

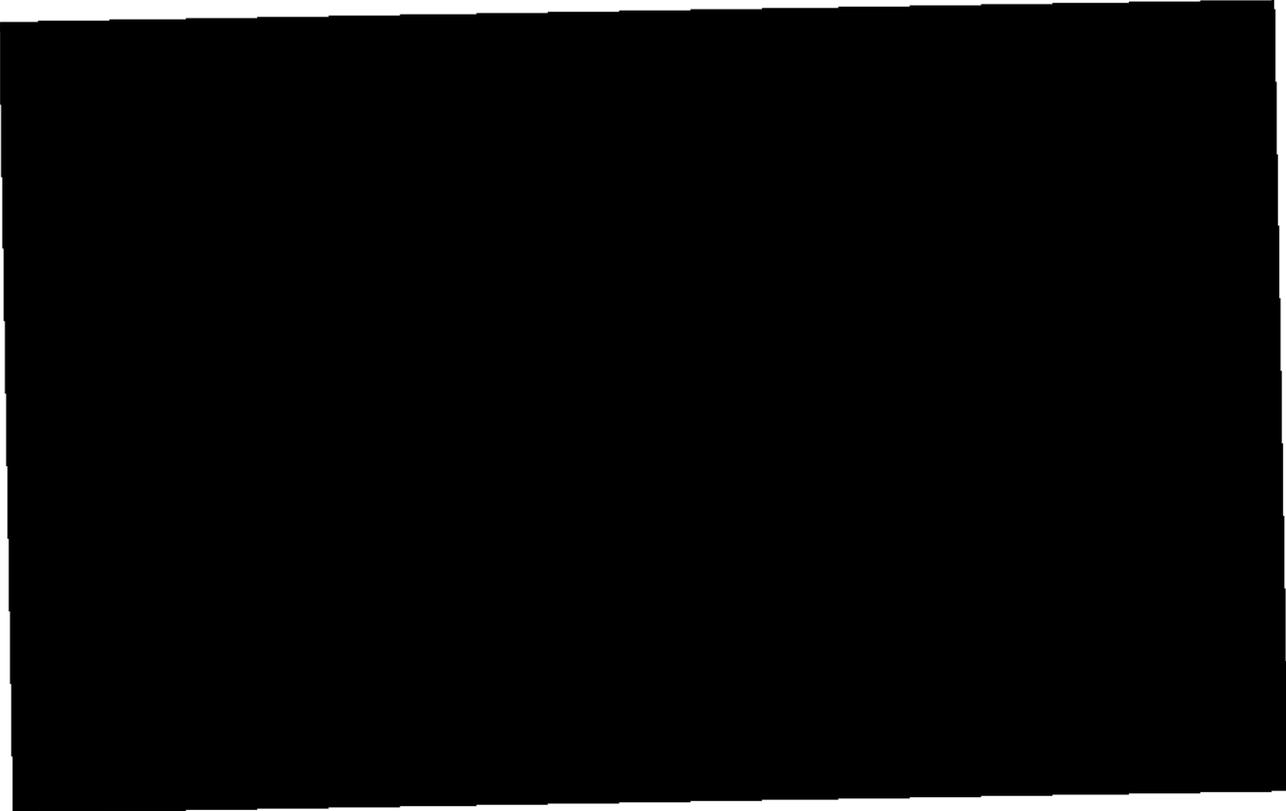
**BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND**

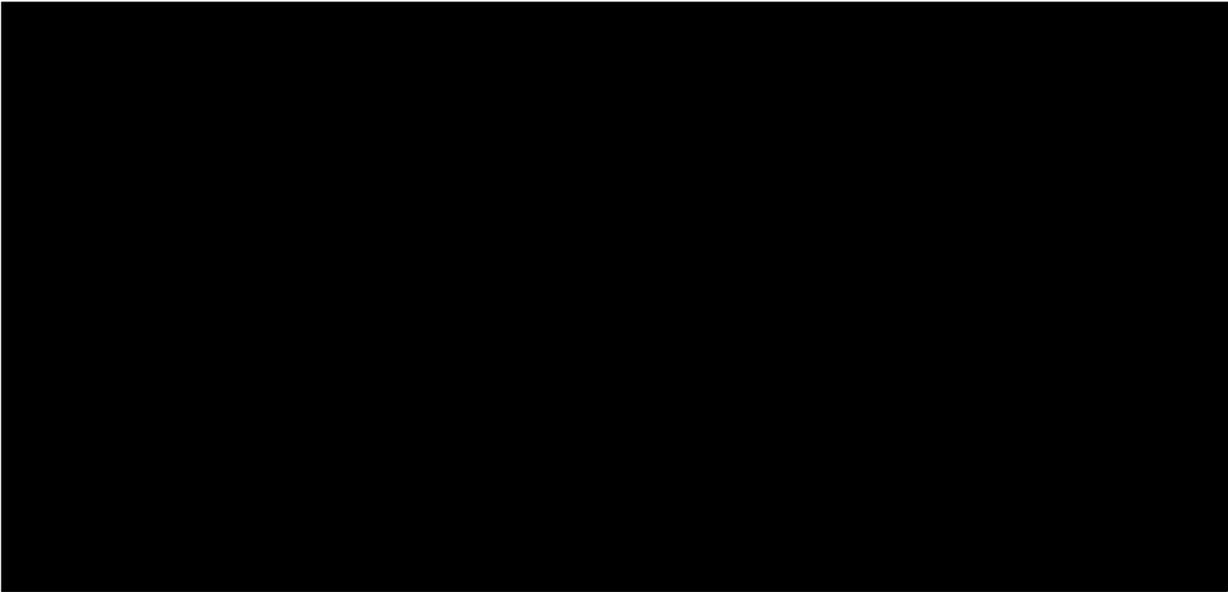
IN THE MATTER OF)	1977 POLICE OFFICERS' AND
CHRISTOPHER M. REILY,)	FIREFIGHTERS' PENSION AND
)	DISABILITY FUND
Petitioner.)	

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

This case was assigned to me for determination of the appeal of Christopher M. Reily from the initial determination of the Director of the 1977 Fund denying Reily's application for disability benefits. Reily timely objected to this determination and requested a hearing.

A hearing was held on March 13 and 14, 2007. Reily was represented by Matthew G. Langenbacher. The PERF Board as administrator of the 1977 Fund was represented by Linda I. Villegas. Reily called witnesses Christopher Reily (petitioner), Chief Brian Lott and Dr. Vahid Osman. The PERF Board called witnesses Dr. Omkar Markand and R. Thomas Parker. The following exhibits were received into evidence at the hearing without objection:





After post-hearing briefs were filed, oral argument was heard on August 14, 2007. At that hearing, the parties agreed to submit additional exhibits:

- N. Letter from Matthew Langenbacher to Jordan D. Church and Chief Lott, 4/24/06
- O. Appeal of Local Board Findings, 5/31/07
- P. Local Board Findings of Fact
- Q. Letter from Langenbacher to Director Parker, 8/16/06

Findings of Fact

A. Background

1. Christopher Reily was hired by the Fishers Fire Department in 2003, and as such was a member of the 1977 Fund. Ind. Code §§ 36-8-3-21(b), 36-8-8-7(a).

2. Before joining the Fishers Fire Department, Reily served in the military as a medic. In his service, he observed trauma on a regular basis, including serious military and civilian injuries and deaths.

3. Upon entering military service and serving in the military, Reily, 

4. Reily graduated first of ten in his fire department recruit class. In his

5. While working as a firefighter, Reily was evaluated every six months

6. Working as a firefighter could be stressful.

7. In addition to his full-time work, Reily attended paramedic school.

9. In the course of his work as a firefighter, Reily rendered assistance to persons who suffered traumatic injuries and death, including injuries in which eyes had come out of their sockets.

B. Accident run, March 26, 2005

10. On March 26, 2005, Reily was among firefighters dispatched to the scene of what was reported as a motor vehicle accident with serious personal injury.

11. Upon arrival at the scene, the firefighters observed a female lying on the side of the road. Reily was one of the first to reach her.

