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

IN THE MATTER OF	)	1977 POLICE OFFICERS' AND
BETH ANNE LOCKE,	)	FIREFIGHTERS' PENSION AND
	)	DISABILITY FUND
Petitioner.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION

This case was assigned to the ALJ for determination of the appeal of Beth Anne Locke from the initial determination of the Director of the 1977 Fund granting Locke disability benefits, finding her disability to fall within Class 3, and finding the degree of impairment to be 20%. Locke timely objected to this determination and requested a hearing. She challenges only the degree of impairment.

A hearing was held on June 15, 2010. Locke represented herself after being reminded of her right to be represented by counsel. She was accompanied and assisted by her husband, Anthony Locke. The PERF Board as administrator of the 1977 Fund was represented by attorney Allison Murphy.

Locke called herself as her only witness. The PERF Board called Dr. Omkar Markand and Floyd Teamer. The parties were given the right to cross-examine and Locke presented rebuttal testimony. The following exhibits were introduced by PERF without objection from petitioner:

1. Local board determination and minutes, 12/30/09
2. Application for Disability Benefits, 12/28/09
3. Initial determination letter from Steven Barley, 1977 Fund Director, 1/22/10
4. Appeal request letter from Beth Anne Locke, 2/3/10
5. AMA Guides to the Evaluation of Permanent Impairment (5th ed.), pp. 312-313
6. Curriculum Vitae, Omkar N. Markand
7. Determination letter of Dr. Markand, 1/6/10

[redacted]

[redacted]

At the conclusion of the hearing, PERF counsel requested time to submit supplemental testimony of Dr. Markand, which was conditionally granted. However, PERF counsel later notified the ALJ and petitioner that no further testimony would be submitted.

