BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

IN THE MATTER OF	)	1977 POLICE OFFICERS' AND
SUSAN KNAPP,	)	FIREFIGHTERS' PENSION AND
	)	DISABILITY FUND
Petitioner.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION

This matter was assigned to me for determination of the appeal of Susan Knapp from the amended initial determination of the Director of the 1977 Fund dated May 16, 2006, finding Knapp to be eligible for disability benefits, finding her disability to be a Class 2 disability under Ind. Code § 36-8-8-12.5(b), with a degree of impairment of ten percent, and granting disability benefits subject to a review of the impairment.

A hearing was held on April 24, 2007. Knapp was represented by Keith A. Karlson. The PERF Board as administrator of the 1977 Fund was represented by Linda I. Villegas. Knapp presented witnesses Chief Ronald Evans, Kathleen M. Vogler, Ph.D., H.S.P.P., Michael Dettner, M.S., L.M.H.C., and Susan Knapp (petitioner). The PERF Board called witnesses Omkar Markand, M.D., and R. Thomas Parker. The following exhibits were received into evidence at the hearing without objection unless otherwise noted:

Petitioner's Exhibits:

[redacted]

PERF Board Exhibits:

[redacted]

Motion to Exclude Dettner Testimony

The PERF Board moved to exclude the testimony of Michael Dettner on the ground that Knapp failed to properly respond to written discovery requests. The motion was taken under advisement and Dettner was permitted to testify subject to a ruling on the motion.

The PERF Board's Request for Production No. 1 sought production of "all medical evidence that will be presented at trial." Knapp responded that she had not yet determined which documents would be introduced, she had "many Medical records she may introduce," and that copies of all such documents would be provided at PERF's expense.

Request for Production No. 2 requested "a copy of all exhibits to be presented at trial." Knapp responded much as she responded to Request No. 1, offering to provide copies of all documents in her possession that she might introduce.

Request for Production No. 3 sought "a copy of a current curriculum vitae for all witnesses." Knapp responded that the only CVs she possessed were those of Dr. Markand and Dr. Vogler, and she produced a copy of Dr. Vogler's CV.

The PERF Board also served interrogatories requesting the identities of all witnesses and expert witnesses Knapp would ask to testify. Knapp's answers to these interrogatories are not a matter of record. Therefore, it is not known when Dettner was first identified by Knapp as a potential witness or expert witness.

Counsel for the PERF Board states that she received copies of all medical records produced by Knapp, none of which included any records of Dettner. On April 4, 2007 (20 days before the hearing), she asked Knapp's counsel for copies of any records not previously submitted. On April 16, 2007, she requested Dettner's CV. On the same date, Knapp's counsel responded that Knapp did not have Dettner's CV, that Dettner was not a retained expert, but that Knapp would request one from Dettner. On April 18, 2007, Knapp's counsel advised that Knapp did not possess any of Dettner's records.

Knapp responds that she truthfully produced all documents in her possession and that Dettner was disclosed to the PERF Board several months before the hearing as a therapist who provided treatment to Knapp. She contends that the PERF Board could have obtained Dettner's records by submitting a release signed by Knapp or by subpoena.

Neither the records nor Dettner's CV were introduced into evidence at the hearing. The PERF Board has not denied that it was aware that Dettner treated Knapp. Contrary to my usual practice, there was not a requirement that the parties disclose witnesses before the hearing.

I have previously ruled that the Trial Rules governing discovery apply in this administrative proceeding. (Order of 11/17/06.) Sanctions for failing to respond to discovery, including the sanction of prohibiting a party from introducing evidence, are usually preceded by violation of an order to compel under T.R. 37, a motion for which must be preceded by efforts at informal resolution, T.R. 26(F). A discovery violation uncovered during or after trial can also result in a finding that a party has been denied a fair trial. See Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65 (Ind. 2006).

The PERF Board did not file a motion to compel, although the PERF Board was aware in advance that Dettner was a treating provider, may have been aware that he would be called as a witness, and knew that neither his records nor his CV had been provided. Because this issue could have been but was not raised before the hearing under T.R. 37, it has been waived.

In any event, there is no showing of a discovery violation by Knapp. Trial Rule 34 did not oblige her to produce documents not in her possession, custody or control. Records of a medical provider are not within the patient's possession, custody or control. See Clark v. Vega Wholesale Inc., 181 F.R.D. 470 (D. Nev. 1998) (under Fed. R. Civ. P. 34); Ayers v. Continental Cas. Co., 2007 WL 2156553, *4-*5 (N.D. W.Va. 2007) (same). The PERF Board does not contend that Knapp's denial of possession was false.

Identification of experts whom a party intends to call at trial (whether retained or not) and their opinions is obtainable through interrogatories under T.R. 26(B)(4)(a). The PERF Board served such an interrogatory and does not contend that Knapp's answer (whatever it was) was incomplete or false. Presuming that the PERF Board was aware of Dettner and Knapp's intent to call him as a witness, the PERF Board was able to subpoena his records from him as a non-party under T.R. 34(C) and 45(B), obtain his records based on a release executed by Knapp, and/or interview him with Knapp's consent.

For these reasons, the PERF Board's motion to exclude the testimony of Dettner is denied. Knapp's request for her costs in responding to the motion is denied.

Findings of Fact

A. Background

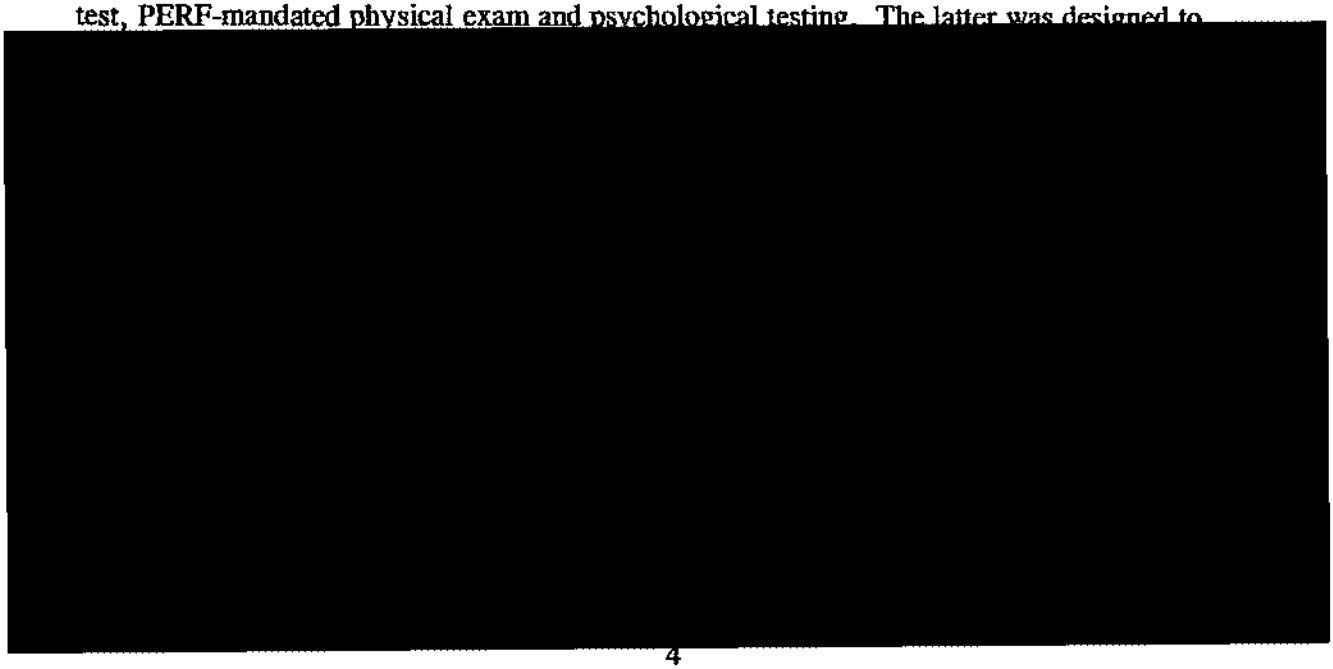
1. Susan Knapp was hired by the Wayne Township of Marion County Fire Department on December 27, 1999, and as such was a member of the 1977 Fund. I.C. §§ 36-8-3-21(b), 36-8-8-7(a).