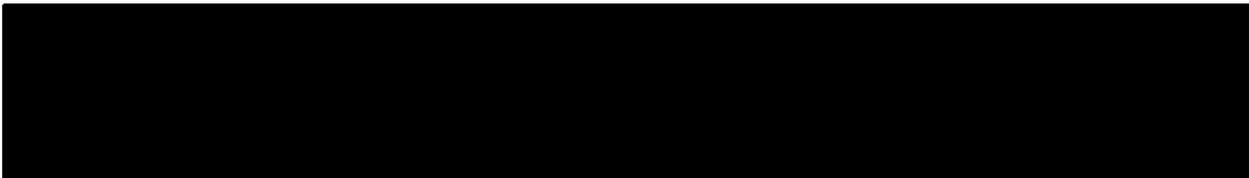
12. Blood and long hair obscured immediate observation of her head injuries.

13. Following standard procedure, Reily first checked for breathing and pulse. He found no breathing but a faint pulse. He then began the task of establishing an airway and preparing to apply an ambubag to force oxygen into the woman's lungs.

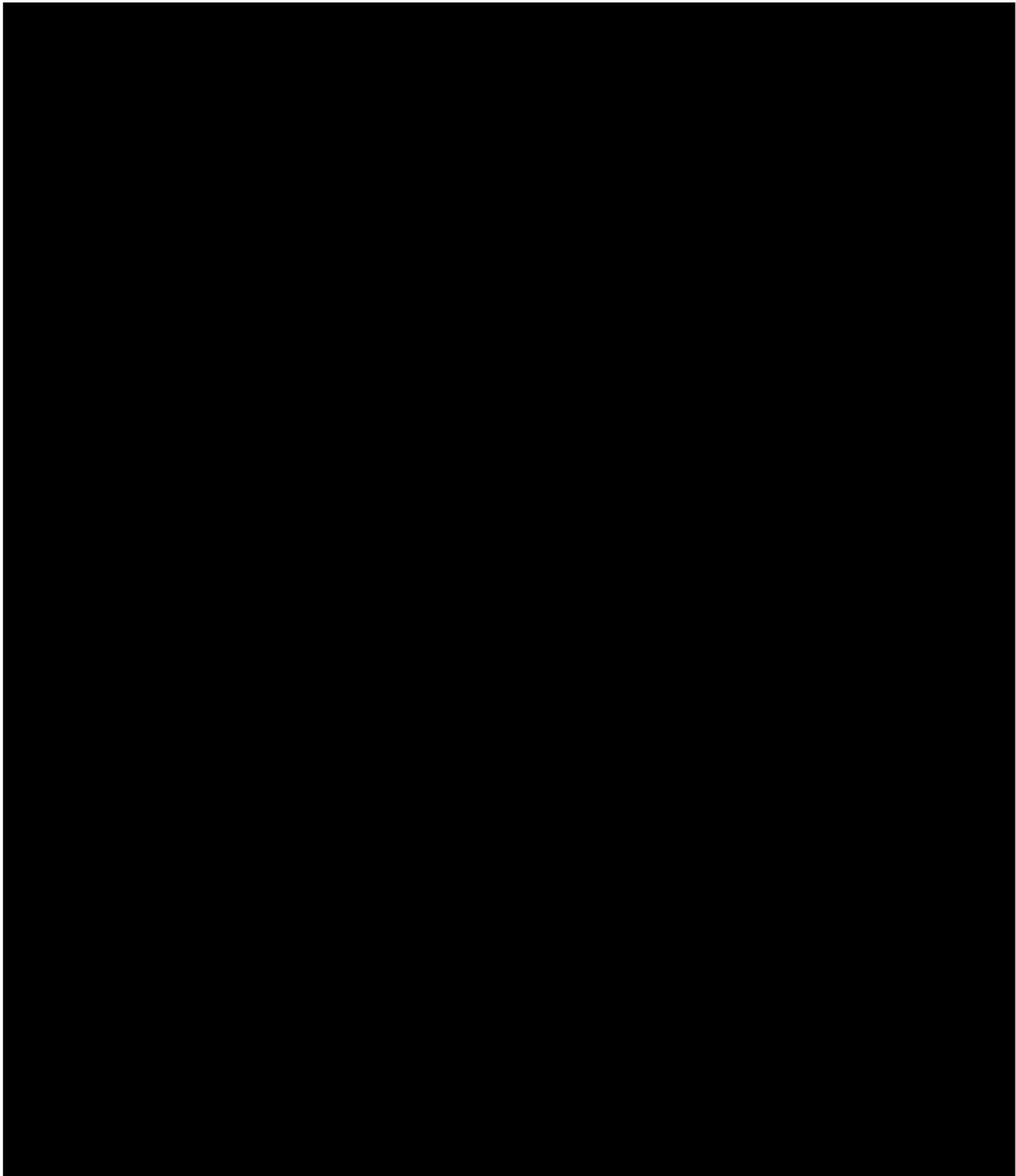
14. A paramedic arrived to assist and moved the woman's head to help establish an airway. The rescuers then first observed that the woman's head was misshapen into a somewhat flat shape, brain matter was coming out of a hole in her head, and her right eye had popped out of its socket. The paramedic stated that there was nothing they could do. They were later told that the patient had jumped from a moving truck and the truck's rear wheel ran over her head.

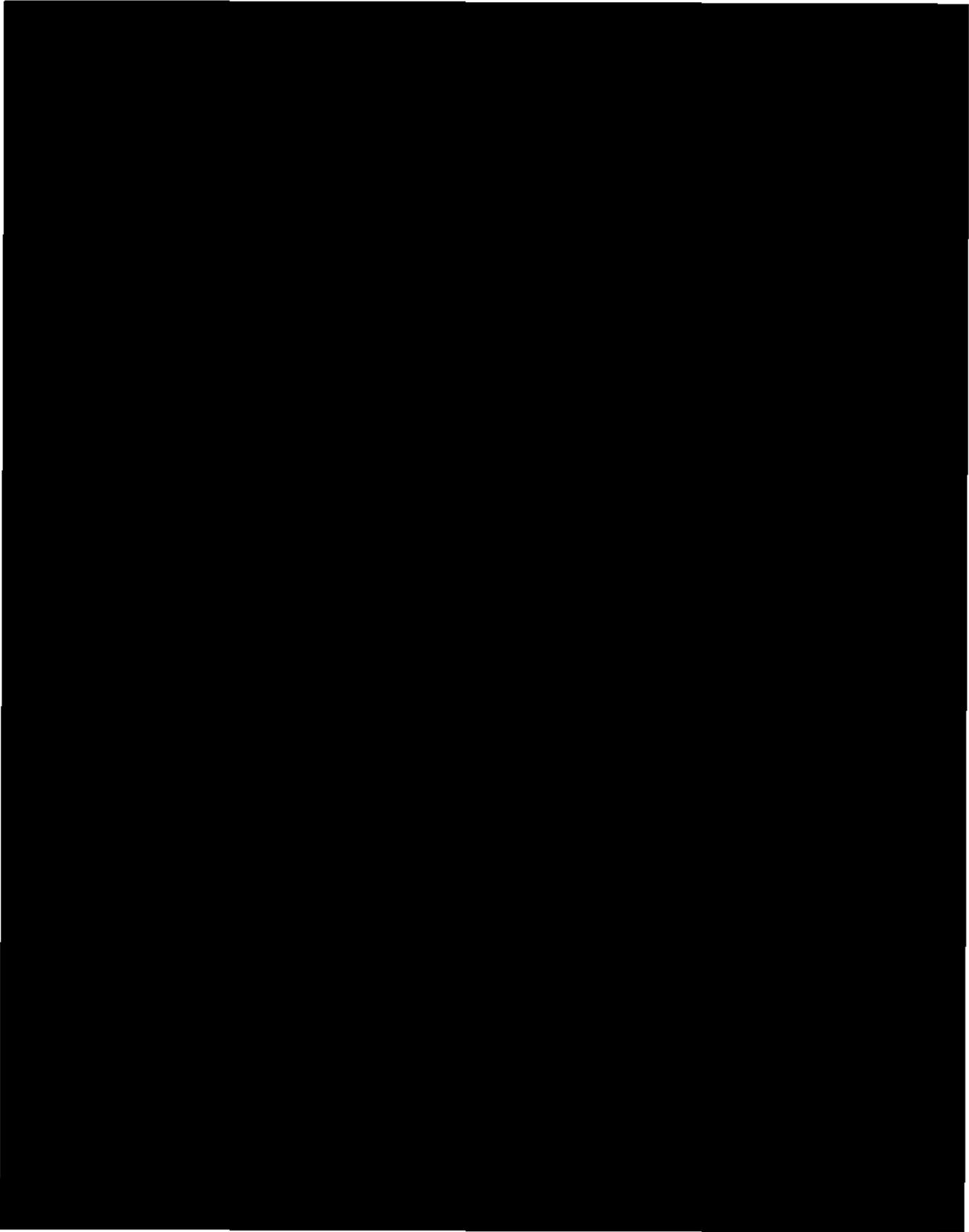
15. Reily stayed at the scene for four hours. Because it was a homicide investigation, he assisted in uncovering and covering the body for police investigators taking photographs.