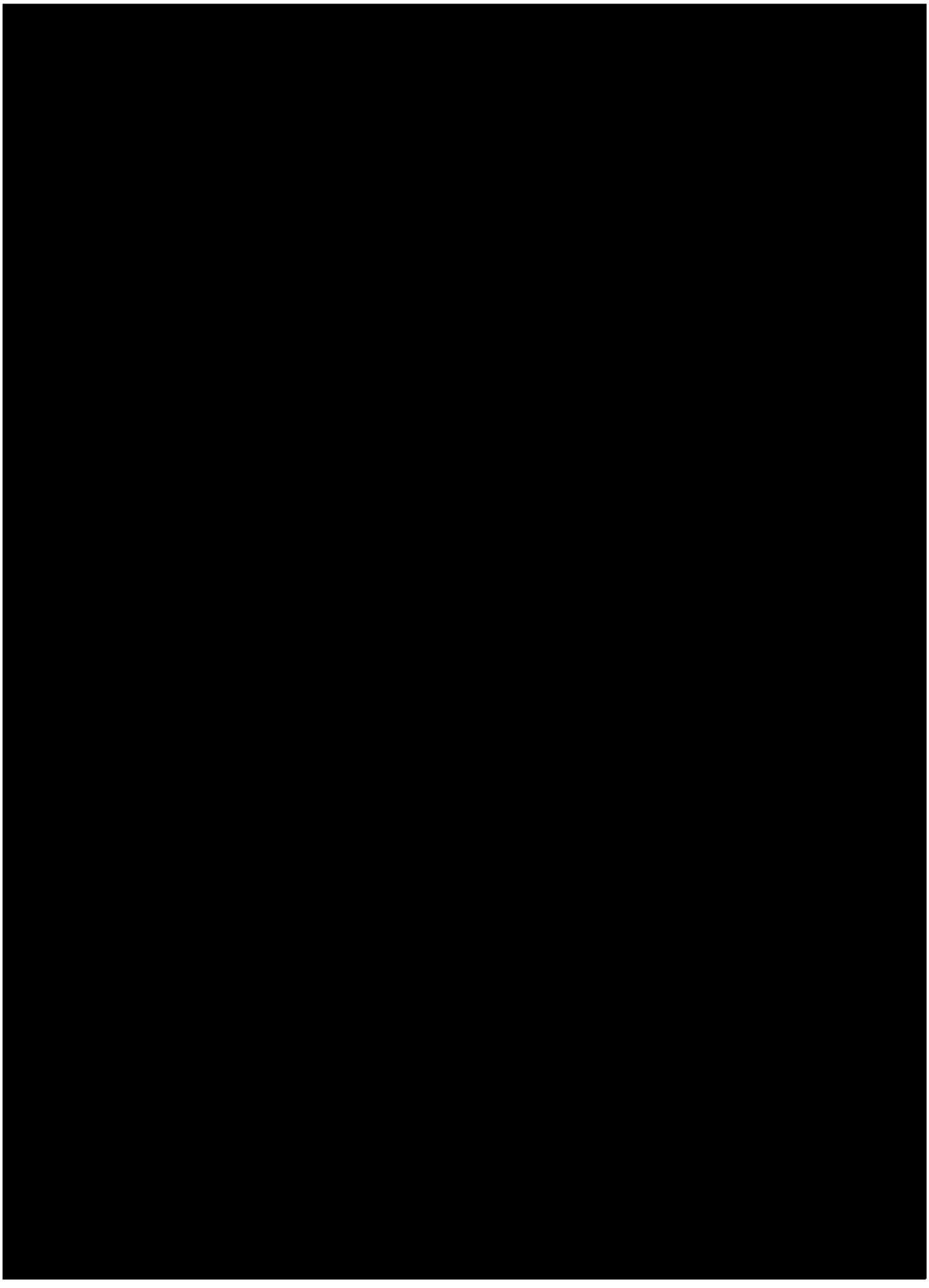
Findings of Fact

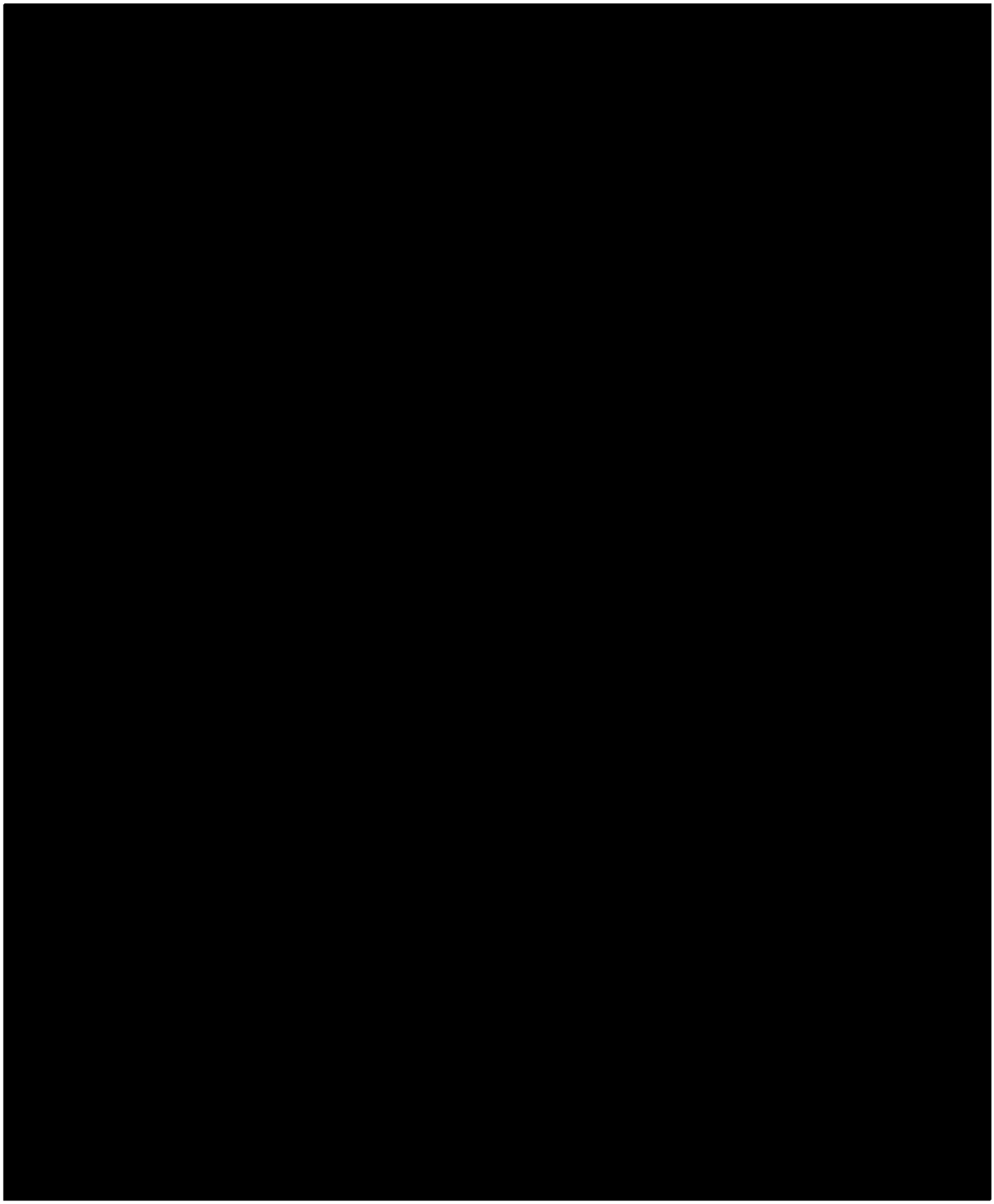
[redacted]