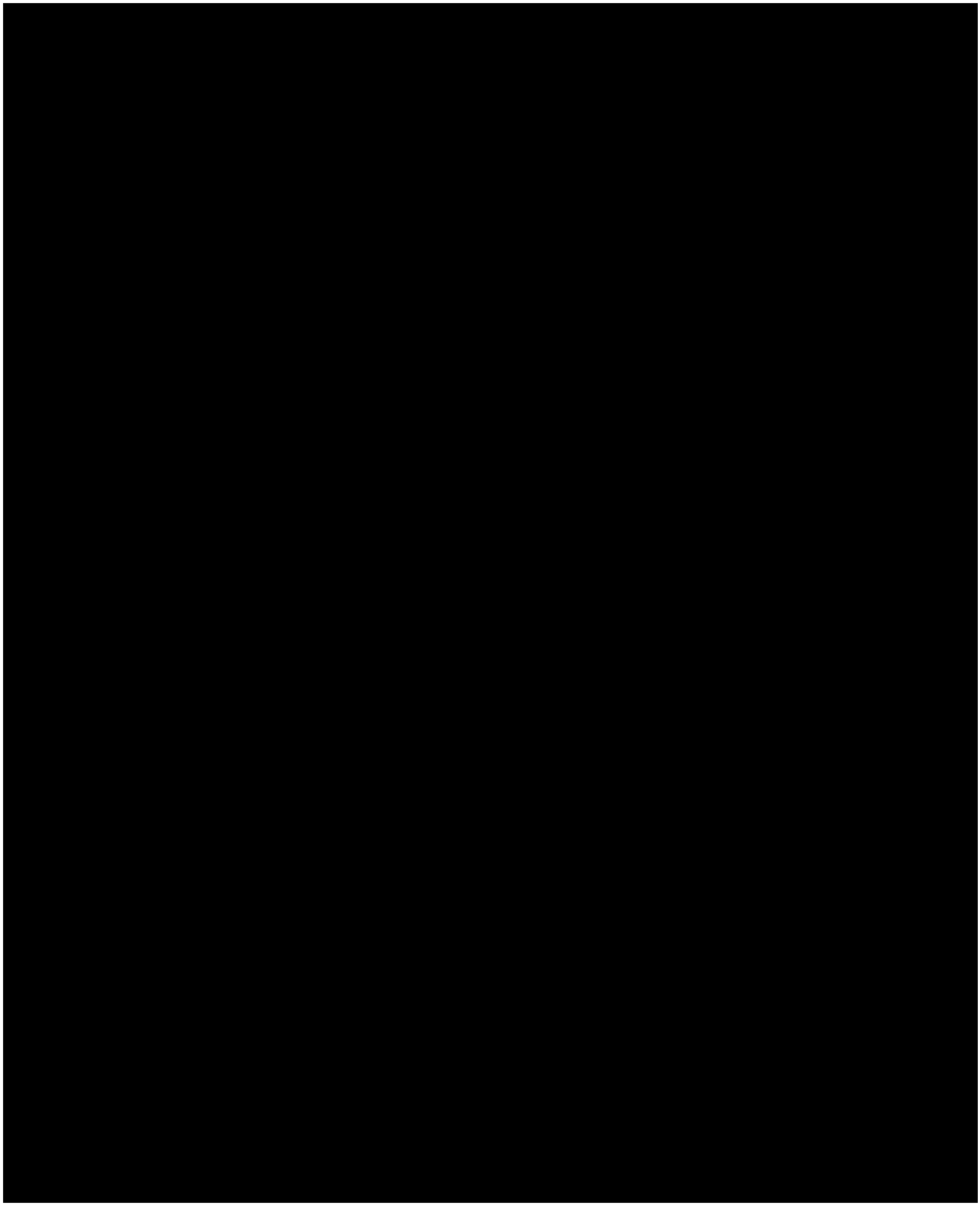
2. Knapp applied to become a firefighter after taking an EMT class and working as a volunteer. She wanted to be a firefighter because she enjoyed the camaraderie and liked emergency runs.

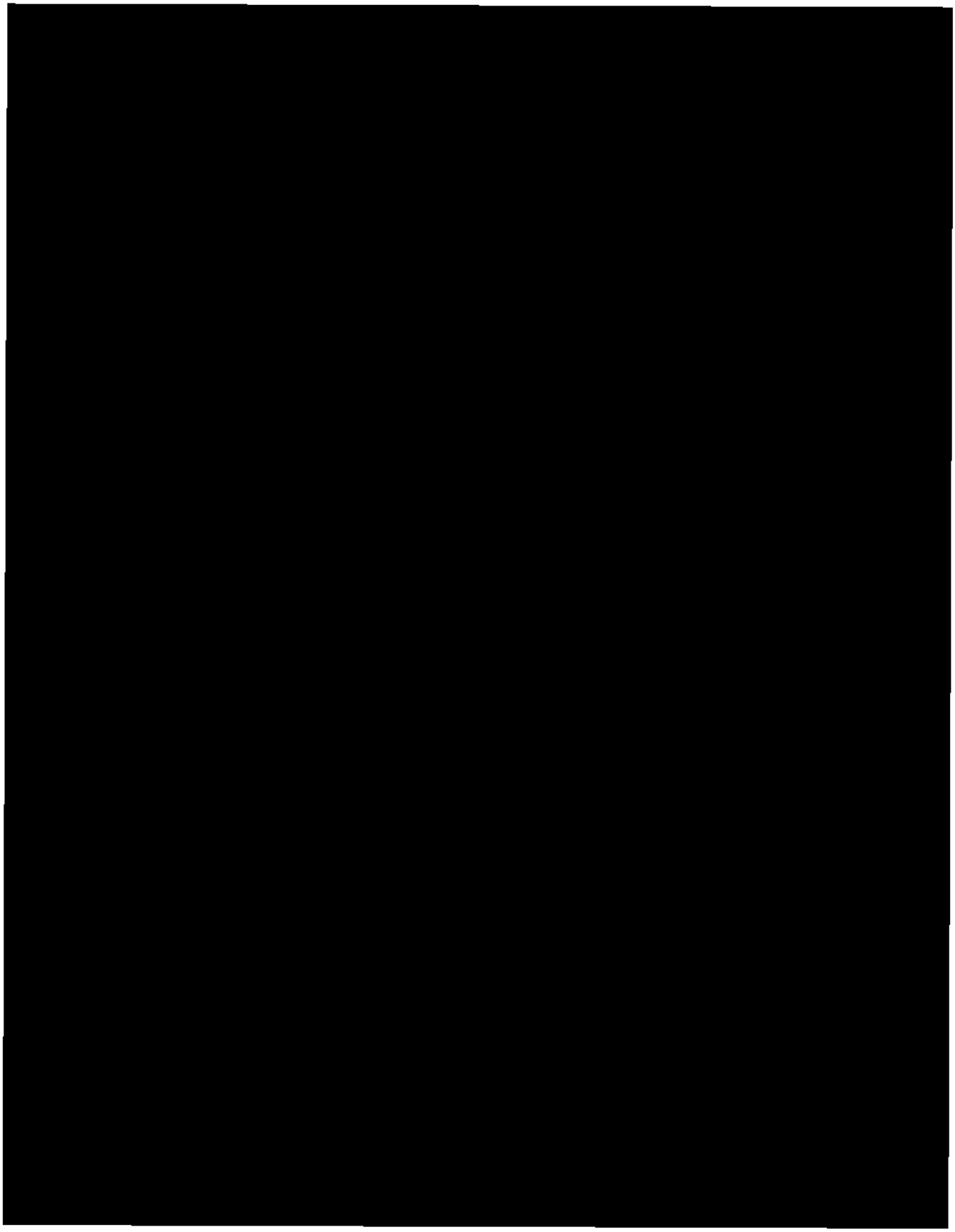
3. Knapp began work at midnight on December 31, 1999.

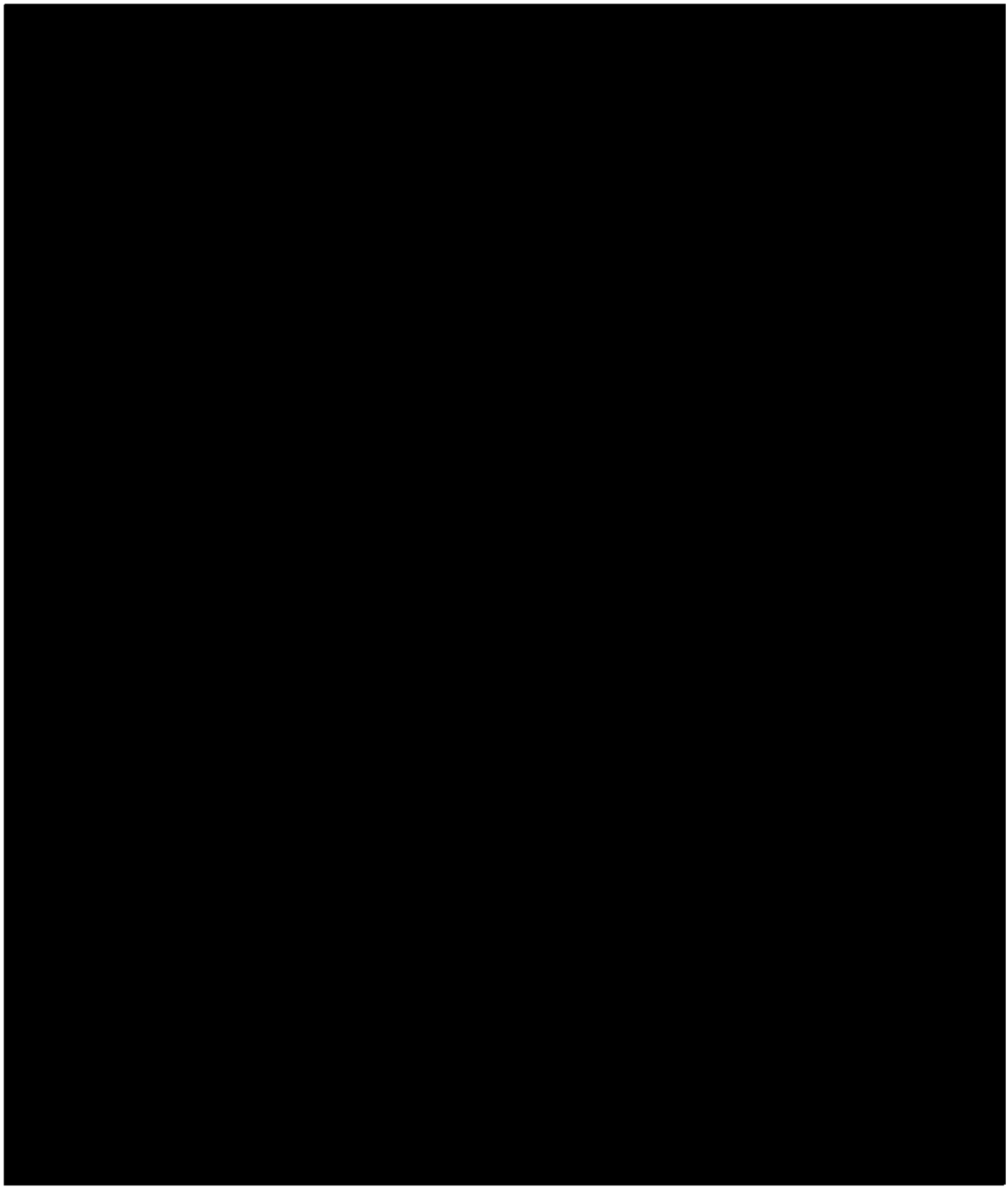
4. Chief Ronald Evans became Chief of the Wayne Township Fire Department on December 31, 1999. He had acted in a consulting capacity on hiring and promotion since October 1999, and was familiar with the process for hiring Knapp.

