WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

THOMAS D'ALESSANDRO, ***Applicant***

vs.

CITY OF MENIFEE; permissibly self-insured, ***Defendant***

Adjudication Number: ADJ16610370
Riverside District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the July 9, 2024 Findings and Orders (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant did not meet his burden of proof in establishing injury arising out of and in the course of employment (AOE/COE) to the left knee while employed by defendant as a police officer. Applicant was participating in an off-duty jiu-jitsu class when he became injured and contends that pursuant to *Ezzy v. Workers' Comp. Appeal Board* (1983) 146 Cal.App.3d 252, he believed participation in the class was expected by defendant and that this belief was objectively reasonable.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration (Petition), the Answer, the contents of the Report, and have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, rescind the F&O, and substitute it with a new F&O which finds injury AOE/COE to the left knee.

FACTS

Applicant claims that while employed by defendant as a police officer on August 8, 2022, he sustained an industrial injury to left knee. Applicant was taking an off-duty jiu-jitsu class when the injury occurred.

At the time, applicant was a member of and instructor for the city of Menifee's defensive tactics team. The team was responsible for training officers in defensive tactics. There were five instructors, including applicant.

In 2021 – 2022 the instructors underwent an Artemis defensive training course, and in 2022, Gracie survival tactics were included. Techniques learned in the trainings came from a variety of disciplines, including jiu-jitsu.

Applicant claimed that he believed participation in his off-duty jiu-jitsu class was expected based upon an email from the team lead, discussions with co-workers, and applicant's own belief that the class would make him a more competent employee. (Report, p. 3.)

The email from team lead, Lieutenant Gutierrez stated, in relevant part, as follows:

> "The goal [for the Defense Tactics Team] is to develop you all in a variety of defense tactics disciplines so that we may collectively expand our current d-tac training program."

It goes on further:

> "Take a look at your calendars and come up with a date where we can all gather to discuss our program and to practice our current Artemis tactics. This will allow us to stay sharp. In the meantime, please stay in shape. Eat healthy and workout. More fruit and less donuts from the lounge. Our officers look at us for guidance when it comes to defensive tactics, so we should definitely look the part. I look forward to more training and to getting together soon."

(Joint Exhibit 4, Email from Lieutenant Heriberto Gutierrez, August 17, 2021.)

Injury AOE/COE was denied by defendant and on May 7, 2024, the matter proceeded to trial.

On July 9, 2024, the WCJ found that the injury was barred under Labor Code section[1] 3600(a)(9) because applicant did not meet the second prong of the two-prong test under *Ezzy*.

[1] All further references will be to the Labor Code unless otherwise indicated.

DISCUSSION

Preliminarily, former section 5909 provided that a Petition for Reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a Petition for Reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board." The date appearing within this section is the transmission date.

Here, according to Events, the case was transmitted to the Appeals Board on August 2, 2024, and 60 days from this date is October 1, 2024. This decision was issued on or by October 1, 2024. As such, we have timely acted on the Petition as required under section 5909(a).

Further, section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. This ensures that parties are notified of the accurate date for the commencement of the 60-day period upon which the Appeals Board is to act on a petition. As noted above under section 5909(b)(1), transmission of the case to the Appeals Board in EAMS constitutes notice to the Appeals Board, and as noted under section 5909(b)(2), service of the Report and Recommendation constitutes notice of transmission to the parties.

According to the proof of service, the Report in this case was served on August 2, 2024. The case was also transmitted to the Appeals Board on August 2, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. As such, parties were provided with notice of transmission per section 5909(b)(1) since the Report was served per

section 5909(b)(2). Parties were therefore provided with actual notice as to commencement of the 60-day period.

Turning to the merits of the Petition, section 3600(a)(9) states, in relevant part, that compensation does not exist where an injury arises ". . . out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment." In determining whether an off-duty athletic activity constitutes an industrial injury, the Appeals Board must determine whether the activity is a reasonable expectancy of employment, which consists of two elements: (1) whether the employee subjectively believes that the activity is expected by the employer and (2) whether that subjective belief is objectively reasonable. (*Ezzy*, *supra*, at 260.)