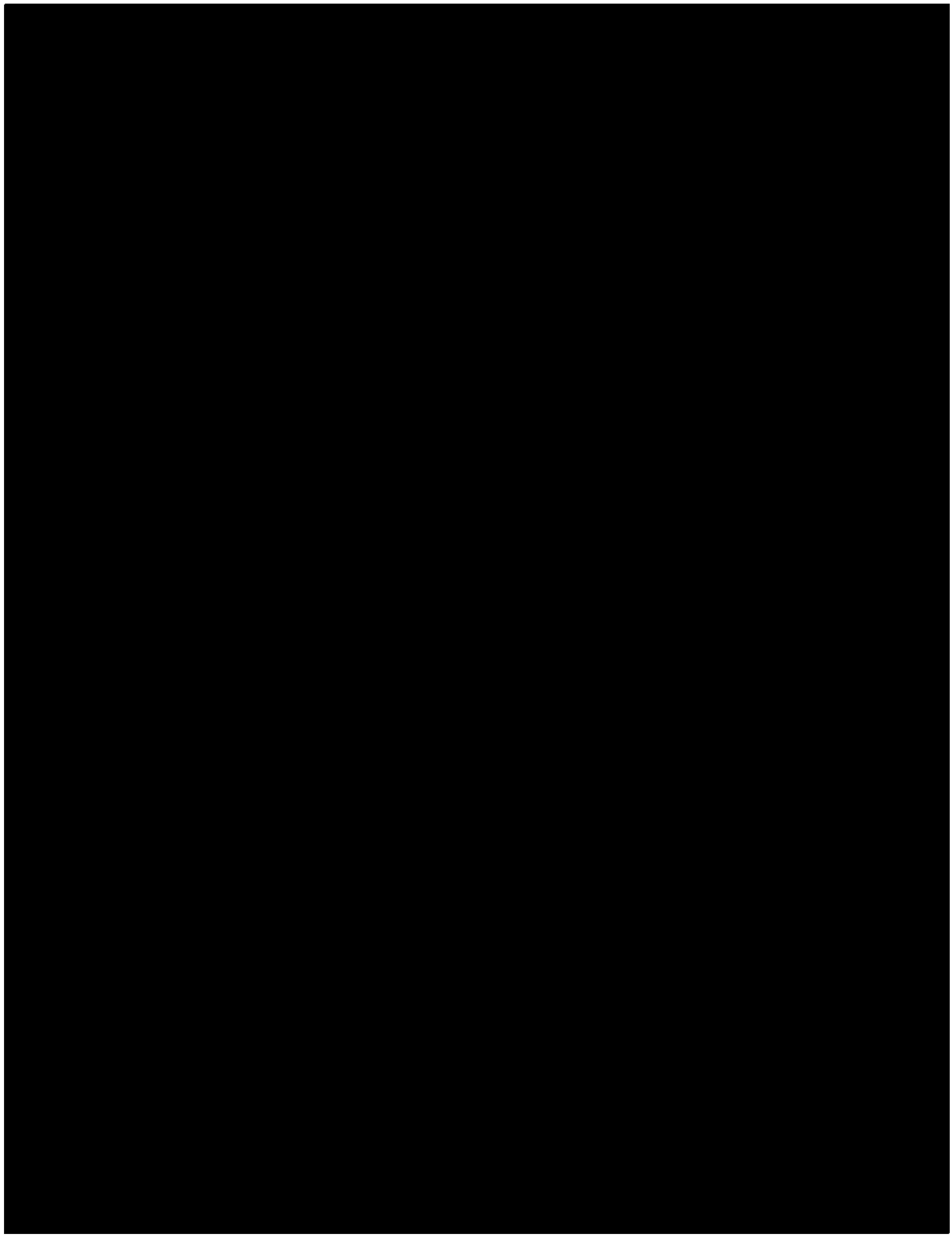
2. Locke was trained and certified as a paramedic and retains that training and certification today.

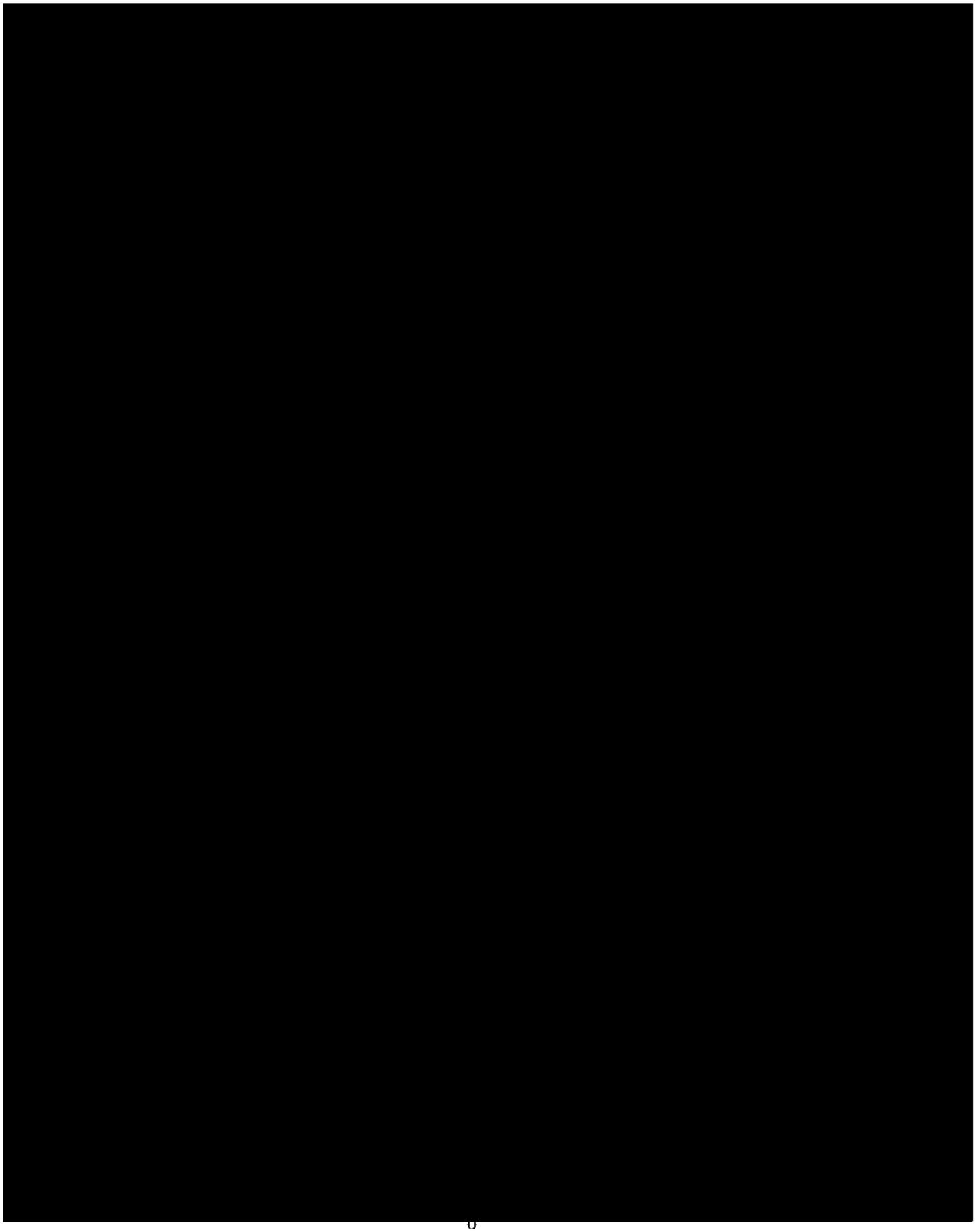
[redacted]Locke also worked part-time as a paramedic at Community Hospital North in the Emergency Department.