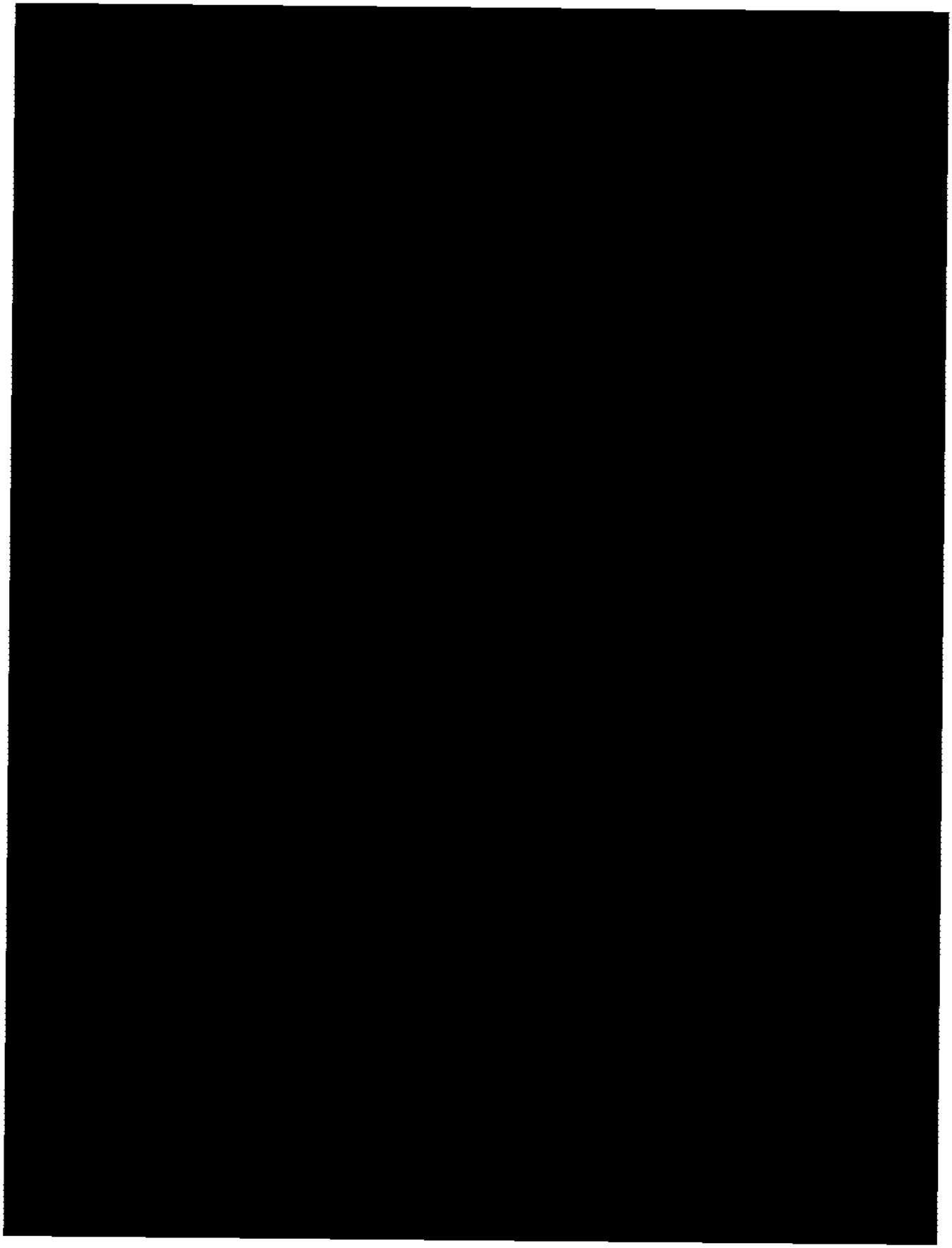
5. The selection process included an interview, background check, physical ability test, PERF-mandated physical exam and psychological testing. The latter was designed to

