U.S. Department of Justice

Office of the Inspector General

[redacted]

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February 12, 2020

VIA ELECTRONIC MAIL

[redacted]

Re: Termination of OIG Whistleblower Reprisal Investigation

Dear [redacted]:

This letter serves as the Final Written Statement detailing the Office of the Inspector General's (OIG) findings related to your allegations that officials at the Federal Bureau of Investigation's (FBI) [redacted] retaliated against you for protected whistleblower activities, in violation of 5 U.S.C. § 2303, *Prohibited Personnel Practices in the Federal Bureau of Investigation*, and 28 C.F.R. Part 27 (the FBI Whistleblower Regulations).[1]

I. Introduction

A. Background Facts

[redacted] you submitted a whistleblower reprisal complaint to FBI Inspection Division (INSD), which was forwarded to the OIG, claiming that you were denied the opportunity to apply for a [redacted] assignment to the

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[redacted] on [redacted], allegedly in retaliation for whistleblowing activities in [redacted].[2] We learned from your complaint and subsequent document reviews that between [redacted], and [redacted] you worked as a [redacted] Analyst [redacted].

On or about [redacted], you disclosed to the [redacted].[3] You indicated that you had earlier raised these issues with the following officials in your chain of command: [redacted] and the previous [redacted], all of whom were made aware that you intended to take this matter to [redacted]. After speaking with you, [redacted] forwarded the information you provided to INSD and ordered that [redacted] lead an independent review of these allegations. The independent review confirmed [redacted] substantiating your allegation. [redacted].

Subsequently, on [redacted], you emailed the FBI [redacted] complaining that [redacted] you had identified [redacted]. On or before [redacted], you raised the same [redacted] concerns with the [redacted], who then requested INSD conduct its own review [redacted] to assess [redacted], thereby [redacted].

substantiating your second disclosure. [redacted]

[redacted]

[redacted]

Date **Disclosure**

[redacted]

B. Your Retaliation Allegations

As noted above, your [redacted] complaint to INSD alleged that you had been denied the opportunity to apply for a [redacted] assignment [redacted] in reprisal for your protected disclosures. After interviewing you, the OIG expanded the scope of our review to include several reprisal claims arising from several earlier alleged personnel actions over which the OARM did not exercise jurisdiction. Specifically, subsequent to your initial reassignment [redacted], you submitted several applications [redacted] for placement [redacted] to rejoin [redacted] but were not selected [redacted] who based his decisions on the rankings from [redacted] rating boards made up of [redacted] or the advice of the current [redacted]. [redacted] In total, we addressed the following ten alleged actions or threatened actions:

Date	Event
[redacted]	Nonselection for a [redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	Nonselection for a [redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

C. Summary of OIG Findings

Our investigation found that at least some of the issues you raised to your management chain or INSD constituted objectively reasonable allegations of violations of law, rules, or regulations and thereby constituted protected disclosures. In particular, your [redacted] and [redacted] complaints to the [redacted] that were subsequently forwarded to INSD were clearly protected.[5]

We found [redacted] actions taken by [redacted] management were personnel actions: the denials of your applications for [redacted], [redacted]

[5] This investigation included a review of thousands of FBI documents pertaining to your whistleblower reprisal complaints, including emails, agency reports, and written statements. The OIG also conducted interviews of 18 individuals who decided or contributed to the various alleged actions and decisions involved, including you and FBI [redacted] officials.

[redacted]

Our investigation also concluded that you sustained your burden of proving that the protected disclosures regarding [redacted] were contributing factors in the [redacted] nonselections.

After examining the available record, we found sufficient evidence and reasonable grounds to believe the two [redacted] nonselections in [redacted] and [redacted] were made in reprisal for your [redacted] and [redacted] protected disclosures. However, we found clear and convincing evidence that the FBI would have taken the other personnel actions regardless of your protected disclosures.

II. Detailed Analysis and Findings

Below we summarize the legal standards applicable to all allegations of whistleblower retaliation, and analyze whether the facts and circumstances as you alleged them support a finding of retaliation.

A. Legal Standards

Under whistleblower protections in 5 U.S.C. § 2303 and FBI Whistleblower Regulations, 28 C.F.R. Part 27, a complainant can establish a prima facie case of unlawful retaliation by showing by preponderant evidence: (1) that she made a "protected disclosure"; (2) that she subsequently suffered a "personnel action"; and (3) that the disclosure was a "contributing factor" in such personnel action.[6] If the complainant establishes a prima facie case of unlawful retaliation, the OIG examines whether the FBI can show, by clear and convincing evidence, that it would have taken the personnel action in the absence of the protected disclosure.[7]

[6] "Preponderance of the evidence" refers to "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." *See* 5 C.F.R. § 1201.4(q).

[7] "Clear and convincing evidence" is "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." *See* 5 C.F.R. § 1209.4(e).

B. Protected Disclosures

To qualify as a "protected disclosure" an FBI employee or applicant for employment must make a complaint regarding specifically enumerated types of misconduct to certain officials or offices designated in FBI prohibited personnel practices laws and implementing regulations.

First, a disclosure must be made to one of the offices or officials authorized to receive it.[8] In this case, your first disclosure was initially raised to your direct chain of command in early [redacted], and then made to the [redacted] promptly transmitted these allegations to INSD. You initially made your second disclosure to the FBI [redacted], and then you raised it directly with [redacted], who again transmitted this information to INSD [redacted]. You made all succeeding disclosures to either the FBI [redacted] or INSD. We find that all these disclosures were therefore made to those officials designated to receive them.

Under 5 U.S.C. § 2303(a)(2), the disclosure itself must contain information that the complainant reasonably believes constituted:

- any violation of any law, rule, or regulation; or
- gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The appropriate test under the "reasonable belief" requirement is whether a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude" that the actions of the government evidence the wrongdoing in question.[9] In this case, the OARM has already found that your [redacted] complaint to [redacted] regarding [redacted] qualified as a "protected disclosure."[10] We agree. The record demonstrates that you had a

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[8] The officials and offices designated under 5 U.S.C. § 2303(a) as proper recipients of disclosures include a supervisor in the direct chain of command of the employee, up to and including the head of the employing agency, the Department of Justice Office of the Inspector General, Department of Justice Office of Professional Responsibility, FBI Office of Professional Responsibility, FBI Inspection Division, or the Office of Special Counsel. 5 U.S.C. § 2303(a). OIG applies the amended language regarding the "direct chain of command" retroactively to events prior to 2016. 5 U.S.C. § 2303(a).

[9] *Chianelli* v. *Envt'l Prot. Agency*, 8 F. App'x. 971 (Fed Cir. 2001), citing *Lachance* v. *White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (applying 5 U.S.C. § 2302(b)(8)(A)(i)).

[10] *See* OARM's [redacted] Final Determination. The OARM concluded that your original [redacted] disclosure satisfied the "reasonable belief" test based on three factors: your

reasonable belief the [redacted] complained of violated a law, rule, or regulation, namely [redacted], and that belief was confirmed by the subsequent independent review.[11]

On [redacted], you sent a complaint to the FBI [redacted] This disclosure was followed by conversations with [redacted] on the same topic. We find that the disclosure to the FBI [redacted], followed by the discussion with [redacted], was also grounded in a reasonable belief [redacted] such that they constituted violations of a law, rule, or regulation within the meaning of the whistleblower regulations.

[redacted]

position [redacted] since [redacted], the [redacted] request of an internal review into the allegations by [redacted] and referral of the allegations to INSD, and discovery of evidence to corroborate your allegations.

[11] Courts and agencies have held that agency policy statements and operating instructions qualify as "rules" within the meaning of the whistleblower statutes. *See Rusin* v. *Dept. of Treasury*, 92 M.S.P.R. 298, 304-07 ¶¶ 14-19 (2002) (stating alleged violation of agency's procurement instruction memorandum sufficient); *accord Special Counsel* v. *Costello*, 75 M.S.P.R. 562, 582, *rev'd on other grounds*, *Costello* v. *Merit Sys. Prot. Bd.*, 182 F.3d 1372 (Fed. Cir. 1999) (finding violation of agency standard of conduct prohibiting cursing sufficient).

[12] 5 U.S.C. § 552a.

[13] *Drake* v. *Agency for Int'l Dev.* 543 F.3d 1377, 1382 (Fed. Cir. 2008) (no need to prove disclosed activities were actually misconduct, only that disinterested observer could have reasonably concluded they were).

[redacted]

C. Personnel Actions

After establishing that a protected disclosure was made, the second prong of a retaliation claim under FBI regulations, 28 C.F.R. § 27.2, requires showing by a preponderance of the evidence that the disclosure affected the decision of the agency in taking, not taking, or threatening to take or not take, a "personnel action" as defined in statute. The FBI Whistleblower statute, 5 U.S.C. § 2303, defines a personnel action as "any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title" taken with respect to an FBI employee, including:

> (i) an appointment; (ii) a promotion; (iii) an action under Chapter 75 of this title [*5 U.S.C. §§ 7501-7543]* or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title [*5 U.S.C. §§ 4301-4315*]; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination.

This inquiry will turn on whether the [redacted] selection decisions at issue regarding your [redacted] nonselections; [redacted] constitute personnel actions.

We find each [redacted] at issue [redacted] would qualify as a "detail, transfer, or reassignment" under the regulations.[14] Therefore, your nonselections for these positions were personnel actions. In addition, we found a major reason for your [redacted] nonselection was the failure of both your prior [redacted] and your current [redacted], to provide you

[14] *See* 5 C.F.R. § 210.102(b)(12) (reassignment defined as a change from one position to another without promotion or demotion within the same agency).

recommendations. We note that failing to provide a subordinate a recommendation itself may constitute a personnel action.[15]

[redacted]

[redacted]

[15] *See Special Counsel.* v. *Spears*, 75 M.S.P.R. 639, 662 (1997) (the failure of a supervisor to recommend a subordinate, if sufficiently effectual, may constitute personnel action).

[redacted]

[redacted]

D. Contributing Factor

After establishing that a personnel action occurred, a reprisal claim requires showing that the protected disclosure was a "contributing factor" in the action under 28 C.F.R. § 27.4(e)(1). The disclosure may be one factor among many that caused management to take or fail to take the personnel action. For this element, a disclosure you made must be shown to have affected in any way your performance evaluation or your nonselection for the relevant rotations, reassignment, or promotion. A complainant may demonstrate "contributing factor" with direct evidence of the connection between the disclosure and the personnel action. Alternatively, the whistleblower law and regulations also permit a complainant to make this showing through circumstantial evidence, including "evidence that the employee taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action"—known as the "knowledge/timing" test.[17] The timing of the personnel action reasonably close to when the deciding officials learned of the disclosure constructively establishes the disclosure as a contributing factor.[18]

1. [redacted] Nonselection Decisions, [redacted]

We begin with [redacted] nonselection decisions made during [redacted], including the nonselections for [redacted] or [redacted]. In applying the knowledge/timing test to these personnel actions, we first consider whether the officials involved in or with influence over the nonselection for the [redacted] knew of your disclosure. In this case, there is evidence that [redacted], the ultimate deciding official for all alleged [redacted] nonselection actions at issue, was fully aware of your [redacted] and [redacted] disclosures prior to those [redacted] nonselections occurring from [redacted]. On [redacted] sent an email to two INSD officials laying out in detail the disclosure you made [redacted], the in-house investigation [redacted] ordered in response, [redacted] The email then went on to describe your

[17] 28 C.F.R. § 27.4(e)(1); *see also Gonzalez* v. *Dep't of Transp.*, 109 M.S.P.R. 250, 259 (2008).

[18] 5 U.S.C. § 1221(e)(1)(B) (action occurring within period of time such that a reasonable person could conclude the disclosure was a contributing factor).

second disclosure [redacted], which prompted the request for an INSD inspection of the [redacted] process. This email string was forwarded to [redacted], who confirmed to us he received this email and was aware of both [redacted] and [redacted] disclosures to the [redacted]. Since [redacted] was the ultimate selecting official for the [redacted] nonselection claims, and he had knowledge of your [redacted] and [redacted] disclosures at the time they were made, we find you have established the requisite knowledge necessary for [redacted] nonselection personnel actions occurring during [redacted].

Further, with respect to your application on [redacted], we also note that [redacted] who were part of the rating panel for that [redacted] and [redacted], made separate decisions not to provide you their recommendations, which were significant to this nonselection. [redacted] Neither your new [redacted] nor your previous [redacted] provided you with recommendations when you requested, and you were not selected.

We found both [redacted] had knowledge of your disclosures. [redacted] told us that he was aware [redacted] issue you raised to your immediate chain of command [redacted], as well as your intention to take the matter to the [redacted]. He also told us he assumed the INSD inspection of the [redacted] process in [redacted] stemmed from your complaints. In addition, your new [redacted] at [redacted], told us he was familiar with the issues [redacted] and with the fact that you were the employee who complained to [redacted][19]

With knowledge established, we turn to the "timing" portion of the test. To invoke the contributing factor presumption, the timing of the personnel action must occur within a reasonably proximate time period from when the

[19] More broadly, [redacted], we determined [redacted] had knowledge that you made a disclosure to the [redacted] about [redacted] whereas [redacted] recalled not being aware of your disclosures.

deciding official gained knowledge of the disclosure.[20] There is no specific time limit or window in the knowledge/timing test, but a personnel action taken up to two years after an official first learns of a protected disclosure generally has been held to qualify.[21] The [redacted] personnel actions occurring in [redacted], all happened within 24 months of the initial [redacted] disclosure involving officials with actual or implied knowledge of the disclosure and would therefore constitute a contributing factor in those actions.[22] Likewise, the [redacted] occurred within 24 months of the [redacted] disclosure to the FBI [redacted] and the [redacted] The evidence indicates that [redacted] all had knowledge of the [redacted] and [redacted] disclosures at the time of the nonselections and that knowledge was well within the general 24 month time period sufficient to satisfy the knowledge/timing test.

[redacted]

Therefore, we found that regarding the [redacted] nonselection personnel actions during [redacted], the principal deciding officials had knowledge of your disclosures, and these nonselections occurred sufficiently proximate to the [redacted] and [redacted] disclosures to constructively establish them as contributing factors.

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[20] 5 U.S.C. § 1221(e)(1); e.g., *McCarthy* v. *Int'l Boundary & Water Comm'n*, 116 M.S.P.R. 594, 617 ¶ 40 (2011), *aff'd* 497 F. App'x. 4 (Fed Cir. 2012).

[21] *Schnell* v. *Dep't of the Army*, 114 M.S.P.R. 83, 93 (2010) (personnel action taken within approximately 1 to 2 years satisfies the knowledge/timing test); *Sutton* v. *Dep't of Justice*, 94 M.S.P.R. 4, 11-12 ¶¶14-16 (2003) (repeating disclosures year to year could be contributing cause of reprimand issued 15 to 26 months from initial disclosure).

[redacted]

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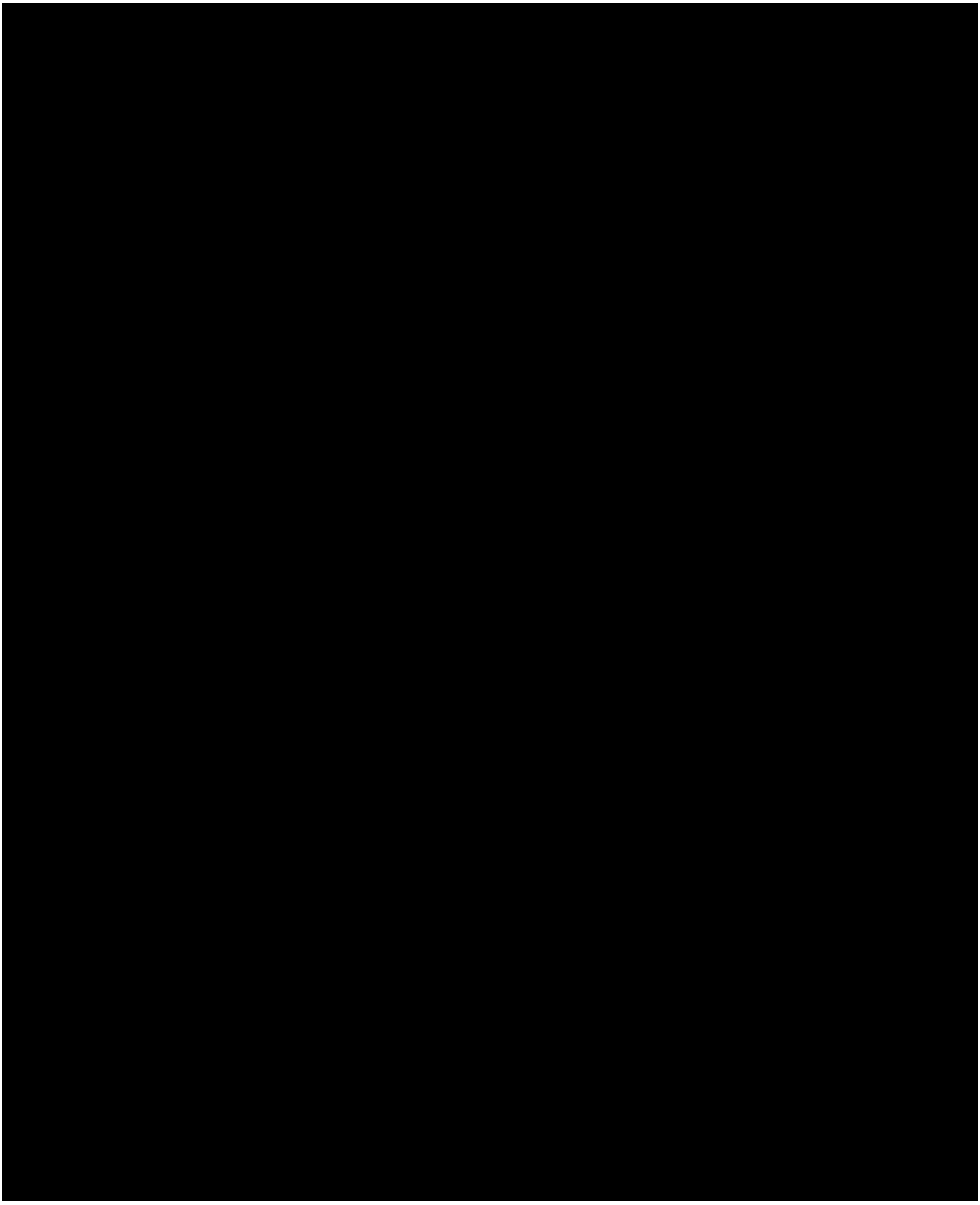

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[redacted]

[redacted]

[redacted]

In summary, the OIG has found you have made a prima facie case of retaliation because you are entitled to the presumption that your [redacted] and [redacted] disclosures are contributing factors in the [redacted] nonselection personnel actions you have claimed, [redacted].

E. Rebutting by Clear and Convincing Evidence

Under the FBI whistleblower statute and regulations, the FBI may still take a personnel action with respect to a whistleblower provided that there is "clear and convincing evidence" that it would have taken such action in the absence of the protected disclosure.[32] To determine whether the FBI has shown clear and convincing evidence that it would have taken the same personnel action, we consider three factors: (1) the strength of the FBI's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the FBI officials who were involved in the decision; and (3) any evidence that the FBI takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated (the *Carr* factors).[33] The two most important factors of this defensive "trilogy" are the strength of the supporting evidence and any motive to retaliate, and these two factors are often balanced against each other: the stronger the evidence of retaliatory motive, the stronger the evidence in support of its action the agency will have to produce.[34]

1. [redacted]

On [redacted] the month after being removed from your previous [redacted] position, you sent in your application for a [redacted] opportunity that the [redacted] announced on [redacted],

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[31] We find selecting official, [redacted] first learned of your [redacted] disclosure when you made it and knew your [redacted] disclosure generated [redacted] inspection at that time.

[32] 28 C.F.R. § 27.4(e)(2) and 5 C.F.R. § 1209.4(e). Clear and Convincing evidence should produce an abiding conviction that the truth of a factual contention is highly probable. *Price* v. *Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993). Clear and Convincing evidence is a high standard for the government to carry because it only comes into play when preponderant evidence has already been shown that whistleblowing activity was a contributing factor to the personnel action at issue and because the government is in possession of most evidence for the agency decision. *Gergick* v. *Gen. Servs. Admin.*, 43 M.S.P.R. 651, 663 n.14 (1990).

[33] *See Carr* v. *Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (1999).

[34] *See Bonggat* v. *Dep't of Navy*, 56 M.S.P.R. 402, 408-409 (1993).

[redacted]

You were not selected for the [redacted]. As detailed below, we found that your current and prior [redacted] refused to provide you with a recommendation for the [redacted] rotation, and that the reasons given by the [redacted] for their refusals were not persuasive. We found that the lack of recommendations were a significant factor in your nonselection. We also found that the [redacted] had retaliatory motives for failing to provide a recommendation, as did the ultimate selecting official. The only similarly situated employee was in fact selected for the [redacted]. We therefore did not find clear and convincing evidence that the FBI would have denied this position to you in the absence of your [redacted] and [redacted] disclosures.

a. Strength of Support for the Personnel Action

(1) Recommendation Refusal

On [redacted] two days before the deadline for submitting the application [redacted], you had requested a recommendation from [redacted] since transitioning into [redacted] in [redacted]. However, [redacted] did not recommend you. When we initially spoke with [redacted], he had no recollection of not recommending you, and told us he thought you had not solicited his recommendation and that if you did, he said at that time "I [didn't] know anything about her and she hadn't been with me for too long."

However, we found email evidence that on [redacted] in fact provided a negative recommendation by opining to the [redacted] that he believed you didn't "have sufficient experience [redacted] He also noted, "Additionally, my unit cannot afford to lose any more folks and still meet our production expectations." However, you stated that [redacted] only told you that you had not been in his section long enough for him to form an opinion to provide a recommendation. We note that [redacted] stated to us that he was familiar with your [redacted] disclosure and said it was "common knowledge" that you raised it to [redacted], contradicting his statement that he "didn't know anything about [you]."

In response to the failure of [redacted] to recommend you, on [redacted], you sought a recommendation from [redacted] and [redacted] of the unit you had just recently left [redacted] Despite indicating he would forward your application materials to [redacted], [redacted] instead merely sent only your application narrative without his recommendation. Because neither [redacted] from your new unit nor [redacted] gave you a recommendation, you consequently received no

points [redacted]

We find the evidence supporting the decision to not recommend you to be relatively weak. In the first place, the rationale [redacted] stated in his email to not recommend you ignores the fact that you had worked [redacted]. In fact, [redacted] told us [redacted] would have known that as [redacted] you were very high-functioning because [redacted] only had high-functioning employees and further, he said he could not understand why [redacted] would say you did not have sufficient [redacted] experience. Secondly, the alternate rationale of [redacted] is totally unrelated to your skills or abilities and is consequently very weak support for his refusal to provide a recommendation.

It seems reasonable that you would seek the recommendation of [redacted] in whose unit you had spent enough time for him to form an assessment of your talents, especially when the only reason you were given for not receiving your current [redacted] recommendation was that you had not been with that unit long enough. [redacted] does not specify that only the current [redacted] provide the recommendation. Further, [redacted] we spoke with indicated that obtaining a recommendation from [redacted] by one recently switching units was logical and appropriate.

However, [redacted] also declined to provide you a recommendation, and we found his reasons to be unpersuasive as well. [redacted] stated it was a "conflict of interest" for him to give a recommendation to someone from his team [redacted] to rejoin his team. On the other hand, he told us that it was not a conflict for him to provide a recommendation to someone already in his unit who was seeking [redacted] or to obtain [redacted] a different job function in his unit. We find no reasoned basis for this distinction.

(2) Rating Panel

We found evidence that the lack of a Supervisor [redacted] recommendation had both a direct and indirect effect on the assessment of your application by the rating panel for the [redacted]. [redacted] [35] Each [redacted] was given the one page narrative each

[35] We found [redacted] knew of at least one of your disclosures. Further, [redacted], told

applicant submitted, the canvass announcement with position description, a copy of the emails forwarding each applicant's narrative with their recommendations and a ranking sheet. [redacted] [36] [redacted] Because you had not obtained a recommendation from [redacted] you immediately lost [redacted] points that all other applicants received.

Overall, you were marked lower than all other applicants, [redacted].[37] Had you received [redacted] points for having a recommendation you would have ranked [redacted] This evidence suggests that even if you had received a recommendation from [redacted] or [redacted] you might not have been selected for the position. We view this as some support for the action that the FBI took.

However, we also received evidence that the lack of a Supervisor [redacted] recommendation influenced the outcome beyond [redacted] rating points that it directly cost you. We obtained testimony from other [redacted] that a candidate's failure to receive a recommendation can negatively impact their perceptions of the abilities of an individual applicant in the other categories being rated. [redacted] told us that failure to obtain a recommendation made them less likely to rank a candidate highly on other

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us he had learned you had filed "some kind of complaint" from the outgoing [redacted] and assumed it was about [redacted]. [redacted]

attributes considered. For instance, [redacted] told us "absolutely," that the biggest factor in his scoring on elements was that fact you did not have a recommendation.

We also obtained conflicting testimony about whether [redacted] discussed the reasons why you were not provided a recommendation before some of them performed their ratings or the final tally was taken, with [redacted] recollecting such discussion did occur. Regardless, we take particular note that, despite being the only applicant who was then accepted into and had completed the required [redacted] Program [redacted], you were ranked with the lowest score [redacted] of all the candidates.[39] We also were told by [redacted] present that upon closer review of your narrative, they saw that you did provide examples of training they had not noticed before. We consider this to be evidence that the lack of a recommendation affected the other rating elements for at least some of the [redacted] present. We therefore cannot exclude the possibility that the lack of a recommendation was ultimately a determinative factor in your nonselection.

b. Strong Motive to Retaliate

Turning to the second *Carr* factor, we found persuasive evidence of a motive to retaliate against you for your [redacted] and [redacted] disclosures.[40] To begin with, one individual conducting the panel ratings and the selecting official were both negatively impacted by your [redacted] disclosures – a fact that makes more plausible their retaliatory motive.[41] [redacted] was the ultimate selecting official and was not bound by the panel scores. In fact, in another rotation reviewed, we found the [redacted] re-ranked candidates, notwithstanding the original panel scores. We found that [redacted] had some retaliatory motive since your [redacted] complaint [redacted] requesting INSD to inspect the [redacted] Section. [redacted] was fully aware of the [redacted] disclosure [redacted]

[39] [redacted]

[40] Since direct evidence of a deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate. *Whitmore* v. *Dep't of Labor,* 680 F.3d 1353, 1371 (2012), *citing McCarthy* v. *Int'l Boundary & Water Comm*'n, 116 M.S.P.R. 594, 613 (2011).

[41] See, e.g., *Russell* v. *Dep't of Justice* 76 M.S.P.R. 317, 326 (1997) (Reasoning, in part, that a disclosure that results in an investigation of management officials can support an inference of retaliatory animus).

[redacted] and knew your complaint directly caused the inspection in question. Further, [redacted], told us that he recalled a conversation sometime after becoming [redacted] in which [redacted] said you were only out for yourself and had no loyalty to the FBI because he was so frustrated with you and your complaints [redacted].[42] Given these facts, we found some evidence that [redacted] had at least a moderate amount of retaliatory motive.

With respect to your current [redacted] at that time, [redacted] who refused you a recommendation, we found weak retaliatory motive. In our OIG interview, [redacted] told us "it was common knowledge" that you raised a complaint [redacted]. However, he was not the subject of or implicated in any way by your [redacted] and [redacted] protected disclosures, nor was he or his unit embarrassed by them. We, therefore, attribute weak retaliatory motive to [redacted] at the time he refused to give you a recommendation in support of your candidacy for this rotation.

However, we found [redacted] – who, as noted above, also refused to give you a recommendation – had a strong motive to retaliate, considering he was aware you had gone over his head [redacted] nd that these complaints [redacted] resulted in two separate reviews covering in whole or in part the actions of the unit he managed. [redacted] told us he was aware your initial [redacted] complaint resulted in a [redacted] review [redacted] it can reasonably be concluded he believed that reflected poorly on himself. [redacted] also knew his [redacted] unit was to be specifically inspected by INSD [redacted] that he told us he assumed was because of your [redacted] complaints [redacted].

[redacted] also intentionally failed to inform you he was not going to recommend you, letting you believe that he was forwarding your materials, presumably with a recommendation. [redacted] instead told us he purposely did not communicate with you because he was frustrated that his emails to you seemed to end the up the subject of conversations with his superiors. Coupled with his knowledge of your disclosure, and the resulting investigations of his unit, we find this to be some evidence of his animus against you.

Further, we found it particularly salient that barely a month after your initial disclosure to [redacted] presented you with a

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[42] [redacted] said, "I remember clearly [redacted] having a conversation with her about, you know, that she was all about herself—nothing for the Bureau—you know, that her loyalties were not, certainly, with the Bureau or the Department of Justice—it was all about [redacted] 'cause he was so frustrated with her and it was just constant things."

letter of counseling regarding your penchant to go up the chain of command and "check behind your respective leader, supervisor, manager," which he described as something that "borders on insubordination." Also our interviews uncovered evidence that [redacted] was frustrated with your complaints and discussion with upper management and purposely avoided communicating with you in [redacted] which indicates some level of animus.

[redacted]

c. Similarly Situated Employees

With respect to the third *Carr* factor, the only truly similarly situated employee among the applicants in question was [redacted] who was the selectee. [redacted] The fact that this person, the other similarly situated employee, was not a whistleblower but rather the selectee weighs slightly in favor of finding retaliation. Therefore, we found some evidence supporting an inference that you received more scrutiny or harsher treatment than other FBI [redacted] employees who were similarly situated except for whistleblowing activity.

Taking all of the *Carr* factors into account, we found that the evidence that the FBI would have taken the same personnel action in the absence of your whistleblowing activity falls short of "clear and convincing" because of the weak support for the decision not to give you a recommendation, the impact of that decision on your nonselection [redacted] and the evidence of retaliatory motive on the part of some actors in the selection decision.

[redacted]

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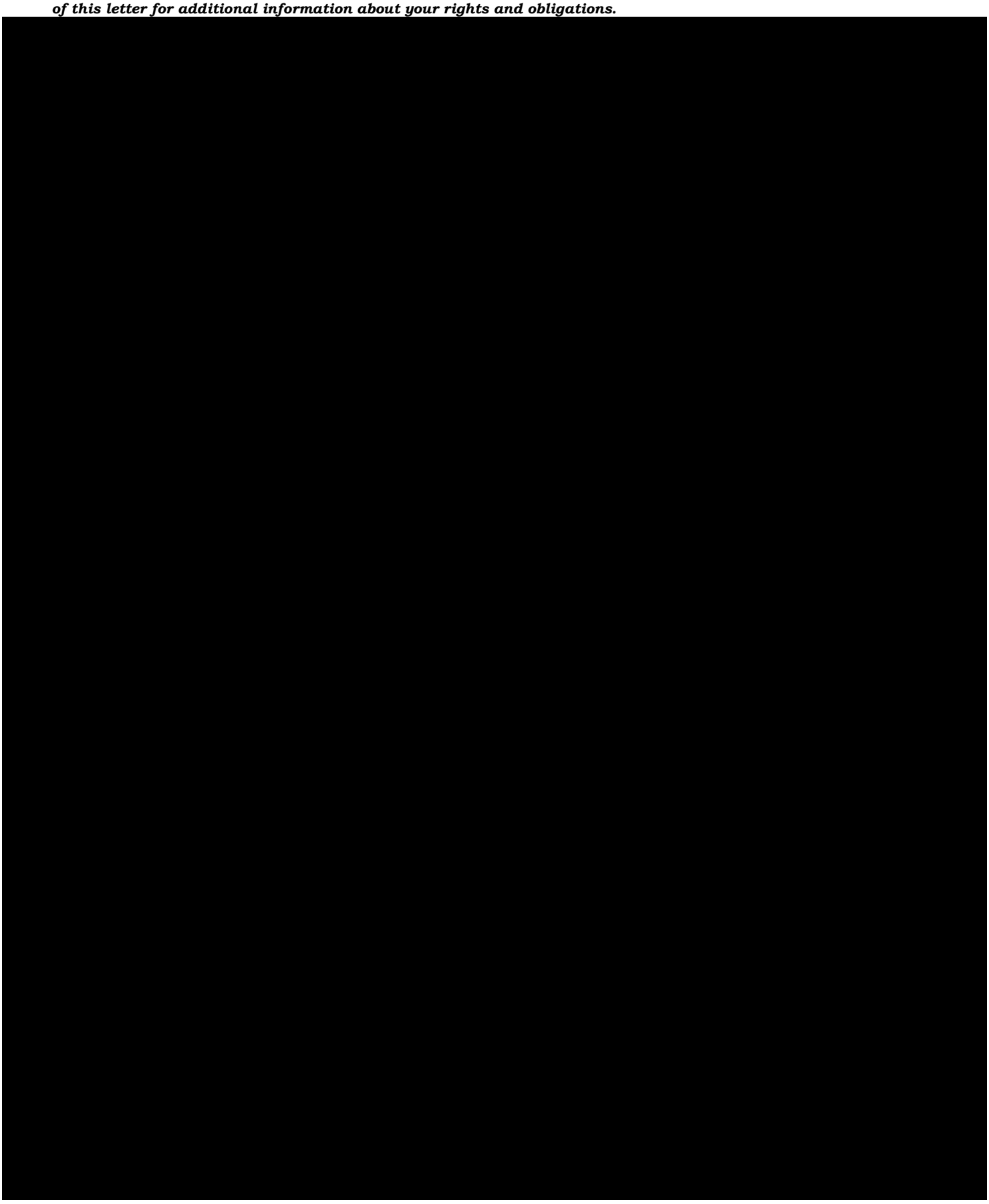

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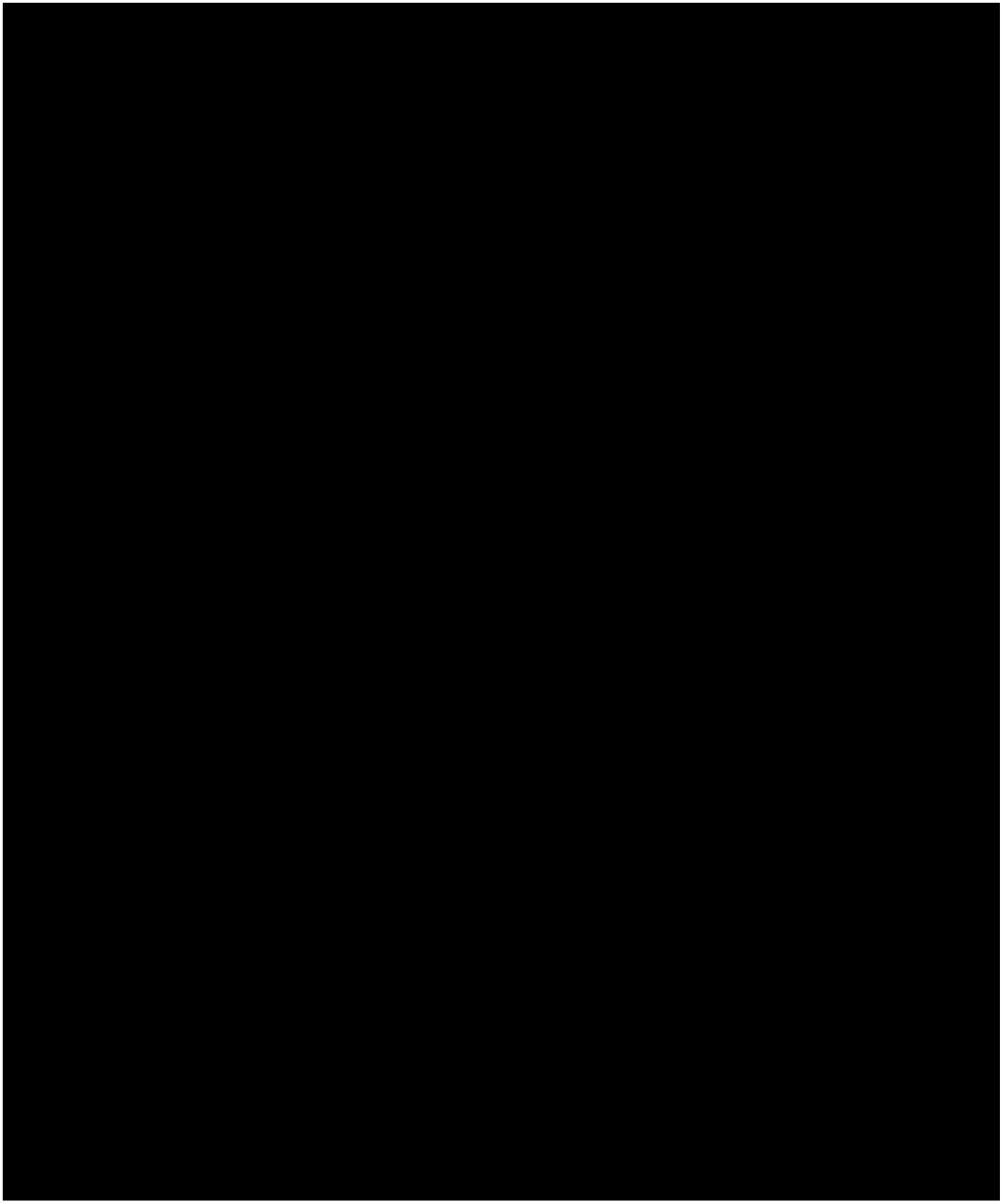

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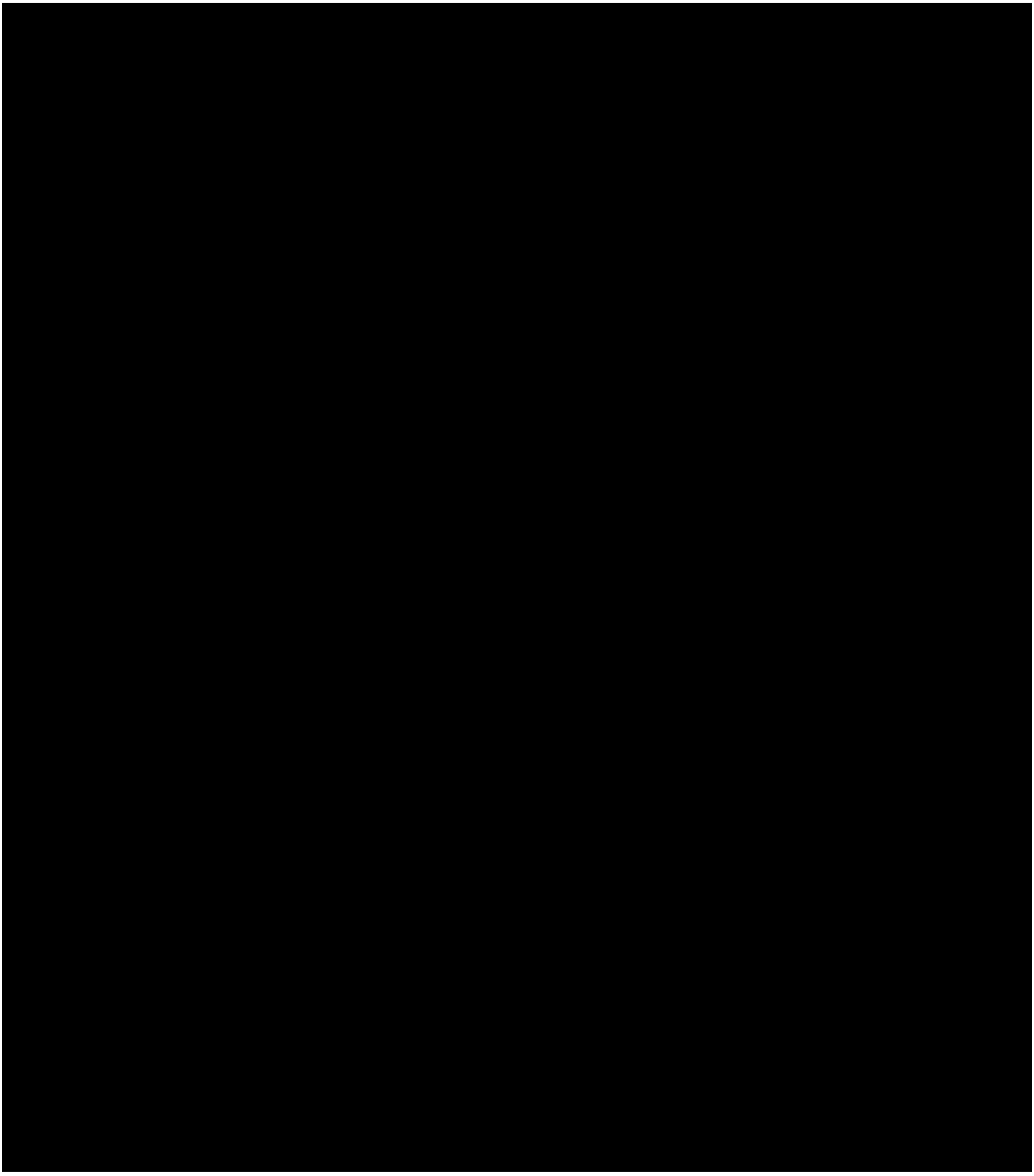

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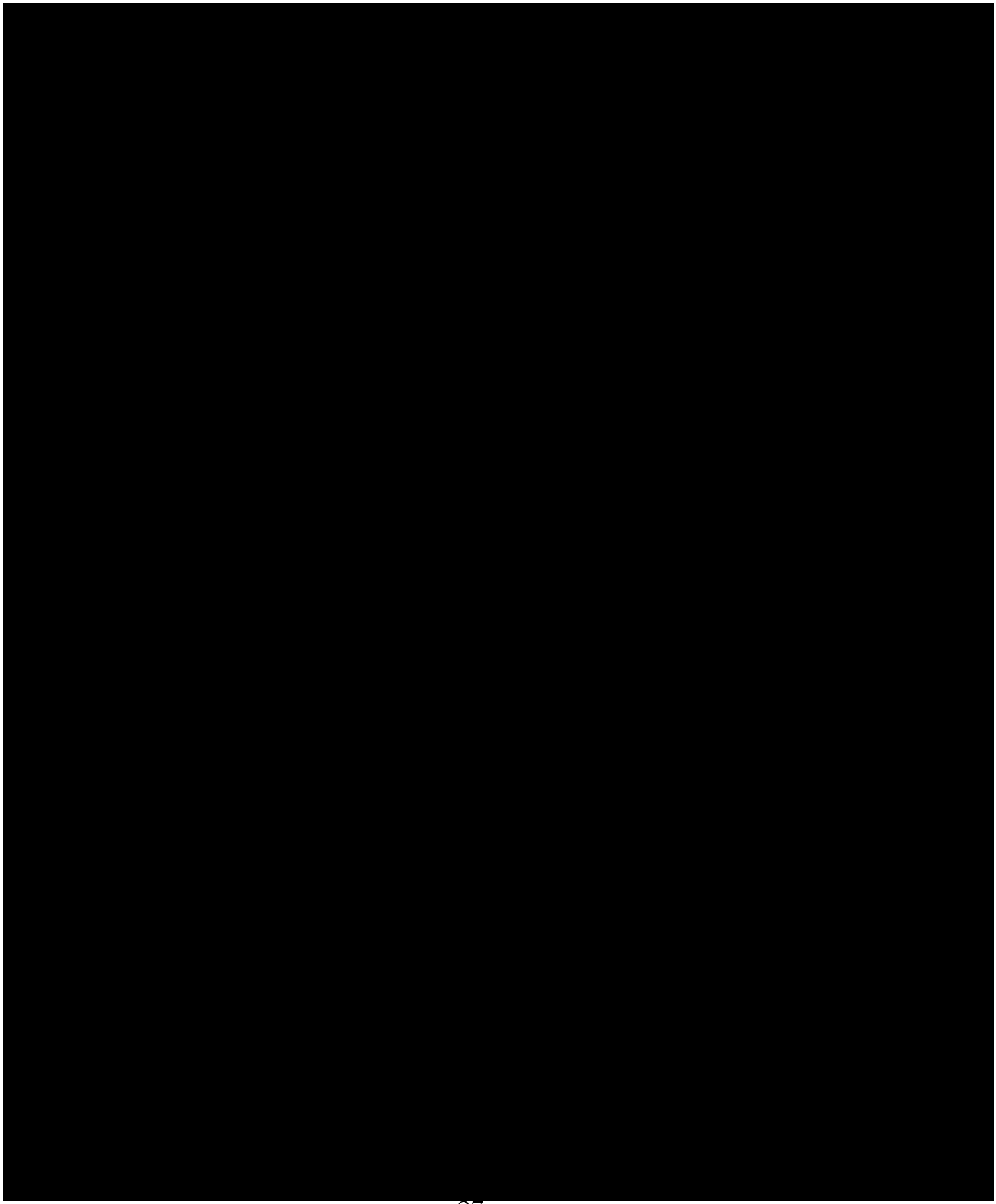