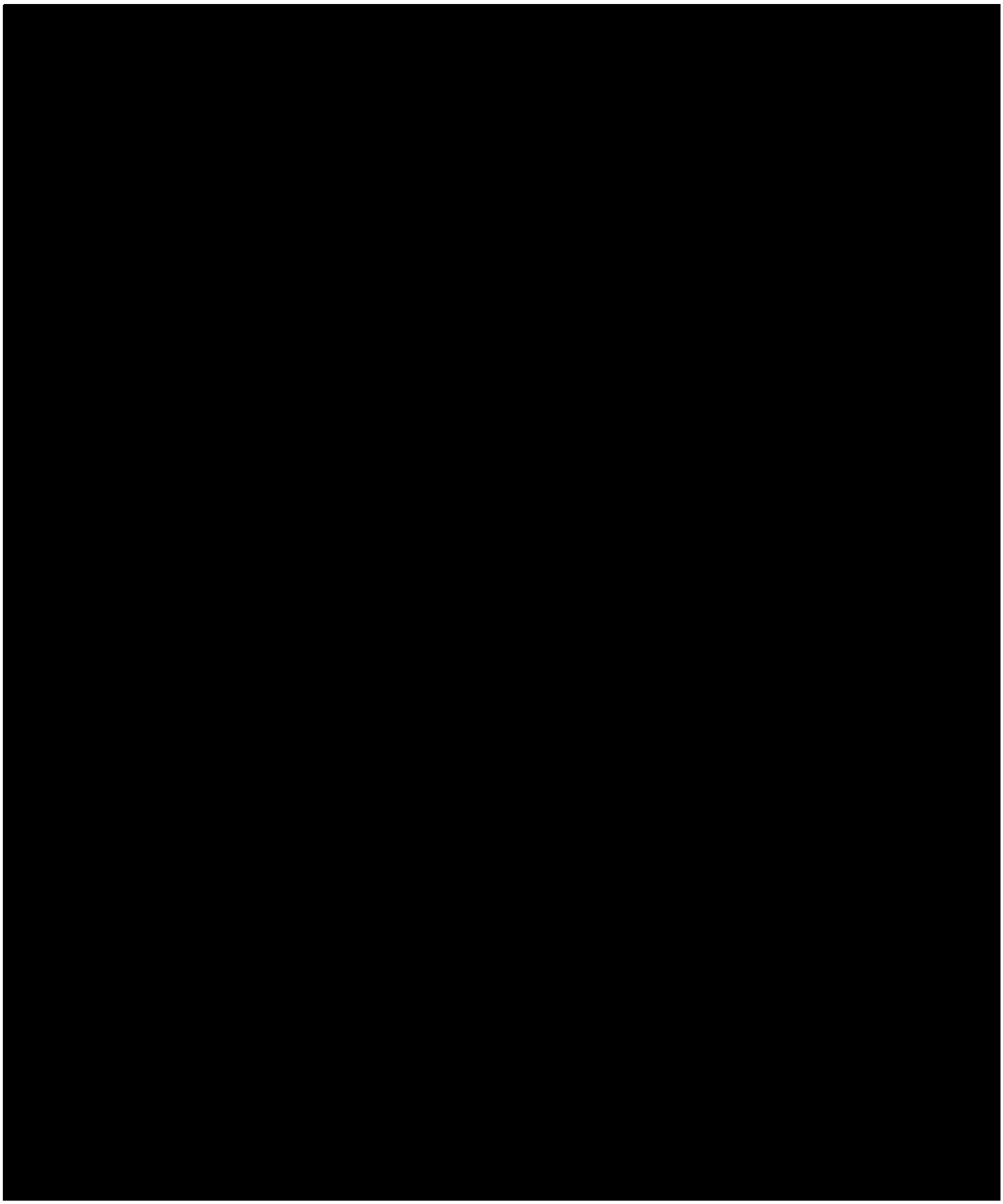
[redacted]