During the May 7, 2024 trial, applicant testified that he was sent by his department to train for defensive tactics and jiu jitsu was incorporated into this training program as a part of restraining and holding techniques. (Minutes of Hearing and Summary of Evidence, May 9, 2024, p. 4.) This information was not contradicted by Lieutenant Gutierrez's testimony. Based upon the training requirements and the above noted email from Lieutenant Gutierrez, applicant testified that he believed continuous training in jiu-jitsu was necessary to keep his skills sharp so that he would have continued "confidence and technique of control." (*Id.*) Applicant therefore subjectively believed that training in jiu-jitsu was expected by the employer. This was acknowledged by the WCJ who confirmed that applicant "subjectively believed" participation in jiu-jitsu was an activity "expected by his employer." (Report, p. 2.)

With respect to the second element under *Ezzy*, whether applicant's subjective belief was objectively reasonable, applicant references *Wilson v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 902 [52 Cal.Comp.Cases 369] and *Tomlin v. Workers' Comp. Appeals Bd.* (2008) 162 Cal.App.4th 1423 [76 Cal.Comp.Cases 672]. In *Wilson*, the Court of Appeal found compensable an injury sustained by a police officer while running to train for a fitness test. The applicant in *Wilson* testified that his superiors told him off-duty conditioning would be necessary to maintain the physical qualifications of the job. (*Id.*) The Court of Appeal held that applicant's subjective belief was objectively reasonable. Similarly, in *Tomlin*, the applicant, a member of the SWAT team, was injured while running. Applicant was training for an annual physical examination, and

it was encouraged that he train off-duty. The Court of Appeal found compensability despite applicant being on vacation at the time of injury.

The WCJ and defendant argue that *Wilson* and *Tomlin* are distinguishable in that in both of those cases, the officers "were required to pass tests that involved the type of exercise the officer was performing while off duty." (Report, p. 3.) Although it is true that the officers in the *Wilson* and *Tomlin* were training for fitness tests which required the subject activity, it is also true that physical fitness was required and how they were to maintain their fitness and otherwise train was not limited by superiors. Further, the Court of Appeal in *Wilson* noted that "proving express or implied pressure upon the employee serves to establish the objective reasonableness of that employee's belief that he or she was required to participate in the off-duty activity." (*Wilson*, *supra* (quoting *Aetna Casualty & Surety Co. v. Workers' Comp. Appeals Bd.* (1986) 187 Cal.App.3d 922, 931.).) As in *Wilson*, in the case at hand, maintenance of physical fitness was either directly expressed or implied by superiors. Evidence of this is found in the email from Lieutenant Gutierrez wherein he specifically requested that officers "stay in shape" and "workout." (Joint Exhibit 4.) He also underscored the fact that other officers looked towards the team for "guidance when it comes to defensive tactics" and as such, team members were to "definitely look the part." (Ibid.)

Aside from the email communication, on-the-job training included Artemis techniques and Gracie Survival Tactics (GST), and applicant was expected to continue progression in these trainings. (Ibid.; Minutes of Hearing and Summary of Evidence, May 7, 2024, p. 4.) Lieutenant Gutierrez noted that "the goal" was to develop everyone "in a variety of defense tactics disciplines" so that they could "collectively expand" on the current "d-tac training program." (Joint Exhibit 4.) Further, as testified by applicant, GST training included techniques learned from jiu-jitsu and current and past members of the team had taken or were taking jiu-jitsu classes. (Ibid.; Minutes of Hearing and Summary of Evidence, *supra*, at p. 6.)

Based upon the foregoing, we therefore find it objectively reasonable that applicant subjectively believed continued training in jiu-jitsu was expected by the employer.

The WCJ argues that applicant was not explicitly told to take jiu-jitsu classes. However, as noted above, several factors played into the impression that continued training in jiu-jitsu was expected by defendant. A direct order is not necessary. The WCJ further argues that defendant did not purchase equipment or uniforms and did not pay applicant to participate in the classes. As noted in *Wilson*, however, the fact that the employer does not "provide equipment, facilities or

supervision for off-duty workouts" is not determinative insofar as *Ezzy* is concerned. (*Wilson*, *supra*, at 907.) The entirety of the situation must be taken into consideration. Lastly, the WCJ notes that applicant was partially motivated to take the classes because of his stature and would have taken jiu-jitsu classes regardless of his training. We find this information irrelevant. The fact that applicant took jiu-jitsu classes previously and would have continued is not unusual. Given applicant's chosen profession it is not a surprise that he might benefit or enjoy the athletic activities he partakes in on duty, off-duty.

Accordingly, we grant applicant's Petition, rescind and substitute the F&O, and return this matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the July 9, 2024 Findings and Orders is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 9, 2024 Findings and Orders is **RESCINDED** and the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Thomas D'Allessandro, born [], while employed by the city of Menifee on August 8, 2022 as a police officer, occupational group 490, sustained injury in Riverside, California arising out of and in the course of employment to the left knee.

