

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

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

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
RECOMMENDED DECISION**

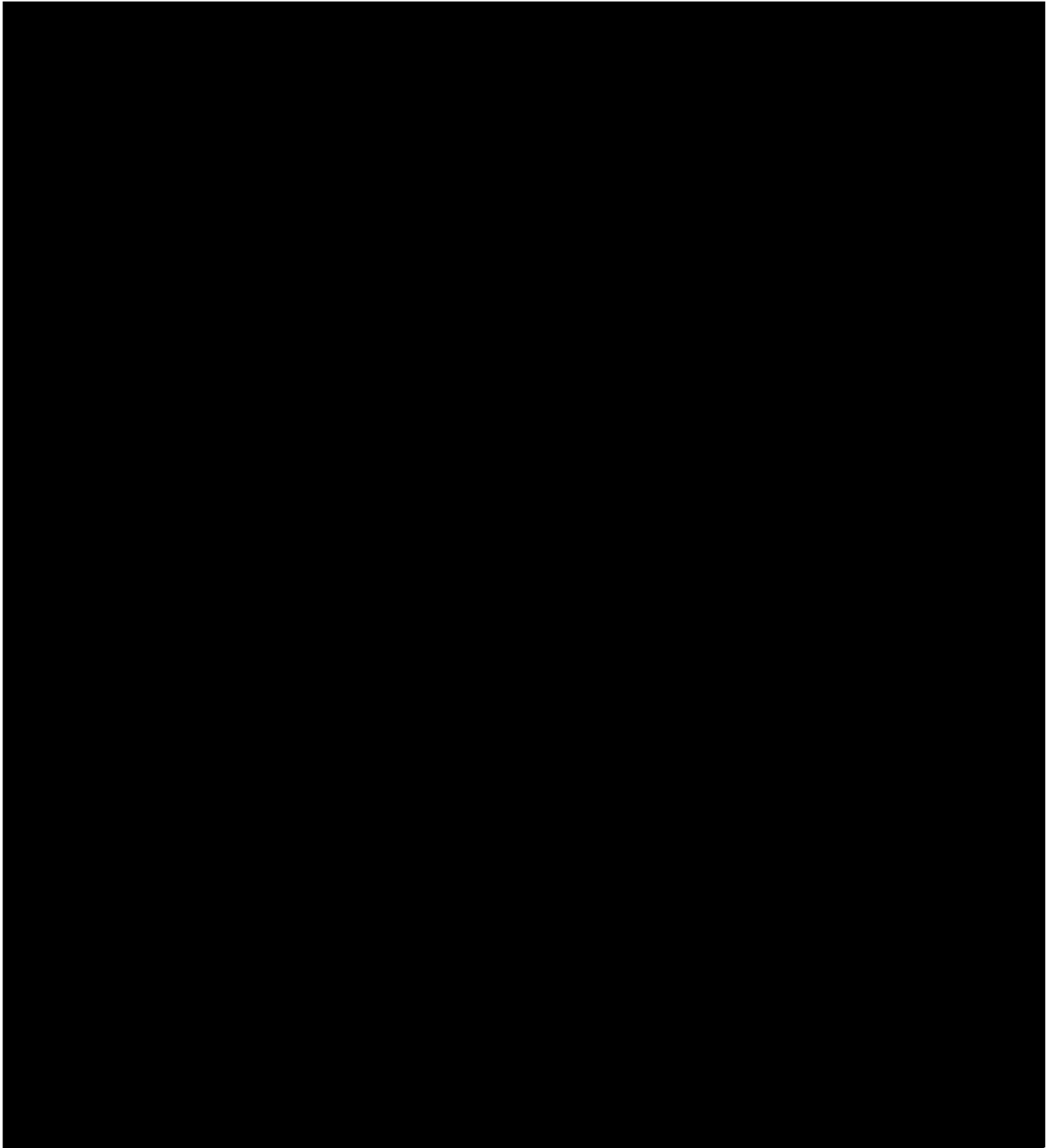
This case was assigned to me for determination of the appeal of Timothy Somers from the initial determination of the Director of the 1977 Fund granting Somers disability benefits, finding his disability to fall within Class 3, and finding the degree of impairment to be 39.30%. Somers timely objected to this determination and requested a hearing. The PERF Board now states that the letter was in error, and that the degree of impairment should have been 48%.

A hearing was held on September 15, 2009. Somers represented himself after being reminded of his right to be represented by counsel. The PERF Board as administrator of the 1977 Fund was represented by attorneys Kathryn Cimera and Allison Murphy.

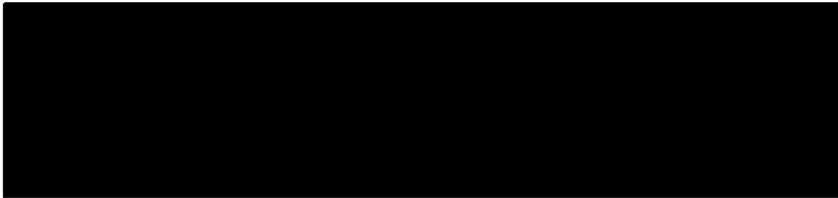
At the outset, Somers stated that he left his documents at home, and he was offered a continuance, but he agreed to proceed when it turned out that PERF counsel had copies of the documents Somers planned to rely on.


Somers called himself and Earl Wysor as witnesses. The PERF Board called Willie Floyd Teamer, Jr. and Dr. Omkar Markand. The following exhibits were received into evidence at the hearing without objection:





After the hearing, by agreement of the parties, certain exhibits that had been considered by the local board but were not introduced at the hearing were submitted. These have been marked as follows:





A post-hearing conference was held by telephone to clarify whether Somers' pre-1990 service qualified him as a pre-1990 member of the Fund. The PERF Board took the position that, because Somers withdrew his contributions and did not refund them, he should not be considered a pre-1990 member, and Somers did not contest this. As further support for this position, the PERF Board submitted the following supplemental exhibits which have been marked as follows:

35. Indiana Police Pension Fund Membership Record, Timothy Mitchell Somers (date hired 1/6/82)
36. Indiana Police Pension Fund Membership Record, Timothy Mitchell Somers (date hired 9/27/96)
37. Line of Duty Determination Review Request
38. Claim for Refund of Contributions (received 11/3/86)