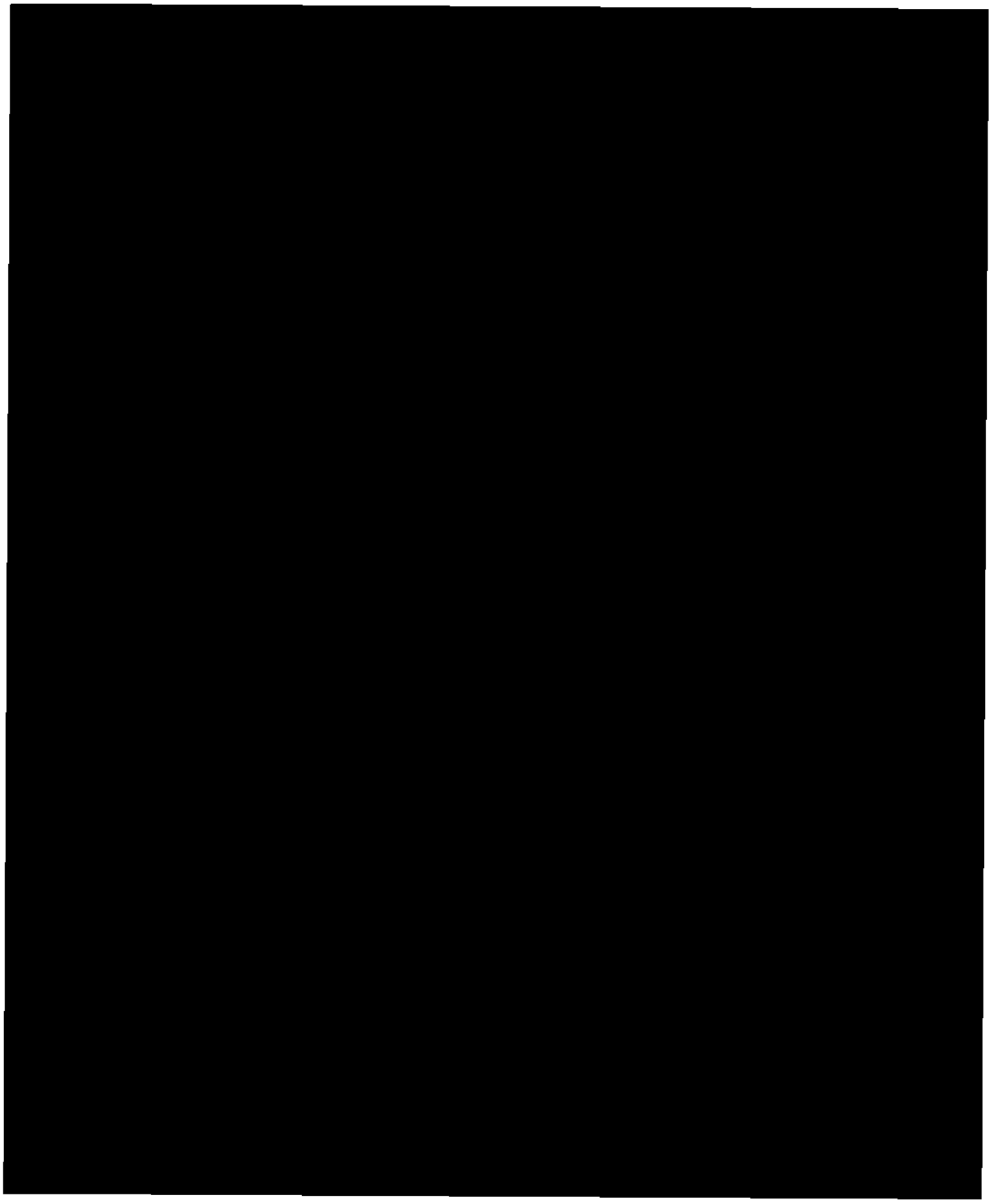


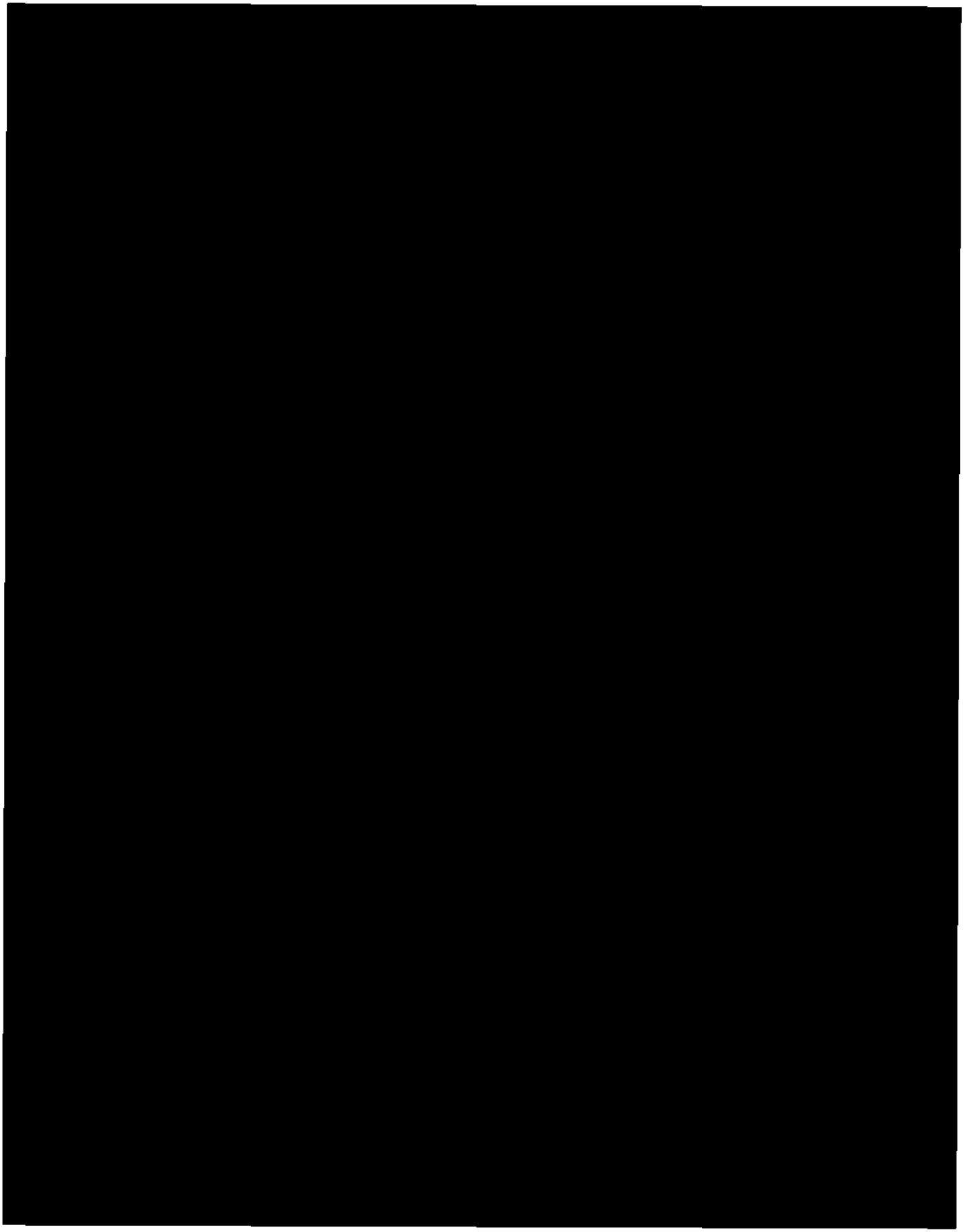








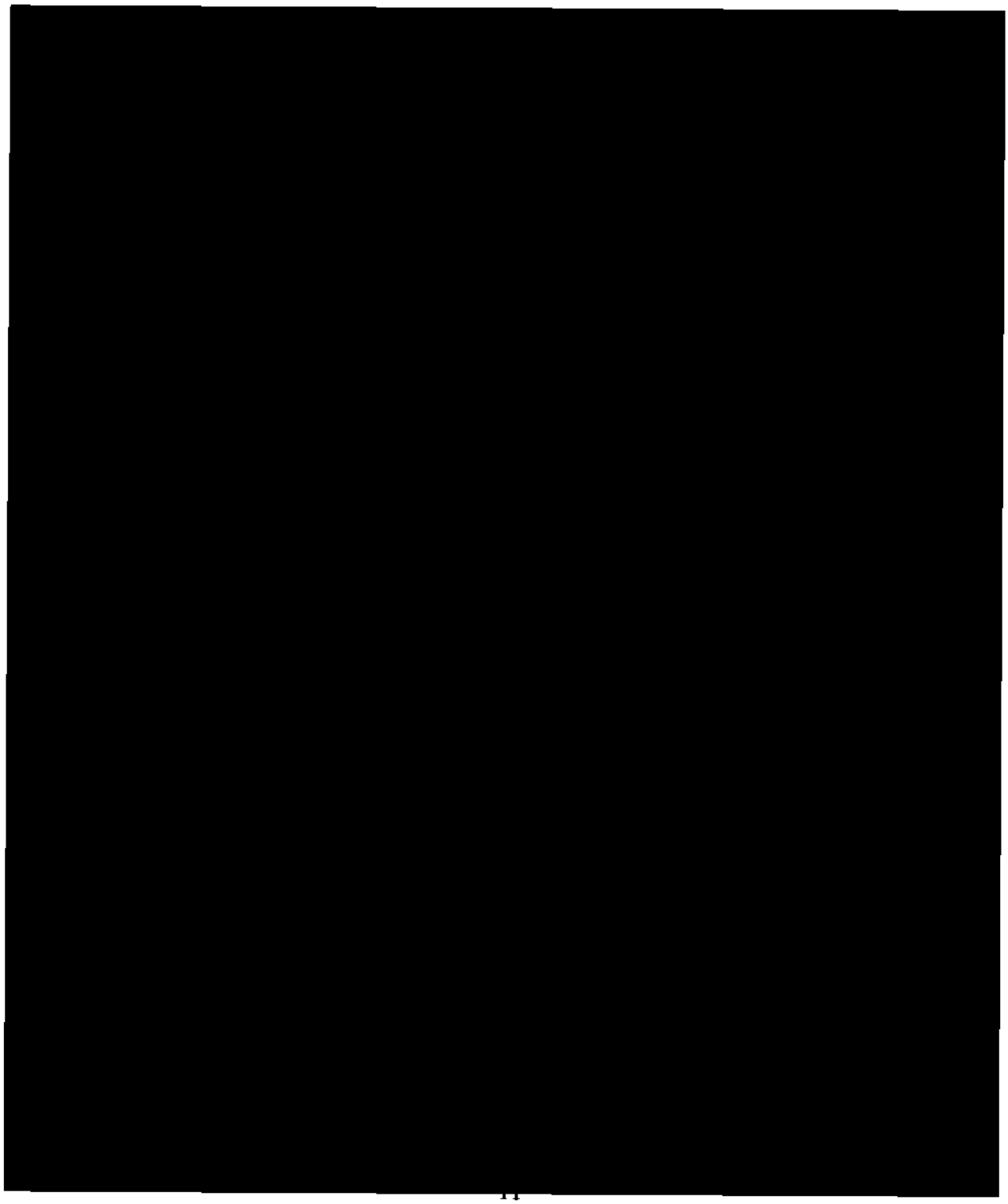


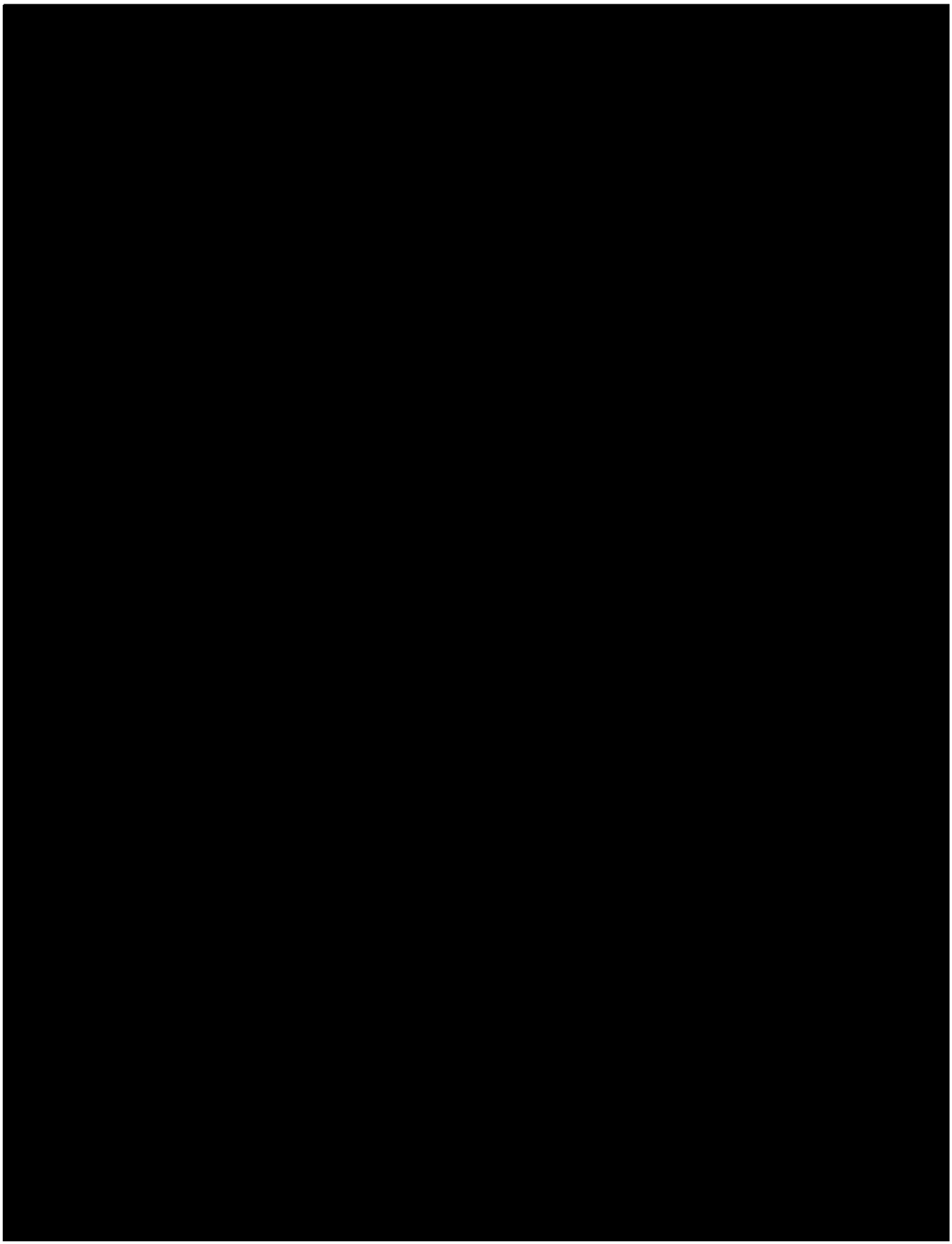


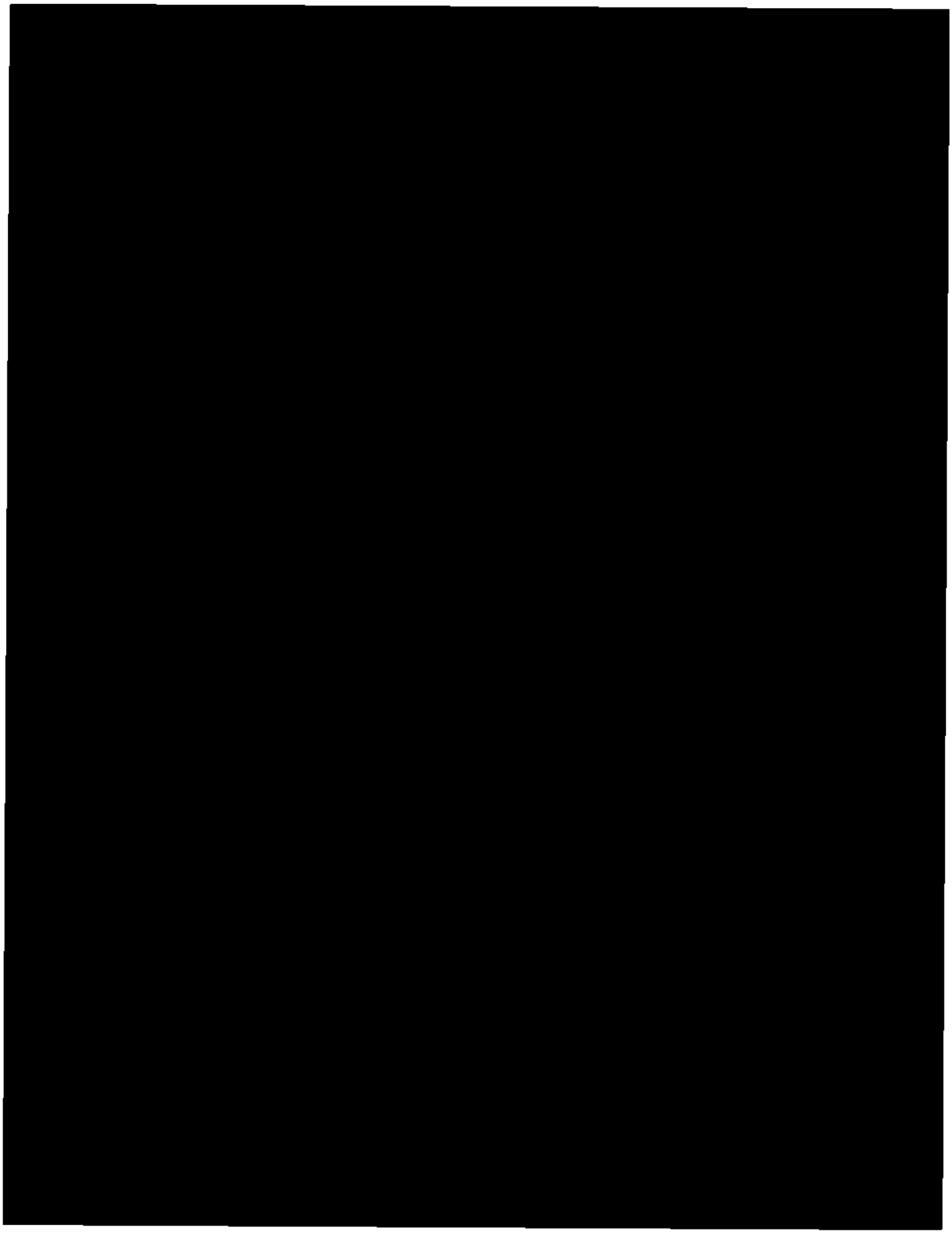
