

**IN THE SUPREME COURT OF OHIO**

**11-1477**

**RONALD L. ROYSE,**  
**Plaintiff/Appellee**

**v.**

**CITY OF DAYTON, et al.,**  
**Defendants/Appellants.**

**: ON APPEAL FROM THE**  
**: MONTGOMERY COUNTY**  
**: COURT OF APPEALS,**  
**: SECOND APPELLATE DISTRICT**  
**:**  
**: COURT OF APPEALS**  
**: CASE NO. 24172**  
**:**  
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**APPELLANT CITY OF DAYTON'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... ii

I. EXPLANATION OF WHY THIS CASE INVOLVES A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST WORTHY OF INVOKING THE DISCRETIONARY JURISDICTION OF THE OHIO SUPREME COURT. ....1

II. STATEMENT OF THE CASE.....3

III. STATEMENT OF FACTS.....4

IV. ARGUMENT .....5

    A. APPELLANT CITY OF DAYTON'S PROPOSITION OF LAW NO. 1: A MUNICIPAL CIVIL SERVICE BOARD IS NOT STRICTLY BOUND BY THE OHIO RULES OF EVIDENCE IN ADMINISTRATIVE HEARINGS UNLESS SPECIFICALLY REQUIRED BY LAW.....5

    B. APPELLANT CITY OF DAYTON'S PROPOSITION OF LAW NO. 2: A MUNICIPAL CIVIL SERVICE BOARD'S DECISION WHICH IS SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE, EVEN IF SAID EVIDENCE IS INADMISSIBLE HEARSAY UNDER THE OHIO RULES OF EVIDENCE, DOES NOT RISE TO THE LEVEL OF ABUSE OF DISCRETION. ....7

    C. APPELLANT CITY OF DAYTON'S PROPOSITION OF LAW NO. 3: THE PHRASE "OTHER QUALIFIED PERSON" CONTAINED IN RULE 803(6) OF THE OHIO RULES OF EVIDENCE IS NOT TO BE NARROWLY INTERPRETED. ....14

V. CONCLUSION.....15

VI. CERTIFICATE OF SERVICE.....16

**I. EXPLANATION OF WHY THIS CASE INVOLVES A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST WORTHY OF INVOKING THE DISCRETIONARY JURISDICTION OF THE OHIO SUPREME COURT.**

This case involves a question of whether a municipal civil service board in an administrative hearing is bound by the Ohio Rules of Evidence.

Ronald Royse, Appellee, was employed with the City of Dayton Fire Department as a firefighter. However, after two positive drug test results revealing his use of cocaine, and a plea of no contest during his pre-disciplinary hearing, Appellee was terminated. Subsequently, Appellee appealed his termination to the Dayton Civil Service Board (“Board”), which held a *de novo* hearing during which it received testimonial and documentary evidence relating to Appellee’s positive drug screens. Said evidence included, but was not limited to, testimony from the City’s Safety Officer and another City employee who oversees the collection of the urine samples used in the drug testing process. Neither the Medical Review Officer, nor a witness from the laboratory performing the test, testified regarding their findings. However, the Civil Service Board, based upon the testimony of the two City witnesses regarding the bargained-for procedures<sup>1</sup> involved in the drug testing process, also admitted into evidence the laboratory reports from the City’s testing facility showing the positive test results, as well as two reports from the City’s Medical Review Officer interpreting the test results. The Civil Service Board issued its Order on Appeal on August 21, 2008, affirming Appellant’s discharge from employment. Subsequently, the Montgomery County Court of Common Pleas affirmed the Order of the Civil Service Board. Subsequently, Appellee appealed to the Second District Court of Appeals of Montgomery County. The court found that the trial court erred in finding that the Decision of the Board was supported by

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<sup>1</sup> The collective bargaining agreement between the City of Dayton and IAFF, Local 136 provides that the testing will be conducted at a U.S. Department of Health and Human Services certified laboratory and will be

substantial, reliable, and probative evidence, in that there was no evidence of record demonstrating that the documentary evidence of the positive test results, and the conclusions of the Medical Review Officer reached therefrom, were trustworthy, in violation of Evidence Rule 901(A).

The Ohio Rules of Evidence explicitly state that they govern proceedings “in the *courts* of this state.” Evid. R. 101(A) (Emphasis added). Additionally, this Court has held that “Evid. R. 101(A) does not mention administrative agencies as forum to which the Rules of Evidence apply.” *Orange City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 415, 417, 1996-Ohio-282. Furthermore, the Board’s rules demonstrate an intention to be able to consider any and all evidence it considers relevant, probative, and reliable. Accordingly, Dayton Civil Service Board Rule 14, Section 5(A), states: “Procedure at Hearings. A. The admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases.”

Additionally, Dayton Civil Service Board Rule 14, Section 5(D) specifically states that “the Board or Hearing Officer conducting a hearing shall have full authority to control the procedure of the hearing, to admit or exclude testimony or other evidence, to rule upon all objections, and to take such other actions as are necessary and proper for the conduct of such hearing.”

In an administrative hearing, these rules should not be construed as adopting the Ohio Rules of Evidence. A more reasonable interpretation is that these rules refer to the manner of presenting evidence and the general procedure for conducting a hearing. The implications of this case are plainly statewide, at a minimum. The Court of Appeals, by its decision, ultimately requires municipal civil service boards, and the scores of other administrative agencies throughout the state not specifically regulated by statute, to strictly follow the Ohio Rules of Evidence in administrative hearings. The effect of such a decision, if allowed to stand, will lead to a

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performed in compliance with federal Department of Transportation guidelines to ensure the reliability and accuracy of the results.

substantial increase in the volume of administrative appeals coming before the courts of the state involving evidentiary issues arising in a variety of administrative contexts, such as employment and zoning matters. Additionally, if such a decision is allowed to stand, it will place a significant burden on administrative agencies to compel the attendance of, perhaps, out-of-state witnesses in order to satisfy the authentication requirements contained in the Rules of Evidence. As Judge Hall points out in his dissent, “there is no burden or expense-shifting mechanism, such as a request for admissions, to require parties either to admit apparent facts or to bear the cost of proving them.” In short, the Court of Appeals would require administrative agencies to expend resources and exercise powers that they do not have, for the purpose of strictly adhering to the Rules of Evidence when the well-settled law of Ohio is that they do not apply in administrative proceedings.

## **II. STATEMENT OF THE CASE**

Appellant, City of Dayton, Ohio (“City”), pursuant to its Notice of Appeal and this Memorandum in Support of Jurisdiction, appeals from the judgment of the Second District Court of Appeals (“Court of Appeals”) rendered July 15, 2011.

Previously, the Appellee, Ronald Royse, appealed from the judgment of the Montgomery County Court of Common Pleas, issued July 6, 2010, which ruled in favor of Appellant, the City of Dayton, Ohio. This case at the trial level, before Judge Barbara P. Gorman, was an administrative appeal from the Dayton Civil Service Board’s (“Board”) Order on Appeal dated August 21, 2008 which affirmed Appellee Royse’s termination from his employment with the City of Dayton (“City”).

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Appellee was employed as a firefighter with the City of Dayton. On November 28, 2007, he was served with Charges and Specifications stating that he was in violation of Civil Service

Rules 13(2)(I)<sup>2</sup> for violating the City of Dayton's Substance Abuse Policy. At a pre-disciplinary hearing held on January 25, 2008 before Larry L. Collins, Director of Fire, appellant plead no contest. On February 12, 2008, the Appellee was found guilty of the Charges and Specifications, and pursuant to the clear language of the substance abuse policy, he was discharged from his position as a firefighter, effective on the close of business, February 14, 2008. Appellant appealed his discharge to the Dayton Civil Service Board on February 22, 2008, which held a de novo hearing on the appeal on July 22, 2008. The Board issued its Order on Appeal on August 21, 2008, affirming the Findings discharging Appellant from his employment with the City of Dayton.