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[redacted]

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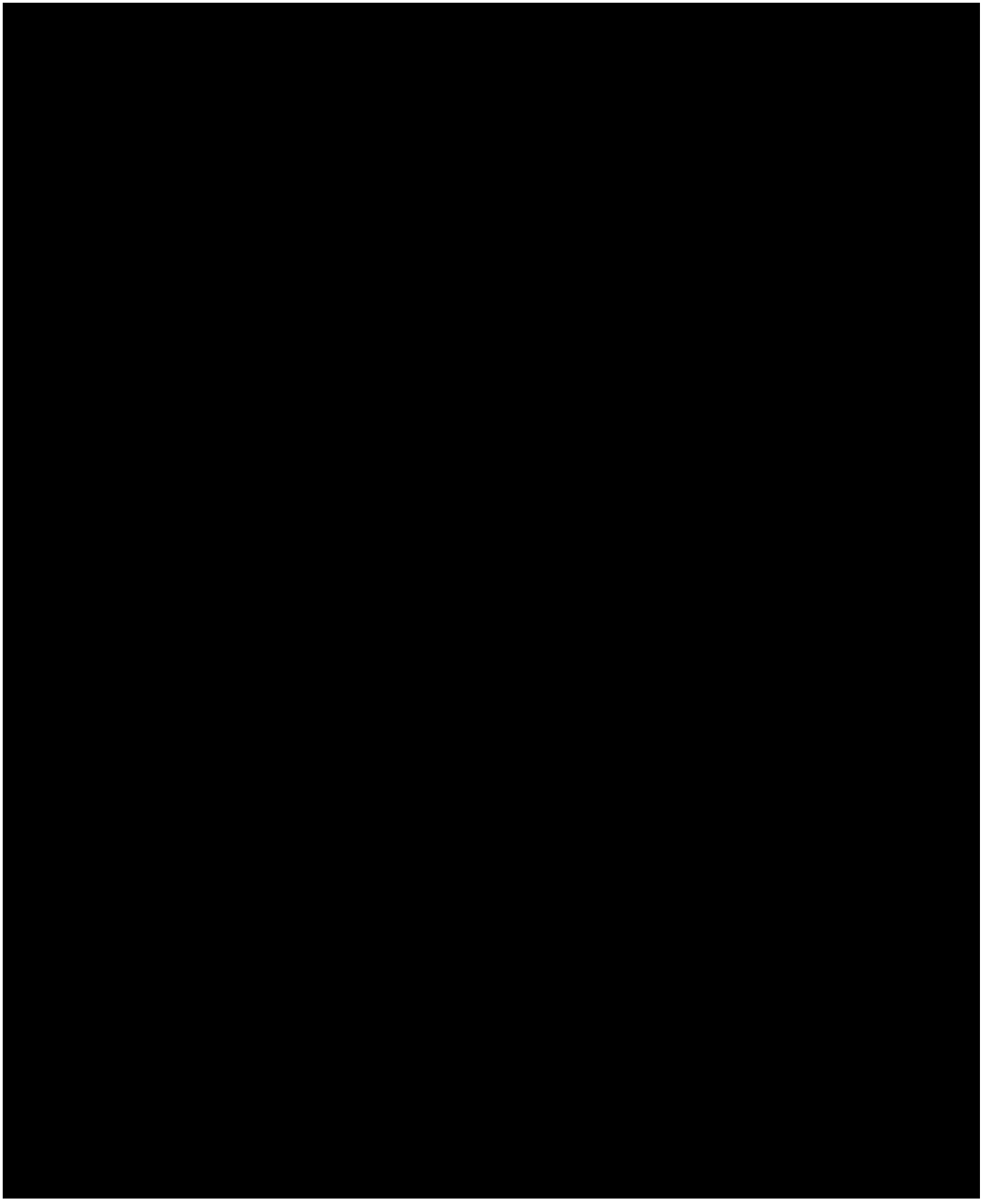