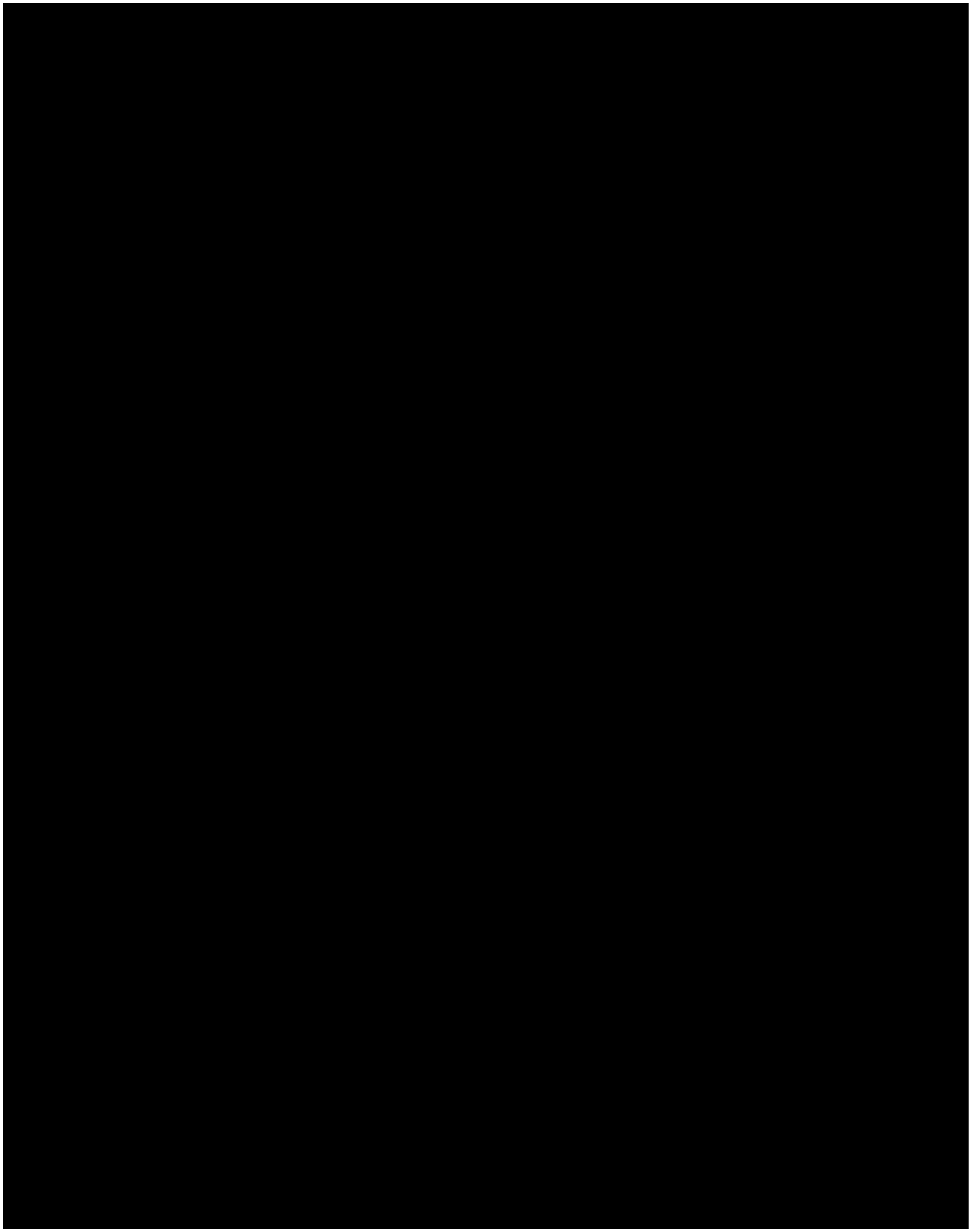


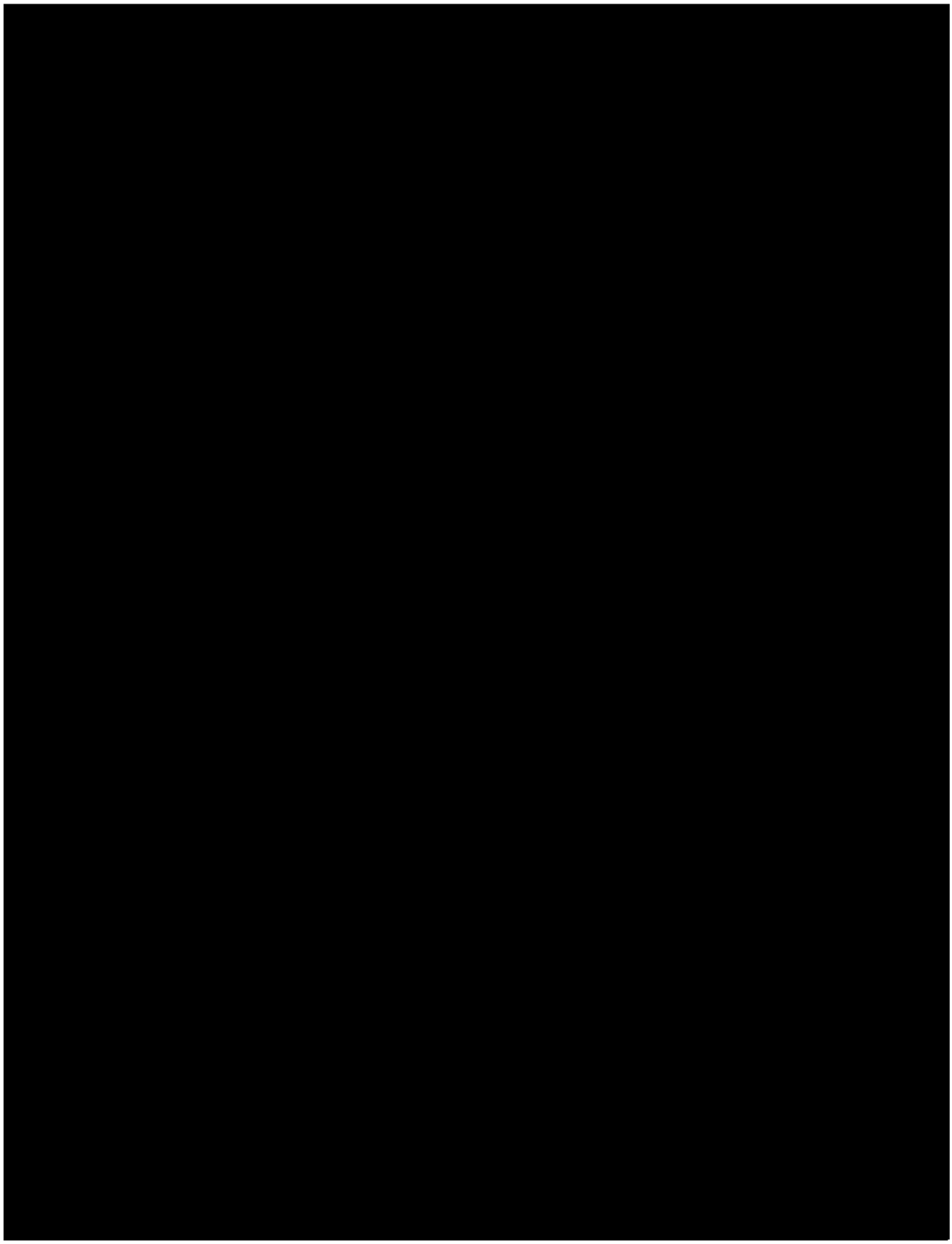












Conclusions of Law

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 Locke, as the person requesting agency benefits. Ind. Code § 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 I.C. § 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, Somers can