### **III. STATEMENT OF FACTS**

The City of Dayton and the International Association of Firefighters, Local 136 ("Union" or "IAFF") are parties to a collective bargaining agreement ("CBA"). Article 33 of the CBA contains a Substance Abuse Policy which provides for the drug testing of bargaining unit members and the consequences that follow should a drug test result come back positive. Specifically, Article 33 states the following:

#### **Section 6. Drug/Alcohol Testing**

The City conducts the following types of drug and alcohol testing to determine if employees/applicants are in compliance with this policy and associated rules of conduct: pre-employment, reasonable suspicion, post accident, return to duty, and follow-up testing. In addition, employees are tested prior to returning to duty after a confirmed positive drug or confirmed alcohol test and follow-up testing conducted during the course of a rehabilitation program recommended by a substance abuse professional. A Medical Review Officer (MRO) reviews test results and determines which tests are positive and which are negative.

#### **Section 7. Test Results**

A Medical Review Officer (MRO) reviews test results and determines which tests are positive and which are negative.

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<sup>2</sup> Civil Service Rule 13(2)(I) prohibits "Violation of any enacted or promulgated statute, ordinance, rule, policy, regulation, or other law".

B. Positive Results 1. If the confirmatory drug test is positive, the MRO will use their best efforts to notify the employee by telephone for a verification interview. No other City employee or agent shall be informed of the positive confirmatory drug test until the verification interview is held. If the employee refuses to participate in the verification interview, or cannot be contacted within 3 business days pursuant to Section 21 B, the MRO will report the confirmed positive test results to the designated employee representative in Human Resources.

Appellee Ronald Royse was employed with the City of Dayton Fire Department as a firefighter. On May 14, 2007, Appellee was required to submit to a random drug screen as a result of his identifying information appearing on a list of computer-generated, randomly-selected names the City receives from ASTS, the company that handles the City's Medical Review Officer ("MRO") services. The result of that test was forwarded to the City of Dayton's Designated Employer Representative (DER), Maurice Evans, which stated that appellant tested positive for cocaine. As a result of that positive drug test result, appellant met with City Safety Administrator, Ken Thomas, who referred him for a substance abuse professional evaluation at Employee Care.

In accordance with the policy, after having completed a drug and alcohol education program, Mr. Royse was ordered to report for a return-to-duty drug screen on May 31<sup>st</sup> and was allowed to return to work after a negative test. However, in accordance with the provisions of the collective bargaining agreement, the substance abuse professional at Employee Care also recommended that appellant undergo eight random follow-up drug tests following his return to duty. Appellee was notified to report to Concentra Medical Center, the City of Dayton's collection agent for urine specimens, for his third follow-up test on November 16, 2007. The City of Dayton was notified by the MRO that Appellee again tested positive for cocaine. As a result of this second occurrence of a positive drug screen, Appellee was charged with violating the City's Substance Abuse Policy and, after a pre-disciplinary hearing, was discharged from employment.

#### **IV. ARGUMENT**

**PROPOSITION OF LAW NO. 1: A MUNICIPAL CIVIL SERVICE BOARD IS NOT STRICTLY BOUND BY THE OHIO RULES OF EVIDENCE IN ADMINISTRATIVE HEARINGS UNLESS SPECIFICALLY REQUIRED BY LAW.**

Dayton Civil Service Board Rule 14, Section 5(A), states: “Procedure at Hearings. A. The admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases.” Additionally, Dayton Civil Service Board Rule 14, Section 5(D) specifically states that “the Board or Hearing Officer conducting a hearing shall have full authority to control the procedure of the hearing, to admit or exclude testimony or other evidence, to rule upon all objections, and to take such other actions as are necessary and proper for the conduct of such hearing.” In an administrative hearing, these rules should not be construed as adopting the Ohio Rules of Evidence. A more reasonable interpretation is that these rules refer to the manner of presenting evidence and the general procedure for conducting a hearing.

It is a cardinal rule of statutory interpretation that a court must first look at the language of the statute itself to determine statutory intent. *Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101, 105, 65 Ohio Op. 2d 296, 298, 304 N.E.2d 378, 381. Moreover, in construing a legislative pronouncement, words are given their ordinary meanings. *In re Appropriation for Hwy. Purposes* (1969), 18 Ohio St. 2d 214, 47 Ohio Op. 2d 445, 249 N.E.2d 48, paragraph one of the syllabus.

While one may interpret Section A, above, as meaning that “the rules applied by the Courts of Ohio in civil cases” are controlling, one could just as easily argue that this language, and said rules, are intended to guide the Board. The word ‘govern’ is defined as follows: “to control, direct, or strongly influence the actions and conduct of; to exert a determining or guiding influence in or over...” *Merriam-Webster Dictionary*, 2011 Ed.

That being said, Section D, even when read in conjunction with Section A, is unequivocal. “The Board or Hearing Officer conducting a hearing shall have full authority to control the

procedure of the hearing, to admit or exclude testimony or other evidence, to rule upon all objections, and to take such other actions as are necessary and proper for the conduct of such hearing.” Thus, the Board, had full authority to admit or exclude the reports and the testimony related to the positive drug tests.

**PROPOSITION OF LAW NO. 2: A MUNICIPAL CIVIL SERVICE BOARD’S DECISION WHICH IS SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE, EVEN IF SAID EVIDENCE IS INADMISSIBLE HEARSAY UNDER THE OHIO RULES OF EVIDENCE, DOES NOT RISE TO THE LEVEL OF ABUSE OF DISCRETION.**

In reviewing a decision of the court of common pleas on an appeal from an administrative proceeding, the limited function of the court of appeals is to determine whether the decision of the court of common pleas is supported by reliable, probative and substantial evidence and is in accordance with the law. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34; *Ohio State Bd. of Pharmacy v. Poppe* (1988), 48 Ohio App.3d 222. This amounts to a review of whether the court of common pleas abused its discretion in reaching its judgment. *Kisil*, supra at 35-36. The term abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. As the Ohio Supreme Court has noted: An abuse of discretion involves far more than a difference in \* \* \* opinion \* \* \*. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222. An action is unreasonable when there is no sound reasoning process to support the

judge's decision. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157. 'Arbitrary' means 'without adequate determining principle; not governed by any fixed rules or standard.' *Black's Law Dictionary* (5th Ed.). *Cedar Bay Construction, Inc. v. Fremont*, 50 Ohio St. 3d 19, 22 (Ohio 1990).

Again, an appeal to the court of appeals brought pursuant to R.C. § 2506 is more limited in scope, than in the court of common pleas. Furthermore, the standard of review in administrative appeals is not *de novo*, and the court of common pleas must affirm the decision of the administrative agency unless it is arbitrary, capricious, unreasonable or unsupported by a preponderance of reliable, probative and substantial evidence. When resolving evidentiary conflicts, the court of common pleas, the trial court, must give due deference to the findings of the administrative agency. Giving due deference to an administrative agency means that "an agency's findings of facts are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise insupportable." *Ohio Historical Society v. SERB* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591.