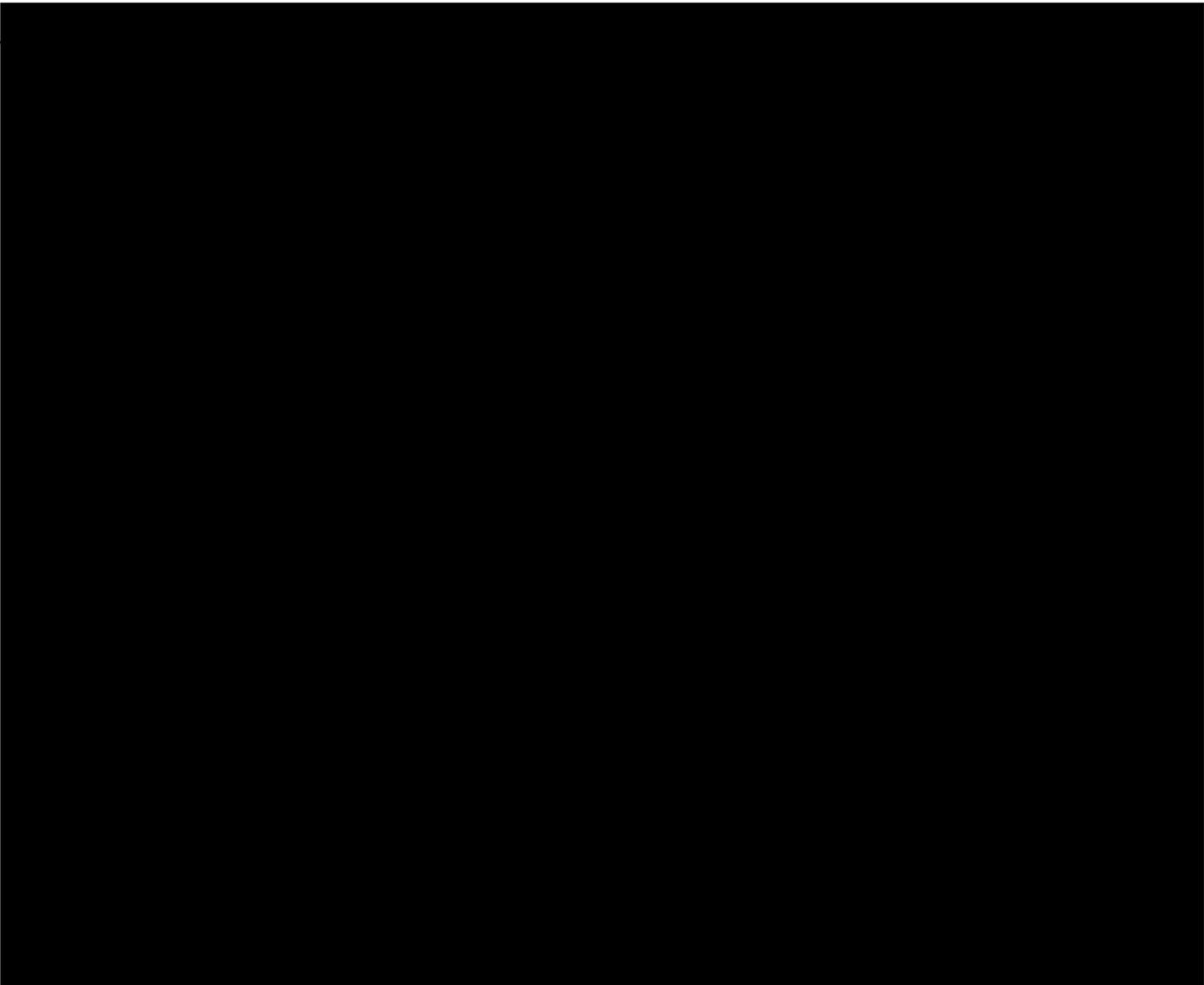
16. Reily helped collect the strewn contents of the woman's purse. Her driver's license showed that she was about the same age as Reily and a card showed



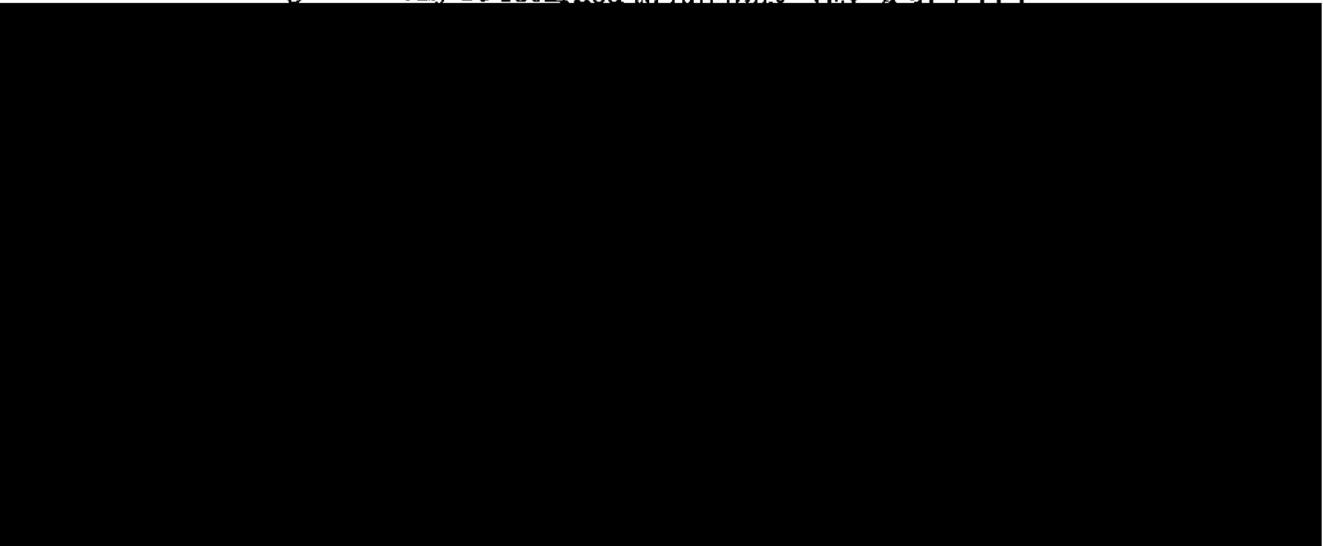
17. This incident was more traumatic than anything Reily had seen before.