### **Findings of Fact**

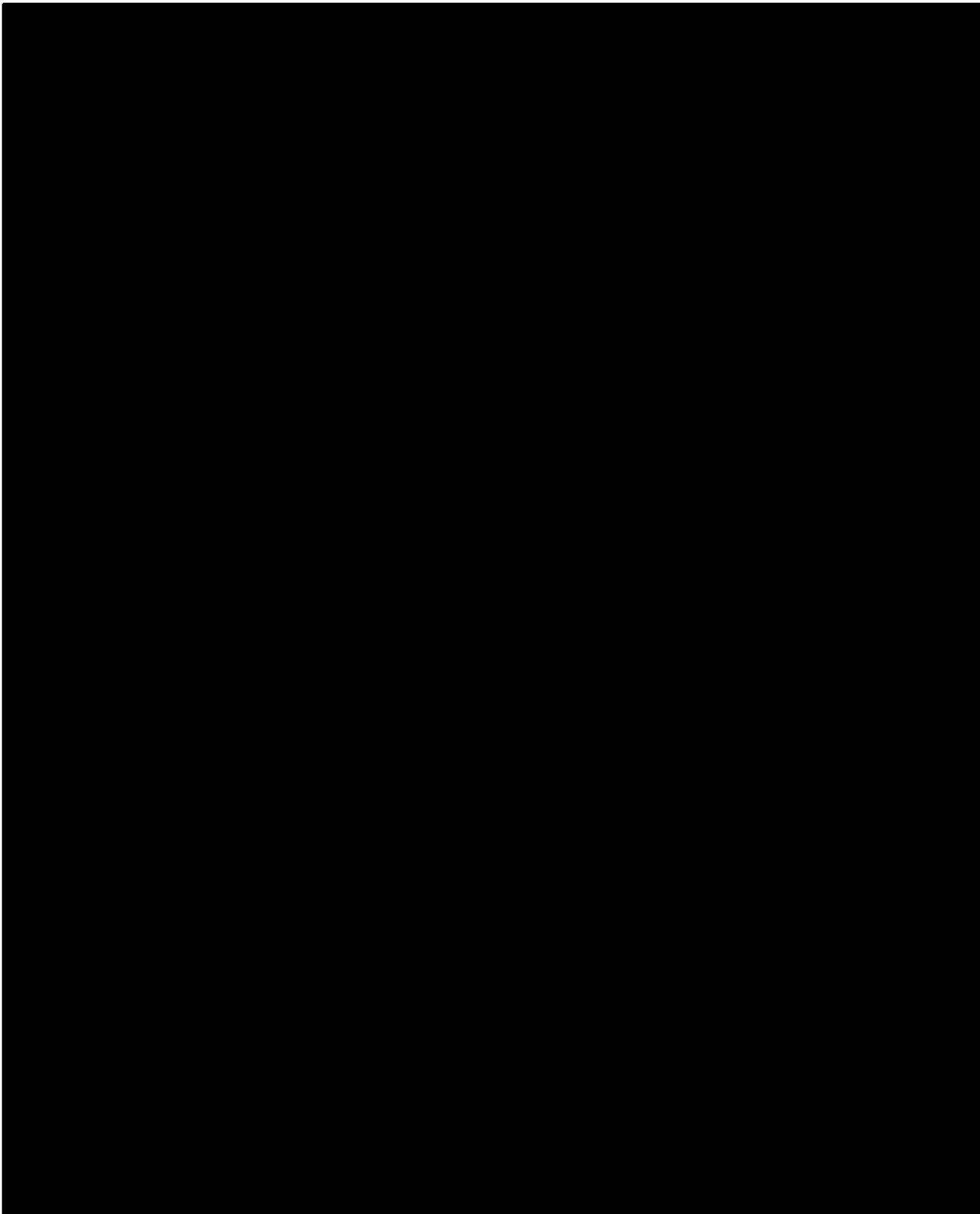
#### **A. Background**

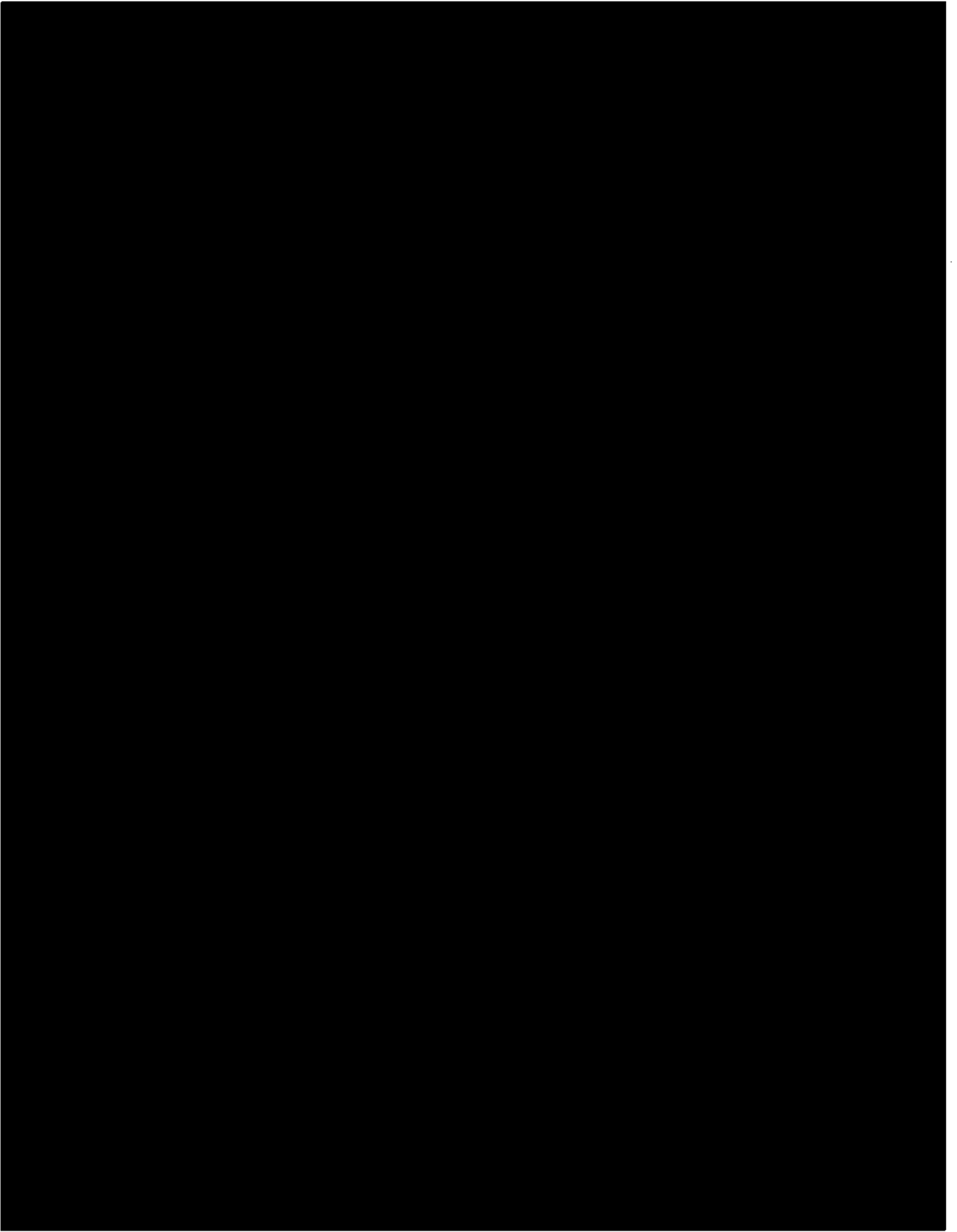
1. Timothy Somers was employed as a police officer by the City of Gary from January 1982 through October 1986. He did not receive any relevant injuries during that tour of service. Upon resignation he received a refund of his contributions.