prevail only if his evidence preponderates over the evidence submitted by the PERF Board.

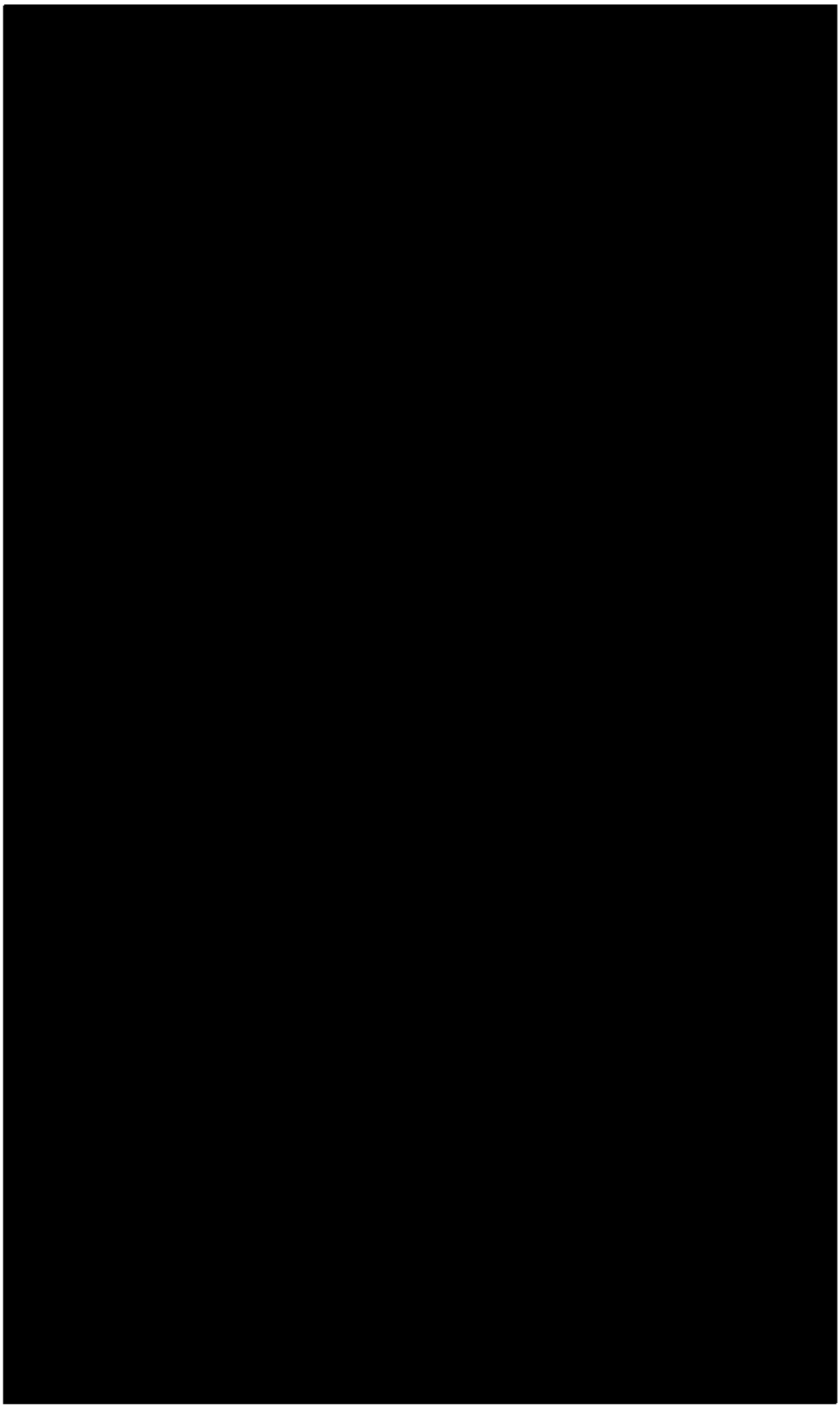
Hearsay evidence may be admitted and, if not objected to, may form the basis for an order. I.C. § 4-21.5-3-26(a). However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence.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