This Court stated that "in a proceeding under R.C. Chapter 2506., the court of common pleas must weigh the evidence in the record, and whatever additional evidence may be admitted pursuant to R.C. § 2506.03, to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision. This does not mean, however, that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise." *Dudukovich v. Housing Authority*, 58 Ohio St. 2d 202, 12 Ohio Op. 3d 198, 389 N.E.2d 872 (1975). Similarly, "Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." *Id.* at

147, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261.

Here, the Montgomery County Court of Common Pleas, found that the testimonial evidence presented before the Civil Service Board was sufficient. Likewise, the Court found that the admission of Appellee's drug test records and results was not arbitrary. The Court further found such evidence was competent and probative of the facts going to Appellee's conduct.

The Civil Service Board had the task of deciding whether appellant, Ronald Royse, was guilty of having a second positive drug test result in violation of the City's Substance Abuse Policy. They had before them a wealth of evidence to consider and draw upon to determine that he was, in fact, guilty of that charge.

The Board heard the very instructive testimony of Ken Thomas, Safety Administrator for the City of Dayton, describing the process that the City engages in to conduct its drug testing pursuant to the policy contained in the Collective Bargaining Agreement. Mr. Thomas explained, at length, that the City's collection agent, Concentra Medical Center, collects the urine specimen from the employee under very strict and stringent requirements. The restroom that will be utilized for the collection is inspected and sealed. He explained that the collection agent secures the water in the restroom by putting tape around it so that the employee can't turn the water on and off. He explained that they put a bluing agent in the toilet so that the specimen can't be altered. Mr. Thomas explained that, in accordance with the requirements of the Collective Bargaining Agreement ("CBA"), the collection agent goes through a ten or twelve step process that is articulated in the DOT standards to make sure that the collection of the specimen is done in a secure environment. In this particular case, the nurse from Concentra certified to do these types

of urine samplings performed the collection for the initial random test on May 14, 2007 which led to the appellant's first positive drug test result.

Once the sample is provided, the collection agent receives the cup from the individual providing the sample and pours the specimen into two vials so that there can be a split sample. The temperature of the specimen is observed to make sure that it is within a certain range that would be appropriate for a human specimen. The color of the specimen is also observed. A special custody and control form ("CCF") is used to ensure that the urine that is being tested is actually the specimen provided by the employee. These forms are produced by Advanced Technology Network ("ATN"), the certified laboratory which processes and handles the testing of the urine specimen. These forms are present from the very beginning of the collection process, and the employee himself has to complete the form before the collection process begins. The custody and control form has bar coded labels affixed to it which the employee has to initial and date and which are peeled off and placed over the cap of the vials that the urine sample and split are poured into. The samples are then placed into a tamper-resistant, pre-addressed sealed envelope that is sent to ATN for testing. This is done in front of the employee, and the sample is sent off by courier at the end of that day to ATN. The laboratory tests for five drugs in specific concentrations of both the initial and confirmatory tests in accordance with Article 6 of the CBA. Pursuant to that labor contract provision, the laboratory tests, inter alia, for cocaine metabolites in a concentration of 300 ng/ml on an initial test and 150 ng/ml on a confirmatory test. Thereafter, the laboratory sends all test results to the Medical Review Officer to review and determine which tests are positive and which are negative. Specifically, in the case of positive confirmatory test results received from the laboratory, the MRO attempts to contact the employee to determine whether there is any medical reason why the substances may be in their system or whether there

are any prescription medications the employee may be taking that mimic the result found by the laboratory. Under DOT standards, which are included in the CBA, the MRO attempts to contact the employee over a three-day period to conduct an interview to ascertain whether there is some reason other than the use of the prohibited substance that led to the positive result. Additionally, Section 21 of the CBA provides that:

If any question arises as to the accuracy or validity of a positive test result, the MRO shall, in collaboration with the laboratory director and consultants, review the laboratory records to determine whether the required procedures were followed. The MRO will then make a determination as to whether the result is scientifically sufficient to take further action. **If records from collection sites or laboratories raise doubts about the handling of samples, the MRO will deem the urinary evidence insufficient and no further action regarding the individual employee shall occur.** (emphasis added).

In this particular case, the Civil Service Board clearly considered the tightly regimented process that the City uses in implementing the substance abuse policy in determining that appellant was guilty of violating the policy. Specifically, the Board stated in its Order on Appeal:

The specimen to be tested is taken at the firehouse and divided (split) into two bottles. A seal is placed over each bottle. The collector and the donor date and initial the seal and both bottles are sent to the laboratory for testing. The results of the test are then sent to the Medical Review Officer who reviews the test results and determines which tests are positive and which are negative. An employee who questions the results of a drug test may request an additional test be conducted on the remaining split of the sample at a different certified laboratory. The request must be made within three business days from notification of initial results or the employee must show that the delay was beyond the control of the employee. In this case, the Appellant did not request that the split be tested. Order on Appeal, p. 3.

Thus, the Board considered the testing process to be reliable evidence upon which to make a determination that appellant had indeed tested positive for cocaine during a random follow-up test after his return to work. The Board had before it the custody and control form ("CCF") where appellant signed the form certifying that it was his urine that was provided to the collector; that he

did not adulterate it in any manner; that the specimen was sealed in bottles in his presence; and, that the information provided on the form and the label affixed to each bottle was correct. The CCF also shows that Paul Moody of Concentra, the collection agent, released the specimen to a courier service the same day it was taken, and that it was received by ATN, intact, on November 17, 2007, the very next day.

The Board also had before them the test result sent by the MRO to the City's designated employer representative, Maurice Evans. This form shows that the appellant testified positive for cocaine within the limits set by the CBA for both the initial and confirmatory tests. Although the document is called a Non-DOT result, and it indicates that the test performed was a 5-panel non-DOT test involving a non-DOT industry, Ken Thomas explained why the drug test was reported in this manner. He explained that while firefighters are not holders of commercial drivers' licenses and therefore are not required to be tested under Department of Transportation ("DOT") regulations, that the labor agreement requires that DOT standards, being the "gold standard", are used for the sake of reliability. Mr. Thomas stated in this regard that "we don't use DOT for FOP and IFF (sic) and say myself, because we are not governed under the Department of Transportation's regulatory aspects because we do not operate a vehicle that qualifies under 26,001 pounds or a trailer of 10,001 pounds. So based on that, collection sites and the labs, they really are to report that as a non-DOT test because they truly do not fall under those classifications of DOT." He further explained that [f]or purposes of standards, the test adhered to DOT standards. For purposes of reporting, they were non-DOT reported." Thus, appellant's arguments that the tests were insufficient due to being non-DOT tests are not well-founded in light of the City's explanation for why they are reported in this manner.

Mr. Thomas also explained why the MRO comments on the test result form, which state “non contact positive/subject to further review” do not undermine the reliability of the test result which led to appellant’s discharge:

Q. And when it says non contact positive under the MRO comments, subject to further review, what does that mean?

A. It’s my understanding the MRO was unable to contact Mr. Royse and if other subsequent information was provided, as we said, even all the way up to the show cause to contest these results, they would be open for review.

Q. Okay. What does non-contact positive mean?

A. That they were unable to contact Mr. Royse in the three attempts they tried once they received the results.

Thus, Appellee did not avail himself of the procedure by which he could have contested the positive test result that was forwarded to the MRO from the laboratory. The Board apparently considered such fact when they noted in their decision that “[a]n employee who questions the results of a drug test may request an additional test be conducted on the remaining split of the sample at a different certified laboratory....In this case, the Appellant did not request that the split be tested.” In fact, the Board took note that during his pre-disciplinary hearing, appellant entered a plea of “no contest” to the charges. Finally, Appellee did not offer any evidence suggesting that the test results were unreliable or inaccurate, nor did he deny his having used cocaine.