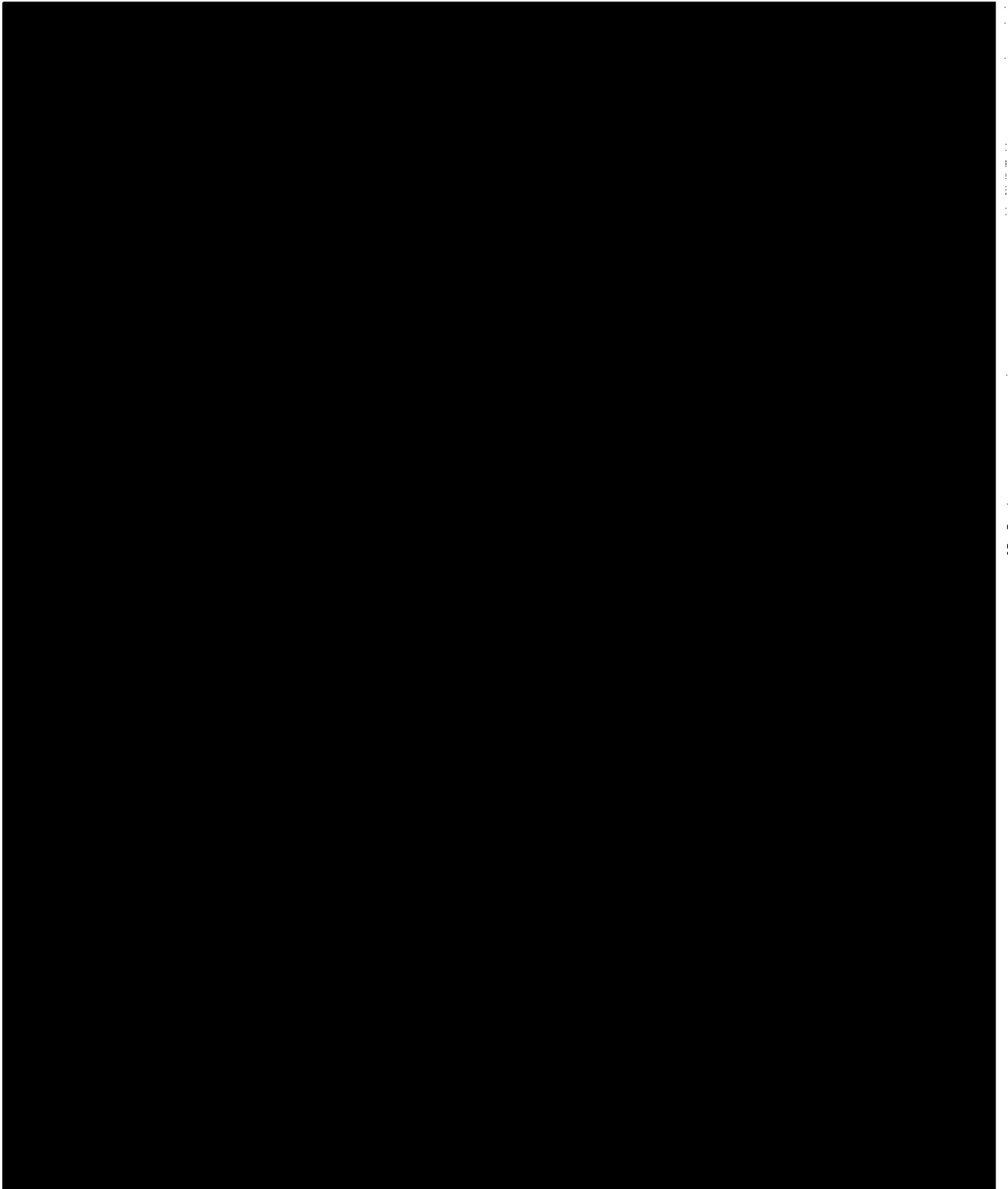
2. Somers was re-hired by the City of Gary in September 1996. He did not refund his contributions made from 1982 to 1986. Therefore, for the purposes of this decision, he is considered to have been "hired for the first time" in September 1996.

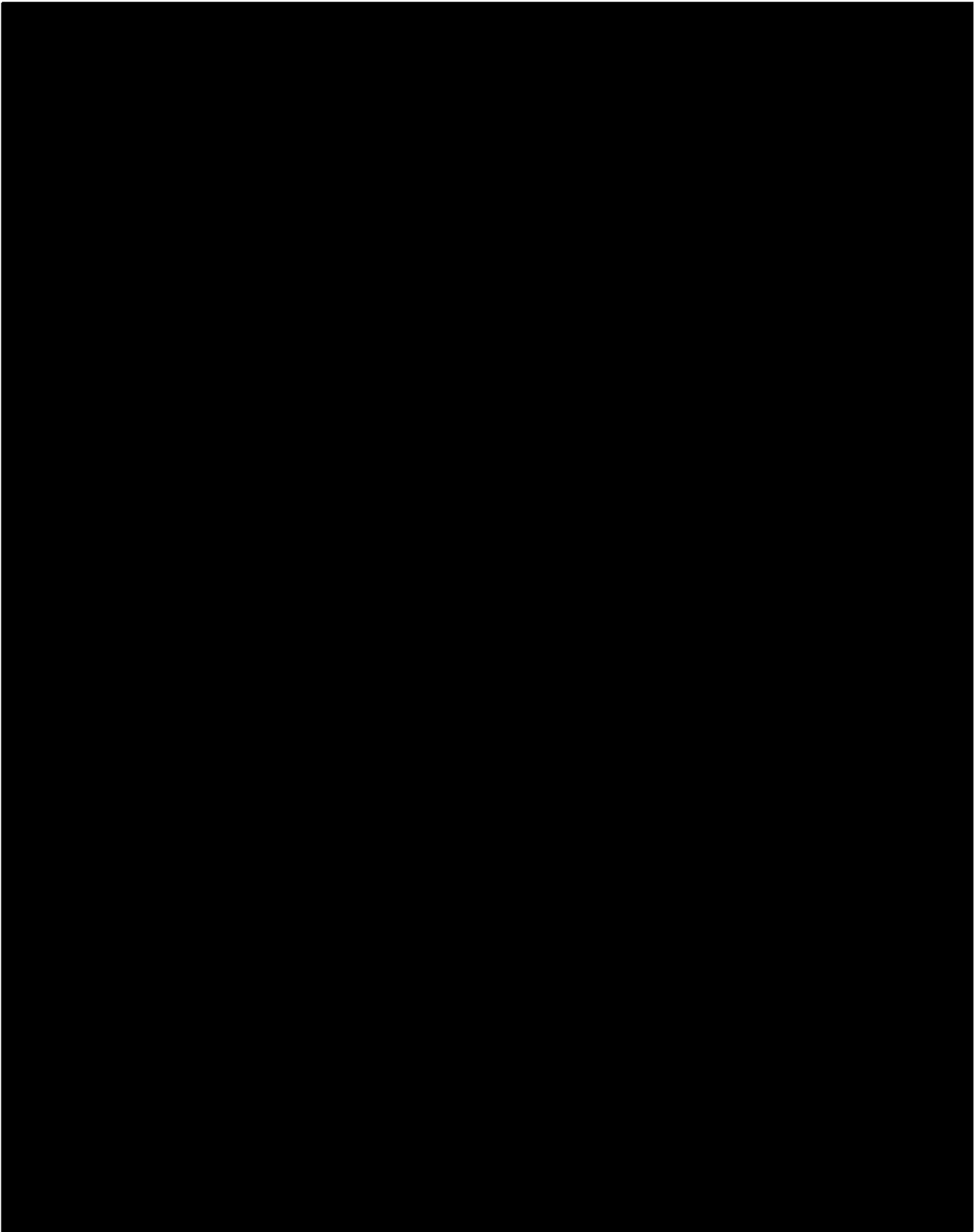
3. Somers testified that he did not suffer any injuries to or have any problems with