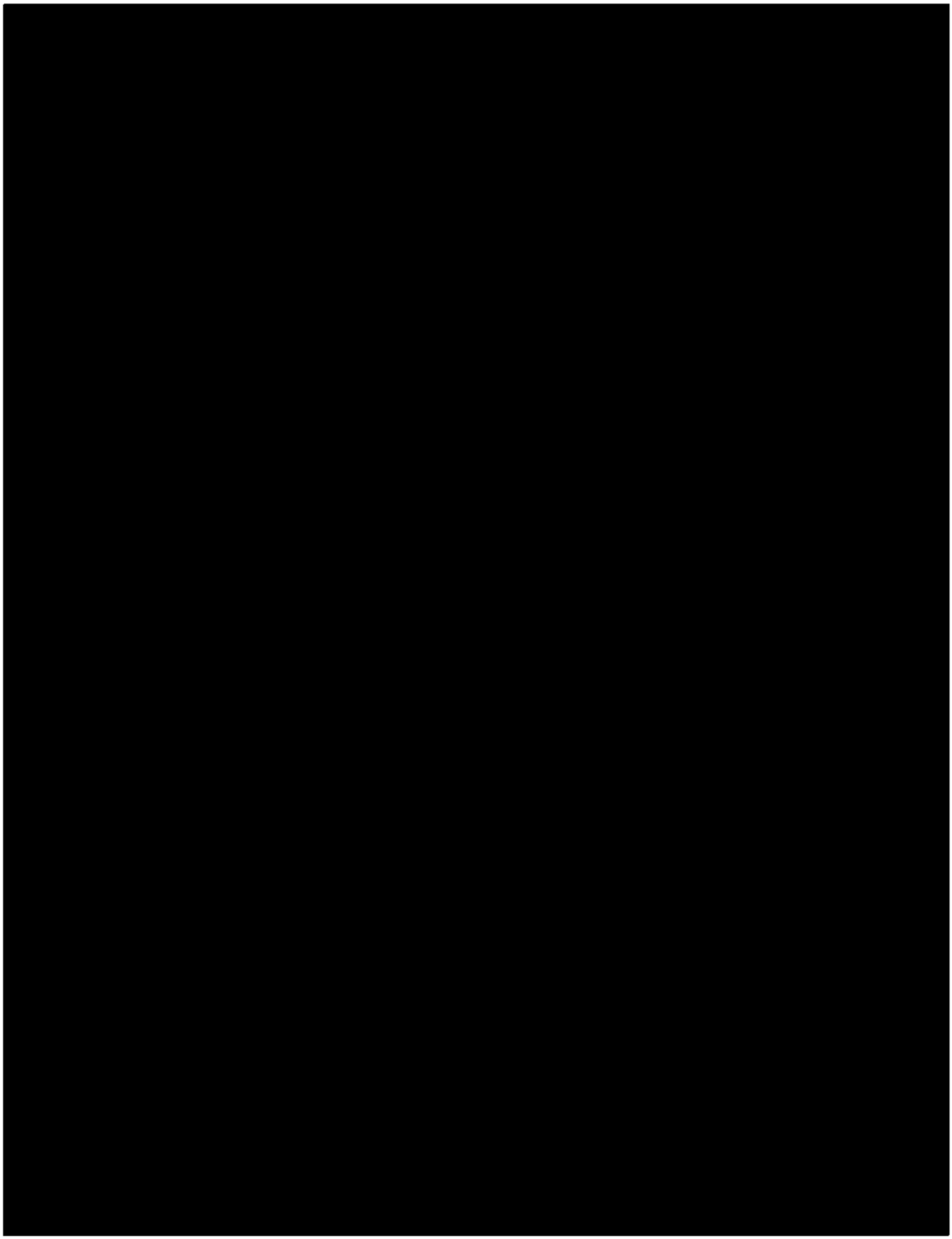
B. Discussion

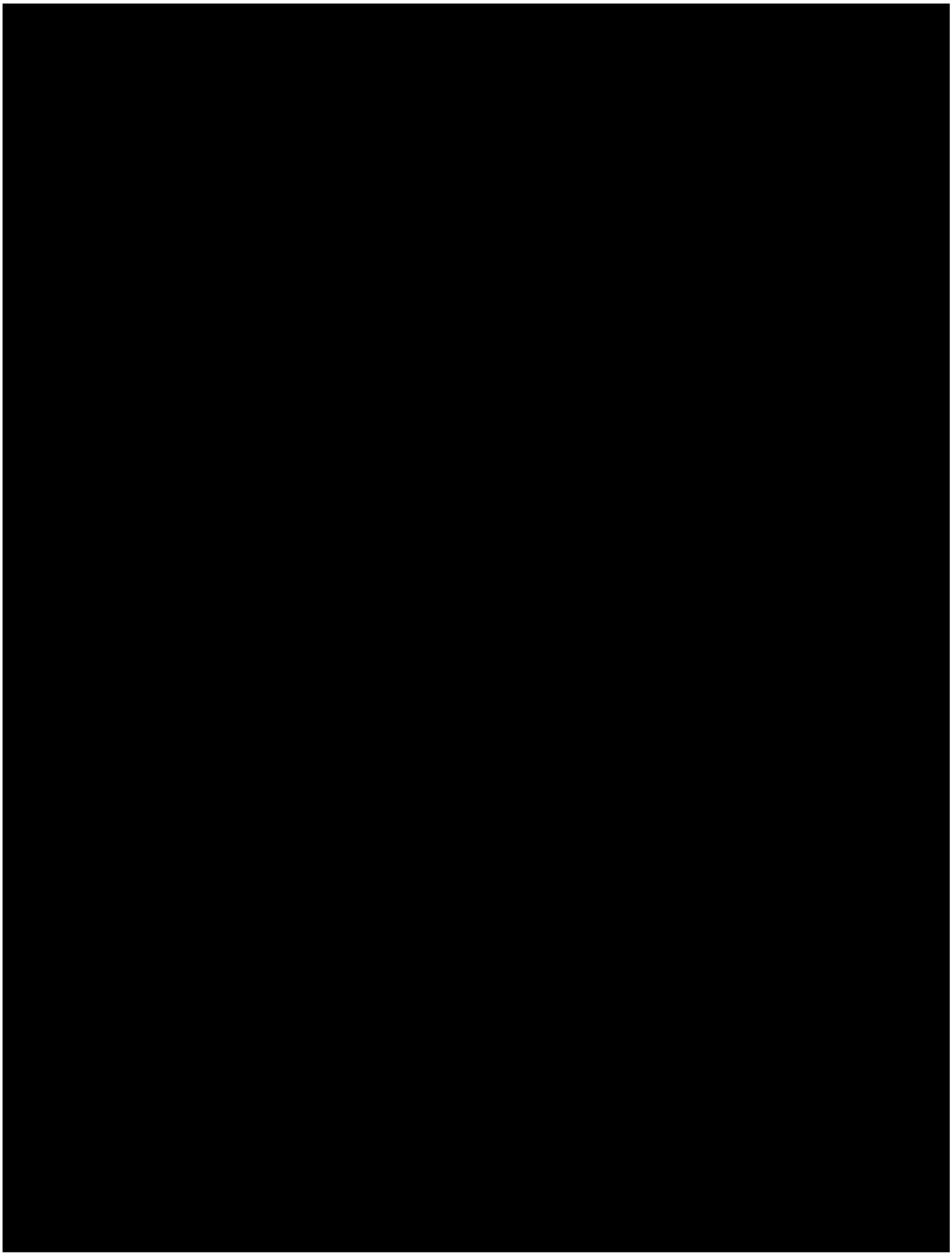
At the time she applied for disability benefits, Locke was an employee of Lawrence Township in its fire department and a member of the 1977 Fund. I.C. § 36-8-8-7(a). Her entitlement to disability benefits is governed by I.C. §§ 36-8-8-12, -12.3, and -12.5. A fund member's entitlement is determined by (1) the existence of a covered impairment, (2) the class of impairment, and (3) the degree of impairment.

There is no dispute in this case that Locke suffers from a covered impairment, [redacted]

[redacted]







Recommended Decision

Based on the foregoing findings of fact and conclusions of law, the initial determination is confirmed. Locke suffers from a covered impairment, her impairment is a Class 3 disability, and her degree of impairment is 20%.

DATED: July 16, 2010

Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388
(317) 844-3830

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 I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on July 16, 2010:

Beth Anne Locke

[redacted]

Kathryn Cimera, General Counsel
Allison A. Murphy, Staff Attorney
PERF
143 W. Market St.
Indianapolis IN 46204
(317) 233-4132

Chief, Lawrence Twp. Fire Dept.
6260 E. 86th St.
Indianapolis, IN 46250

Wayne E. Uhl
Administrative Law Judge