Based upon the foregoing, there was more than a preponderance of both testimonial and documentary evidence, which prove that appellant was guilty of the charge of having a second occurrence of a positive drug or alcohol test. Furthermore, the Substance Abuse Policy outlined in Article 33 of the collective bargaining agreement clearly states that the penalty for such is discharge from employment. Accordingly, the Civil Service Board and the Montgomery County Court of Common Pleas were correct in their affirmance of the discharge, and the divided ruling of the Second District Court of Appeals should be reversed.

**PROPOSITION OF LAW NO. 3: THE PHRASE “OTHER QUALIFIED PERSON” CONTAINED IN RULE 803(6) OF THE OHIO RULES OF EVIDENCE IS NOT TO BE NARROWLY INTERPRETED.**

In the alternative, if it is found that the Ohio Rules of Evidence are to be strictly applied in this matter, the drug test reports constitute records of regularly conducted activity not to be excluded by the hearsay rule. Rule 803(6) of the Ohio Rules of Evidence states:

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Here, the urine samples were collected and promptly tested as a regular and frequent business activity. The test results were transmitted by a person with knowledge and were interpreted by the Medical Review Officer and his report was generated contemporaneously with the analysis as was also a regular business activity. All of this, was supported in the testimony of the City’s custodian who also could be deemed as a ‘qualified witness’ as used in Evid. R. 803(6). The witness providing the foundation need not have firsthand knowledge of the transaction. Rather, it must be demonstrated that the witness is sufficiently familiar with the operation of the business and with the circumstances of the record’s preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be and that it was made in the ordinary course of business consistent with the elements of Rule 803(6).

*Weissenberger’s Ohio Evidence Treatise* (2010 Ed.), § 803.79.

The Medical Review Officer’s report is a business record which satisfies all the requirements of Ohio Evid. R. 803(6), and Appellee has not offered one shred of evidence

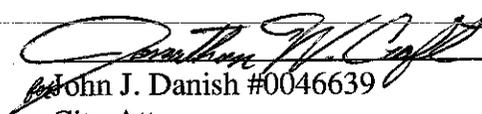
suggesting that the source of the information or the method of its preparation indicates that the resultant record is untrustworthy. As such, this record, should not be excluded.

#### IV. CONCLUSION

Ohio Revised Code 2506.04 makes clear that the decision of an administrative agency should be upheld if it is supported by reliable, substantial, and probative evidence. The Board explained its decision and the evidence considered and relied upon in reaching its conclusion to affirm the discharge. The decision of the court of common pleas is supported by reliable, probative and substantial evidence and is in accordance with the law. The Court of Common Pleas did not abuse its discretion in reaching its judgment. The term abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. As such, the City of Dayton respectfully requests that this Court overturn the Appellate Court and effectively affirm the decision of the Court of Common Pleas which upholds the Decision and Order of the Civil Service Board discharging Appellant from his employment with the City of Dayton.

For the reasons discussed above, this case involves a matter of public and great general interest. Appellant, the City of Dayton, respectfully requests that this Court grant jurisdiction and allow this case to be heard to ensure that the Court of Appeals' decision will not create law that effectively renders the legislative enactment of R.C. 2506.04 meaningless while simultaneously requiring administrative agencies throughout the state to strictly adhere to the Rules of Evidence.

Respectfully submitted,

  
John J. Danish #0046639  
City Attorney  
Norma M. Dickens #0062337  
Jonathan W. Croft #0082093

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid this 29th day of August 2011, to the following:

Terry W. Posey  
7460 Brandt Pike  
Dayton, Ohio 45424

  
Jonathan W. Croft  
Assistant City Attorney



FILED  
COURT OF APPEALS

2011 JUL 15 AM 8:40

CLERK OF COURTS  
MONTGOMERY CO. OHIO  
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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

RONALD L. ROYSE	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24172
vs.	:	T.C. CASE NO. 2008 CV 8296
	:	<u>FINAL ENTRY</u>
CITY OF DAYTON, et al.	:	
Defendants-Appellants	:	

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Pursuant to the opinion of this court rendered on the  
15th day of July, 2011, the judgment of the trial  
court is Reversed and the matter is Remanded to the trial court  
for further proceedings consistent with the opinion. Costs are  
to be paid as provided in App.R. 24.

I hereby certify this to be a true  
and correct copy.

Witness my hand and seal this 25th  
day of August 20 11.

*Bryce E. Bunch*, Clerk

Clerk of Common Pleas  
Court of Montgomery County, Ohio

By *J. McClinton*  
Deputy

*Thomas J. Grady*  
THOMAS J. GRADY, PRESIDING JUDGE

*Mike Fain*  
MIKE FAIN, JUDGE

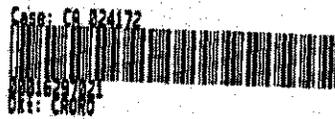
\_\_\_\_\_  
MICHAEL T. HALL, JUDGE

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COURT OF APPEALS

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COURT OF APPEALS  
MONTGOMERY COUNTY, OHIO

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

RONALD L. ROYSE	:	
Plaintiff-Appellant	:	C.A. CASE NO. 24172
vs.	:	T.C. CASE NO. 2008 CV 8296
	:	(Civil Appeal from
CITY OF DAYTON, et al.	:	Common Pleas Court)
Defendants-Appellees	:	

O P I N I O N

Rendered on the 15<sup>th</sup> day of July, 2011.

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GRADY, P.J.:

Plaintiff, Ronald Royse, appeals from an order of the court of common pleas affirming the decision of the Civil Service Board of the City of Dayton ("the Board").

Royse was employed by the Dayton Fire Department for fourteen years. On May 14, 2007, he submitted to a random drug screen pursuant to the collective bargaining agreement between the City of Dayton and the International Association of Firefighters, Local 136 A.F.C.-C.I.O. The test results were

positive for cocaine. Pursuant to the collective bargaining agreement, Royse then was evaluated by a substance abuse professional and completed a drug and alcohol education program. On May 31, 2007, Royse was subjected to a return to duty drug screen, which was negative. Royse then returned to work with the Dayton Fire Department.

As a result of his May 14, 2007 positive drug test, Royse was scheduled to submit to eight follow-up, random drug screenings after his return to work. His first two follow-up tests were negative, but his November 16, 2007 follow-up test result was positive for cocaine. Following a pre-disciplinary hearing, the City of Dayton discharged Royse from his employment with the Dayton Fire Department.

Royse appealed his termination to the Board. At the hearing before the Board, two witnesses, Ken Thomas and Maurice Evans, testified on behalf of the City of Dayton. They described the process that takes place when a firefighter is submitted to a random drug test. Evans and an employee of Concentra Medical Center collect the urine samples from the firefighter being tested. The samples are sealed and shipped to ATN, a laboratory in Memphis, Tennessee. ATN performs tests on the samples to determine whether the samples contain drugs. ATN then sends the results of the tests to Alternative Safety & Testing Solutions ("ASTS"), a company in Michigan. A medical review officer employed by ASTS then reviews the results produced by ATN to determine whether the test results are positive or negative for

the presence of marijuana, cocaine, amphetamines, opiates, or PCP. If the medical review officer interprets the results of ATN's study to be positive for any of these five substances, then the medical review officer attempts to contact the employee. Finally, ASTS sends the medical review officer's positive test report to Ken Thomas, the Safety Administrator for the City of Dayton.