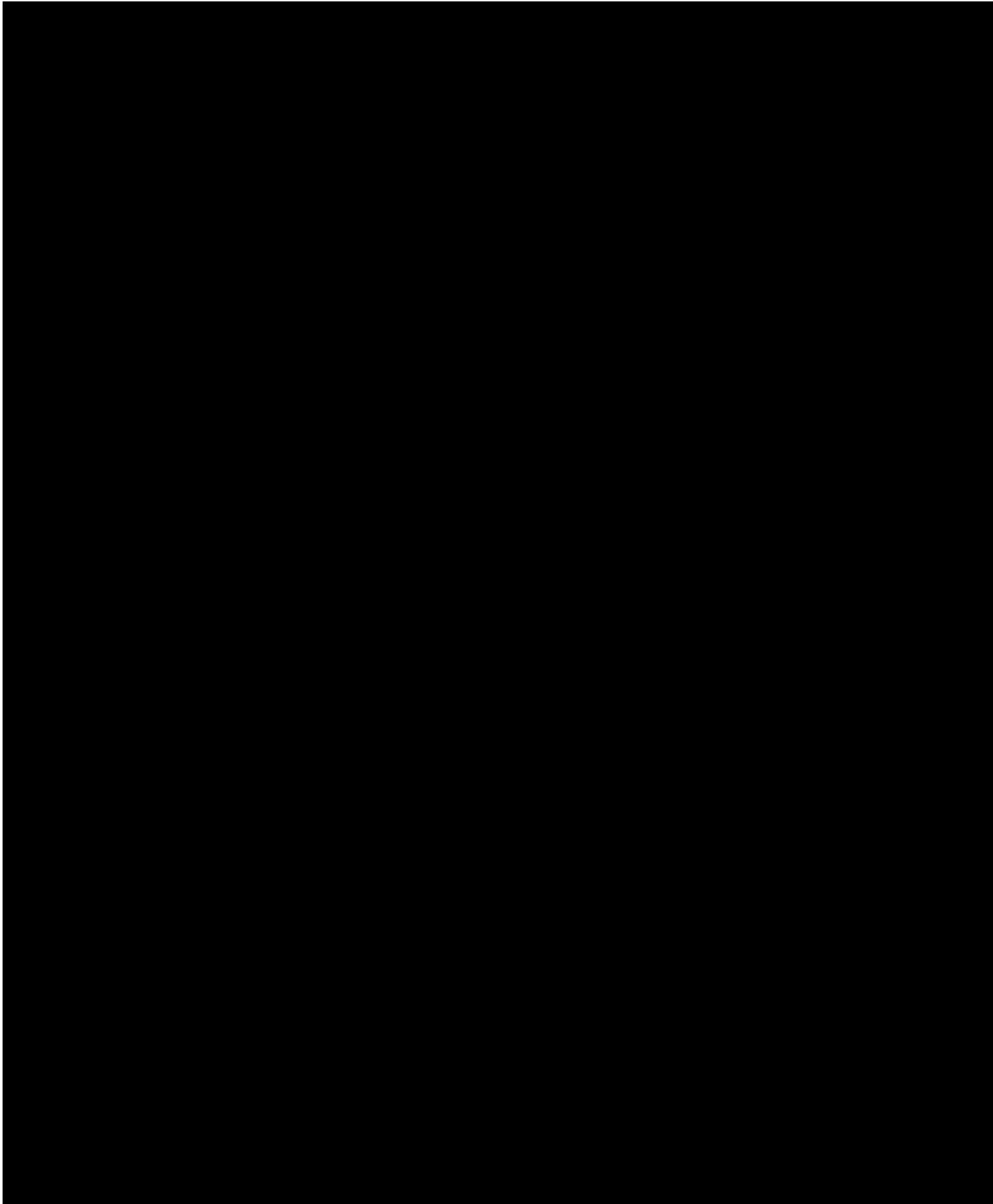




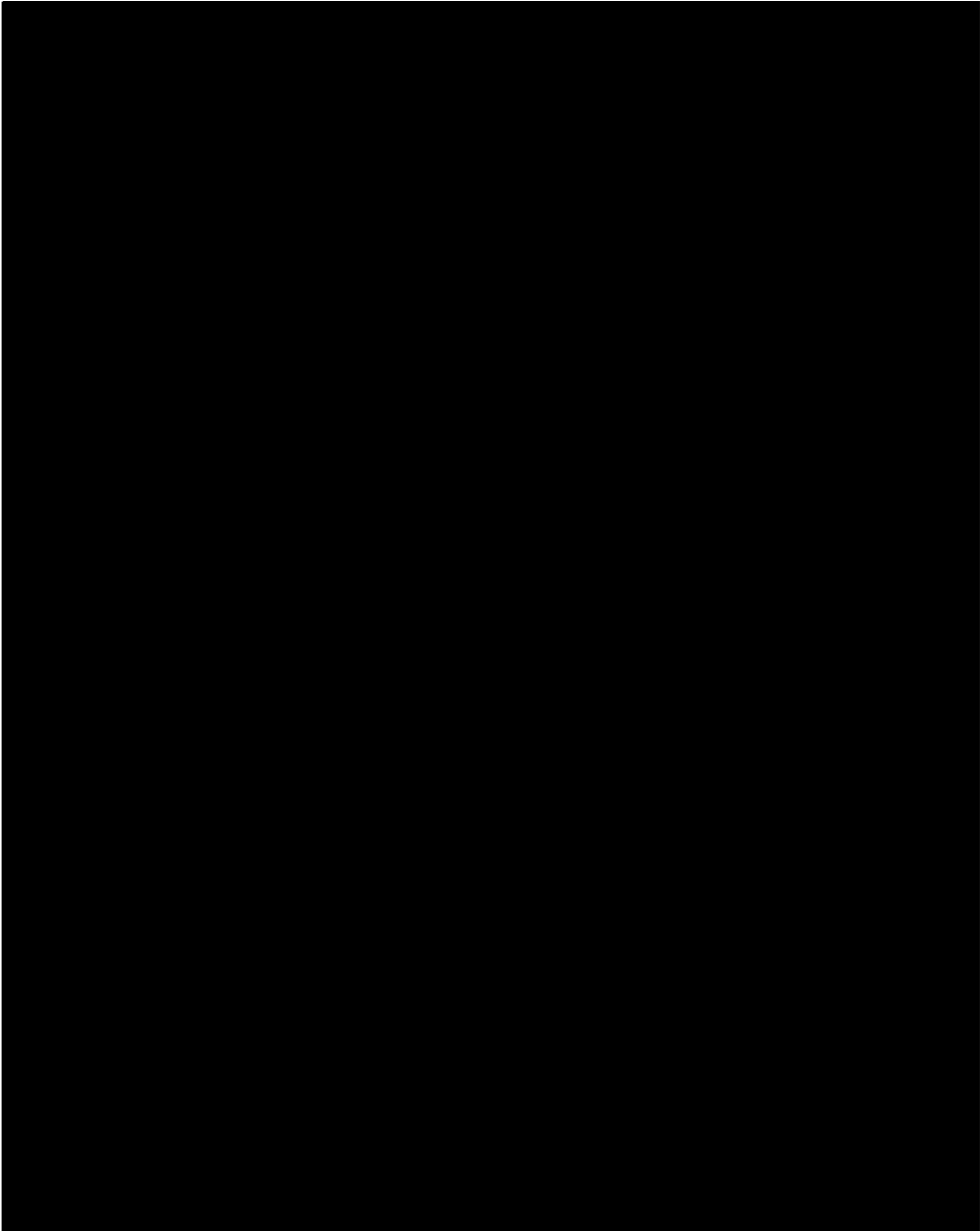


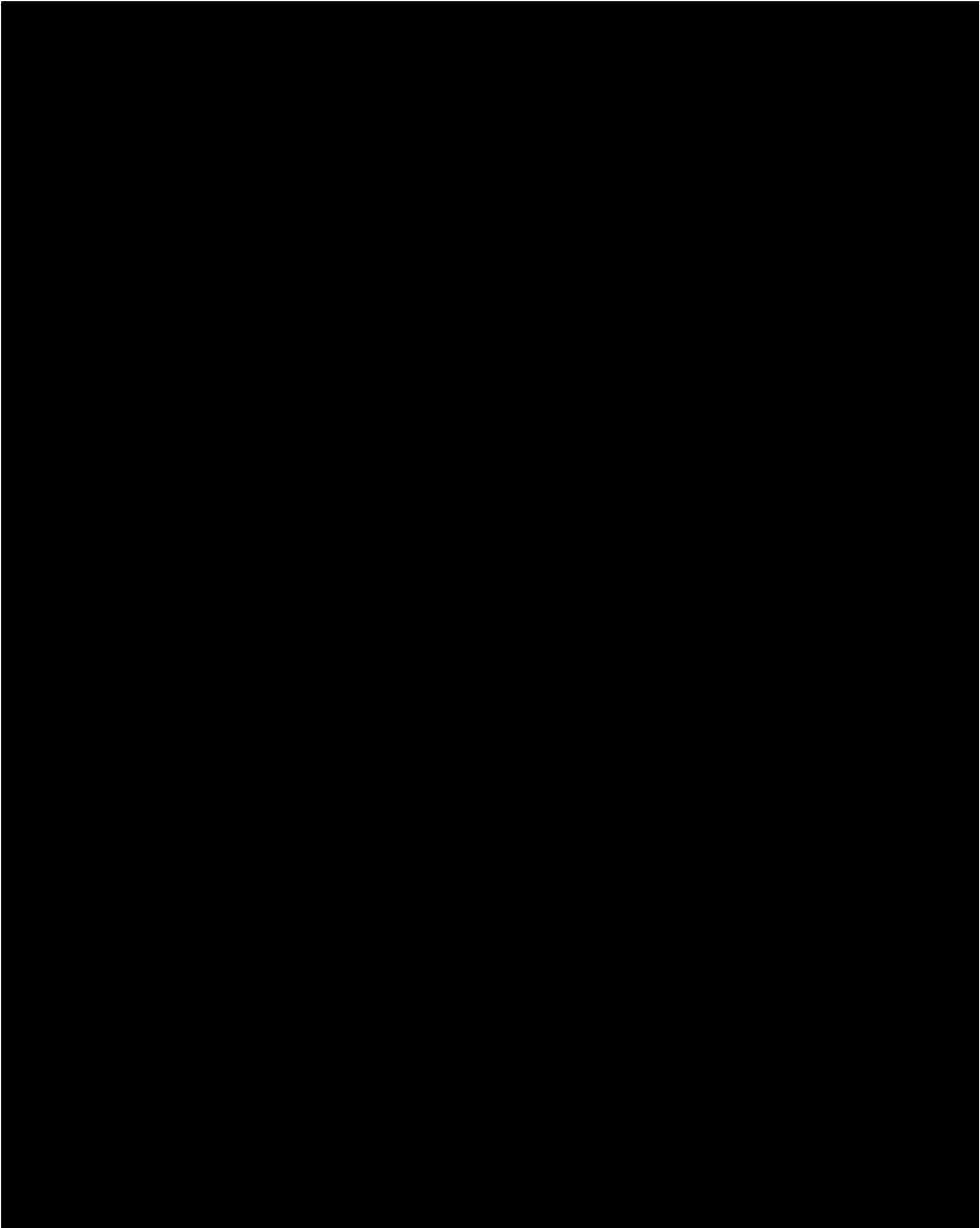


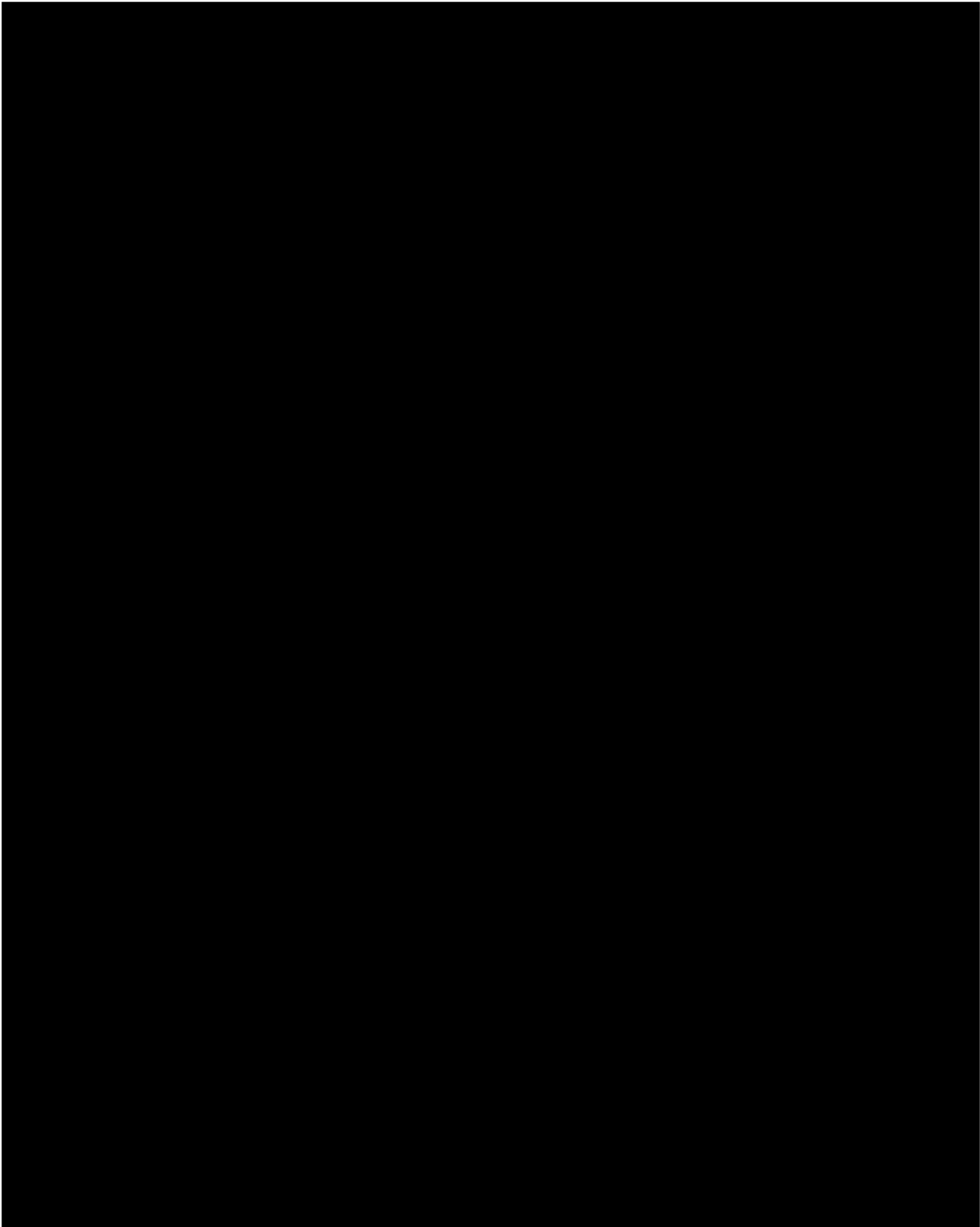


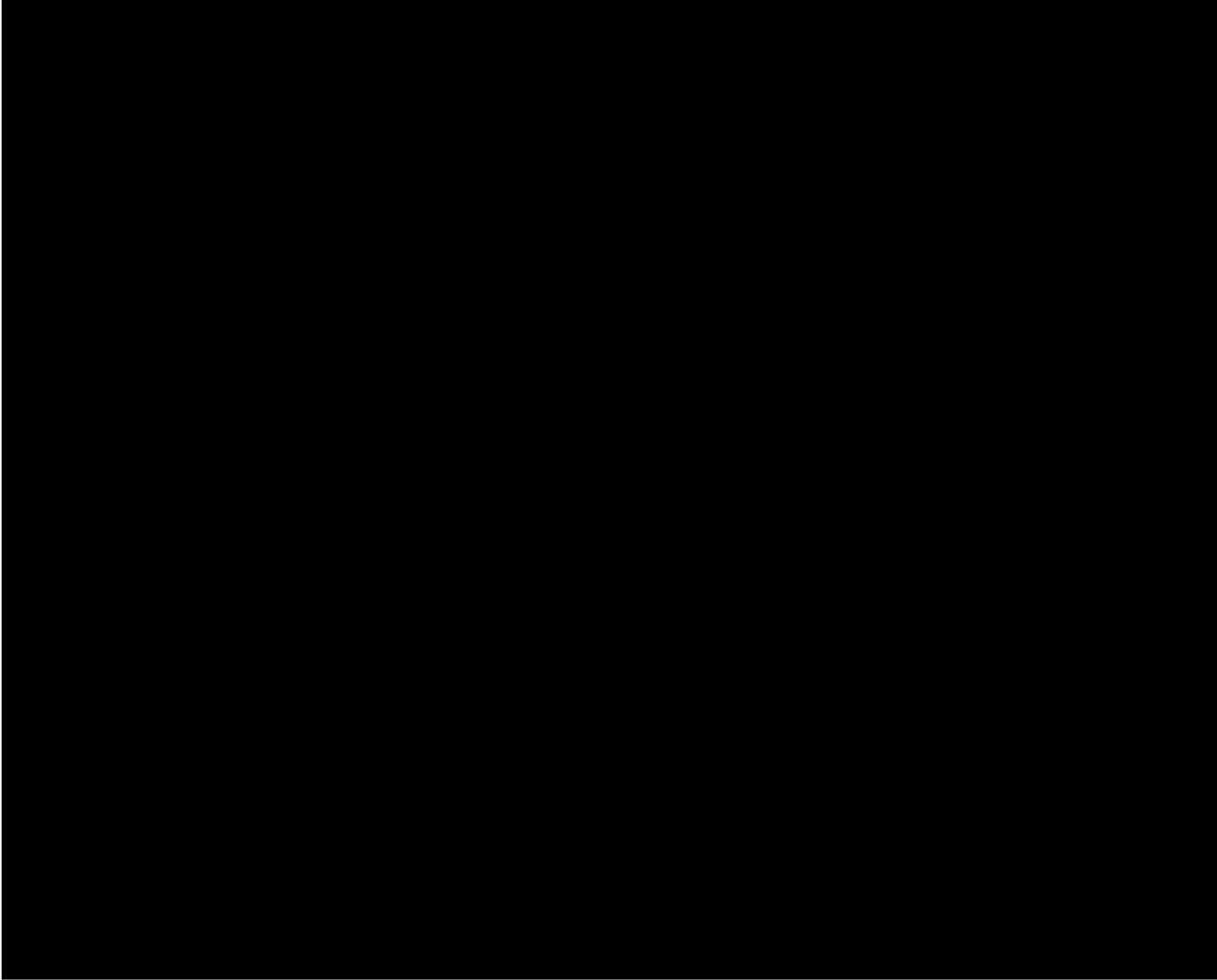












**J. Initial determination and proceedings**

77. On May 22, 2009, the Director of the 1977 Fund issued an initial determination based on Dr. Markand's assessment that Somers is disabled, that his disability is class 3, and that his degree of impairment is 39.30%. This latter figure was an error, as Dr. Markand had determined all along that the degree of impairment is 48%.

78. By letter faxed on June 7, 2009, Somers objected to the initial determination. The Fund concedes that Somers' request for review was timely (Letter to ALJ Uhl, 6/17/09).

79. Any finding of fact contained in the Conclusions of Law below 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 Somers, 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. Granzel*, 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 he applied for disability benefits, Somers was an employee of the City of Gary in its police department and a member of the 1977 Fund. I.C. § 36-8-8-7(a). His 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.

## 1. Covered impairment

“A covered impairment is an impairment that permanently or temporarily makes a fund member unable to perform the essential function of the member’s duties, considering reasonable accommodation to the extent required by the Americans with Disabilities Act [ADA], with the police or fire department.” I.C. § 36-8-8-12.3(b). There is no dispute that Somers has covered impairments that prevent him from working as a police officer. He has low back and neck pain, right shoulder pain, and left knee pain. He also has significant psychological issues, including anxiety and depression. (He has diabetes, but does not contend that his diabetes would prevent him from working as a police officer.)