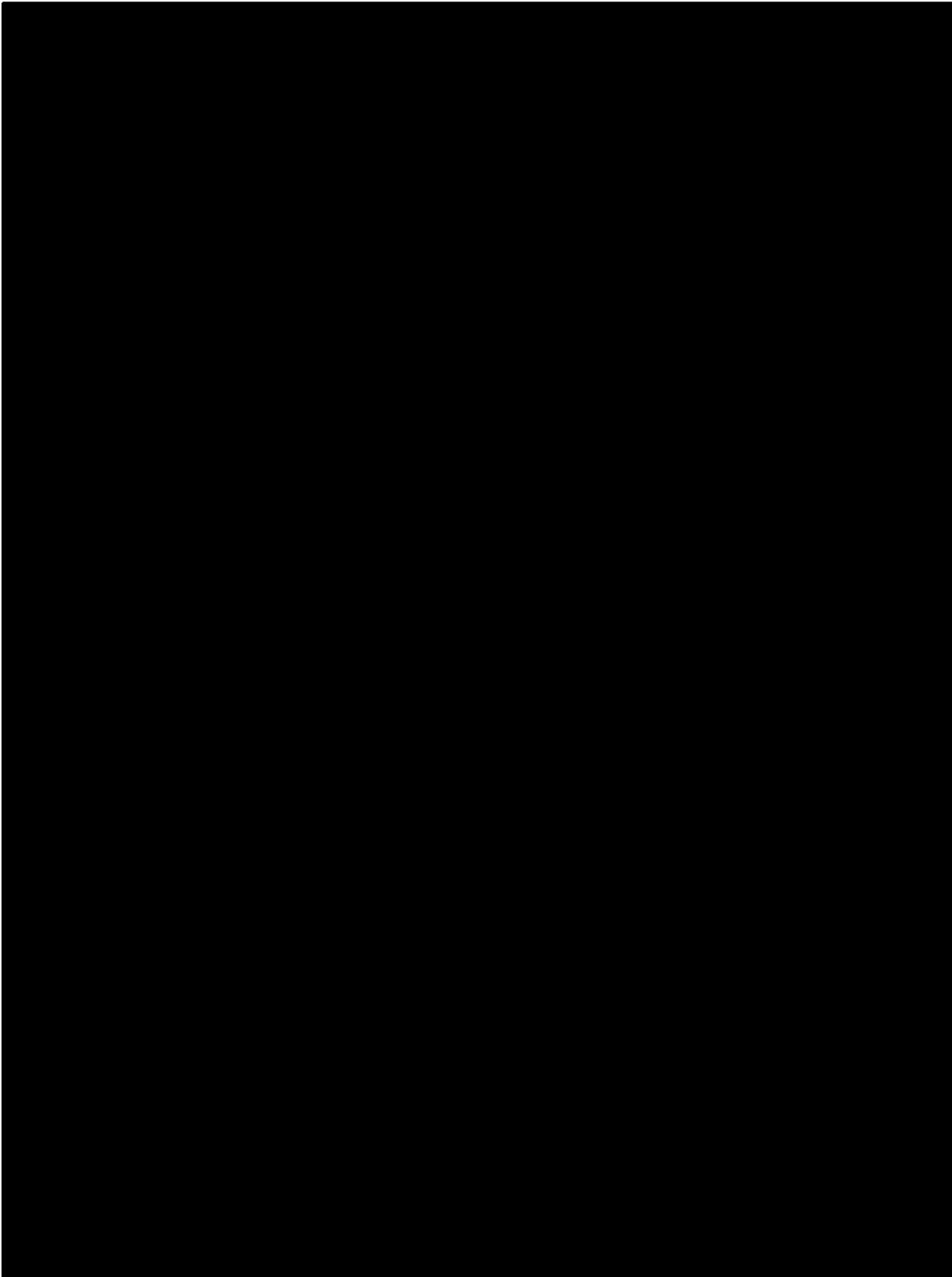


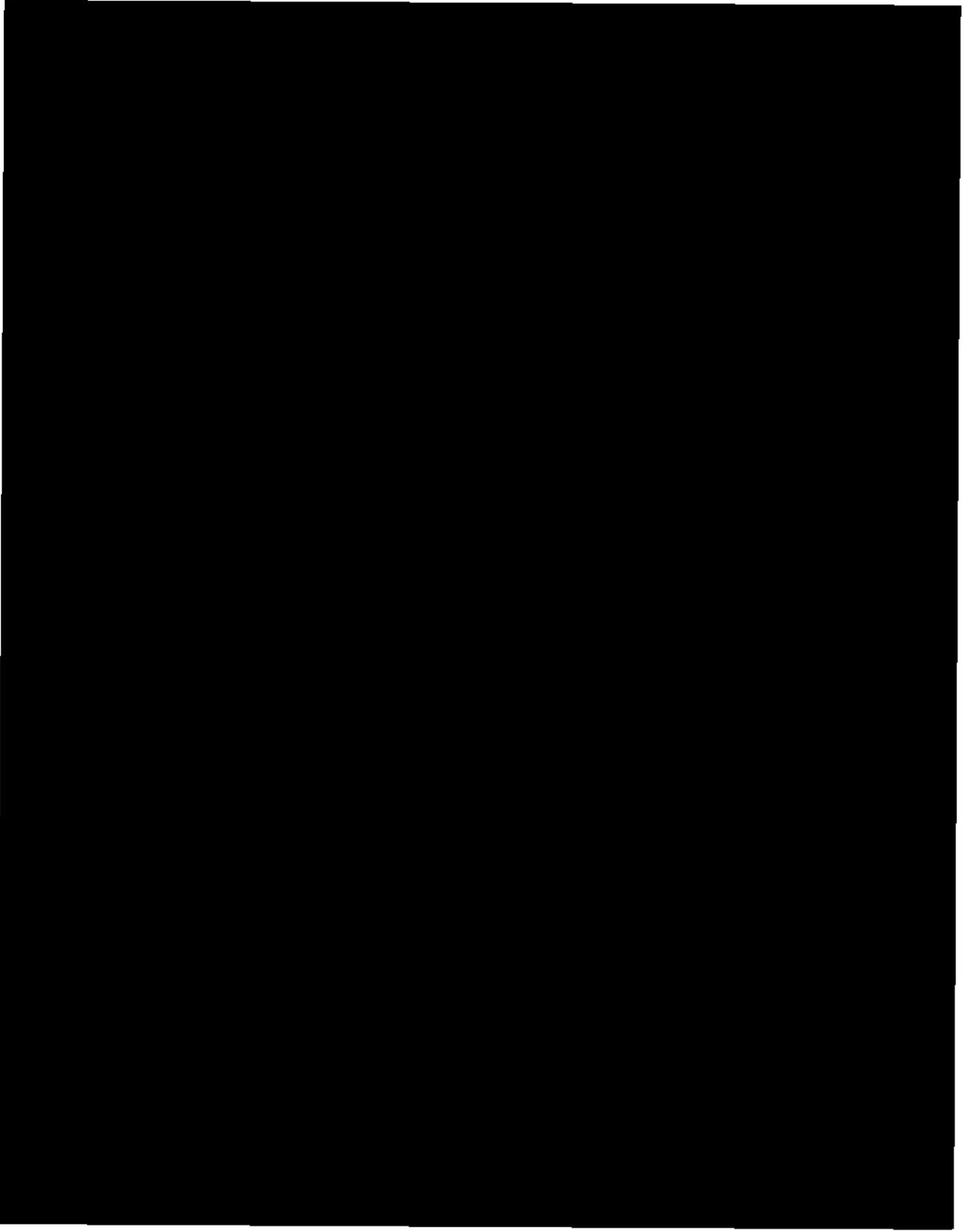




40. On September 23, 2005, Dr. Hale signed a work status form recommending that Reily be returned to full duty. (Ex. A at 7-11.)







60. There were light duty positions available within the department when Reily was terminated.

E. Application for disability benefits, treatment after termination, local board proceedings, initial determination

61. On January 26, 2006, one week before the termination hearing, Reily requested a hearing before the local pension board to determine the existence of a covered impairment under Ind. Code § 36-8-8-12.3(a). (Ex. L, Local Board Hearing Ex. 4.)



67. In March 2006, Reily was employed for about a month for a company providing medical and rescue services at a power plant. The position originally required performing confined space rescue and emergency care, and Reily was qualified based on his experience as a firefighter/EMT. After he started work at the power plant, the duties were changed to occupational medicine (drug tests) and non-emergent care (eye washes for particles in the eye), although he was told that he would be backup to a team of industrial medical technicians who were the primary confined space rescuers. If there were an emergency that required his assistance, Reily would offer that assistance and hope that he would be able to assist. (Ex. L, Local Board Hearing Tr. at 21-26, 33-35, 37-40.)

68. The power plant job consisted of working a 12-hour shift doing drug tests, safety walk-throughs, first aid, and confined space rescue. The job turned out

to be very low-stress because there were only 20 to 40 employees on site, there were no traumatic injuries, and the responsibility for potential confined space rescues was taken away after he had been there for about 10 days. The job ended after eight weeks.