64. On May 16, 2006, an amended initial determination was issued, changing the benefit calculation to [redacted] percent of first-class salary. (Ex. R-13.)

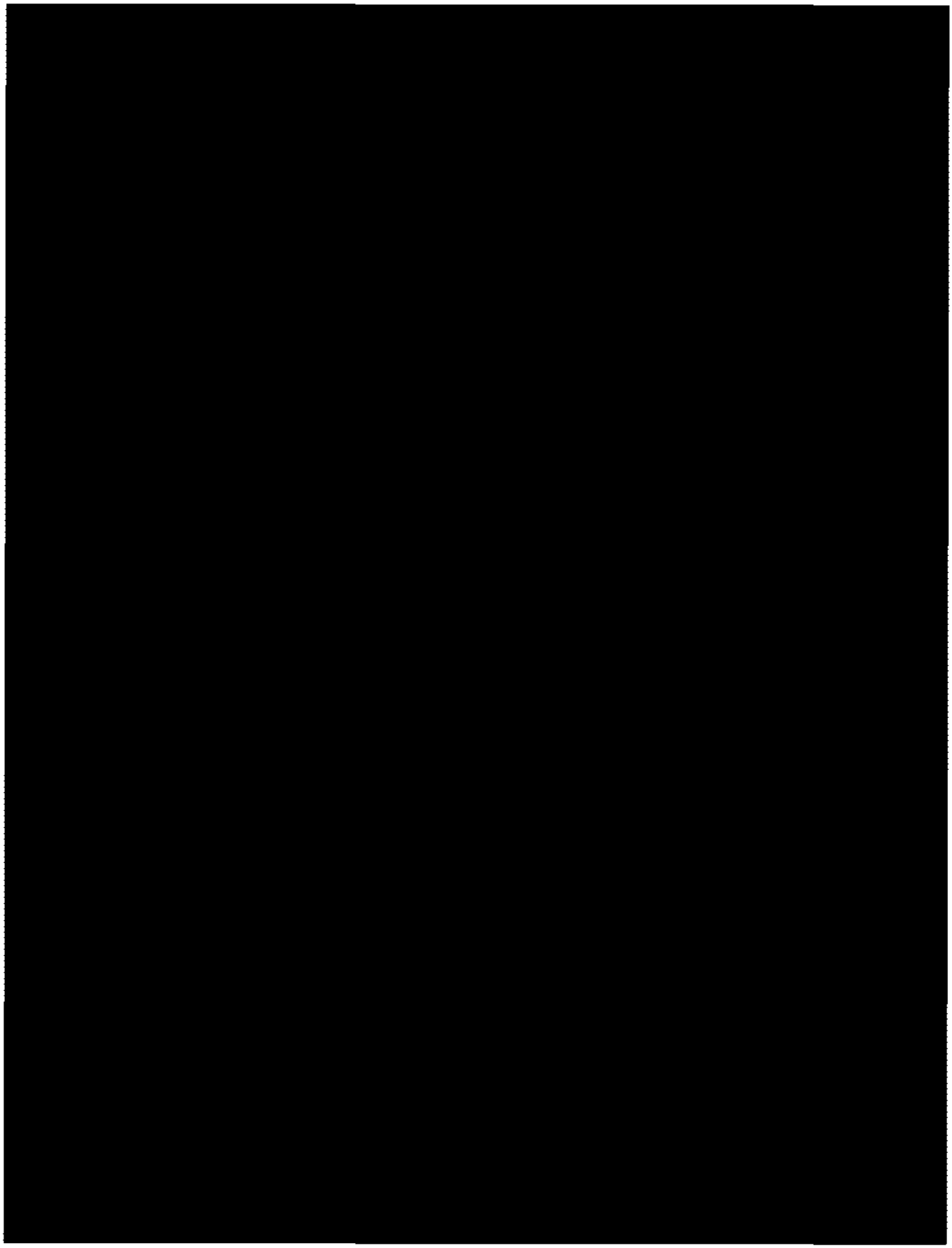
65. The PERF Board has not adopted a standard for the determination of class of impairment.