## 2. Class of impairment

The next question is which class the impairment falls into under I.C. § 36-8-8-12.5(b):

(1) . . . A Class 1 impairment is a covered impairment that is *the direct result* of one (1) or more of the following:

(A) A personal injury that occurs while the fund member is on duty.

(B) A personal injury that occurs while the fund member is off duty and is responding to:

(i) an offense or a reported offense, in the case of a police officer; or

(ii) an emergency or reported emergency for which the fund member is trained, in the case of a firefighter.

(C) An occupational disease (as defined in IC 22-3-7-10). A covered impairment that is included within this clause and subdivision (2) shall be considered a Class 1 impairment.

(D) A health condition caused by an exposure risk disease that results in a presumption of disability or death incurred in the line of duty under IC 5-10-13.

(2) . . . A Class 2 impairment is a covered impairment that is a *duty related disease*. A duty related disease means a disease *arising out of* the fund member’s employment. A disease shall be considered to arise out of the fund member’s employment if it is apparent to the rational mind, upon consideration of all of the circumstances, that:

(A) there is a connection between the conditions under which the fund member’s duties are performed and the disease;

(B) the disease can be seen to have followed as a natural incident of the fund member's duties as a result of the exposure occasioned by the nature of the fund member's duties; and

(C) the disease can be traced to the fund member's employment as the proximate cause.

(3) . . . A Class 3 impairment is a covered impairment that is not a Class 1 impairment or a Class 2 impairment.

(Emphasis added.) Thus, both Class 1 and Class 2 require that the disability be caused by or related to the performance of the member's duties, with Class 1 being "the direct result" and Class 2 being "duty related" and "arising out of" the member's employment. A Class 3 impairment is everything else, including conditions caused by factors unrelated to duty.

Therefore the combined legal and factual question is one of causation and, with respect to Class 1 and Class 2, the distinction between "the direct result" and "duty related." When reviewing a statute, effect and meaning must be given to every word, and a part of a statute will not be construed as to be meaningless if it can be reconciled with the rest of the statute. *Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068, 1071 (Ind. 2003); *Brown v. State*, 774 N.E.2d 1001, 1004 (Ind. App. 2002). The use of the word "direct" implies a strict requirement of causation between the on-duty injury and the impairment, and use of the word "the" implies exclusivity. By contrast, in defining a Class 2 impairment, the legislature used less strict language such as "arising out of," "connection between," "natural incident of" and "proximate cause." A Class 1 impairment requires a showing that an injury in the line of duty was the sole cause of the impairment, while a Class 2 impairment requires a showing that the on-duty injury contributed to but was not the sole cause of the impairment.