At the hearing before the Board, the City of Dayton submitted copies of the medical review officer's two reports that found that Royse's urine samples tested positive for cocaine on May 14, 2007 and November 16, 2007. (City of Dayton's Exhibits 6, 7.) No person testified regarding the methodology of the tests performed by ATN or the results of these tests that ATN forwarded to ASTS. Further, no person testified on behalf of ASTS regarding what particular data the medical review officer reviewed or why the officer concluded that Royse's test results were positive for cocaine.

Royse objected to the admission of the medical review officer's positive reports based on tests performed by ATN as inadmissible hearsay. The Board overruled the objection and affirmed Royse's discharge on August 21, 2008. Royse filed a notice of appeal from the Board's decision in the court of common pleas pursuant to R.C. Chapter 2506. On July 6, 2010, the court affirmed the Board's decision. Royse filed a notice of appeal.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN APPLYING A DEFERENTIAL STANDARD OF

REVIEW INSTEAD OF CONDUCTING A TRIAL DE NOVO."

Royse argues that the trial court applied an incorrect, deferential standard of review in reviewing the Board's decision. According to Royse, the trial court should have conducted a de novo review of the Board's decision instead of giving the Board deference on evidentiary and credibility issues. Royse's argument relies on R.C. 124.34(C), which provides for an appeal "on questions of law and fact."

"[A] member of a fire or police department may utilize either of two distinct avenues of appeal to the court of common pleas from a decision of suspension, demotion or removal from office by a municipal civil service commission.[] First, if an appeal is brought on questions of law and fact under \* \* \* [R.C. 124.34] the procedure on appeal is governed by the Appellate Procedure Act.[] In such a case, the trial court is required to conduct a de novo review of the civil service proceedings.[] The court may conduct an independent judicial examination and determination of conflicting issues of fact and law.[] The court may, in its discretion, hear additional evidence, and may substitute its judgment for that of the commission.[] Second, if an appeal to the court is brought pursuant to \*\*\* [R.C. Chapter 2506] the court is required to allow additional evidence only in the circumstances enumerated in the statute, and the court must give due deference to the administrative resolution of evidentiary conflicts." 15 Ohio Jur. 3d (2006) 698, Civil Servants, Section 605 (citations omitted). See *Resek v. City of*

*Seven Hills* (1983), 9 Ohio App.3d 224; *Giannini v. Fairview Park* (1995), 107 Ohio App.3d 620.

Royse did not identify in his notice of appeal from the Board's decision which statutory avenue of appeal he invoked. In his brief filed with the court of common pleas, however, Royse identified R.C. Chapter 2506 as providing the proper standard of review. (Dkt. 11.) Further, he noted in a motion to strike that this case was an administrative appeal brought pursuant to R.C. 2506.04. (Dkt. 15.) Finally, in his reply brief submitted to the trial court, Royse reiterated the standard used by trial courts when conducting a review pursuant to R.C. Chapter 2506. At no point did Royse mention R.C. 124.34 to the trial court or that he desired a trial de novo.

The doctrine of invited error estops an appellant, in either a civil or criminal case, from attacking a judgment for errors the appellant induced the court to commit. Under that principle, a party cannot complain of any action taken or ruling made by the court in accordance with the party's own suggestion or request. *State v. Woodruff* (1983), 10 Ohio App.3d 326.

Royse induced the court to apply the R.C. Chapter 2506.04 standard of review the court applied. Royse may not now argue that in doing so, the court erred in not applying the R.C. 124.34 standard instead.

When reviewing an administrative appeal pursuant to R.C. 2506.04, the trial court considers the "whole record," including any new or additional evidence admitted under R.C. 2506.03, and

determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147. The trial court correctly applied that standard of review to Royse's appeal from the Board's decision.

The first assignment of error is overruled.

#### SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN CONSIDERING THE EVIDENCE OF THE DRUG TESTS AS A MATTER OF EVIDENCE AND OF LAW."

The standard of review to be applied by an appellate court in an R.C. 2506.04 appeal is "more limited in scope" than the standard of review applied by the common pleas court to the Board's decision. *Henley*, 90 Ohio St.2d at 147, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. In *Henley*, the Ohio Supreme Court explained:

"[R.C. 2506.04] grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable, and probative evidence,' as is granted to the common pleas court. \*

\* \* Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." *Id.* at 147, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261. A "question of law" is "[a]n issue to be

decided by the judge, concerning the application or interpretation of the law.'" *Henley*, 90 Ohio St.3d at 148, quoting *Black's Law Dictionary* (7 Ed. 1999) 1260.

The trial court found that the testimony of the City of Dayton's two witnesses and documentary evidence of Royse's drug test records were competent and probative evidence that supported the Board's decision. Royse argues that the trial court erred in affirming the Board's decision because the primary evidence on which the Board relied, the report of a medical review officer who had reviewed the results of drug tests that the officer concluded were positive for drugs, was inadmissible hearsay evidence under the Ohio Rules of Evidence and the Board's own Rules and Regulations.

"As a general rule, even apart from specific statutes, administrative agencies are not bound by the strict rules of evidence applied in court. \* \* \* However, an administrative agency should not act upon evidence which is not admissible, competent, or probative of the facts which it is to determine. \* \* \* The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner." *Haley v. Ohio State Dental Board* (1982), 7 Ohio App.3d 1, 6 (citations omitted).

Rule 14.5(A) of the Board's Rules and Regulations provides that "[t]he admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases." Therefore, while the application of the rules of evidence may be somewhat relaxed

in administrative proceedings, the Board itself chose to adopt a rule that requires it to apply the fundamentals of the rules of evidence in its proceedings.

Rule 14.5(D) of the Board's Rules and Regulations provides, in part: "[t]he Board or Hearing Officer conducting a hearing shall have full authority to control the procedure of the hearing, to admit or exclude testimony or other evidence, to rule upon all objections, and take such other actions as are necessary and proper for the conduct of such hearing. \* \* \*" This rule explains the authority of the Board to control its hearings, but does not give the Board authority to ignore Rule 14.5(A), or the well-established precedent that "the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner." *Haley*, 7 Ohio App.3d at 6.

It is undisputed that the documents concerning Royse's drug test that were submitted by the City of Dayton to the Board were hearsay in that they were offered to prove the truth of the matter asserted. Evid.R. 801(C). Generally, hearsay evidence is inadmissible unless it fits within an exception to the hearsay rule. Evid.R. 802, 803, 804. The trial court found that the drug test records qualified as an exception to the hearsay rule under the "business records" exception in Evid.R. 803(6). That exception provides:

"Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from

information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B) (10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. \* \* \*

Royse provided urine samples to Concentra Medical Center, which then shipped the samples to ATN, a company in Memphis, Tennessee. ATN tested the urine samples for the presence of five different substances. ATN then forwarded the test results to a medical review officer in Michigan. The medical review officer reviewed the test results and determined that two of Royse's tests were positive. The medical review officer's report of his findings was then provided by him to the City of Dayton, which relied on the report to terminate Royse and to demonstrate the cause of his termination in the proceedings before the Board. (City of Dayton's Exhibit 7.)

"To be admissible under Evid.R. 803(6), a business record must display four essential elements: (1) it must have been kept in the regular course of business; (2) it must stem from a source who had personal knowledge of the acts, events, or conditions; (3) it must have been recorded at or near the time of the transaction; and (4) a foundation must be established by the testimony of either the custodian of the record or some other

qualified person." *State v. Comstock* (Aug. 29, 1997), Ashtabula App. No. 96-A-0058.