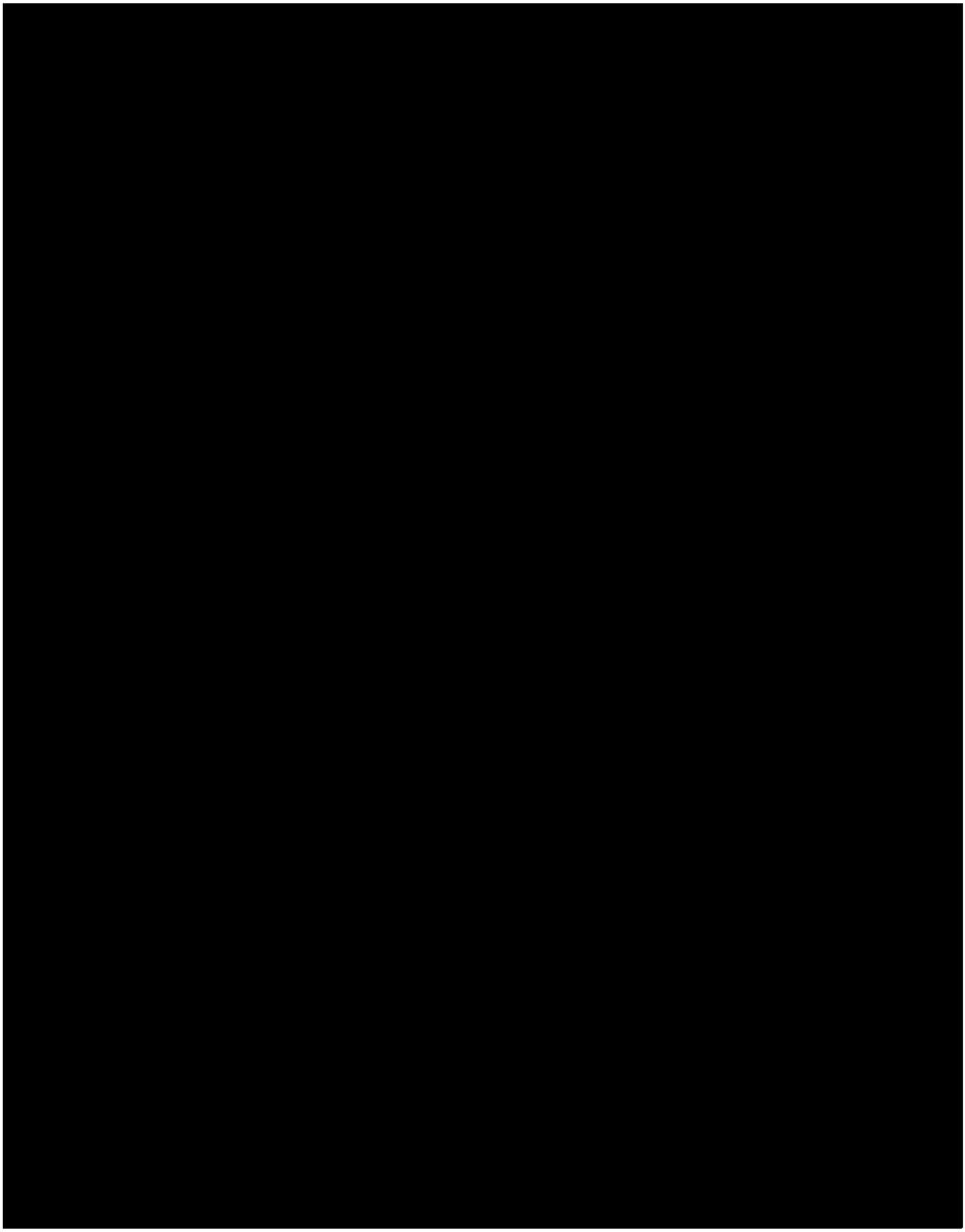
Current condition

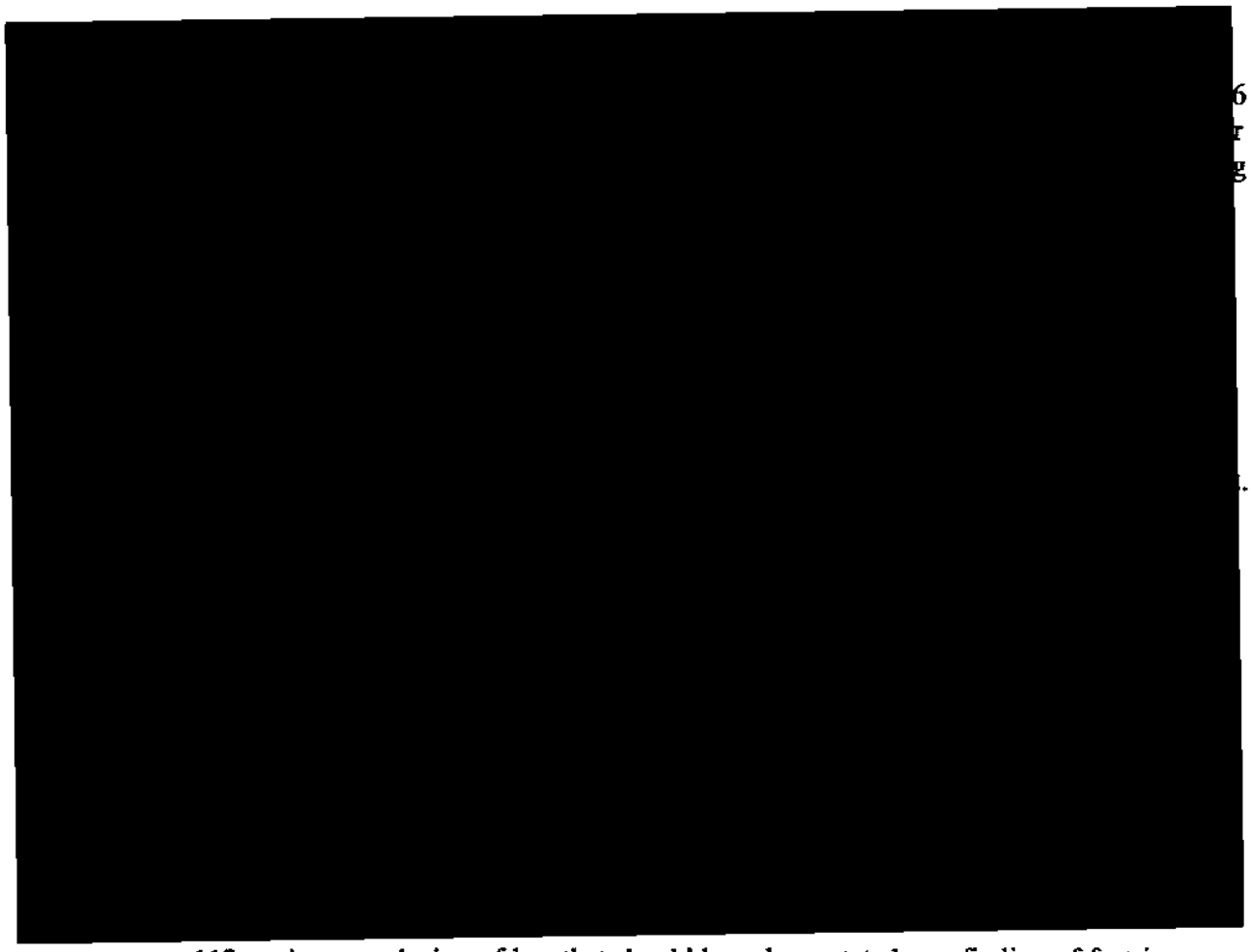












113. Any conclusion of law that should have been stated as a finding of fact is incorporated herein.

Conclusions of Law

A. Legal standard

The factual questions presented by this case are reviewed under the preponderance of the evidence standard. Pendleton v. McCarty, 747 N.E.2d 56, 64-65 (Ind. App. 2001). The ALJ, even where not the ultimate authority, performs a role similar to that of a trial judge sitting without a jury, and reviews the evidence de novo without deference to the agency's initial determination. Indiana Department of Natural Resources v. United Refuse Company, Inc., 615 N.E.2d 100, 103-04 (Ind. 1993); Branson v. Public Employees' Retirement Fund, 538 N.E.2d 11, 13 (Ind. App. 1989).

The burden of proof lies with Knapp, as the person requesting agency benefits. I.C. § 4-21.5-3-14(c); see Indiana Department of Natural Resources v. Krantz Brothers Construction Corp., 581 N.E.2d 935, 938 (Ind. App. 1991) (party seeking exemption from general rule has burden of proof, both under § 4-21.4-3-14(c) and at common law). Traditionally, an applicant for an administratively granted privilege bears the burden of

demonstrating eligibility. Leventis v. South Carolina Dept. of Health and Environmental Control, 530 S.E.2d 643, 651 (S.C. App. 2000), citing 73A C.J.S. Public Administrative Law and Procedure § 128 at 35 (1983) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue."); Division of Motor Vehicles v. Granziel, 565 A.2d 404, 411 (N.J. Super. 1989).