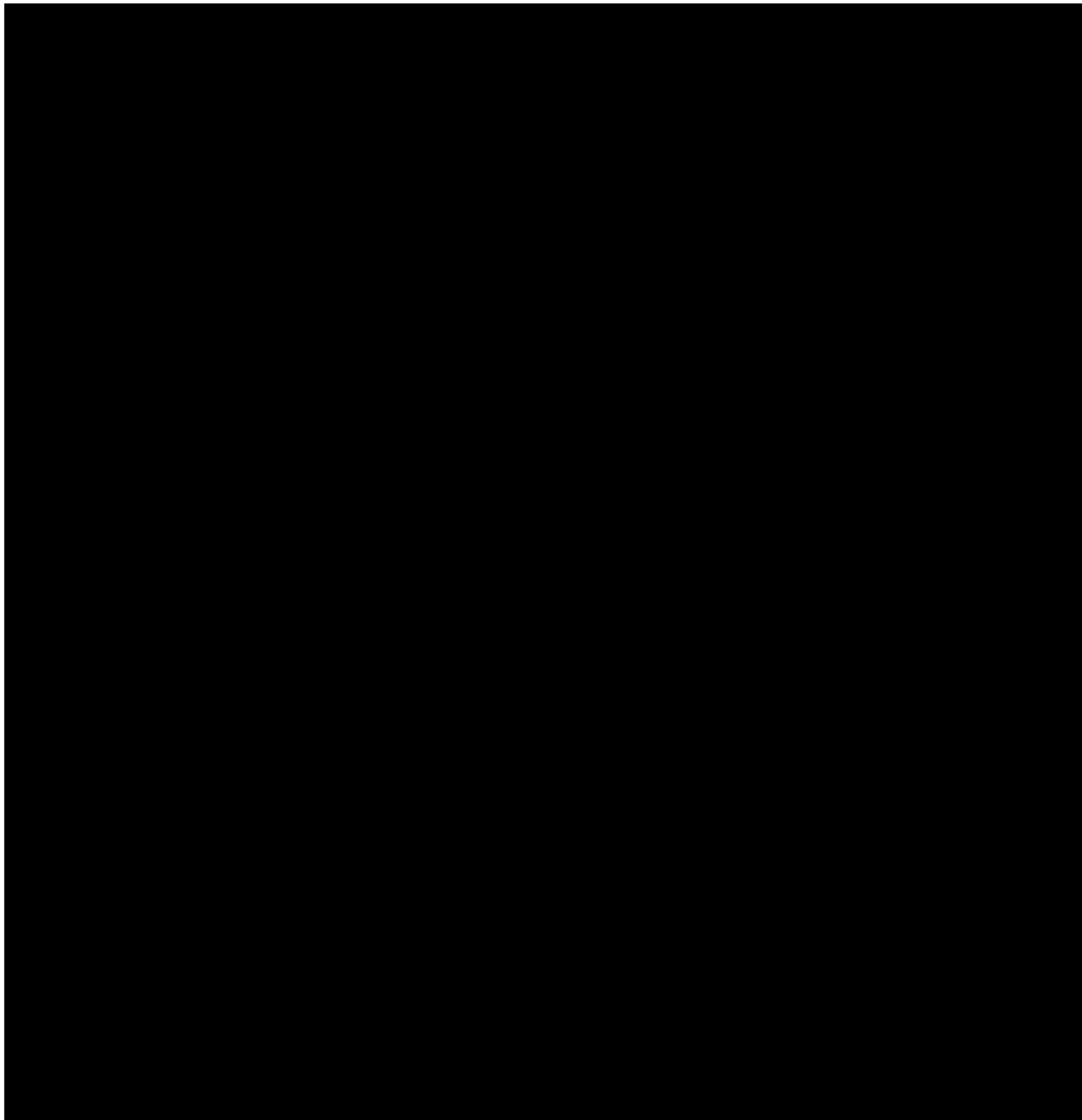
In this case, the PERF Board, relying on its medical authority, determined that Somers' impairments were not duty-related in any way, so fall into Class 3. Somers believes that his impairments were caused by specific injuries he received on the job—[REDACTED] the

As explained below, Somers has failed to show by a preponderance of the evidence that his impairments were the direct or indirect result of on-duty injuries. His burden is particularly high because the PERF Board presented expert testimony which was not discredited or rebutted by Somers.

When an injury is objective in nature, the plaintiff is competent to testify as to the injury and such testimony may be sufficient for the jury to render a verdict without expert medical testimony. Ordinarily, however, the question of the causal connection between a permanent condition, an injury and a pre-

existing affliction or condition is a complicated medical question. When the issue of cause is not within the understanding of a lay person, testimony of an expert witness on the issue is necessary.

*Foddrill v. Crane*, 894 N.E.2d 1070, 1077 (Ind. App. 2008), quoting *Daub v. Daub*, 629 N.E.2d 873, 877-78 (Ind. App. 1994).







### **3. Degree of impairment**

The degree of impairment is determined by the fund's medical authority based on a standard adopted by the PERF Board. I.C. § 36-8-8-13.1(c). The PERF Board has adopted the U.S. Department of Veterans Affairs Schedule for Rating Disabilities in effect at the time the application for disability benefits is filed. 35 IAC 2-5-5.1. The VA Schedule is found at 38 CFR §§ 4.1 *et seq.* (July 1, 2008).<sup>1</sup>

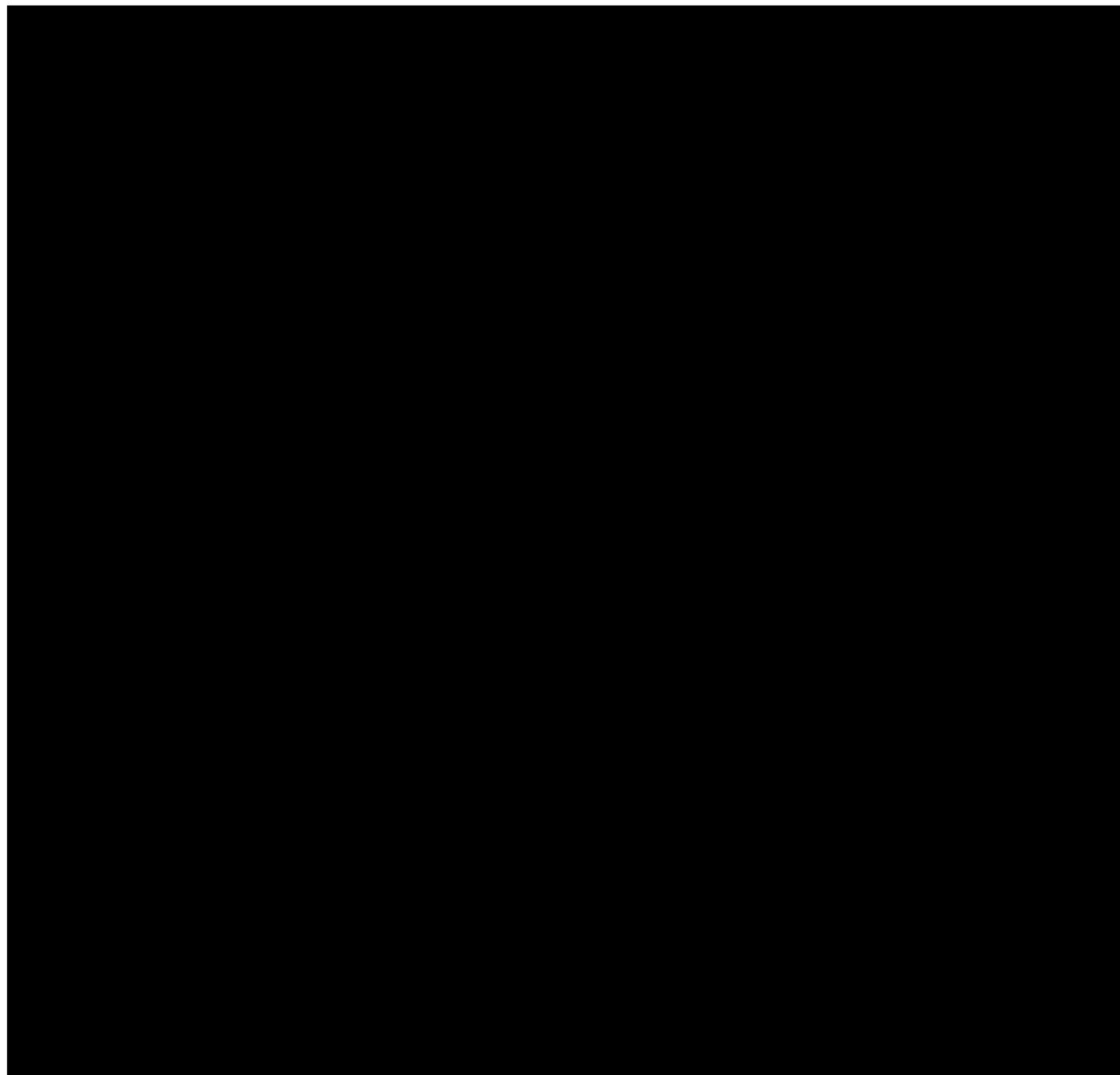
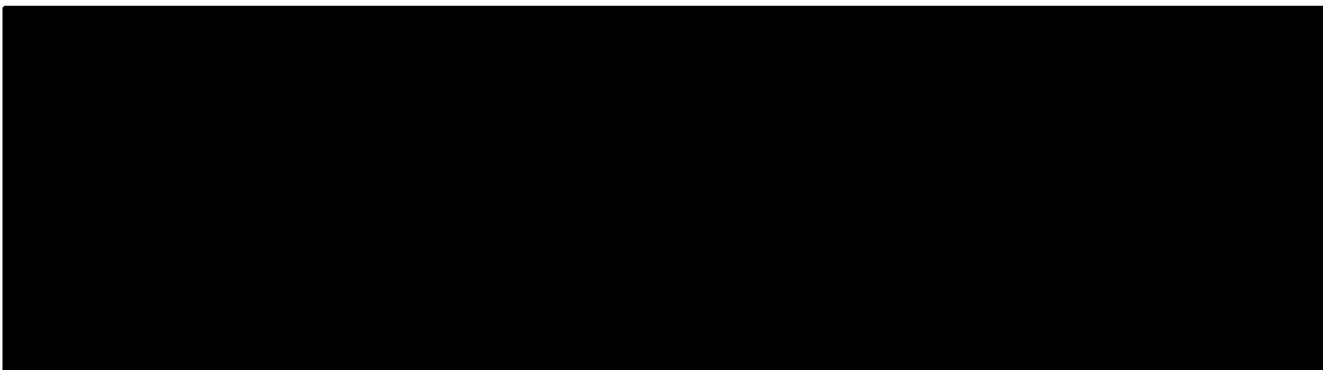
The first step is to determine the degree for each impairment. All of the ratings given by Dr. Markand were based on the VA ratings for the musculoskeletal system, 38 CFR § 4.71a.