69. On April 20, 2006, the local pension board held a hearing on Reily's request for a finding that he suffered from a covered impairment.

70. An exhibit at the hearing was a letter from Dr. Osman dated April 19, 2006, which stated that Reily's impairment was a Class 2 impairment. (Ex. 10)

71. At the hearing, Chief Lott testified that the department did not currently have light duty positions "but that doesn't mean that we won't." (Ex. L, Local Board Hearing Tr. at 7.)

72. At the hearing, Reily (represented by counsel) asked the local board to find that he suffered from a Class 2 impairment. (Ex. L, Local Board Hearing Tr. at 29-30.)

73. On April 24, 2006, Reily's counsel submitted a letter to the local board asking the board to consider whether Reily may have a Class 1 impairment, emphasizing the portion of the definition of Class 1 impairment to include an

74. The local board issued undated Findings of Fact concluding that Reily "has a temporary Class 2 impairment." (Ex. P, ¶ 15.) The board found, based primarily on Dr. Osman's letter of April 19, 2006 (Ex. 10), that Reily's impairment was a Class 2 impairment. (Ex. P, ¶ 13.) The board rejected Reily's argument for a Class 1 impairment because there was insufficient evidence at the hearing that the impairment was a Class 1 impairment. (Ex. P, ¶ 14.)

75. On May 31, 2006, Reily filed with the local board his Appeal of Local Board Findings. (Ex. O.) He stated that he received the findings on or about May 15, 2006 (¶ 7) and requested that he be found to have a Class 1 impairment with a degree of impairment of 30 percent (¶ 8). He further requested that the chief certify to the PERF Board that there was no suitable or available work for him (¶¶ 9-10).

76. On June 15, 2006, the 1977 Fund received from the fire department Reily's application for disability benefits. (Ex. D.)

77. The chief signed the application form, certifying that "there is no suitable and available work, considering reasonable accommodations pursuant to the Americans With Disabilities Act (as applicable), for which he/she is or may be capable of becoming qualified." (Ex. D.)

78. Under "work status" the chief checked a box labeled "able," but wrote "see attached" and "but was terminated from employment." (Ex. D.)

79. In an attached letter, also dated June 15, 2006, Chief Lott provided an explanation of his certification. (Ex. F.) He wrote that there would "theoretically" be a position available for Reily because "the weight of the medical evidence at the hearing did not restrict him from light duty. However, there is in fact no position available for Mr. Reily since he was terminated from the department . . ." The chief further explained that he felt Reily's back was healed and he could have returned to work because (a) Dr. Hale had released Reily to full duty, (b) Dr. Osman and Dr. Pressner had released him to light duty, and (c) Reily had applied for a position in confined space rescue and emergency response and took the job. However, work was not available to Reily because he was terminated from employment on February 2, 2006, [REDACTED] (Ex. F.)

80. There was light-duty work available in June 2006, and if Reily had not been terminated the department would have found something for him, but Reily would not have been eligible for it because he had been terminated.

81. Reily found new employment starting on February 1, 2007.

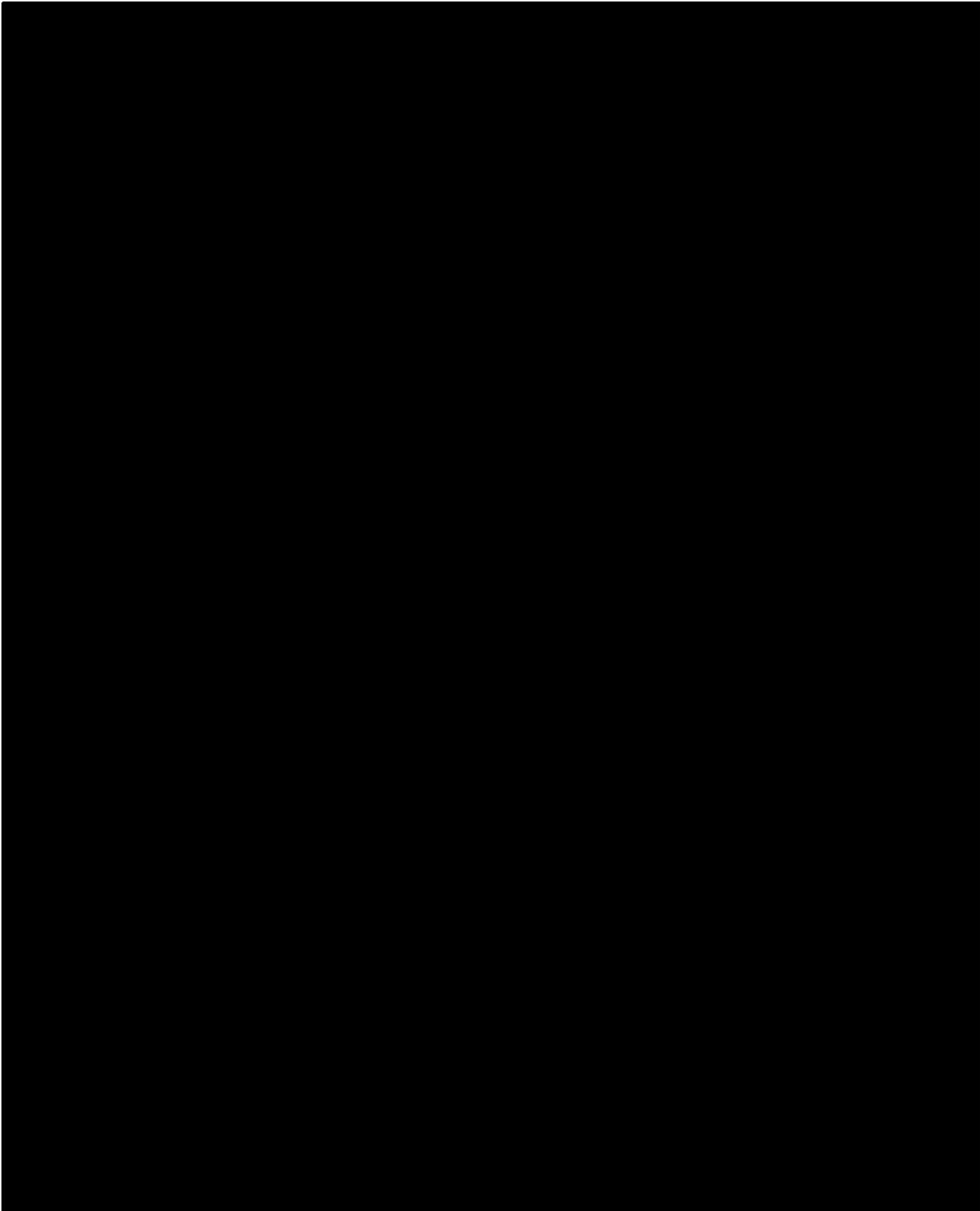
[REDACTED]