Administrative decisions must be supported by "the kind of evidence that is substantial and reliable." I.C. § 4-21.5-3-27(d). In other words, the quality of evidence must be substantial and reliable. If both sides present evidence that is substantial and reliable, Knapp can prevail only if her evidence preponderates over the evidence submitted by the PERF Board.

Hearsay evidence may be admitted and, if not objected to, may form the basis for an order. I.C. § 4-21.5-3-26(a). However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence. Id.

B. Discussion

At the time she applied for disability benefits in November 2005, Knapp was an employee of the Wayne Township Fire Department and a member of the 1977 Fund. I.C. §§ 36-8-3-21(b), 36-8-8-7(a). Her entitlement to disability benefits is governed by I.C. §§ 36-8-8-12, -12.3, and -12.5.

The first question is whether the member suffers from a "covered impairment" under I.C. § 36-8-8-12.3(b). See Board of Trustees of Public Employees Retirement Fund v. City of Plymouth, 698 N.E.2d 335, 336-37 (Ind. App. 1998). That element is undisputed here, as the PERF Board has found that Knapp presently suffers [redacted] is unable to perform the essential functions of a firefighter considering reasonable accommodation under the ADA.

The second question is which of three "classes" the impairment falls into under I.C. § 36-8-8-12.5(b). Here, the Director found and the PERF Board contends that Knapp suffers from a Class 2 impairment, while Knapp contends that her impairment is Class 1.

The third question is the degree of impairment under I.C. §§ 36-8-8-13.1(c) and -13.5(f). Here, the Director found an impairment of ten percent, but Dr. Vogler opined that Knapp's impairment is 40 percent.

1. Class of impairment

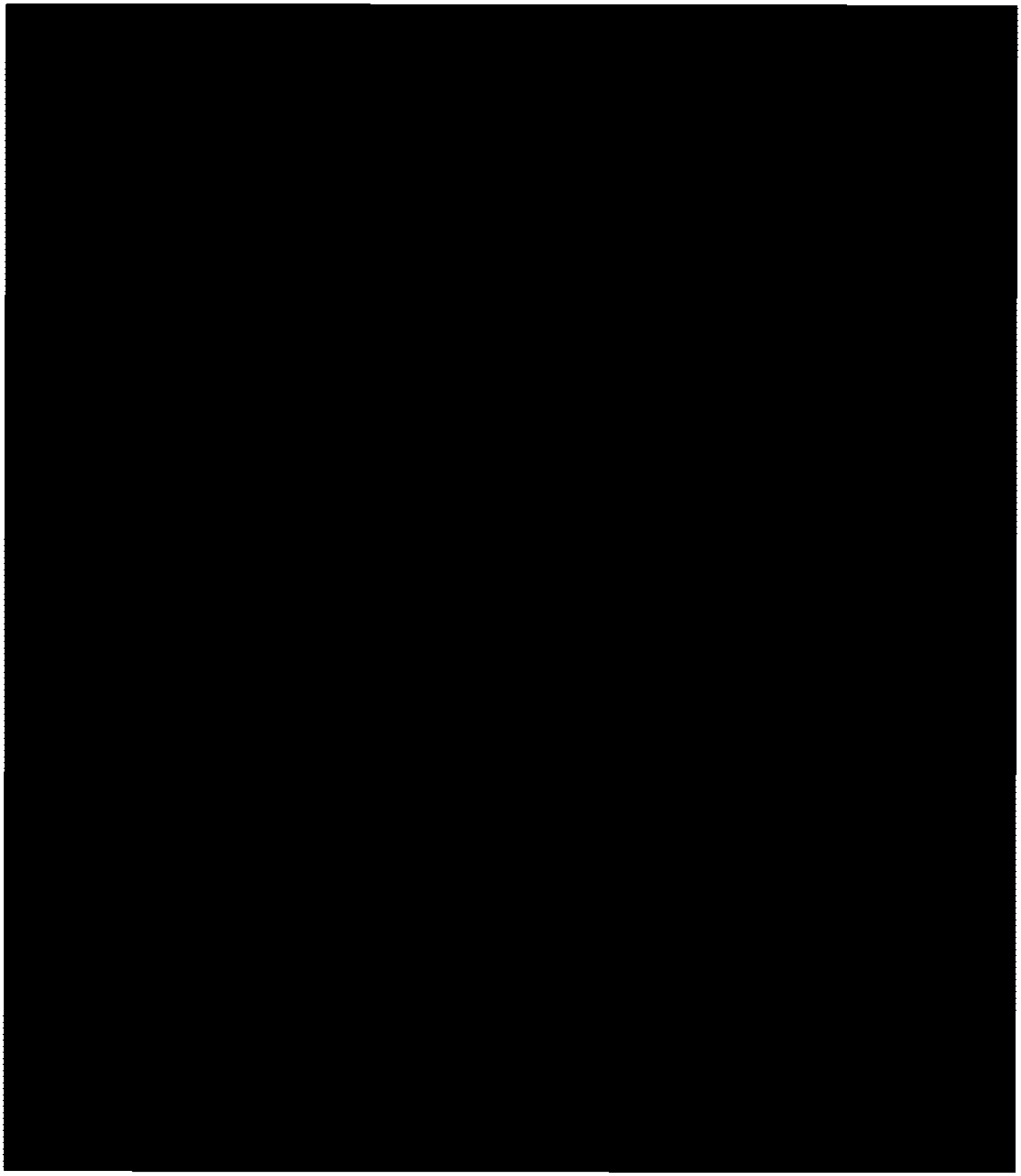
Earlier, Knapp moved for partial summary judgment on the question of class of impairment and PERF requested partial summary judgment in response. In the Order on Petitioner's Motion for Partial Summary Judgment filed on November 16, 2006 (MSJ Order), summary judgment was denied to both sides due to disputes of material fact.

The MSJ Order discussed at length the difference between the classes of impairment set forth in I.C. § 36-8-8-12.5(b). It found that a Class 1 impairment must be "the direct result" of a job-related personal injury or occupational disease, meaning that the job-related event must have been the sole cause of the impairment. The MSJ Order further found that PTSD can be a "personal injury" or "occupational disease" eligible for treatment as a Class 1 impairment. A Class 2 impairment, on the other hand, is a "duty related disease," i.e., a disease "arising out of" the member's employment, meaning that there need not be as high a level of causation. The MSJ Order concluded, however, that the evidence showed a dispute of material fact on the question of causation, so summary judgment was denied.

The legal discussion in the MSJ Order is incorporated by reference. Neither party has expressly requested reconsideration of the legal conclusions reached in that decision. [7]

[redacted]

[redacted]



an "occupational disease" which separately makes her eligible for Class 1 benefits under I.C. § 36-8-8-12.5(b)(1)(C).

2. Degree of impairment

The 1977 Fund medical authority estimated that Knapp's degree of impairment is ten percent, and this determination was incorporated into the Director's initial determination. At the hearing, the parties presented somewhat conclusory expert testimony. Dr. Markand's ten

[redacted]

The statutes governing operation of the 1977 Fund do not dictate a standard for degree of impairment, but dictate that a standard be set by the PERF Board. I.C. § 36-8-8-13.1(c) states that the medical authority selected by the PERF Board "shall determine the degree of impairment," and that the PERF Board "shall adopt rules under IC 4-22-2 to establish impairment standards, such as the impairment standards contained in the United States Department of Veterans Affairs Schedule for Rating Disabilities." The PERF Board has not followed the mandate to adopt standards.

Knapp argues that application of the AMA Guides without adoption by the PERF Board "constitutes a due process violation" because there is "no discernable standard." Somewhat inconsistently, Knapp then argues that the only standard that can be applied is the VA Schedule, because it is "the only standard mentioned in the statute." (Petitioner's Initial Post-Hearing Brief at 4-5.)

As Knapp suggests, due process is potentially implicated where an agency fails to specify a standard for its decisions. To satisfy due process, administrative decision-making must be done in accordance with previously stated, ascertainable standards. The standards must be written with sufficient precision to give fair warning as to what the agency will consider in making its decision. Worman Enterprises, Inc. v. Boone County Solid Waste Management Dist., 805 N.E.2d 369, 378 (Ind. 2004); Union Tank Car, Fleet Operations v. Comm'r of Labor, 671 N.E.2d 885, 889 (Ind. App. 1996); Dept. of Environmental Management v. AMAX, 529 N.E.2d 1209, 1212-13 (Ind. App. 1988); Podgor v. Indiana University, 381 N.E.2d 1274, 1283-84 (Ind. App. 1978).

The courts will overlook the failure to promulgate a standard where the statute itself provides sufficient notice. In Pendleton v. McCarty, 747 N.E.2d 56 (Ind. App. 2001), an insurance agent complained that the commissioner of insurance had failed to promulgate specific rules to govern discipline against licensees. The court held that while administrative decisions generally must be based on ascertainable standards so that agency action will be orderly and consistent, providing fair warning to those having contact with the agency, in the

absence of such regulations a statute proscribing "dishonest practices" conducted by an insurance agent "under the [agent's] license" was sufficiently clear to advise insurance agents that they will be subjected to discipline if they engage in such practices while conducting activities for which they are licensed, at least with respect to the plainly dishonest practices at issue in Pendleton. Id. at 62-63, citing Clarkson v. Department of Insurance, 425 N.E.2d 203, 207 (Ind. App. 1981). "Where standards are stated with sufficient precision in the statute itself, it is not necessary for the administrative agency to provide additional clarification and specificity." Mugg v. Stanton, 454 N.E.2d 867, 869 (Ind. App. 1983).