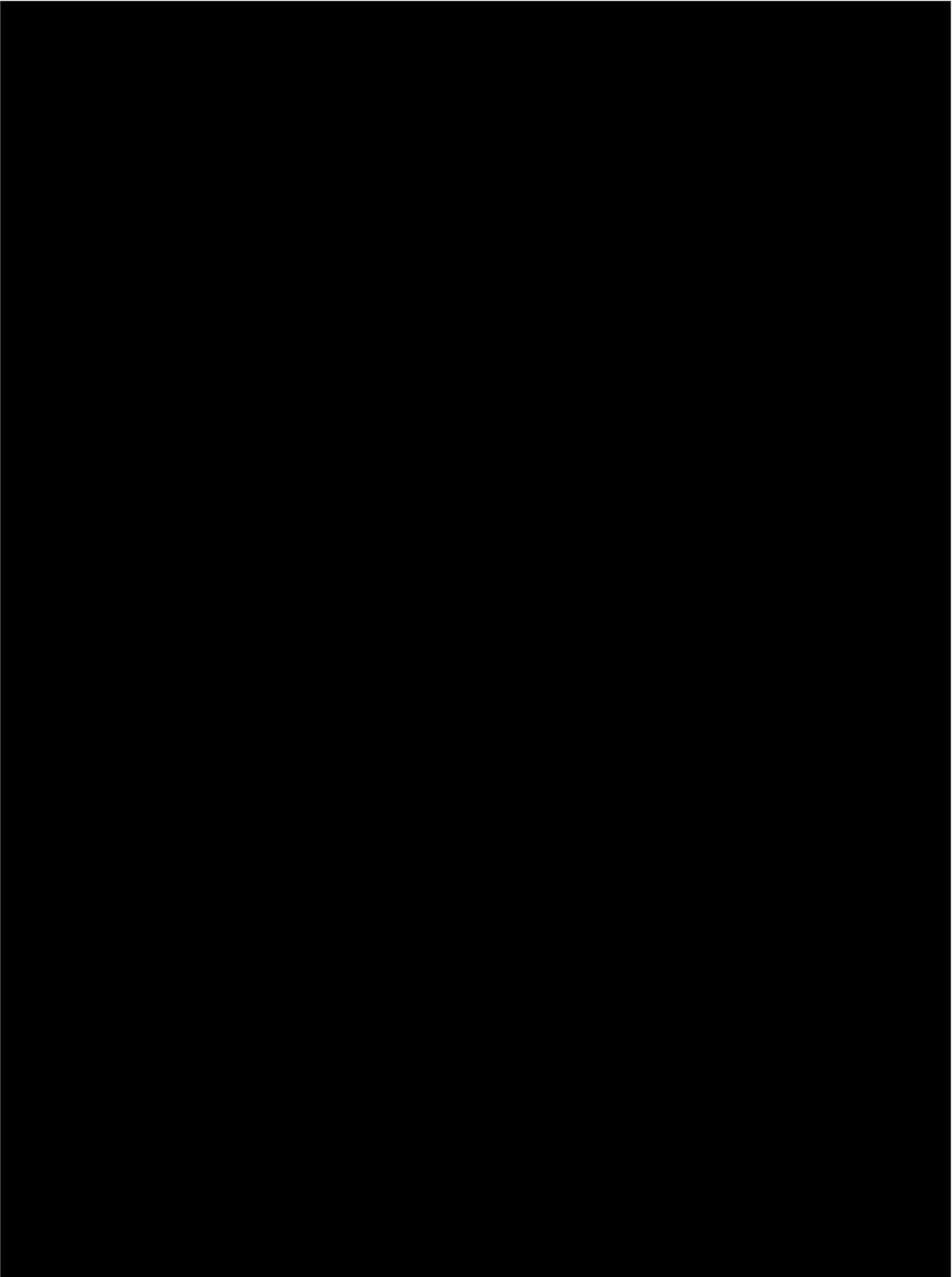
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<sup>1</sup> Exhibit 21, the schedule used by Dr. Markand, is dated 6/25/04. The ALJ cross-referenced the July 1, 2008 version of the rules promulgated in the Code of Federal Regulations, but did not find any relevant differences.





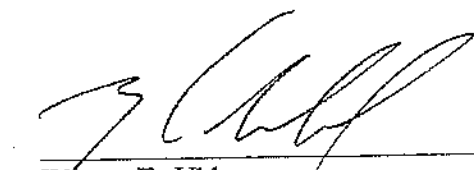
### Recommended Decision

Based on the foregoing findings of fact and conclusions of law, it is recommended that the initial determination that Officer Somers suffers from a covered impairment and his impairments are Class 3 disabilities be affirmed.

It is further recommended that the initial determination that the degree of impairment is 48% be vacated, and that Officer Somers be given a physical examination for measurement of the appropriate criteria for impairment [REDACTED]

etc.). The objective criteria resulting from this examination shall then be applied by the medical authority to recalculate the total impairment rating using the VA Schedule. The recalculation shall be in accordance with 38 CFR § 4.25, including a final rounding of the result to the nearest value divisible by 10. Officer Somers' disability benefit shall then be recalculated pursuant to the newly determined degree of impairment, and he shall be paid any increase retroactively to the date of his application for disability benefits.

DATED: November 17, 2009.

  
\_\_\_\_\_  
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**

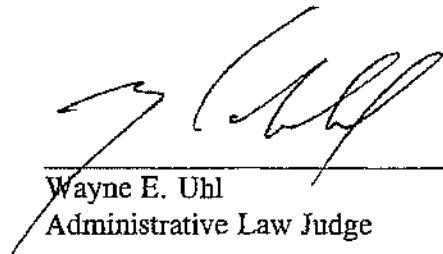
I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on November 17, 2009:

Timothy Somers



Kathryn Cimera, General Counsel  
Allison Murphy, Attorney  
PERF  
143 W. Market St.  
Indianapolis IN 46204  
(317) 234-6222

Chief, Gary Police Department  
555 Polk St.  
Gary, IN 46402



Wayne E. Uhl  
Administrative Law Judge

A handwritten signature in black ink, appearing to read 'Wayne E. Uhl', is written over a horizontal line. Below the line, the name and title are printed.