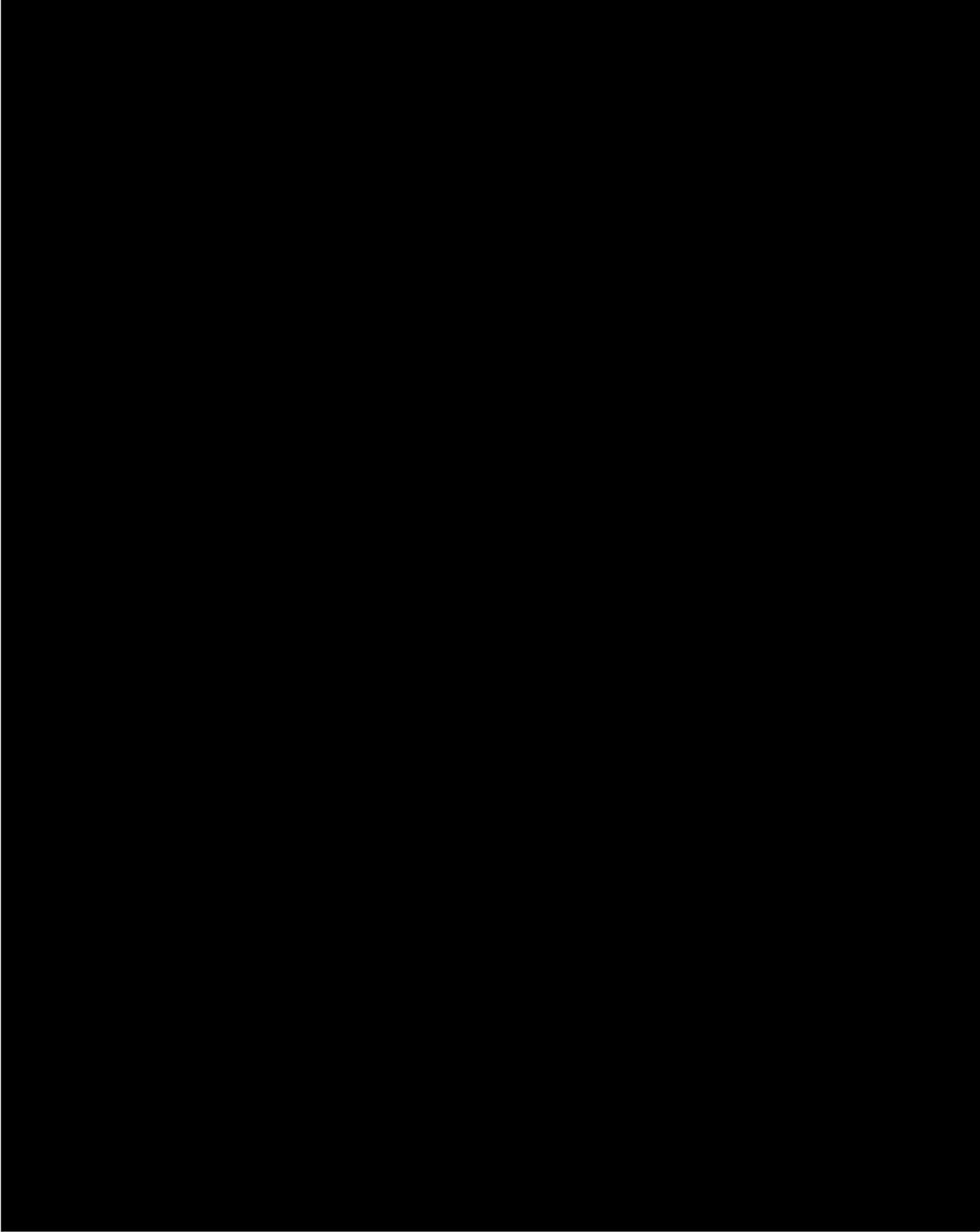
83. Reily does not feel ready to return to front-line firefighting duties. He does feel capable of performing office work or some other form of light duty.

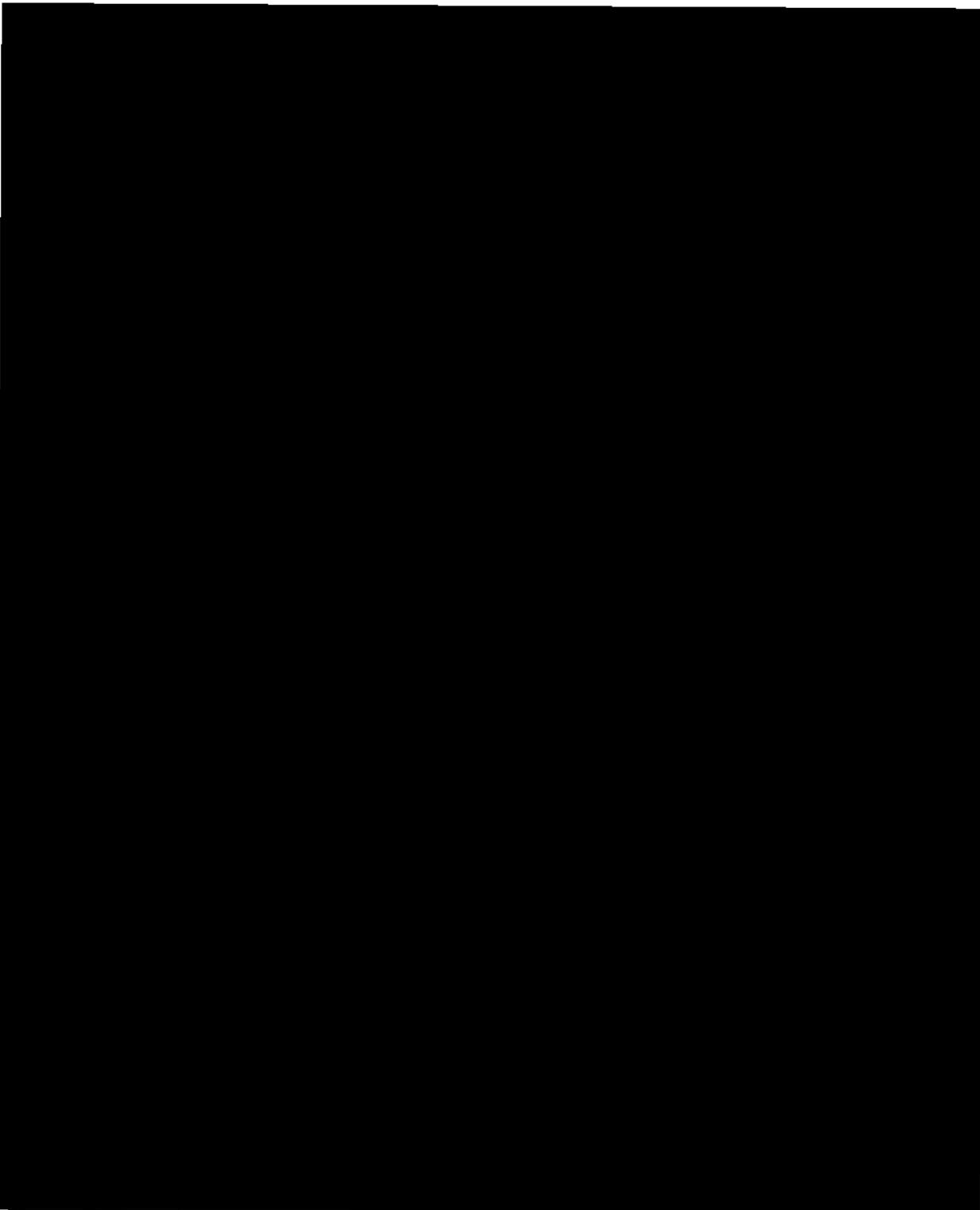
84. Reily's treatment for his psychological issues has been, and continues to be, paid for by the town's worker's compensation insurance.

F. Expert medical opinion

[REDACTED]







G. PERF proceedings

113. R. Thomas Parker is the Director of the 1977 Fund.

114. Parker's duties include receiving, reviewing and issuing determinations on members' applications for disability benefits.

115. Parker obtains and generally defers to the evaluation of the 1977 Fund's medical consultant, Dr. Markand, when making his determinations of eligibility.

116. In this case, Parker reviewed and agreed with Dr. Markand's evaluation that Reily had recovered from the condition that was the basis for his application for benefits. (Ex. I)

117. On August 9, 2006, Parker issued a determination that Reily had recovered from his medical condition and that the chief of the fire department had determined that there was suitable and available work. Therefore, Parker determined that Reily is not eligible for disability benefits. (Ex. E.)

118. Reily timely objected to the initial determination under Ind. Code § 36-8-8-13.1(e) by letter dated August 16, 2006, and received by the 1977 Fund on August 17, 2006. (Ex. Q.)

119. The 1977 Fund is administered by the Board of Directors of the Public Employees' Retirement Fund, which is the ultimate authority.

120. The Board has delegated to Parker its authority as the ultimate authority. Therefore, if either party objects to the ALJ's recommended decision, Parker as the Board's designee will act as the ultimate authority to decide whether to accept, reject or modify the ALJ's decision under Ind. Code § 4-21.5-3-29.

121. Any conclusion of law below that should be designated as a finding of fact is incorporated by reference.

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 Reily, 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 § 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." Ind. Code § 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, Reily 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. Ind. Code § 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 in January 2006, Reily was an employee of the Fishers Fire Department and a member of the 1977 Fund. Ind. Code §§ 36-8-3-21(b), 36-8-8-7(a). His entitlement to disability benefits is governed by Ind. Code §§ 36-8-8-12, -12.3, and -12.5.