The medical review officer's reports were produced as part of his work for his employer, ASTS, which supplied the report to the City of Dayton. "The information in reports that a business receives from outside sources is not part of its business records for the purposes of Evid.R. 803(6)." *Babb v. Ford Motor Co.* (1987), 41 Ohio App.3d 174, 177. See also *State v. Jackson*, Ashtabula App. No. 2007-A-0079, 2008-Ohio-6976, at ¶32. Therefore, the City of Dayton cannot establish that the medical review officer's records were its own business records admissible per Evid.R. 803(6). The trial court erred in finding the business records exception satisfied.

Authentication, which is evidence sufficient to support a finding that the matter in question, including documentary evidence, is what its proponent claims, is a condition precedent to admissibility of that matter in evidence. Evid.R. 901(A). Illustrative examples of proof of authentication are set out in Evid.R. 901(B)(1)-(10). A showing that an exception to the rule against hearsay applies satisfies the example in Evid.R. 901(B)(10). The example most frequently applied is in Evid.R. 901(B)(1): "Testimony of a witness with knowledge. Testimony that a matter is what it is claimed to be."

No witness with personal knowledge testified about ATN's internal recordkeeping or testing procedures or about the recordkeeping at ASTS. Evid.R. 602. The City of Dayton's only

two witnesses at the hearing before the Board were Ken Thomas and Maurice Evans. Ken Thomas is the Safety Administrator for the City of Dayton. He testified that he has never been to ATN's laboratories and has never observed their testing process. He did not exhibit sufficient knowledge of ATN's actual testing procedures or internal recordkeeping. Further, he testified that the medical review officer does not perform any tests on the urine samples, but instead reviews the results of the testing performed by ATN.

Maurice Evans is the City of Dayton's designated employer representative. He testified regarding his familiarity with the process used in collecting urine samples for drug tests. But he does not test the urine samples and relies on others to provide those test results.

In short, there is no evidence of record demonstrating that the documentary evidence of positive test results and the ultimate conclusions reached therefrom were trustworthy. This is the very type of evidence that the requirement of authentication in Evid.R. 901(A) was meant to preclude from consideration. Without testimony from a witness that could testify, based on personal knowledge, regarding the testing procedures and internal recordkeeping of ATN and ASTS, the Board and trial court should not have relied on the positive test results. Therefore, the trial court erred in finding that the Board's decision was supported by the preponderance of substantial, reliable, and probative evidence.

The record suggests that, instead of the business records exception to the rule against hearsay, the City of Dayton attempted to authenticate the records of the medical review officer's report pursuant to Evid.R. 901(B)(9), which allows authentication through "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." To do that, the process or system must be described, and there must be evidence that the process or system produces an accurate result. Those matters may be established by the testimony of a person with knowledge of the process or system. Weisenberger's Ohio Evidence Treatise (2010 Ed.), Section 901.121. The testimony of the City of Dayton's two witnesses was insufficient to satisfy those requirements.

We do not, as Judge Hall suggests, hold that the formal and technical requirements of the Rules of Evidence must be satisfied in administrative proceedings. Weissenberger writes: "Conceptually, the function of authentication or identification is to establish, by way of preliminary evidence, a connection between the evidence offered and the relevant facts of the case. The connection is necessary in order to establish the relevancy of the particular item, since an object or item is of no relevance if it is not attributed to, or connected with a particular person, place, or issue in a case." *Id.*, § 901.1.

The City of Dayton offered the report as relevant to prove the central issue in the case, which is that Royse had used cocaine. But, absent evidence of the process by which that

conclusion was reached, the report demonstrates nothing more than that the conclusion was reached, by persons who did not testify and in accordance with a method of analysis that remains unexplained. As evidence, it is nothing more than proof that the report had been received by the City of Dayton from a person it engaged to prepare such reports. That bare fact does not demonstrate that Royse had used cocaine, which was the basis for his discharge on which the Board was required to pass.

The second assignment of error is sustained. The judgment of the trial court will be reversed and the cause is remanded for further proceedings consistent with this Opinion.

FAIN, J., concurs.

HALL, J., dissenting:

I agree with the disposition of the first assignment of error finding that the appellant pursued his administrative appeal below as an R.C. 2506.01 appeal, rather than pursuant to R.C. 124.34. Therefore, he cannot now argue that the trial court should have considered his appeal under the standards applied to the latter section.

However, because I believe that the Dayton Civil Service Commission had authority to rule on objections to admit or exclude evidence, and that the Dayton Civil Service Board reasonably and constitutionally admitted the reports of the appellant's second positive cocaine drug test, the trial court was correct in affirming the Commission's decision that he be

discharged from his position as a firefighter.

The result of the majority's opinion, which will require the Dayton Civil Service Board to adhere to the Ohio Rules of Evidence, is unnecessary and undesirable. Admittedly, Dayton Civil Service Board Rule 14, Section 5, states:

"Procedure at hearings. A. The admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases."

In an administrative setting, however, this rule need not, and should not, be construed as adopting the Ohio Rules of Evidence for hearings. A more reasonable interpretation is that the rule refers to the manner of presenting evidence and the general procedure for conducting a hearing. Otherwise, the words "in civil cases" are superfluous. Those words distinguish the procedure for the presentation of evidence at the civil service level from the procedure applicable in criminal cases. The rules of evidence apply to both civil and criminal cases, so it is reasonable to infer that the words "in civil cases" were included to encompass the process for admitting evidence, not to require application of the rules of evidence themselves.

Moreover, Section 5(D) of Civil Service Rule 14 specifically states that "[t]he Board or Hearing Officer conducting a hearing shall have full authority to control the procedure of the hearing, to admit or exclude testimony or other evidence, to rule upon all objections, and to take such other actions as are necessary and proper for the conduct of such hearing." This

specific language in Section 5(D) prevails over the introductory Section (5) (A) and grants the board plenary authority to determine the admissibility of evidence.

A virtually identical rule appears in the decision of this court more than twenty years ago in *Emmons v. Miamisburg* (March 27, 1989), Montgomery App. No. 11197. There, Section 11.1 of the Miamisburg Civil Service Rules and Regulations stated:

"Appeal and Hearings: No legal rules of evidence shall be required and the Civil Service Commission shall determine the manner of conduct of such hearings." (Emphasis added).

The next rule, Section 11.2, is identical to current Dayton Civil Service Board Rule 14, Section 5. It stated:

"Procedure at Hearings: The admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases." (Emphasis added).

This language from Section 11.2 of the Miamisburg Civil Service Rules and Regulations, which is of similar vintage to the Dayton rule, cannot possibly be construed to adopt the Ohio Rules of Evidence because the previous section (11.1) specifically excluded the "legal rules of evidence." Likewise, Dayton Civil Service Board Rule 14, Section 5(A), need not, and should not, be construed to apply the Ohio Rules of Evidence to Dayton civil service hearings.

Applicable rules, case law, and statutory procedure all support the notion that rules of evidence should not apply to a civil service hearing. The Rules of Evidence explicitly state

that they govern proceedings "in the courts of this state." Evid R. 101(A) (Emphasis added). The Ohio Supreme Court has held that "Evid.R. 101(A) does not mention administrative agencies as forums to which the Rules of Evidence apply." *Orange City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 415, 417, 1996-Ohio-282. This court, too, has held that hearsay is admissible in administrative hearings as long as discretion to admit is not arbitrarily applied. *Haley v. Ohio State Dental Board* (1982) 7 Ohio App.3d 1, 6.