In addition to these due process considerations, the General Assembly requires that an agency "rule" be promulgated under the procedure set forth in I.C. §§ 4-22-2-3 et seq. The procedure requires public notice, opportunity for comment, and publication. A "rule" that must be promulgated is

> an agency statement of general applicability that:
>
> (1) has or is designed to have the effect of law; and
>
> (2) implements, interprets, or prescribes
>
> (A) law or policy; or
> (B) the organization, procedure, or practice requirements of an agency.

I.C. § 4-22-2-3(b). See Dept. of Environmental Management v. Twin Eagle LLC, 798 N.E.2d 839, 847-48 (Ind. 2003); Indiana-Kentucky Electric Corp. v. Commissioner, Indiana Dept. of Environmental Management, 820 N.E.2d 771, 779-81 (Ind. App. 2005); Dept. of Environmental Management v. AMAX, Inc., 529 N.E.2d 1209, 1212-13 (Ind. App. 1988); Blinzinger v. Americana Healthcare Corp., 466 N.E.2d 1371, 1375 (Ind. App. 1984).

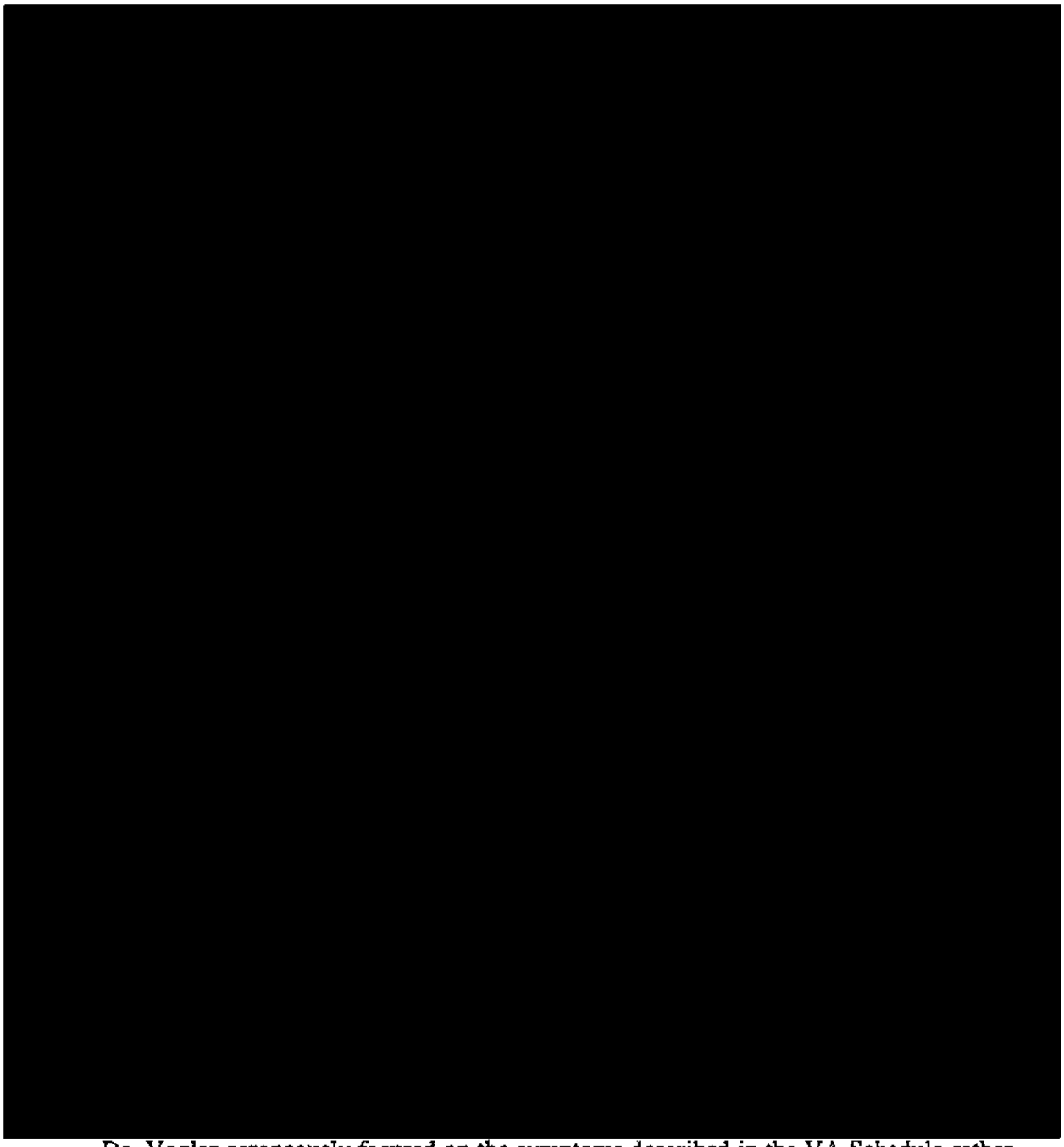
The requirement of promulgation does not apply to internal policies of the agency that do not have the effect of law. I.C. § 4-22-2-13(c)(1). Nor does it apply to administrative adjudication of specific cases. I.C. § 4-22-2-3(c) and (d) (rulemaking does not include "agency action" as defined in I.C. § 4-21.5-1-4); see Miller Brewing Co. v. Bartholomew County Beverage Co., Inc., 674 N.E.2d 193, 202 (Ind. App. 1996) (explaining difference between rule and order); Gorka v. Sullivan, 671 N.E.2d 122, 129-30 (Ind. App. 1996) (agency may promulgate a method of making a determination without promulgating the result of the determination in every instance). Of course, as noted above, regardless of whether a degree of impairment standard is a "rule" or not, the General Assembly has specifically mandated promulgation of the 1977 Fund's standard.

I have considered at length whether it is possible in this case to make a de novo determination of degree of impairment without a promulgated standard. For multiple reasons, I have decided that I cannot do so, at least not on the record before me.

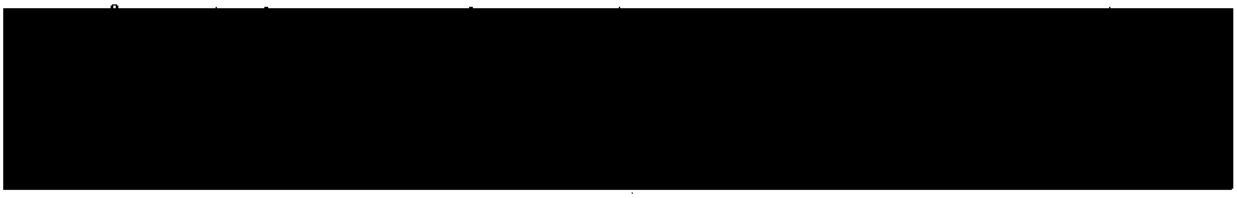
[redacted]

Second, even if a standard could be determined, an adjudication in this case cannot be made due to the inadequacy of the expert evidence on this score.

[redacted]



Dr. Vogler erroneously focused on the symptoms described in the VA Schedule rather than the effects of those symptoms. To the contrary, her evaluation and testimony contained



Therefore, my recommendation must be that the question of degree of impairment be reconsidered by the Director based on a standard that is adopted by the PERF Board under I.C. §§ 4-22-2-3 et seq. or stipulated by the parties, and that Knapp be evaluated by a professional who is familiar with the standard and experienced in its specific application to persons [redacted].

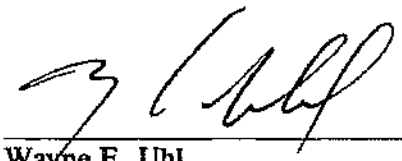
In the interim, both temporarily and subject to modification after that evaluation has occurred, Knapp should receive disability benefits based on an impairment rating of 30 percent.

Recommended Decision

Based on the foregoing findings of fact and conclusions of law, I recommend that the initial determination of the Director of the 1977 Fund be vacated and modified, that Knapp's application for disability benefits be granted, and that Knapp be awarded benefits for a Class 1 impairment.

I further recommend that the matter be remanded to the Director for a fresh determination of degree of impairment after the PERF Board has adopted, or the parties have stipulated to, a standard for determining degree of impairment, and that a qualified mental health treatment professional be assigned to evaluate Knapp's degree of impairment according to that standard.

DATED: October 2, 2007.



Wayne E. Uhl
Administrative Law Judge
Indiana Public Employees' Retirement Fund

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

> (b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:
> (1) affirming;
> (2) modifying; or
> (3) dissolving;
> the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.
>
> (c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.
>
> (d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

(1) identifies the basis of the objection with reasonable particularity; and

(2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Findings of Fact, Conclusions of Law and Recommended decision was served on the following persons, by U.S. Postal Service Priority Mail, Certified Mail Return Receipt Requested, on October 2, 2007:

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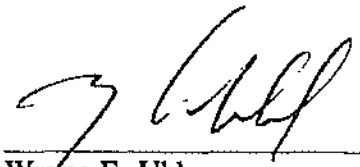

Wayne E. Uhl
Administrative Law Judge
Indiana Public Employees' Retirement Fund