner; and
- Ensure that they seek HR advice where necessary and appropriate when dealing with capability issues.

5.4 Trade union/professional organisation representatives will:

- Work in partnership with NHS 24 to develop joint training as part of the implementation of this policy and participate in such joint training;
- Work in partnership with NHS 24 to raise awareness of the benefits of, and the approach to, the management of employee capability as outlined in this policy;
- Support their members, including providing representation throughout the formal stages of the procedure (and participating at the informal stages where agreement is reached in individual cases to do so), ensuring that their members are aware of their rights and responsibilities under this and other relevant policies; and
- Participate in partnership monitoring, evaluation and review of this policy.

6. Procedure

It is usually best for managers to deal with performance concerns informally in the first instance. In many cases an informal conversation between the manager and a staff member will be sufficient to ensure that performance improves. (Please see the flowchart at **Appendix C** for an overview of procedural steps to be followed)

Formal action will be appropriate where the initial approach has not led to the necessary improvement in performance, although in more serious cases or if there have been repeat issues of the capability issue, a formal approach may need to be adopted from the outset.

6.1 Is There a Performance Issue?

6.1.1 Indications that a staff member is not performing to the required standards of the job may arise in a variety of different ways:

- There may be complaints about, or criticisms of, the staff member's work from colleagues, patients or visitors;
- There may be factual grounds to indicate unsatisfactory performance, such as poor outcomes or experiences;

- The manager's own observations of the staff member's performance may give rise to concerns; or
- The staff member may have requested help to overcome a problem which is considered to be more than a basic development need.

6.1.2 It may often be necessary to undertake an investigation as part of the procedure, in order to determine the nature and extent of the performance concerns, whether the matter is one of capability or conduct and why such concerns have arisen. Such investigation, which should be conducted according to the principles contained within NHS 24 policy Management of Staff Conduct, may involve examining work records and / or interviewing other individuals with whom the staff member works (such as key internal/external customers or other team members).

6.2 Preliminary Precautionary Measures

It may be necessary, due to the nature of the issues of concern, to remove the staff member from certain duties or to put in place additional supervision in order to mitigate risk, whilst any necessary investigation is undertaken and in advance of agreeing a supported improvement plan. It may ultimately be necessary, in such cases, to place the staff member on a short period of special paid leave until such times as a supported improvement plan can be agreed and implemented. However, this should be as a last resort after HR advice and for as short a period as possible, all effort being made to identify alternatives which will allow the staff member to remain at work (e.g. through the use of alternative duties or additional supervision).

6.3 Informal Stage

The staff member's manager should meet with the staff member, informally in the first instance to discuss the following, this may be recorded as an informal one to one meeting:

- The particular performance concerns and whether the staff member accepts that there is a problem:
 - It may be necessary at this stage to undertake a formal investigation if the nature and extent of the unsatisfactory performance is unclear or if the staff member does not accept that there is a problem.
 - A written rationale of the nature and extent of the unsatisfactory performance must be provided to the staff member and they must be given reasonable time to consider this information in order to allow them to respond.
 - The staff member may still express doubt or deny the existence of the problem. They must be encouraged to offer an explanation as to why they do not agree that there is a problem and the manager must listen to and consider what is said. However, where evidence supports that

there is a problem, the staff member's response does not prevent the manager from setting out the need to improve nor reduce the need to provide the staff member with the requisite support and encouragement to do so.

- Possible contributing factors (including whether indeed the matter is one of capability), such as:
 - Lack of awareness/understanding of the standards of performance required;
 - Ill health
 - Difficulties in personal circumstances;
 - Organisational change
 - Bullying or harassment;
 - Inappropriate or ineffective recruitment and selection processes; or
 - A combination of more than one of the above factors.
- Possible solutions;
 - Agree a supported improvement plan (see **Appendix A**) with specified time limits.
 - A list of possible solutions is outlined at **Appendix B**).
- Managers should remember that the aim of the procedure is to keep the staff member at work, and support them to manage their situation effectively.

Several measures may be considered, and these include:

- Referral to Occupational Health;
- Employee Assistance Programme;
- Temporary decrease in hours; altered work pattern (where this can be accommodated within business requirements). Frontline applications for permanent changes to hours or work pattern must be approved by the Rota Review Group);
- Change of location;
- Individual stress risk assessment;
- Confidential Contacts;

- Training.

This will require a sensitively handled discussion free from interruption, involving the manager's undivided attention, in order to establish an atmosphere of trust and open discussion. Staff members must be encouraged to describe the situation from their perspective.

They must not evade pertinent questions and managers must probe the staff member's response through open ended, non-negative questions in order to identify possible contributing factors.

The manager must constantly bear in mind that the aim is to assist the staff member to improve their work performance to an acceptable standard. It is crucial that as many aspects of the problem as possible, as perceived by the staff member and the manager, are established. It is important that this is not one-sided and that, as well as the manager understanding the staff member's perspective, the staff member understands the manager's issues. In all cases, managers will respond by adopting a non-threatening and non-critical approach.

- The outcome of the meeting should be confirmed by the manager in writing to the staff member. The letter of outcome should detail:
 - the issues discussed
 - the agreements reached
 - the date of interim and final reviews, and include any supported improvement plan and timescales agreed.
 - the possibility of progression to the formal stages of the procedure should there be inadequate improvement within the agreed timescales.

6.4 Supported Improvement Plans

A supported improvement plan, using SMART objectives, should be completed and updated at each stage of the procedure. Line managers are tasked with ensuring that all objectives set are:

- Specific
- Measurable
- Achievable
- Relevant, and
- Time Bound

The supported improvement plan should detail the nature and extent of the unsatisfactory performance, the standards of performance required, how reaching and maintaining such standards are expected to be evidenced, what support mechanisms have been put in place (whether solely for the duration of the supported improvement plan or as permanent supports) and the

timescales within which satisfactory improvement is expected to be reached and sustained.

There may be circumstances where, due to the nature of the issues of concern, there is a requirement to remove an individual from certain duties or to put in place additional supervision in order to mitigate risk during the supported improvement plan period. It may similarly be necessary to amend an individual's duties during the course of the supported improvement plan, to enable a focus on the particular areas of concern or through a need to introduce greater levels of supervision.

It should always be made clear, however, that successful completion of the supported improvement plan will ultimately require the staff member to be able to reach and sustain the required performance standards across their full range of job duties and without the need for any such increased level of work supervision. That said, a distinction should be drawn with those supports which would be considered sustainable beyond completion of the supported improvement plan, such as those introduced by way of reasonable adjustment in the case of staff members who may be considered to have a disability.

The supported improvement plan should be signed and dated by both the manager and the staff member to confirm agreement. It should be noted, however, that a failure by the staff member to agree to the contents of a supported improvement plan will not prevent its implementation.

The staff member's line manager should meet with the staff member to undertake regular reviews within the agreed timescale in order to discuss progress and provide additional support as necessary. The manager must complete a written note of such review meetings, which the staff member will also be invited to comment against. Again, such written notes should be signed and dated by both parties to confirm agreement.

6.5 Formal Procedure

Where there has been inadequate improvement and the staff member is continuing to fail to perform to an acceptable standard despite having been given initial, informal guidance and support, or in more serious cases, a more formal approach will be required. Where evidence exists that there is a genuine factor which renders a staff member incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, there is scope to move straight to the formal process at Stage 2. Matters should not, however, be progressed to the formal stages if it is established that the staff member has not had the necessary training, guidance and support required to undertake the job.

6.5.1 Right to be Accompanied

Staff members have a right to be accompanied by a trade union/professional organisation representative or a current work colleague at any investigatory

meeting or meeting being held under the formal stages of this policy (including appeals).

While there is no right to be accompanied at a meeting to confirm any preliminary precautionary measures, staff members should (where practicable) be given reasonable notice to organise representation.

Specific to any meeting being held under the formal stages (including appeals), the role of such a representative is as follows:

- To prepare, present and sum up the staff member's case on their behalf; and
- To provide further information after the staff member's response or to respond on behalf of the staff member to any views expressed, with a view to providing additional clarity to the case.
- The representative is not permitted to answer questions on the staff member's behalf, with the staff member being required to personally respond to any specific questions directly.

Where the staff member is a trade union/professional organisation representative, no formal action should be taken without discussion with a full-time official of the appropriate organisation.

If the representative chosen by the staff member is not available at the time proposed for any investigatory meeting or meeting being held under the formal stages (including appeals), the meeting must be postponed to an alternative time suggested by the staff member, provided that such alternative time is reasonable and falls before the end of 5 working days after the original date proposed.

6.5.2 Attendance at Meetings Under the Formal Stages (Including Appeals)

Formal Stage 1 meetings will comprise the Chair, the staff member and their representative. The staff member's line manager will also be in attendance.

Formal Stage 2 meetings will comprise the Chair, the staff member and their representative. The staff member's line manager and the Stage 1 Chair will also be in attendance.

A member of the HR department will normally be present at all formal meetings.

The panel make-up and similarly the format, in the case of formal Stage 3 meetings and appeals, mirrors that contained within NHS 24 policy 'Management of Staff Conduct'.

Chairs will be identified in accordance with the scheme of Delegation.

6.5.3 Stage 1

Where the informal approach has not resulted in the required improvement in performance, or in more serious cases, or where there have been repeat issues of the capability issue, the matter will be escalated to Stage 1 of the formal procedure (except where evidence exists that there is a genuine factor which renders an staff member incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, in which case there is scope to move straight to Stage 2).

The identified Chair will write to the staff member and their representative providing at least 5 working days notice of the meeting, advising as follows:

- The date, time and location of the meeting;
- The procedure and stage being used;
- Clear details of the performance concerns;
- All necessary supporting documentation (including details of any informal approach already undertaken);
- Who will be attending the meeting;
- The right to be accompanied;
- An indication of the possible outcomes of the meeting; and
- A copy of the policy.

The purpose of the meeting at Stage 1 will be to discuss and agree the following:

- The nature and extent of the performance concerns and whether such concerns are well founded;
- Possible contributing factors (including whether indeed the matter is one of capability and whether the staff member accepts that there is a problem);
- A review of action taken to date;
- Possible solutions;
- A supported improvement plan, detailing the improvement in performance required, how it will be achieved, how achievement will be measured/evidenced and the identified timescales for improvement;

- The date on which the staff member's performance will be reviewed again; and
- Action which may follow if the required improvement in performance is not achieved and maintained.

During the meeting, the staff member will be told clearly and precisely the areas identified in which their performance is unsatisfactory and the improvement in work standard which is required together with the possible consequences of not doing so. There must be an opportunity for the staff member to answer these points and to explain any difficulties which they may be having. There should also be a discussion about the ways and means by which the desired improvement may be achieved.

The outcome will be formally recorded in a letter to the staff member and their representative issued within 10 working days of the date of meeting. The letter will include:

- Clear details of the performance concerns;
- The improvement(s) required
- An agreed supported improvement plan to achieve improvement, underpinned by regular monitoring meetings;
- Timescales for improvement, with a date for overall review;
- The possible consequences if the necessary improvement is not achieved; and
- Details of the right of appeal.

The staff member's line manager will thereafter be responsible for ensuring the implementation of the agreed supported improvement plan, and ensuring regular interim review, prior to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps.

The outcome of this reconvened meeting will fall into one of the following categories:

- The staff member has improved to the required standard and maintained their performance to the extent that unsatisfactory performance is no longer an issue. This will be confirmed in writing to the staff member and their representative, and application of the procedure will cease. Normal management support arrangements will thereafter apply;
- The required improvement has not been satisfactorily achieved and maintained, but it is agreed that this is likely to be the case following an

extension to the supported improvement plan timescale for a reasonable period or through the introduction of further support measures not previously identified. In such cases, the process should remain at the current stage and this should be confirmed in writing to the staff member and their representative; or

- The required improvement has not been satisfactorily achieved and maintained; it is agreed that this is unlikely to be the case following an extension to the supported improvement plan timescale for a reasonable period; and no further support measures have been able to be identified. In such cases, the matter should be progressed to the next stage of the procedure and this should be confirmed in writing to the staff member and their representative.

6.5.4 Stage 2

Upon being advised that the matter is being escalated to Stage 2 of the procedure, the identified Chair will write to the staff member and their representative no later than 7 working days in advance of the meeting, advising as per Stage 1.