1. Covered impairment. The first question is whether Reily has a 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." Ind. Code § 36-8-8-12.3(b) (also listing exceptions not applicable here). See Board of Trustees of Public Employees Retirement Fund v. City of Plymouth, 698 N.E.2d 335, 336-37 (Ind. App. 1998).

Because Reily's condition arguably changed over time, the parties dispute when the covered impairment must be determined to exist. The disability statutes always speak in the present tense. See Ind. Code §§ 36-8-8-12(b) ("If an active member has a covered impairment . . ."); 36-8-8-12.3(a) (local board shall conduct hearing to "determine whether the fund member has a covered impairment . . .");

36-8-8-13.1(c) (PERF medical authority shall determine “if there is a covered impairment . . .”) (emphases added). The statutes also contemplate that the member’s condition be reviewed and the member may wholly or partially recover from the impairment. Ind. Code § 36-8-8-13.7. The PERF Board argues, therefore, that the date of determination is the date on which the Director makes the initial determination based on de novo review of the local board determination and the findings of the medical authority.

On the other hand, according to counsel, the 1977 Fund will pay benefits retroactively to the date that the disabling condition was incurred, if the member exhausted his or her paid leave with the department. See 35 IAC 2-5-1 (disability payments begin at later of effective date set by local board or upon exhaustion of paid leave). Reily argues that the determination, therefore, should be based on his condition at any date on which he was unable to perform the essential functions of the job.

The statutes and rules reflect a policy that benefits be paid to replace income a member is losing when he or she would otherwise be working, and that the system be flexible to accommodate changes in the member’s condition or other circumstances such as the availability of light duty. In this case, it appears that Reily was compensated through the date of his termination, so there is no question about entitlement to retroactive benefits. He is entitled to benefits only after he exhausted paid leave.

Therefore, the determination of a covered impairment must be based on Reily’s condition at the time he applied for benefits in January 2006, and any improvements or deteriorations in his condition since then. It must also be based on the availability of work at present. Reily’s condition in 2005 is relevant in this proceeding only for the purposes of determining causation, that is, whether Reily’s current impairment is a continuation [REDACTED] as a result of the on-duty accident run, or is the result of off-duty causes. That will be discussed in Part B.2. below regarding class of impairment.

[REDACTED]

I conclude that at the time of his application for benefits, Reily suffered from a covered impairment, and he continues to suffer that impairment today. Dr.

[REDACTED]

The fact that Reily took a job in spring 2006 for which his experience as a firefighter/EMT was a requirement, and for which he might have been required to respond to emergencies, is a concern but does not defeat the conclusion that he was unable to perform as a full-time firefighter. I accept Reily's testimony that the potential for confined-space rescue calls was remote even at first, and made even more remote when those responsibilities were transferred to another crew. The job was simply not nearly as stressful as full-time firefighter/EMT work.

It is also true that Dr. Hale concluded his treatment of Reily in March 2006 by stating that Reily had reached maximum medical improvement, and he assigned a permanent impairment rating of zero. But it is clear that Dr. Hale was reporting to a worker's compensation carrier with his scope limited to the injuries suffered as a result of the March 2005 accident run: "At this point I do not believe that Mr. Reily shows any evidence of behavioral impairment associated with his psychological reaction to the March 2005 event." (Ex. A at 28, emphasis added.) Dr. Hale's finding of full recovery is not inconsistent with Dr. Osman's conclusion that Reily is psychologically incapable of performing the essential functions of the job.

Finally, there is no work available for Reily to perform. Although Chief Lott testified that the department would have tried to find light-duty work for Reily had he kept his job, he also testified that light-duty work is not assigned on an indefinite or permanent basis. Given Dr. Osman's assessment that Reily is unlikely to regain his ability to function as a firefighter, it is doubtful that Reily would have been kept in a light-duty position indefinitely.

The fact that Reily was terminated for cause after he applied for disability benefits does not, on the facts of this case, preclude a finding that he was eligible for benefits for a condition that existed before his termination. The 1977 Fund statutes do not address this question, and Indiana courts do not appear to have addressed it. Courts of other states have found that a member who applied for disability based on the termination itself, or who applied after termination, is not eligible. Haywood v. American River Fire Protection Dist., 67 Cal. App.4th 1292, 79 Cal. Rptr. 2d 749 (1998) (firefighter fired for cause was ineligible for subsequent disability retirement); DiFalco v. Bd. of Trustees of Firemen's Pension Fund of Wood Dale Fire Protection Dist No. 1, 521 N.E.2d 923 (Ill. 1988) (firefighter terminated during probationary period was not eligible for disability for injury suffered on duty, where he applied after termination; disability plan was intended for those "who would still be employed as fire fighters if not for their disability"). However, where the member applies for benefits before being discharged, he is eligible. Iwanski v. Streamwood Police Pension Bd., 232 Ill. App. 3d 180, 173 Ill. Dec. 67 (1992).

I have considered the possibility that Reily's current condition is due entirely to the circumstances that led to his termination. In Haywood, supra, a firefighter

sought benefits for [REDACTED] caused by a series of disciplinary proceedings culminating in his termination. The court upheld the denial of benefits, finding that it would be contrary to the purposes of the disability plan to reward an employee for his recalcitrant behavior and effectively overturn his termination. Here, however, the fact that Reily was physically impaired and delayed in returning to work due to his back condition contributed to his [REDACTED]. I cannot find that [REDACTED] was the only cause of his current psychological impairment.

2. Class of impairment. Having determined that Reily continues to perform the functions of a firefighter, and work is not available, the next question is which class the impairment falls into under I.C. § 36-8-8-12.5(b) (emphasis added):

- (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;

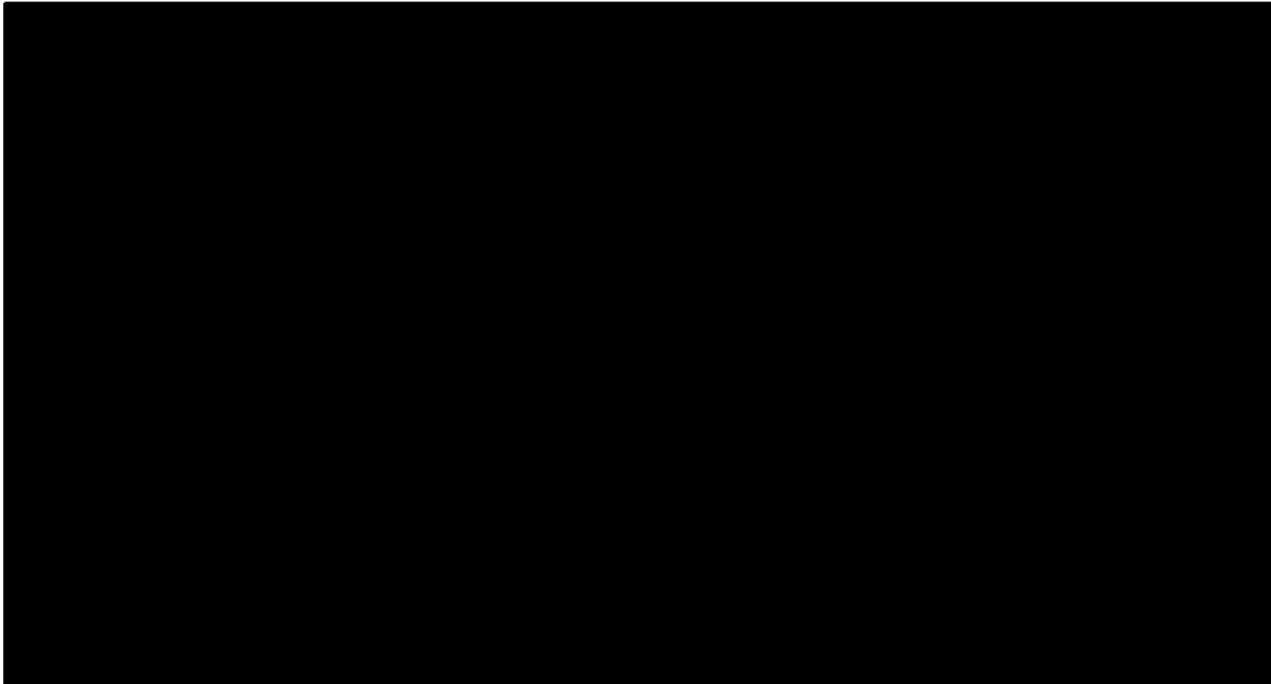
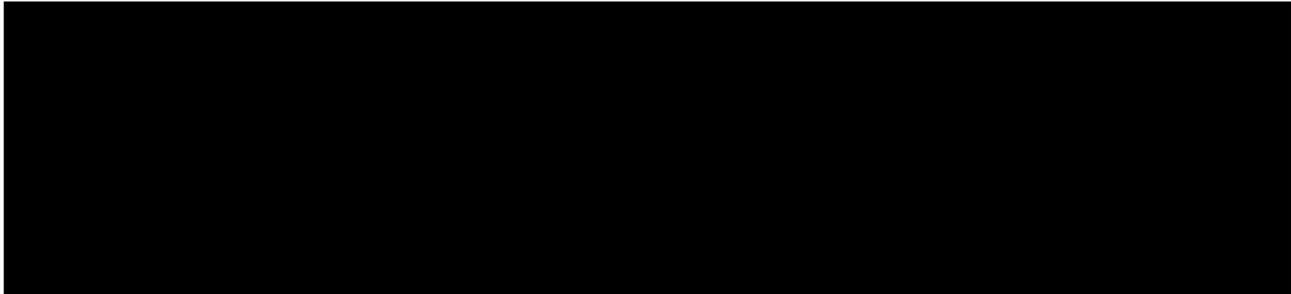
(B) the disease can be seen to have followed as a natural incident of the fund member's duties as a result of the exposure occasioned by the nature of the fund member's duties; and

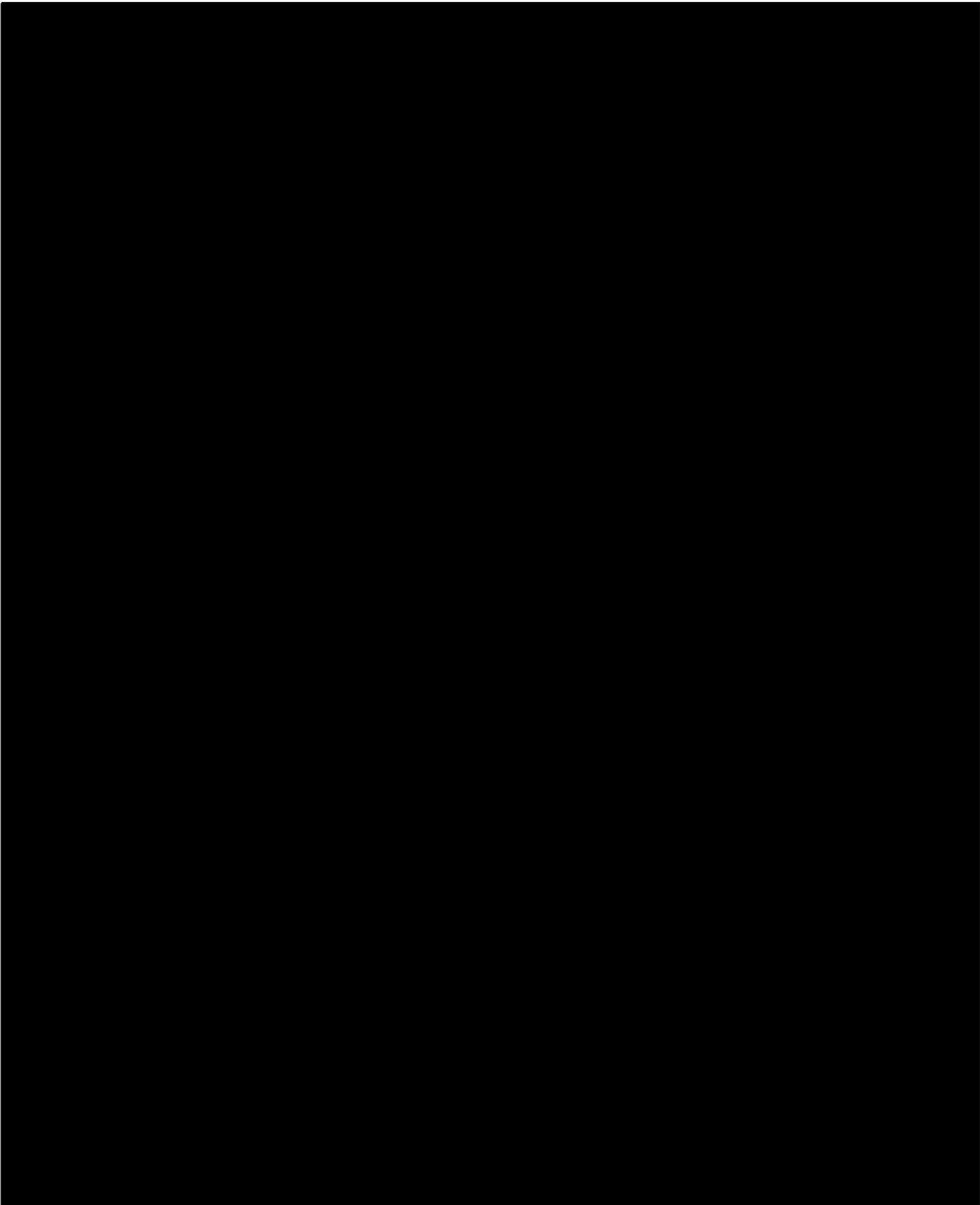
(C) the disease can be traced to the fund member's employment as the proximate cause.

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

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 a "direct result" and Class 2 being "duty related." A Class 3 impairment is everything else, including conditions caused by factors unrelated to duty.

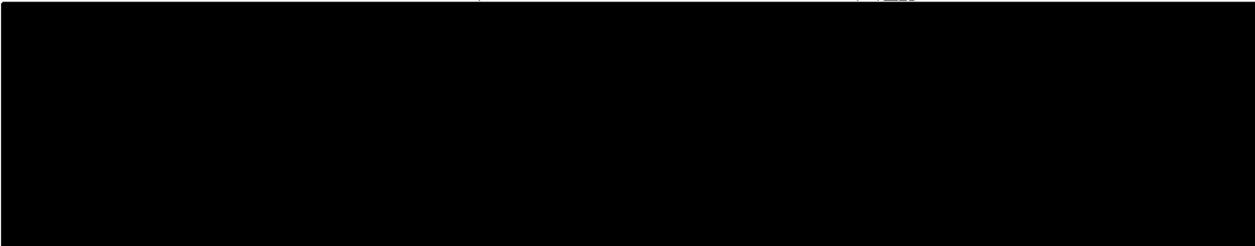
Riley argues that his present impairment is a Class 1 impairment because it was a direct result of the March 2005 accident run. The local board found that the impairment was a Class 2 impairment. The Director of the 1977 Fund did not make a determination because he found no impairment.







Based on these facts, it is plain that Reily's current impairment is not a Class 1 impairment directly caused by the March 2005 accident run.



Therefore, the impairment falls into Class 3.

3. Degree of impairment. Finally, a determination must be made as to the degree of impairment. Ind. Code §§ 36-8-8-13.1(c) and -13.5(f). No such determination has been made. Therefore, if the final reviewing authority adopts this recommended finding that Reily is eligible to receive benefits for a Class 3 impairment, degree of impairment should be determined.

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 reversed, that Reily's application for disability benefits be granted, that he be awarded benefits for a Class 3 impairment, and that the medical authority be requested to determine the appropriate degree of impairment.

DATED: August 27, 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.

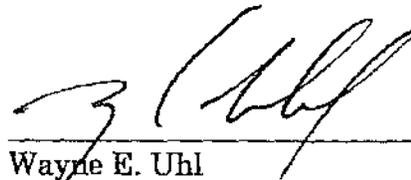
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this Findings of Fact and Conclusions of Law and Recommended decision on the following persons, by U.S. Postal Service Priority Mail, Certified Mail Return Receipt Requested, on August 27, 2007:

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