Ohio administrative agencies are to determine what evidence is to be admitted in their proceedings. R.C. 119.09 states that "The agency shall pass upon the admissibility of evidence...." "[A]dministrative agencies are not bound by the rules of evidence applied in courts." *Black v. Ohio State Bd. of Psychology*, 160 Ohio App.3d 91, 2005-Ohio-1449, at ¶17, citing *Haley*, at 6. The Ohio Administrative Code, which promulgates rules for various administrative hearings, states: "The 'Ohio Rules of Evidence' may be taken into consideration by the board or its attorney hearing examiner in determining the admissibility of evidence, but shall not be controlling." Ohio Adm. Code 4732-17-03(D) (10).

Rules of evidence do not apply, statutorily, to workers' compensation hearings. For example, R.C. 4123.10 provides: "The industrial commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure." Similarly, the Ohio Rules of Evidence statutorily do not apply to unemployment compensation hearings.

In this regard, R.C. 4141.281(C)(2) provides that "[h]earing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure." Such proceedings are no more or less significant than Dayton Civil Service Board hearings. And the foregoing statutory provisions express the concept recognized by this court in *Haley, supra*, and others. See, e.g., *Day Lay Egg Farm v. Union Cty. Bd. Of Revision* (1989), 62 Ohio App.3d 555, 556 (recognizing that administrative agencies are not bound by rules of evidence). Furthermore, in reviewing a decision of an administrative board, a common pleas court must give "due deference to the administrative resolution of evidentiary conflicts" and, therefore, must not substitute its judgment for that of the administrative agency. *Hawkins v. Marion Corr. Inst.* (1990), 62 Ohio App.3d 863, 870.

The Dayton Civil Service Board's "Order on Appeal," signed and entered August 21, 2008, is a reasoned and balanced decision as to why the Board admitted the evidence presented about the appellant's positive drug test results. The appellant's underlying protection is that the hearing was required to comport with procedural and substantive due process. The "process" the appellant was due was the hearing before the Civil Service Board, of which he received notice and an opportunity to be heard. He introduced not a shred of evidence that his test results were inaccurate or unreliable. He presented nothing to the effect that he denied abusing cocaine, the possession of which, if not prescribed, is a felony. A separately preserved one-half of the

tested urine sample was available to him for independent testing. Yet, upon hearing of the second positive drug report, rather than have his own confirmatory test, he checked himself into a drug treatment facility. He refused the City's request for his medical records, which may have corroborated the test results. Under these circumstances, the appellant was accorded due process.

In addition to a strict legal analysis why the rules of evidence do not apply in administrative settings, there are numerous practical implications here: (1) this is an administrative proceeding in which strict rules of evidence should not apply; (2) administrative officials often are not legally trained or versed in the nuances of evidentiary rules; (3) at the administrative level, there is no burden or expense-shifting mechanism, such as a request for admissions, to require parties either to admit apparent facts or to bear the cost of proving them; (4) out-of-state test suppliers are routinely relied upon for accuracy in many walks of life, including medicine; and (5) nothing in the record suggests that Royse ever denied having a cocaine-abuse problem.

The majority holding effectively reinstates a cocaine abuser as a firefighter. I dissent.

I hereby certify this to be a true and correct copy.

Witness my hand and seal this 25<sup>th</sup> day of August 20 11.

*Gregory E. Bland*, Clerk

Clerk of Common Pleas

Court of Montgomery County, Ohio

By *J. McClinton* Deputy

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- Hon. Barbara P. Gorman

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

RONALD L. ROYSE,

CASE NO.: 2008 CV 8296

Plaintiff,

JUDGE BARBARA P. GORMAN

-vs-

CITY OF DAYTON, et al.,

Defendant.

**DECISION, ORDER AND ENTRY  
OVERRULING APPELLANT RONALD L.  
ROYSE'S APPEAL OF THE ORDER OF  
APPEAL AND AFFIRMING THE  
DECISION OF THE DAYTON CIVIL  
SERVICE BOARD**

This matter is before the Court on the *Notice of Appeal* filed by Appellant appealing the decision of the Dayton Civil Service Board. The *Brief of Plaintiff Ronald Royse* was filed on February 25, 2009. The *Brief of Appellee City of Dayton Ohio* was filed on April 23, 2009. The *Reply Brief of Plaintiff Ronald Royse* was filed on May 1, 2009. The *Notice of Submission of Supplemental Authority* was filed by Appellant. This matter is properly before the Court.

**I. FACTS**

Appellant Ronald L. Royse ("Appellant") was discharged from his position as a fourteen year employee of the Dayton Fire Department as a result of an alleged violation of the collective bargaining agreement ("CBA") between the City of Dayton ("Appellee" or the "City") and the International Association of Firefighters, Local 136 A.F.C. -C.I.O. and a violation of a Civil Service Rule. Specifically, the discharge was based on alleged drug use by Appellant. Appellant was drug tested under the Substance Abuse Policy contained in Article 33 of the CBA which reads in part:

## **Section 6. Drug/Alcohol Testing**

The City conducts the following types of drug and alcohol testing to determine if employees/applicants are in compliance with this policy and the associated rules of conduct: pre-employment, reasonable suspicion, post accident, return to duty, and follow-up testing. In addition, employees are tested prior to returning to duty after a confirmed positive drug or confirmed alcohol test and follow-up testing conducted during the course of a rehabilitation program recommended by a substance abuse professional. A Medical Review Officer ("MRO") reviews test results and determines which tests are positive and which are negative.

A second occurrence of a confirmed positive drug test conducted under the Substance Abuse Policy "will result in discharge from employment. Article 33, Section 6 of CBA.

On May 14, 2007, Appellant was subjected to a random drug screen, the results of which were positive for cocaine. Appellant was evaluated by a substance abuse professional and completed a drug and alcohol education program. Appellant was then ordered to report for a return to duty drug screen on May 31, 2007 after which he was permitted to return to work because the test result was negative. He was required, however, to undergo eight follow-up random drug tests. His third follow-up test result was positive for cocaine, and Appellant was terminated following a pre-disciplinary hearing. Appellant appealed his termination to the City of Dayton Civil Service Board (the "Board").

Appellant argues that the test results were inadmissible before the Board and insufficient because they were non-DOT tests. The CBA requires that DOT drug tests be used. CBA, Article 33, Section 7(B)(6). According to Appellant, the introduction of tests in this form violated his right to due process, as well as his right to confront witnesses.

## **II. LAW & ANALYSIS**

This appeal of the Dayton Civil Service Board ruling is pursuant to R.C. Chapter 2506, which permits the review of a final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision by the appropriate common pleas court.

## A. Standard of Review

Where a civil service commission of a municipality removes a classified employee from his position for disciplinary reasons, the decision may be appealed to the Court of Common Pleas pursuant to O.R.C. Chapter 2506. *Walker v. City of Eastlake* (1980), 61 Ohio St.2d 273. The court must analyze the action taken by the Civil Service Board through a review of the entire record presented. *City of Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 119. Under R.C. 2506.04, a common pleas court may find that an administrative board=s decision is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. In *Duduckovich v. Housing Authority* (1979), 58 Ohio St.2d 202, 207, 389 N.E.2d 1113, the Ohio Supreme Court elaborated, stating:

[T]he Court of Common Pleas must weigh the evidence in the record \* \* \* to determine whether there exists a preponderance of reliable, probative, and substantial evidence to support the agency decision. We caution, however, to add that this does not mean that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is a preponderance. If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision \* \* \*.