2. At the time of the injury, the employer was permissibly self-insured.

3. At the time of the injury, the employee's earnings were $2081.84 per week, warranting indemnity rates of $2081.84 per week for temporary disability and $290 per week for permanent disability.

4. The employer has furnished no medical treatment.

5. No attorney fees have been paid and no attorney fee arrangements have been made.

6. The parties stipulate to the accuracy of the DEU rating by Sue Barrios dated May 7, 2024 without waiving legal arguments.

7. Defendant did not meet its burden to show that compensation for applicant's injury was barred by Labor Code section 3600(a)(9).

ORDER

1. All other issues are deferred.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I DISSENT, (See attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 30, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

THOMAS D'ALESSANDRO
LAW OFFICES OF SMITH AND GARFUNKEL
HANNA, BROPHY, MacLEAN, McALEER & JENSEN
EMPLOYMENT DEVELOPMENT DEPARTMENT

RL/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS

DISSENTING OPINION OF COMMISSIONER JOSE RAZO

I respectfully dissent. I would have denied the Petition for Reconsideration based upon the reasons set forth in the WCJ's Report and Recommendation, which is adopted and incorporated into this dissent. As discussed, to establish injury AOE/COE, the Appeals Board must determine whether the off-duty recreational activity causing the subject injury is a reasonable expectancy of employment. (*Ezzy v. Workers' Comp. Appeal Board* (1983) 146 Cal.App.3d 252). The reasonable expectancy test consists of two elements: (1) whether the employee subjectively believes that the activity is expected by the employer and (2) whether that subjective belief is objectively reasonable. (*Id.*) In the instant case, applicant has not met his burden of proof in establishing injury AOE/COE as he has failed to prove the second element of the test.

Applicant contends that he believed participation in jiu-jitsu classes was expected by defendant and that this belief was objectively reasonable. He relies on *Wilson v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 902 [52 Cal.Comp.Cases 369] and *Tomlin v. Workers' Comp. Appeals Bd.* (2008) 162 Cal.App.4th 1423 [76 Cal.Comp.Cases 672]. Applicant's case, however, is distinguishable from *Wilson* and *Tomlin* and other cases wherein injury was found compensable. (See also *Kidwell v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1130 [60 Cal.Comp.Cases 296].) In these cases, the police officers were training for specific tests required by their employment when they became injured. Per the WCJ, the officers "were required to pass tests that involved the type of exercise the officer[s] w[ere] performing while off duty." (Report, p. 3.) This was not the case here. Applicant was not injured while participating in a specific athletic activity that was to be tested as a condition of employment.

Applicant's case is more akin to *City of Stockton v. Workers' Comp. Appeals Bd.* (*Jenneiahn*) (2006) 135 Cal.App.4th 1513 [71 Cal.Comp.Cases 5]. In *Jenneiahn*, the police officer was injured while playing basketball off-duty. He was not training for a specific test, but rather, working out to maintain general fitness for duty. The court found no injury AOE/COE and held that "[t]he general, and reasonable expectation that a police officer will maintain sufficient physical fitness to perform his or her duties is not a sufficient basis to extend workers' compensation coverage to any and all off-duty recreational or athletic activities in which an officer voluntarily choses to participate." (*Jenneiahn*, *supra*, at p. 1526.)

As in *Jenneiahn*, in the current case applicant appeared to be taking jiu-jitsu classes off-duty to maintain his general fitness rather than to prepare for a specific fitness test. Per Lieutenant

Gutierrez, jiu-jitsu was "not required" and some instructors "did not have any martial arts experience." (Minutes of Hearing and Summary of Evidence, May 7, 2024, p. 11, emphasis added.) Further, applicant was not hired because of any specific training in jiu-jitsu. Rather, he was hired because of his ability to communicate and implement "teaching policy." (*Id.* at 13.)

The fact that jiu-jitsu was incorporated into training techniques for the defensive tactics team is not persuasive. Lieutenant Gutierrez noted that "Artemis techniques are based upon a *variety* of disciplines" including taekwondo and aikido, among others. (*Id*., emphasis added.) This was not contradicted by applicant's testimony.