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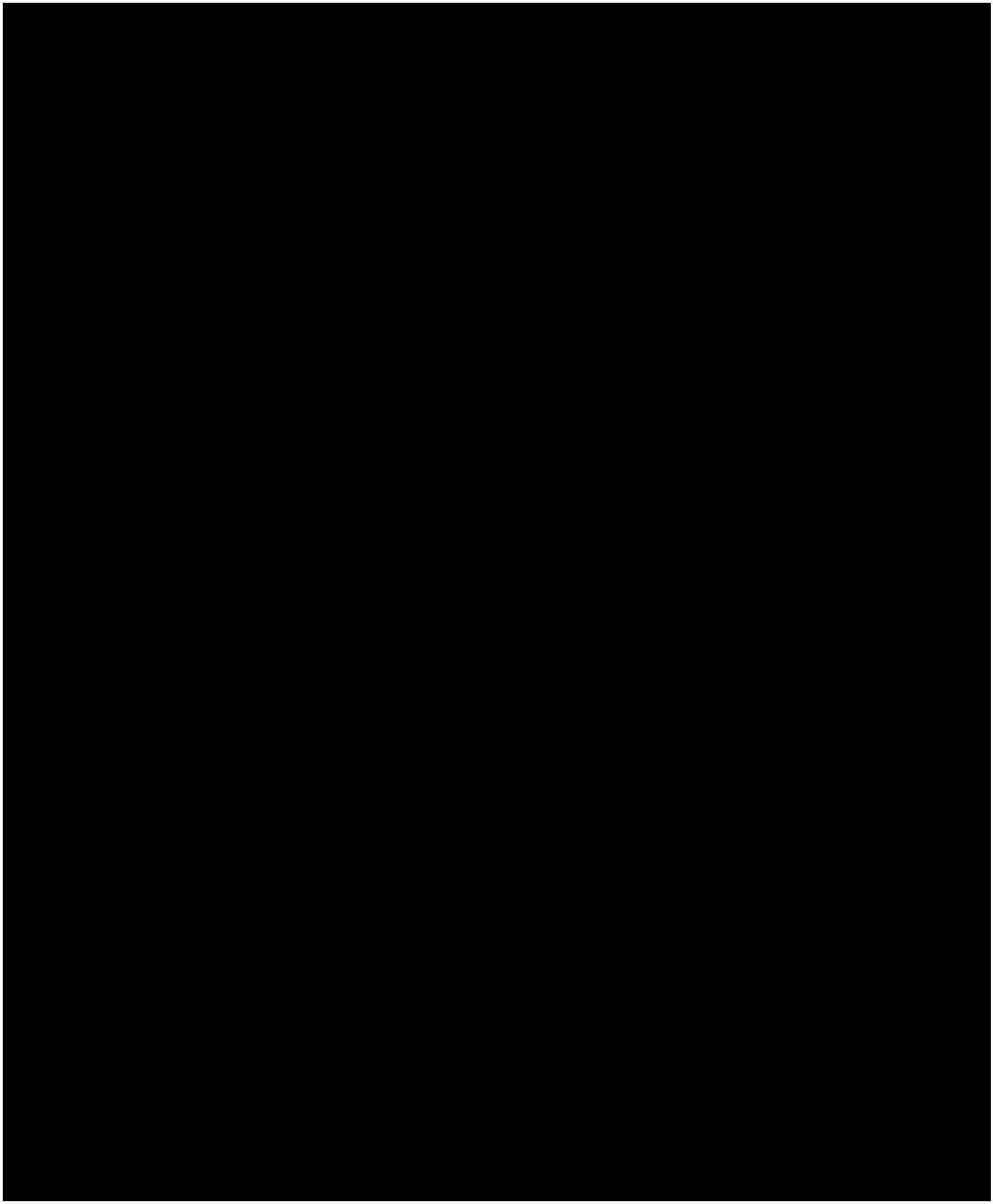

6. [redacted]

You have alleged that you were prevented from applying for a [redacted] position in [redacted] in retaliation for your protected disclosures. In an email to [redacted] on [redacted], you expressed your surprise that [redacted]. On [redacted] responded and explained he extended [redacted] a [redacted] position for another year and encouraged you instead to apply for a [redacted]. On [redacted], he announced that you were selected for [redacted] without going through a ratings panel. [redacted] Finally, on [redacted], you sought to apply for a new [redacted] announced that month, but were prevented from applying since you already were in the [redacted]. After considering the three *Carr* factors, we found the FBI cannot sustain its burden to provide clear and convincing evidence supporting its nonselection determination in the absence of your protected disclosures. Instead, we found your conflicting [redacted] was assigned without full transparency by a deciding official with a retaliatory motive.

With respect to the first *Carr* factor, our investigation found the evidence supporting the personnel actions at issue, which involved barring you from applying to [redacted] due to the prohibition against reappointments without a year break, was not strong. In this case, there is evidence the [redacted], which barred you from consideration for [redacted] was offered to you in less than transparent and good faith circumstances.

The evidence shows that [redacted] and other [redacted] management were aware of your interest in competing for the next available [redacted] but took steps to keep you uninformed of the likelihood of [redacted] expansion, apparently preferring you seek a [redacted] instead. We found that by [redacted] knew about plans to expand [redacted], but on [redacted] in response to your [redacted] email expressing great interest in a potential [redacted], he failed to so inform you of this when he explained he was extending [redacted].[48] Moreover, [redacted] told us that by [redacted] he had already taken

[redacted]

[48] We also note that this extension technically came 12 days after the expiration of the [redacted]

steps to designate another employee, Employee 2, as the next selectee for a new [redacted] position. [redacted] said he approved Employee 2 for the [redacted] Program on [redacted] because [redacted] and he wanted to use her expertise [redacted]

Importantly, [redacted] told us that on [redacted] when again informed by you that you preferred [redacted] position over the [redacted] he did not inform you of the [redacted] expansion plans specifically because he thought you did not have the knowledge [redacted] needed to perform effectively in that position. Instead, he cautioned in his reply that if you should take a [redacted] position, you should not expect that an exception would be made to [redacted] to allow you to compete for [redacted] when it next came open.

Even though a second canvass for [redacted] and [redacted] was posted on [redacted] in the mid-afternoon on [redacted] suddenly announced that he selected you to receive a [redacted], to be effective [redacted] He unilaterally selected you off the [redacted] list, [redacted]. We found that this abrupt selection was prompted by a complaint you made at 7:43 a.m. on [redacted] to [redacted] and [redacted] regarding being repeatedly turned down for [redacted] selections and requesting to be reinstated as a [redacted] had emailed the [redacted] and [redacted] at 8:59 a.m. that same day telling them he would "address" your complaint "ASAP" after returning from appointments. [redacted]

The timing of these events and the explanations for why information was not provided to you regarding the likelihood that a [redacted] would soon be available for competition allows us to conclude that the [redacted] unilaterally selected you as [redacted] and intentionally kept you in the dark about a possible [redacted], with full knowledge that you would be conflicted out from competing for [redacted] that would soon become available. We note that the [redacted] that was eventually made available was for a generic [redacted] not [redacted] specialist, so the reasons the [redacted] gave for engineering your exclusion from competing for this position are not persuasive. An additional circumstance further highlights the paucity of procedure and rationale behind the selection. Although the [redacted] did not recall such a conversation, two other witnesses told us that the [redacted] had been discussing with them simply letting you choose between a [redacted] and [redacted] prior to [redacted], apparently without reference to any rating panel process. In such circumstances, we find the strength of

support for FBI's actions – that you were barred because you already had a [redacted] – to be weak. The facts surrounding the [redacted] lead us to conclude that the denial preventing you from competing for the [redacted] was too contrived to support FBI's actions.

Regarding the second *Carr* factor, as noted earlier we found the ultimate deciding official, [redacted], had moderate retaliatory motive since your complaint [redacted] resulted in the [redacted] requesting INSD to inspect the [redacted] functions of his Section.

With respect to the third *Carr* factor, while anyone already serving in [redacted] would be similarly situated, we are aware of no such employees who tried to obtain a waiver or exception to apply for [redacted].

We find that the moderate retaliatory motive of the [redacted] coupled with the weak evidence found in the available record to support barring you from applying for the [redacted] does not show sufficiently clear and convincing evidence that the FBI would have taken the same personnel action in the absence of your whistleblowing activity. Such evidence is insufficient to rebut the presumption that these decisions were made due to your protected disclosures.

III. Conclusion

For the reasons stated above, we have found a reasonable basis to believe that you have suffered a reprisal for protected disclosures within the meaning of 5 U.S.C. § 2303 and the FBI Whistleblower Regulations regarding the [redacted] and [redacted].

This letter serves as the Final Written Statement required by 28 C.F.R. § 27.3(h) of the FBI Whistleblower Regulations. Pursuant to 28 C.F.R. § 27.4(c)(1), you may present a request for corrective action directly to the Director of the Office of Attorney Recruitment and Management within 60 calendar days of the receipt of this letter. We request that you not share this written statement with anyone other than your attorney.

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Sincerely,

M. Sean O'Neill
Assistant Inspector General
Oversight and Review Division