Thus, the standard of review in administrative appeals is not *de novo*, and this Court must affirm the City of Dayton Civil Service Board=s ruling unless it is arbitrary, capricious, unreasonable or unsupported by a preponderance of reliable, probative and substantial evidence. When resolving evidentiary conflicts, this Court must give due deference to the findings of Dayton Civil Service Board. Giving due deference to an administrative agency means that an agency=s finding of facts are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency=s findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise insupportable.” *Ohio Historical Society v. SERB* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591. Questions of witness

credibility must be deferred to the board or agency which had the opportunity to observe the witnesses= demeanor. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 407 N.E.2d 1265.

**B. The Civil Service Board did not err in admitting evidence of Appellant's positive drug tests.**

For this court to set aside the decision below, as Appellant requests, it must be found that the decision below was not based upon a preponderance of reliable, probative and substantial evidence. Appellant first argues that the Board erred in admitting Appellant's drug tests result because they were impermissible hearsay. According to Appellant, the results were authenticated by City of Dayton employees who did not participate in the urine sample collection, testing or interpretation.

In the case at bar, the Board stated that it considered the testing process used by the City. At the hearing before the Board, Ken Thomas ("Thomas") Safety Director for the City of Dayton testified that the urine samples used for Appellant's drug tests were collected by Concentra Medical Center. Thomas testified generally as to the procedure used. According to Thomas, all samples are collected in a secure rest room, and that the collection agent conducts a ten-twelve step process to make sure that the collection environment is secure. According to Thomas, a provided sample is split into two vials and observed for color and temperature consistent with a human sample. A bar-coded custody control form is completed, initialed by the Concentra employee conducting the test, and affixed to each sample. One sample is tested, and the second is kept secure for testing if requested by a person receiving a positive drug test on the first split sample. According to Thomas, the samples are placed in tamper-resistant envelopes and sent to Advanced Technology Network ("ATN") the same day for testing. All test results are sent to the Medical Review Officer under the CBA. Thomas testified that the MRO attempts to contacts any person with a positive drug test to determine if the test was positive for some legitimate reason.

In this case, the MRO was unable to contact Appellant in three attempts to do so following his second positive result. Tr. pp. 114:23-115:11. Likewise, Appellant did not avail himself of his right to have the second half of the split sample tested.

## **1. Testing Standards.**

Appellant argues that the appropriate testing standards were not used because the CBA requires that “the method of collecting, storing and testing the split sample will follow the Department of Transportation guidelines.” Appellant points out that the form showing that Appellant tested positive for cocaine on the two occasions specifically states that it is Non-DOT result.

Thomas testified to the Board that the test adhered to DOT standards, but were reported as non-DOT, “because we are not governed under the Department of Transportation’s regulatory aspects because we do not operate a vehicle that qualifies under 26,001 pounds or a trailer of 10,001 pounds. So based on that, collection sites and the labs, they really are to report that as a non-DOT test because they truly do not fall under the classifications of DOT. Tr. pp. 18:20-19.5. Thomas also testified, “For purposes of standards, the test adhered to DOT standards. For purposes of reporting, they were non DOT reported.” Tr. p. 89:5-7. Further, the City of Dayton HR Analyst who ordered the testing, Maurice Evans, testified that even if he had mistakenly ordered a non-DOT test, “the drug test is still the same, there’s no difference.: Tr. p. 158:17-20.

Based on the foregoing, the Court finds that the Board’s determination that the testing standards were appropriate in the case at bar was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.”

## **2. Admissibility of Evidence before the Board.**

Appellant argues that the evidence used to justify his discharge to the Board was inadmissible hearsay. According to Appellant, however, the evidence that led to Appellant’s discharge was (i) the testimony of two employees who were not involved in the testing describe the process, and (ii) the introduction of Appellant’s drug test results and reports. Appellant cites Civil

Service Rule 14, Section 5(A) which states that, “[t]he admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases.”

It is well-settled in the Second District of Ohio that, generally, administrative agencies are not bound by strict rules of evidence, even if there is a general rule which requires that the rules of the Ohio Civil Courts be used. See *Day Lay Egg Farm v. Union Cty. Bd. Of Revision* (1989), 62 Ohio App.3d 555, 560. Further, in reviewing a decision of an administrative board, a common pleas court is required to give “due deference to the administrative resolution of evidentiary conflicts” and therefore must not substitute its judgment for that of the administrative agency.” See *Hawkins v. Marion Corr. Inst.* (1990), 62 Ohio App.3d 863, 870.

In the case at bar, testimonial evidence as to the process used by the Appellee to test Appellant and the results of those tests was given by two City employees who were not involved in the testing process. He also argues that the paper records of his drug tests were improperly admitted as business records. Appellant cites to various cases *criminal* cases in which such testimony was not admissible. As set forth above, however, administrative agencies are not required to strictly adhere to the civil rules at their hearings. Further, in addition to the general statement in Civil Service Rule 14 set forth above that the civil rules apply to Board hearings, Section 5(D) of Civil Service Rule 14 specifically states that “[t]he Board or Hearing Officer conducting a hearing shall have full authority to control the procedure of the hearing, to admit or exclude testimony or other evidence, to rule upon all objections, and to take such other actions as are necessary and proper for the conduct of such hearing.” Although the hearsay rule is relaxed in administrative proceedings, however, the “discretion to consider hearsay evidence cannot be exercised in an arbitrary manner.” See *Day Lay Egg Farm*, supra.

Keeping these principles in mind, the Court finds that the testimonial evidence presented before the Board was sufficient. Likewise, the admission of Appellant’s drug test records and

results as business records of the City was not arbitrary. The Court further finds that such evidence was competent and probative of the facts going to Appellant's conduct.

Finally, in the case at bar, Appellant was afforded due process in that he was present at the Board's hearing and represented by counsel. Appellant chose not to testify, but did cross-examine the City's witnesses and had a witness testify on his behalf. Thus, based on this Court's review of the record, the Court finds that Defendant was afforded due process at his administrative hearing before the Board and the decision of the Board was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Accordingly, the decision of the Board must be AFFIRMED and Appellant's *Notice of Appeal* must be DENIED.

## II. CONCLUSION

Accordingly, the *Notice of Appeal* filed by Appellant appealing the decision of the Dayton Civil Service Board is hereby DENIED and the *Decision of the Dayton Civil Service Board* is hereby AFFIRMED.

This is a final appealable order, and there is not just cause for delay for purposes of Ohio Civ. R. 54. Therefore, the time for prosecution and appeal to the Second District Court of Appeals must be computed from the date upon which this decision and entry is filed.

The above captioned case is ordered terminated upon the records of the Common Pleas Court of Montgomery County, Ohio.

Appellee's costs are to be paid by Appellant.

SO ORDERED:

BARBARA P. GORMAN, JUDGE

**TO THE CLERK OF COURTS:**

**Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.**

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**BARBARA P. GORMAN, JUDGE**

The parties listed below were notified of this Entry through the electronic notification system of the

Clerk of Courts:

Terry W. Posey  
Norma M. Dickens.

William Hafer, Bailiff (937) 225-4392 [haferw@montcourt.org](mailto:haferw@montcourt.org)



General Division  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

**Case Title:** RONALD L ROYSE vs CITY OF DAYTON  
**Case Number:** 2008 CV 08296  
**Type:** Decision

So Ordered

*Barbara Pegler Gorman*

Barbara P. Gorman