Additionally, in the August 17, 2021 email to the defensive tactics team, Lieutenant Gutierrez made no mention of training in jiu-jitsu specifically. Rather, he spoke generally about staying in shape, asking officers to "eat healthy and workout." There was no direct or implied request by Lieutenant Gutierrez or any else on the team to participate in off-duty jiu-jitsu classes. To say that the email communication constituted any such request is a stretch. There was also no pre-approval for the jiu-jitsu classes. As such, based upon the facts of this case, there is no basis for applicant's contention that there is an objective reasonable expectation that off-duty jiu-jitsu was required, either to stay in shape, or otherwise.

In light of the foregoing, I would deny the Petition for Reconsideration and affirm the July 9, 2024 Findings and Orders.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
SEPTEMBER 30, 2024
SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

THOMAS D'ALESSANDRO
LAW OFFICES OF SMITH AND GARFUNKEL
HANNA, BROPHY, MacLEAN, McALEER & JENSEN
EMPLOYMENT DEVELOPMENT DEPARTMENT

RL/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS

REPORT AND RECOMMENDATION

ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Date of injury:	Specific injury 08/08/2022 to left knee. The application was filed on 08/26/2022.
Hearings set:	None set.
Age on date of injury:	Age [] on 08/08/2022.
Identity of Petitioner:	Andrew D. Smith, Esq. attorney for applicant Thomas D'Alessandro, Petitioned for Reconsideration of Findings, Orders, and Opinion on Decision issued 07/09/2024.
Parts of body injured:	The applicant claimed and industrial injury to left knee.
Occupation:	Police Officer, Occ Group 490.
Date of Decision:	07/09/2024
Petition for Reconsideration was filed:	07/25/2024
Timeliness:	The petition was timely.
Verification:	The petition was verified by an attorney.
Petitioner's Contentions:	Petitioner contends that the evidence does not justify the Findings of Fact and by the order, decision, or award, the Board acted without or in excess of its powers in issuing the, Order, Decision or Award.

Applicant, by and through his attorney of record, has filed a timely Petition for Reconsideration on July 25, 2024 (EAMS DOC ID 53040892) challenging the Findings of Fact, Orders, and Opinion on Decision dated July 9, 2024.

The defendant has filed an answer on July 31, 2024. The defendant argues that the applicant was never told or encouraged to take outside Jiu Jitsu classes. The defendant also argued that in response to authority by applicant that Mr. D'Alessandro was not required to pass any tests and was not required to be an expert in Jiu Jitsu to be a defense tactics instructor. The defendant analogized this case to a case, *John Swafford v WCAB,* County of Solano (2005) 70 CCC 1745

(*writ denied*) in which it was found that an applicant lifting heavy weights at a personal gym was not industrial.

II.

FACTS AND PROCEDURAL HISTORY

The Application for Adjudication alleging injury to left knee on August 8, 2022 was filed by the applicant attorney on August 26, 2022.

Defendant filed a Declaration of Readiness for an MSC regarding temporary disability, permanent disability, future medical, and AOE/COE on 11/30/2023.

The case proceeded to trial in person with two witnesses, the applicant Thomas D'Alessandro and his supervisor, Heriberto Gutierrez, on May 7, 2024. Findings, Orders and Opinion on Decision issued on July 9, 2024. It was found that the applicant did not sustain an industrial injury, as the applicant did not carry the burden of proving injury AOE/COE. (Findings and Orders-78142740; Opinion on Decision-78142746). Applicant attorney timely filed a verified Petition for Reconsideration on July 25, 2024 (EAMS DOC ID 53040892). The defendant filed an Answer to Petition for Reconsideration on July 31, 2024 (EAMS DOC ID 53133257).

III.

DISCUSSION

In relevant part, the undersigned found the applicant did not sustain an industrial injury because the applicant did not carry the burden of proving injury AOE/COE as he did not prove objectively that he was expected to attend Jiu Jitsu classes while he was off-duty.

It was found that on the day of injury, August 8, 2022, the applicant was off duty. There is no dispute on this fact. The applicant subjectively believed that his participation in the activity at the Jiu-Jitsu gym was an activity expected by his employer as he testified: He believes his participation in Gracie Carlson classes was expected of him because of an e-mail dated 08/17/2021. He believed that in speaking with peers, and training outside of work made him more competent and training for one week was not sufficient. It was found that the subjective belief was not objectively reasonable.

The petitioner contends that the applicant's off-duty injury was industrial as the applicant's subjective belief that participation in an off-duty Jiu Jitsu class was expected was objectively reasonable.

In order to discuss this issue, there is a reference to Labor Code 3600(a)(9). Labor Code 3600(a)(9) states:

Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment...

