Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TYRONE CROCKETT	)	OEA Matter No. 1601-0069-07
Employee	)	
	)	Date of Issuance: April 25, 2008
v.	)	
	)	Sheryl Sears, Esq.
	)	Administrative Judge
DEPARTMENT OF PUBLIC	)	
WORKS	)	
Agency	)	

Stephen White, Employee Representative
Christine V. Davis, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACTS

Employee was a Motor Vehicle Operator, RW5703-07 (Truck Driver), working for Agency's Solid Waste Management Administration, Street and Alley Cleaning Division when he sustained an on duty injury on May 5, 2004. The Office of Risk Management declared Employee temporarily and totally disabled to perform the duties of his position. Agency placed Employee on disability leave without pay. The Office of Workers' Compensation paid him benefits.

On August 25, 2006, Mary L. Montgomery, Deputy Director, D.C. Office of Personnel, contacted Employee to determine his plans for and ability to return to his official position of record. The letter stated as follows:

> Dear [Employee]
>
> The purpose of this letter is to inform you of the District of Columbia government's policy regarding employees who are in receipt of disability compensation whether temporary or permanent in nature; and to ascertain your plans and/or decision regarding your employment status.
>
> Pursuant to Section 1-623-45 (1), (2) D.C. Official Code 2001 Edition, the last employing department or agency shall ". . . accord the employee the right to resume his or her former, or an equivalent position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured or disabled, including the rights to tenure, promotion and safeguards in reduction-in-force procedures, provided that the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government. *If the injury or disability is overcome within a period of more than 2 years* after the date of commencement of payment of compensation or the provision of medical treatment by the Disability Compensation Fund; *make all reasonable efforts to place, and accord priority to placing the employee in his or her former or equivalent position* within such department or agency, or within any other department or agency. (Emphasis added.)

Ms. Montgomery went on to advise Employee that he was required to notify the Office of his plans and/or ability to return to his official position of record within fifteen calendar days of receipt of the letter. Employee was warned that his failure to respond by the deadline might result in his termination from employment with the agency. Employee was also advised of other options available to him as follows:

> (1) apply for disability retirement with the Social Security Administration, if eligible;
>
> (2) seek other employment opportunities that are compatible with your disability; or
>
> (3) return to full duty with proper medical certification regarding your injury and proper clearance stating that you

> are fully capable of performing the duties of your official position.

On August 29, 2006, the Office of Risk Management notified Anthony Duckett, Chief of the Street and Alley Cleaning Division, that Employee was cleared for light duty work involving lifting a maximum of twenty pounds. Mr. Duckett responded that there were no light duty assignments available commensurate with Employee's disability.

On November 14, 2006, Thomas Henderson, Solid Waste Management Administrator, issued a notice of proposal to remove Employee upon the charge of "incompetency: inability to satisfactorily perform one or more major duties or your position." Henderson issued an amended notice to inform Employee of a change in the assigned hearing officer. According to Agency, Employee moved from his last known address and failed to notify either the D.C. Office of Personnel or the Department of Public Works and, for that, did not receive either notice.

In the second week of March, 2007, Employee visited the Solid Waste Management Administration Office where Evelyn Graves, Human Resources Liaison, presented him with a copy of the notice and first learned Employee's new address. Employee did not present a response to Wanda Ellis, the Hearing Officer. By letter dated April 3, 2007, William O. Howland, Jr., the deciding official, notified Employee that he would be removed effective April 13, 2007.

JURISDICTION

The Office has jurisdiction pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether this appeal should be dismissed for failure to state a claim upon which relief can be granted.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that "[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction." Accordingly, the agency has the burden of proof in this matter. Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is a "preponderance of the evidence." OEA Rule 629.1 defines a preponderance of the evidence as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."

ANALYSIS AND CONCLUSION

This appeal presents, at the threshold, a question of whether there is relief that this Office can afford Employee in his current circumstances. Employee seeks restoration to

the position that he formerly encumbered. However, he is not physically capable of performing the duties of that position.

"Cause" is defined in DC Government Personnel Regulations, Section 1603.3 (Chapter 16, Part I), as follows:

> For the purpose of this chapter, "cause" means a conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary and capricious. This definition includes, without limitation, unauthorized absence, negligence, *incompetence*, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government. (Emphasis added).

Agency charged Employee with "incompetence." To the lay reader, that term can strike a chord of insult as it is often casually used for that very purpose. However, Blacks Dictionary of Law defines "incompetence" as "the state or fact of being unable or unqualified to do something." In the legal sense, incompetence can simply mean that an employee is not physically fit for the duties of his or her job.

Employee's right to be considered for reemployment expired when, after two years, he was not able to demonstrate that he was physically able to resume his duties. Under those circumstances, this Judge must conclude that Agency correctly removed him from his position for incompetence. Even by the time he filed his appeal, Employee had not regained full competence. In light of that fact, even if this Office had, for some reason, concluded that Agency acted unlawfully in removing Employee, there would be no relief that it could afford. The Office cannot order Agency to reinstate an employee who is not physically fit for the duties of his position.

It is a harsh reality for an employee who performs his duties capably and is injured on the job to find that he cannot be reinstated to the position he formerly held. But every position of employment in the D.C. government requires specific capabilities. If an employee does not have them, even if they are lost through no fault of his own and while doing the job he was hired to do, an agency can lawfully remove him.

Employee was lawfully removed. And he is not physically competent to resume his duties. Thus, he has stated no claim pursuant to which relief can be afforded by this Office. A complaint may be dismissed if it fails to state a claim that would entitle the complainant to relief. *Owens v. Tiber Island Condominium Association*, 373 A.2d 890, 893 (D.C. 1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). This appeal will be dismissed.

ORDER

It is hereby ORDERED that the petition in this matter is dismissed.

FOR THE OFFICE: ____________________

Sheryl Sears, Esq.
Administrative Judge