The format of the meeting will also be as per Stage 1, with the support measures previously identified being reviewed and discussion as to whether they should continue or if additional support measures might be helpful.

However, at Stage 2 it may be felt appropriate to discuss other options, for example formal career counselling, or whether permanent redeployment would be possible, and, if so, is an agreeable option for the staff member. In the case of redeployment, NHS 24's Redeployment Policy will apply. Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within NHS 24 within a reasonable period of time. It should be noted that there is no legal requirement to create a post for a staff member who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move.

The outcome will be formally recorded in a letter to the staff member and their representative within 10 working days following the meeting. Where the outcome of the meeting is to continue to pursue a supported improvement plan, the letter will be as per Stage 1, but will additionally note that, should the necessary improvement not be achieved, the matter may be escalated to Stage 3, which may result in consideration being given to redeployment, or if not appropriate, termination of employment on grounds of capability.

Where the outcome of the meeting is to pursue redeployment, this should be confirmed in writing to the staff member and their representative, advising that if suitable alternative employment is not secured within a reasonable

timescale, the matter will be escalated to Stage 3, which may result in consideration of termination of employment on grounds of capability.

As per Stage 1, the staff member's line manager will thereafter be responsible for ensuring the implementation of the agreed supported improvement plan, and ensuring regular interim review, prior to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps. This presents a further opportunity to consider whether redeployment would be possible, and, if so, is an agreeable option for the staff member.

Where as a result of a reconvening of the above meeting, it is determined that there has been a failure to secure suitable alternative employment within a reasonable timescale, consideration will be given to escalating the matter to Stage 3, and, if so, this will be confirmed in writing to the staff member and their representative.

6.5.5 Stage 3

If, despite all the measures outlined above, the desired improvement has still not been achieved (or redeployment has already been exhausted or dismissed by one of the parties as a reasonable option), a Stage 3 meeting must be convened by the manager with the authority to dismiss upon being advised that the matter is being escalated to this stage of the procedure.

The identified Chair will write to the staff member and their representative no later than 7 working days in advance of the meeting, advising as per Stage 1, but additionally confirming that consideration may be given to redeployment, or if not appropriate, termination of employment on grounds of capability.

As the outcome of this meeting may involve termination of employment on the grounds of capability, the manager involved at Stage 2 will be required to submit a written case no later than 8 working days in advance of the meeting, which will be shared with all parties in advance of the meeting. Similarly, following receipt of the manager's case, the staff member, if they wish may submit a written case in response, no later than 4 working days in advance of the meeting, and, again, this will be shared with all parties in advance of the meeting. As such, notification of the meeting must include arrangements for the exchange of cases.

The purpose of the meeting will be to discuss the following:

- The nature and extent of the performance concerns and whether such concerns are well founded;
- Possible contributing factors (including whether indeed the matter is one of capability and whether the staff member accepts that there is a problem);
- The improvement in performance which was required and the extent of such improvement achieved;
- What action has been taken by NHS 24 and the individual with regard to the agreed supported improvement plan (including any reasonable adjustments and other support mechanisms put in place to address the performance concerns); and
- Whether there are any further considerations, not previously explored, which might result in the required improvement being achieved or whether timeframes previously applied should be extended, with clear consideration of NHS 24's duties under the Equality Act 2010 with regard to staff who may be considered to have a disability.

There are 3 potential outcomes:

- It may be considered that the staff member will be able to achieve and maintain the required standard of performance within their current role within a reasonable period of time, in which case a supported improvement plan should be agreed and implemented as per the earlier stages, with the Stage 3 meeting being adjourned until an agreed review date;
- Where it is considered that such improvement is not likely to be achieved and maintained, it may be considered that redeployment (at the same or lower pay level) would be possible. Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within NHS 24 within a reasonable period of time. It should be noted that there is no legal requirement to create a post for a staff member who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move. If such a decision is reached, the provisions of NHS 24's Redeployment Policy should be used, with the Stage 3 meeting being reconvened should there be a failure to secure suitable alternative employment within a reasonable timescale; or
- It may be that, having considered both of the above options, termination of employment on the grounds of capability is the only option.

The staff member and their representative will be advised of the outcome in writing within 10 working days of the meeting. If the outcome is to adjourn the Stage 3 meeting following pursuit of redeployment or further implementation of a supported improvement plan, then this should be confirmed in writing as per the above.

If the outcome is dismissal, the letter will include:

- Details of who was present at the meeting;
- Clear details of the performance concerns;
- Confirmation of the decision to dismiss and the reason such a decision was taken;
- The date on which employment will terminate (recognising the staff member's contractual notice);
- Any necessary administrative or financial arrangements; and
- Details of the right of appeal.

6.5.6 Appeals

The right to an appeal exists at all stages of the formal procedure. There will not be a delay in implementing management decisions, pending an appeal, but they may subsequently be amended or reversed as a result of an appeal meeting. However, an appeal cannot result in a higher level of sanction than the action being appealed.

The procedure for appeal against decisions reached at each stage, including appeal against dismissal is as follows:

- Details of the right of appeal must be clearly set out within the letter confirming the outcome of a capability hearing, detailing to whom such an appeal must be made and the timescale within which it must be lodged (i.e. no later than ten working days following receipt of the letter confirming the capability hearing outcome).
- The identified Chair, in accordance with the scheme of delegation, will be responsible for identifying membership of the appeal hearing panel. The Chair will also be responsible for ensuring that the staff member and their representative are advised in writing, no later than 7 working days prior to the hearing, of the following:

- The date, time and location of the appeal hearing;
 - Who will be attending the appeal hearing;
 - The right to be accompanied;
 - Arrangements for the exchange of cases; and
 - A copy of the policy
- Thereafter, and within 5 working days in advance of the hearing, the staff member's appeal case will be shared with the appeal panel and Chair, and with the manager who chaired the earlier hearing of the staff member appealing.
 - Similarly, within 5 working days in advance of the hearing, the written case produced by the manager who issued the capability sanction will be shared with the appeal panel and Chair and the staff member and their representative.
 - Such cases will include details of any witnesses which either party is calling to the appeal hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the appeal hearing.

6.5.7 Grievances/Dignity at Work Complaints

Where an staff member raises a grievance or dignity at work complaint during implementation of the formal capability process, the capability process may be temporarily suspended in order to deal with the grievance/complaint. However, where the grievance/complaint and capability case are related, it may equally be appropriate to deal with both issues concurrently.

6.5.8 Failure to Engage

There may be occasions when a staff member is repeatedly unable or unwilling to attend an investigatory meeting or meeting being held under the formal stages (including appeals). This may be for various reasons, including illness or a refusal to face up to the issue. The reasons for the staff member's failure to attend should be considered, including the staff members work commitments and also the availability of staffside representatives. In such cases, consideration will require to be given to all the facts before coming to a reasonable decision on how to proceed. Considerations will include:

- If the staff member has failed to attend a previous meeting/hearing;
- The seriousness of the issue under consideration;
- The staff member's general work record, work experience, position and length of service;

- Medical opinion on whether the staff member is fit to attend the meeting;
- How similar cases in the past have been dealt with; and
- Whether, therefore, it is considered fair and reasonable in the particular circumstances to proceed in the absence of the staff member.

Where a staff member continues to be unavailable to attend a meeting, it may be concluded that a decision in their absence will need to be made based on the evidence available. The staff member must be informed where this is to be the case.

7. Debrief & Reintegration

Regardless of whether or not a matter progresses to the formal stages, it may be appropriate to undertake a debrief in order to review the case, any lessons learned and agree any further general organisational improvement actions identified during the process. Involvement in such a discussion will be determined on a case-by-case basis.

In addition to the duty of care (referred to at paragraph 8 below) it is also critical to ensure that, where the outcome does not involve dismissal, the staff member is supported in being reintegrated back into their job role and within their team (or within any new job role/team into which they are redeployed). Managers should liaise with HR and staffside representatives to discuss measures which might help to support reintegration.

8. Duty of Care

In line with current health and safety legislation, NHS 24 has a duty of care to its staff members. In the context of this policy, this means that NHS 24 needs to be mindful of the potential risks to health and safety associated with individuals who are involved in the process (primarily the individual who is the subject of the case and any witnesses).

Where it is suspected that an individual's health and safety may be at risk, at any stage of the procedure, contact should be made with Occupational Health as a matter of priority. Trade union/professional organisation representatives, where they perceive any potential concerns in this regard should advise their member to seek Occupational Health Support, or the Employee Counselling Service, as well as advising management accordingly.

Particular consideration needs to be given in circumstances where a decision is reached following a Stage 3 meeting to dismiss a staff member (or where such a decision has been upheld following appeal). Where concerns around the individual's health and safety exist, it may be helpful to arrange for the individual to meet with Occupational Health following verbal confirmation of the outcome or, where the outcome is to be conveyed solely in writing, invite

the staff member to attend to receive the written confirmation, with Occupational Health on-hand for immediate support.

9. Applications for Early Benefits from the Scottish Public Pensions Agency

Where it is believed that a staff member's capability issues are related to ill-health and where Occupational Health advice reflects this, the staff member may choose to apply for ill-health retirement via the Scottish Public Pensions Agency if they are unable to continue working due to their ill-health. Any application for ill-health retirement will require an up-to-date occupational health assessment, which line managers can arrange where appropriate. This application will normally be made at the point of dismissal, however staff may choose to resign and submit their application at an earlier date. Staff who wish to apply for ill-health retirement should discuss this with their Human Resources Advisor in the first instance. Staff should be aware that the decision on whether a staff member is eligible to be paid a pension and lump sum early on the grounds of permanent ill health is taken by the Scottish Public Pensions Agency and is not at the discretion of, nor influenced by, NHS 24. The Scottish Public Pensions Agency may require the staff member to undergo a further occupational health assessment by their own medical advisors.

10. Retention of Records

All records pertaining to management of a staff member under this policy must be held in accordance with both the Data Protection Act 1998 and the Scottish Government Records Management: NHS Code of Practice (Scotland) Version 2.1 (January 2012).

11. Review

This policy will be reviewed, in Partnership, on a 2 yearly basis.

Appendix A

| Development need | Actions required and by whom | Desired Results | Timescales (Ongoing or Temporary) | Evidence of Achievement | Review Date |
|------------------|------------------------------|-----------------|-----------------------------------|-------------------------|-------------|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

Employee Signature: _____

Date: _____

Manager Signature:

Date:

Appendix B: Suggested Solutions

There are many potential solutions to issues of capability. These may include but are not limited to:

- a) Provision of learning and development opportunities;**
- b) Flexible working;**
- c) Referral to Occupational Health;**
- d) Relocation;**
- e) Support in the workplace;**
- f) Employee Assistance Programme;**
- g) Redeployment.**

a) Provision of Learning and Development Opportunities:

The provision of learning and development opportunities to assist a staff member to improve their performance should be considered. The decision as to what constitutes appropriate learning and development and its delivery should be discussed and agreed with the staff member in each case.

b) Flexible Working:

There are many variations around the theme of flexible working and it may be that a change of working hours or moving to part-time employment may assist in improving performance. Such a change may be temporary or permanent. Any changes would have to be agreed between the manager and staff member, and every effort must be made to accommodate such requests when capability issues are being addressed. Details of flexible working practices which might be considered are detailed in NHS 24's Flexible Working Policy and Procedure, in line with the Supporting the Work-Life Balance PIN Policy.

c) Referral to Occupational Health:

Occupational health will, in many instances, have a key role in assessing and addressing certain aspects of capability issues. Managers may refer staff members to Occupational Health or individuals may self-refer. Staff members are assured that confidentiality will be maintained.

d) Relocation:

In supporting an individual to improve performance, it may be beneficial to offer either temporary or permanent relocation. The nature and duration of any relocation must be agreed between the individual and the manager. The staff member would normally be doing the same job in the new location.

e) Support in the Workplace:

It is good practice to provide a staff member who is under-performing with support from a skilled colleague or a designated 'Coach'. This promotes awareness of the demands of the job and an example against which to measure their own performance. The selection of the colleague / Coach will need to be carefully thought through by management and agreed with both of the individuals concerned. It is important to recognise that poor selection of the supporting colleague / coach could result in further de-motivation of the under-performing staff member.

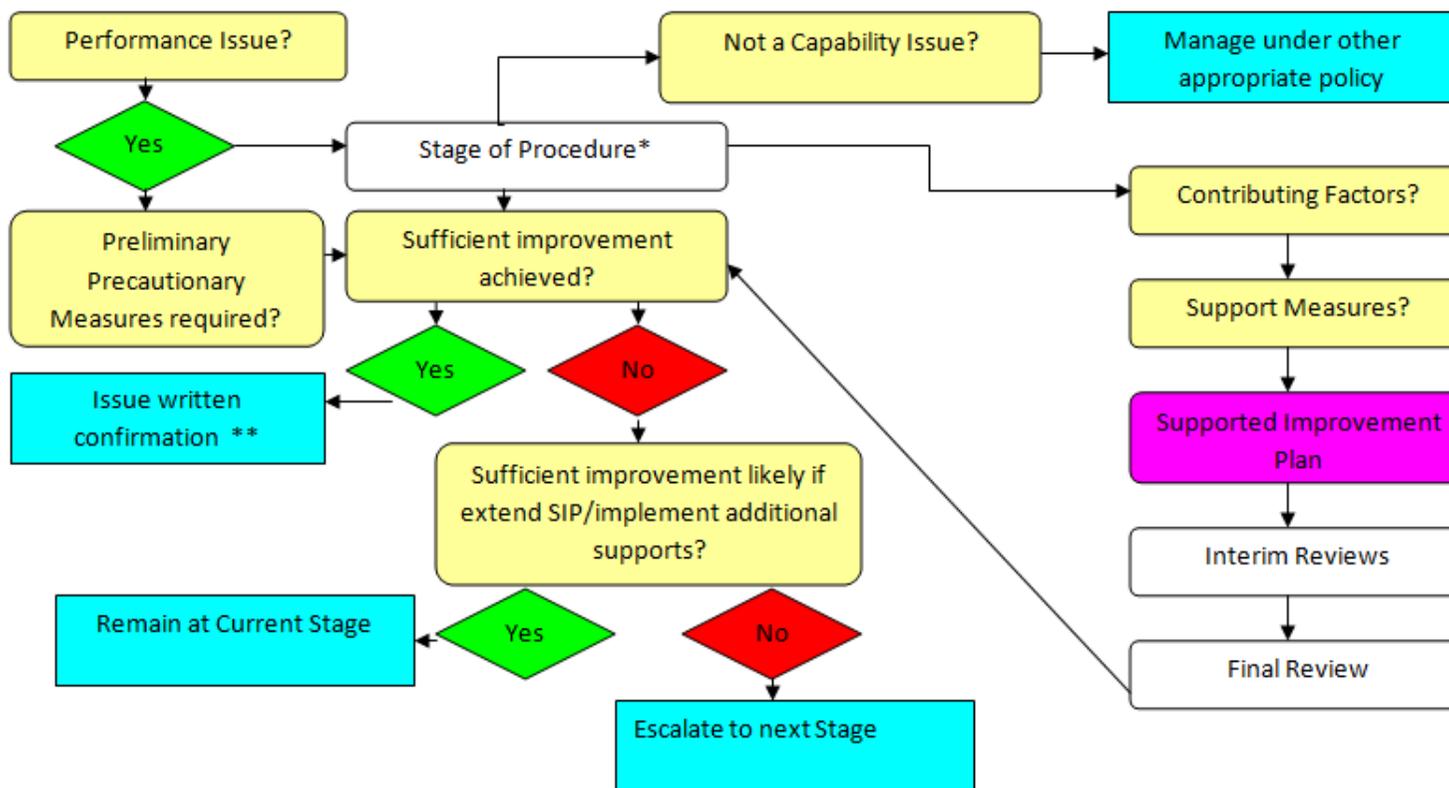
f) Employee Assistance Programme (EAP):

Some staff members may benefit from access to this service and managers should ensure that staff are made aware of this facility and how to access it.

g) Redeployment:

Where redeployment is considered this should be managed in accordance with NHS 24's Redeployment Policy.

Appendix C: Procedure Flowchart



* Procedure ordinarily commences from informal stage, although in more serious cases it can commence from formal Stage 1 (or, where all parties are agreeable that exploration of suitable alternative employment is the only option, from Stage 2)

** At all stages, outcomes must be confirmed in writing