There is a two-part test for determining whether the off-duty activity constitutes a reasonable expectancy of employment (*Ezzy v. WCAB* (1983) 48 CCC 611, hereinafter *Ezzy*). The test is as follows:

1. Whether the employee subjectively believed that his or her participation in an activity was expected by the employer; and
2. Whether that belief was objectively reasonable.

The undersigned concluded that although the applicant had a subjective belief that it was expected, but it was not objectively reasonable. The petitioner disputes this determination based on the second prong, in that it was objectively reasonable to believe it was a reasonable expectation of his employment.

The petitioner cited the appeals court case of *Tomlin v. Workers' Compensation Appeals Board,* 76 Cal. Rptr. 3d 672 (2008) and *Wilson v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 902 to show that off duty injuries such as running while on vacation and running after a shift ended were reasonable expectations of employment. These cases may be differentiated, as they were cases in which each of the officers was required to pass tests that involved the type of exercise the officer was performing while off duty. In contrast, the applicant testified that he was never told or implied to take Jiu Jitsu off duty (SOE, p. 6, lines 12-13).

The critical issue is centered around an e-mail from Heriberto Gutierrez dated August 17, 2021 (joint exhibit 4). It states in relevant part:

> Take a look at your calendars and come up with a date where we can all gather to discuss our program and to practice our current Artemis tactics. This will allow us to stay sharp. In the meantime, please stay in shape. Eat healthy and workout. More fruit and less donuts from the lounge. Our officers look at us for guidance when it comes to defensive tactics, so we should definitely look the part. I look forward to more training and to getting together soon.

The applicant testified that he believed participation at the Jiu Jitsu School he attended was expected of him because of the e-mail, speaking with peers, and the additional training made home more competent (SOE, P. 6, lines 18-20).

The petitioner argued that participation was objectively reasonable because the following:

> City of Menifee makes control and arrest and the way it is done with Jiu Jitsu a priority, the email from Captain Gutierrez to eat healthy, stay in shape and work out to look the part, Sergeant Cox stating the in the supervisor injury/illness report that he was injured in Jiu Jitsu training to stay proficient for DTAC instructor position, other officers took off duty Jiu Jitsu, applicant believed his participation in Jiu Jitsu was expected of him, he believed that physical fitness was a requirement of being on defensive tactics team, Captain Gutierrez did not discourage taking outside classes, Captain Gutierrez believed that applicant's proficiency benefited the City of Menifee in some way (Reconsideration, pages 8-9).

In response, it should be noted that the applicant was not instructed to take classes outside. According to Captain Heriberto Gutierrez, Jiu Jitsu experience is not required and some of the instructors did not have any martial arts experience. It is one of several techniques used. The e-mail by Captain Gutierrez (Lieutenant at time of injury) made it clear that the officers were to stay in shape. That could be running, walking, or sit-ups, eating well. There is no explicit instruction to take Jiu Jitsu lessons. From the e-mail, it could not be reasonably construed that the instructors were expected to take outside courses.

The applicant started taking Jiu Jitsu classes in 2014 (Summary, p. 5, line 15). The applicant had a love for Jiu Jitsu and would have taken Jiu Jitsu even if he was not on the Defensive Tactics Team (Summary. P. 7 lines 23-24; P. 10). The applicant has paid for his own classes in Jiu Jitsu. City of Menifee paid for Artemis, Level 1, or GST courses.

According to the *Ezzy* case the employer is protected from liability for injuries where an employee's belief that he or she is expected to participate in an activity is unreasonable. The burden rests upon an employer to insure that no subtle or indirect pressure or coercion is applied to induce involuntary participation by an employee. In this case the employer did not purchase athletic uniforms or equipment, there were no uniforms that had the employer's name or insignia, no wages were paid during practice or play, the participation would have been voluntary as he was not told, coerced, reminded, pressured, to attend. It was not implied that he should or had to attend off duty Jiu Jitsu classes.

Some of the motivation for taking Jiu Jitsu is his stature (SOE, last paragraph page 7), he practiced techniques with other officers and was paid for it (Summary page 8, lines 9-10), City

policy wanted to avoid the use of force in the city (Summary page 9, lines 6-7), the applicant was selected to be on defensive tactics team because he was a good instructor because of teaching ability, communicating and teaching policy (Summary page 13, lines 7-9). Further, Captain Gutierrez was not aware of specific information applicant was being taught and did not want it taught to other employees (Summary page 13, lines 10-11), and applicant was never told anything that would lead to an expectation of instructors getting outside training (Summary page 12-13).

IV.

RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be denied.

DATE: 08/02/2024

Eric Thompson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE