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**EXPLANATION OF WHY THIS CASE IS NOT A CASE
OF PUBLIC OR GREAT GENERAL INTEREST**

In this case, the City of Dayton brings before the Court a case that is not controversial, caused by its own changing of legal theories three times during the case. This case presents no constitutional issues and no question of great general interest.

This case involves the interpretation of the phrase “The Admission of Evidence shall be governed by the rules applied by the Courts of Ohio in civil cases” as used in Section 5(A) of the Rules Governing the Civil Service Board of the City of Dayton. Here, the Second District Court of Appeals held that this mandate required the limited application of the Ohio Rules of Evidence, and that these rules prohibited the admission of drug test results without proper authentication.

This case does not present a constitutional question or a question of great general or public interest for four reasons. First, it involves the application of longstanding uncontroversial precedent over the same rule—precedent that Dayton and amicus curiae the Ohio Municipal League (“OML”) decline to address. Second, Dayton has chosen to eliminate the language above from the Civil Service Board Rules, meaning that this controversy will only ever apply to these parties (and the OML fails to identify any other municipality with similar language).

Third, several of the propositions of law were not raised below, rendering them inappropriate for jurisdictional consideration by this Court. Finally, the Second District declined to rule on an alternative, equally dispositive grounds for reversal, which means that even if this case is accepted, and the result overturned, the outcome will not be changed.

This is a case about inconsistent lawyering, about attempting to introduce drug test results by first claiming they are business records before the Civil Service Board, then in the common pleas court and the Court of Appeals, claiming that the Rules of Evidence do not have to be

strictly applied, and then before this Court, again, claiming they fit in the business records exception to the hearsay rule.

There is nothing about this case that presents questions of general or public interest. There is simply no basis upon which this Court should exercise jurisdiction.

STATEMENT OF THE CASE

The facts of this case are undisputed. Plaintiff/Appellant Ronald Royse (“Royse”) was a fourteen year employee of the Dayton Fire Department prior to his discharge on February 14, 2008 as a result of two alleged violations of the Labor Agreement between the City of Dayton and the International Association of Fire Fighters, Local 136 A.F.L. – C.I.O. (“Labor Agreement”) The two violations were alleged positive drug tests.

Royse appealed the decision to the City of Dayton Civil Service Board (“Board”) and the matter was scheduled for a hearing. That hearing is a *de novo* review of the grounds for disciplinary action. At the hearing, and over objection, the City of Dayton (“Dayton”) introduced evidence of the alleged positive drug tests without authenticating them by the party administering the test. The Board found that Royse’s termination was proper.

On March 9, 2008, Royse appealed the decision pursuant to R.C. Chapter 2506 to the Montgomery County Common Pleas Court. The matter was briefed. The Trial Court affirmed the decision of the Board on July 6, 2010.

Royse appealed the Trial Court’s decision on August 2, 2010. On July 15, 2011, the Second District reversed the trial court’s decision, finding that the admission of the evidence of the drug tests was improper, and that the decision of the Board should be reversed. On August 29, 2011, Dayton filed a Notice of Appeal to this Court, as well as a Memorandum in Support of Jurisdiction raising three propositions of law. OML raised two related propositions of law in its own Memorandum in Support of Jurisdiction.

STATEMENT OF FACTS

A. Dayton's Drug Testing Procedure for Fire Fighters

Dayton's ability to drug test its fire fighters for disciplinary purposes is governed by Article 33, Section 1, of the Labor Agreement between the City of Dayton and the International Association of Firefighters, Local 136, A.F.L.-C.I.O ("I.A.F.F.").

The Labor Agreement is explicit that Department of Transportation ("DOT") testing standards will be used. Article 33, Section 7(B)(6) states that "the method of collecting, storing, and testing the split sample will follow the Department of Transportation guidelines." Moreover, Article 33, Section 12, requires that for random drug testing procedures, "urine samples will be collected per DOT standards." During the hearing before the Board, representatives for Dayton acknowledged that the Labor Agreement required DOT testing, and that there is a difference between DOT testing and non-DOT testing. The testifying representatives for Dayton did not know whether the testing ordered for a "non-DOT" test was the same for a "DOT test."

The process of drug testing requires four steps and three separate companies:

- (1) Dayton contracts the process out through Concentra Medical Center;
- (2) Concentra is responsible for collecting the urine specimen;
- (3) They send the specimen to a lab, ATN, in Memphis, Tennessee. That lab does the actual testing;
- (4) However, that lab communicates the information regarding the test to Alternative Safety and Testing Solutions ("ASTS") which provides a "Medical Review Officer" who verifies the test results and communicates information regarding positive results to Dayton.

At the hearing before the Board, no individual involved with the drug testing for Roysse (discussed below) testified as to the testing procedure. Ken Thomas, Safety Administrator for the City of Dayton, testified that in previous hearings before the Board, Dayton has called the

individuals who performed the tests to testify as to the accuracy and procedure of the individual test.¹ No such testimony was supplied here.

B. Royse's Drug Tests

On May 14, 2007, Royse was ordered to submit to a random urinalysis pursuant to Article 33, Section 1, of the Agreement between the City of Dayton and the International Association of Firefighters, Local 136, A.F.L.-C.I.O ("I.A.F.F."). He complied with this order without objection.

At the hearing, there was no testimony from the individual who collected the specimen on this date. The matter followed the procedure described above. A result was later sent from Alternative Safety and Testing Solutions, with no quantitative results, alleging by the Medical Review Officer (MRO) that the "Non-DOT Results" of the test was positive for Cocaine with comments that it was "Non-Contact Positive/Subject to Further Review."

As a result of the alleged positive result, Royse was required to attend a three day Employee Health Education Program, which he successfully completed. He was ordered to submit to subsequent drug screening in the next four months, which were without incident. At least one of his negative follow-up tests (the Return to Work Test) on May 31, 2007 was a DOT Test. The follow-up screening was posted on a notice that stated "NOTICE TO REPORT FOR DOT DRUG and/or ALCOHOL TEST." When a negative drug test was received, Dayton received no notice of the results. On November 15, 2007, Royse was ordered to again submit to testing. The Exhibit submitted before the Board again, states at the top "(NON-DOT

¹ In its amicus brief, the OML asserts that the "additional expense" of calling authenticating personnel is not "reasonable." The fact that Dayton has in fact called such personnel to testify at Board hearings indicates the falsity of this statement.

TESTING).” The Dayton employee in charge of sending the order admitted that Royse was not sent for a DOT test.

Royse reported to Concentra Lab, 1 Franciscan Way, Dayton Ohio and submitted a “split” urine sample. The “Custody and Control” form for this test explicitly states: “Do not use this form for D.O.T. collections.” Royse was subsequently notified that he had tested positive for cocaine in a “Non-DOT Test,” again with no quantitative results, alleging by the Medical Review Officer (MRO) of a “Non-Contact Positive/Subject to Further Review.” There was no testimony from any party involved in determining the quantitative results. There was no testimony from any party involved in interpreting the quantitative results.

C. The Hearing before the Board

The only evidence before the Board regarding the positive drug tests was the results of the tests themselves. Counsel for Royse objected to the tests’ admission, asserting they were inadmissible hearsay. Counsel for Dayton responded by asserting they were subject to the business record exception of the hearsay rule and admissible.²

At the hearing, the Board itself was represented by counsel. Despite OML’s contention that somehow determining whether evidence was admissible would constitute the unauthorized practice of law, the Board determined that it would admit the evidence and affirmed Royse’s termination.³

D. The Appeal to the Trial Court

Royse appealed the Board’s decision to the common pleas court, as provided by R.C. 2506.04. In his appeal, Royse argued that the Board erred in admitting hearsay evidence, not

² Dayton did not raise this argument again until the appeal to this Court.

³ In fact, Board Rule 14, Section 6(A) requires the Board to issue “conclusions of law.” Why the OML is concerned about unauthorized practice of law is confusing at best.

subject to an exception, and was deprived of his due process rights and right to confront witnesses afforded to him in an administrative hearing to remove him from public employment. Royse also argued that the Board's decision was wrong as a matter of law, as the test results were "non-DOT" tests, contrary to the Labor Agreement.

Dayton opposed Royse's appeal only by arguing that the Board had the unlimited authority to admit evidence at its own discretion, and that no review of that decision was permitted. It ignored its previous argument that the test results were hearsay subject to the business records exception.

On July 6, 2010, the Trial Court rendered its decision. It determined that it was to act in deference to the Board's findings, and that Dayton had submitted sufficient evidence on all of the required issues.

E. The Appeal to the Second District

Royse appealed the Trial Court's decision to the Second District. He maintained the arguments he raised below (that the Board erred in considering hearsay evidence, not subject to exception) and was deprived of his due process rights and right to confront witnesses afforded to him in an administrative hearing to remove him from public employment. Royse also maintained his argument that the Board's decision was incorrect, as contrary to the Labor Agreement, the test results were not "DOT tests."

Dayton continued its contention that the Board was not subject to the Rules of Evidence, and could admit evidence at its discretion (again, ignoring the business records exception it claimed before the Board).

On July 15, 2011, the Second District issued its opinion ("Opinion") reversing the Trial Court and Board's termination of Royse. The Second District held that "the Board itself chose to

adopt a rule that requires it to apply the fundamentals of the rules of evidence in its proceedings.” Opinion, ¶ 20. The Second District found it “undisputed” that the drug test results were inadmissible hearsay as they were not subject to an exception, and not properly authenticated. *Id.*, ¶¶ 22, 28, 30.

F. Dayton’s Actions after the Opinion

Dayton’s actions **after the release** of the Opinion are telling. Apparently regardless of its confidence in the legal opinions maintained during this litigation, Dayton is seeking to make sure that the issues presented here never arise again. Dayton is seeking to revise the Rule 14 of the Board to: (1) remove any reference to the phrase “governed by the rules applied to the Courts of Ohio in civil cases” as applying to the Board (Rule 14, Section 5(A)); and (2) expressly change the authority of the Board regarding evidence: “*In so doing, the Board or Hearing Officer shall not be bound by the Rules of Evidence.*” (emphasis and italics in original).⁴

ARGUMENT OPPOSING APPELLANT’S PROPOSITIONS OF LAW

Response to Appellant’s Proposition of Law No. I

A municipal civil service board is not strictly bound by the Ohio Rules of Evidence in administrative service hearings unless required by law.

Dayton's first proposition of law appears to acknowledge that the evidence of the drug tests were inadmissible (or else there would be no need for a lower standard). Despite having contradicted themselves on three separate occasions on this issue, this Court should not exercise jurisdiction over this Proposition for three reasons: (1) administrative agencies cannot base a decision on incompetent evidence; (2) there is no authority for Dayton's proposition that

⁴ The City of Dayton Civil Service Board Web Page announcing the proposed changes is available at <http://www.cityofdayton.org/departments/csb/Pages/default.aspx> (accessed 9/5/2011). The document announcing the changes themselves is available at <http://www.cityofdayton.org/departments/csb/Documents/Proposed%20changes%20to%20%20Rule%2014.pdf> (accessed 9/5/2011).

“governed” should mean “influenced”; and (3) there can be no question of great general or public interest, as even accepting this proposition of law as true would not affect the outcome, and Dayton is attempting to limit this case to a single application by changing the rule at issue after the adverse decision in this case.

A. The case law in Ohio is clear, administrative agencies cannot rely on inadmissible evidence.

In this proposition of law, Dayton takes the incredulous position that a Civil Service Board rule, prescribing that “The admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases” permits inadmissible hearsay to be introduced. The Second District Court of Appeals directly addressed this issue over 20 years before:

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) (emphasis added).

Dayton does not even acknowledge this case, much less cite to it. Here, the Second District found: the drug tests were inadmissible hearsay, and that therefore, there was **no admissible evidence** before the Civil Service Board. There is simply not a question of great general or public interest when the matter has been settled for over 25 years.

B. Dayton's construction of the word “governed” stretches belief.

Dayton's argument under the first proposition of law is premised upon using the second definition of “governed” in a Merriam-Webster dictionary to show that the Rules of Evidence do

not strictly apply. Dayton argues that the appropriate use of the word governed is “influenced” (as opposed to the first definition of “controlled”).

Dayton fails to point this Court to the numerous decisions in which this Court has used word “governed” to mean “controlled.” *See e.g. Disciplinary Counsel v. Ricketts* (2010), 128 Ohio St. 3d 271 (discussing attorneys and the rules of professional conduct; *State ex rel. Brooks v. O'Malley* (2008), 117 Ohio St. 3d 385, 387 (discussing standing under the Rules of Juvenile Procedure). “Governed” has always meant controlled, despite Dayton’s (and OML’s, as discussed *infra*) position to the contrary.

An entity contractually agreeing to be “governed” by the “Rules of the Courts of Ohio” has agreed to be controlled by those rules. Inadmissible hearsay is incompetent evidence and should not have been considered. The Second District appropriately reversed the decisions of the trial court and of the Civil Service Board. Dayton’s argument fails before it starts, and there is no question of great general or public interest presented. Jurisdiction over this proposition of law should be declined.

C. The circumstances of this case specifically indicate there is no question of great general or public interest.

The facts of this case are the facts of this case. No ruling in this decision would impact the general law in Ohio or even change the outcome in this case. The case is patently inappropriate for discretionary review.

First, Dayton is attempting to make sure the issue presented in this case can never appear again. Despite admitting before the Board that the usual practice was to admit the drug test results in Board hearings by calling the testing provider (so as to avoid the issues present in this case), immediately after receiving the Opinion, Dayton expressly proposed legislation to remove

the language referencing any Ohio rules of court. The issues presented in this case will not appear again in Dayton.

Second, even if this court accepted jurisdiction, and changed the law to match Dayton's desire, the outcome of this particular case would not be affected. As described above, Dayton failed to order "DOT" tests as required by the Labor Agreement between the IAFF and Dayton. Because it ruled the evidence of the test results were inadmissible, the Second District never reached this aspect of Royse's appeal. Because the legal construction is incorrect, the factual issues presented in this case will not arise again, and even if the law was as Dayton proposes, the outcome of this case would not change. There simply is no question of great general interest.

Response to Appellant's Proposition of Law No. II

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 its Second Proposition of Law, Dayton argues that the Second District overreached its limited scope of review in analyzing the trial court's decision affirming the Board. For this proposition of law to affect the outcome of this case, Dayton must be proposing the "abuse of discretion" scope of review does not permit an appellate court to correct a legal error made by the trial court. This is patently incorrect. *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147; *State v. Today's Bookstore* (1993), 86 Ohio App. 3d 810, 823, 621 N.E.2d 1283.

In *Henley*, this Court held that on an administrative appeal under R.C. 2506.04, an appeals court acts under a "limited power to *** 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.” *Id.* at 147. The Second District was plainly correct when it overruled the legal determination that the evidence relating to the test results were admissible.

Similarly, in *Today’s Bookstore*, the court held that “[w]hen the trial court’s discretionary decision is based on a misconstruction of the law or an erroneous standard, that decision will not be accorded the deference that is usually due to the trial court, but instead will be reviewed *de novo*; it is appropriate for an appellate court to substitute its judgment for that of the trial court where matters of law are involved.” *Id.*, 86 Ohio App. 3d at 823.

Even under an abuse of discretion standard, a legal error can be reversed by the court of appeals in an administrative appeal under R.C. 2506.04. There simply is no question of great general interest worthy of this Court’s review. Jurisdiction over this proposition of law should be denied.

Response to Appellant’s Proposition of Law No. III

The phrase “other qualified person” contained in Rule 803(6) of the Ohio Rules of Evidence is not to be narrowly construed.

In this proposition of law, Dayton asks this Court to construe “other qualified persons” to include individuals that have never been contemplated as part of the business record exception. Jurisdiction over this proposition of law should be denied for two reasons. First, Dayton never raised this issue below and it is waived. Second, it is directly contrary to the settled law in Ohio

A. Any issue regarding standing was waived.

This Court does not review issues that were not raised in the trial court. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099.

Here, the first problem with the third proposition of law is that its substance was never raised in the trial court or on appeal (although, Dayton generically argued in before the Board

that the drug tests were business records). In fact, there is no argument for the “business records exception” or based on Evid. R. 803 in Dayton’s brief in the Trial Court or on appeal.

Dayton cannot influence the Board (comprised of non-attorneys) by claiming a business records exception, abandon that argument before two reviewing courts, and then resume it in this one. For this reason alone, jurisdiction should be declined over this proposition of law.

B. Records of drug tests are not the business records of the receiving business.

Dayton’s ignorance of Evid.R. 803(6) is all the more apparent when considering they ignored contrary authority cited by Royse before the Trial Court and the Second District. The law in Ohio (even before the hearing in this case), is that the custodial entity (i.e. a police station that orders drug testing), cannot testify as to the contents of the results contained in tests it did not perform, because “information in records that an organization receives from outsiders is not part of its business records for the purposes of Evid.R. 803(6).” *State v. Jackson*, 11th Dist. App. No. 2007-A-0079, 2008-Ohio-6976. In *Jackson*, the court held that a detective could not testify as to the contents and authenticity of a Bureau of Criminal Investigation report analyzing a drug sample, because such records did not qualify as “business records” for the hearsay exception.

Dayton cites no authority for this proposition of law, much less attempt to distinguish the authority Royse has been relying on throughout this litigation. Given the direct, undisputed contrary authority, jurisdiction over this proposition of law should be declined.

Response to Amicus’ Proposition of Law No. I

The Ohio Rules of Evidence do not apply to an administrative proceeding unless the administrative body has clearly identified and adopted the Ohio Rules of Evidence.

In this proposition of law, the OML makes two faulty arguments: (1) that R.C. 731.231 mandates that an entity adopting governing “codes” incorporate it directly or have been deemed

to not incorporate it; and (2) that the definition of “governed” does not mean “controlled by.”

This proposition fails for three reasons: (1) R.C. 731.231 is not referring to Rules of Evidence or (or any other judicial rule), but rather model or standard codes of enforcement; (2) Dayton never made any argument relating to whether R.C. 731.231 applied, and has therefore waived it; and (3) “governed” as discussed above and used by this Court, most definitely means “controlled” and not “influenced.”

A. R.C. 731.231 does not apply to Rules of Court.

Without citation to anything other than the statute itself, the OML argues that R.C. 731.231 mandated a specific method of incorporating the Ohio Rules of Evidence, and that the Board failed to follow it. OML fails to provide the operative provision.

R.C. 731.231 applies to “standard ordinances and codes *** including but not limited to codes and regulations pertaining to fire, fire hazards, fire prevention, plumbing code, electrical code, building code, refrigeration machinery code, piping code, boiler code, heating code, or air conditioning code ***” It is uncertain whether the Rules of Evidence even apply to this statute.

In any event, OML does not cite any authority for the proposition that a failure to specifically reference the Rules of Evidence is fatal to its application. This argument does not present a question of great general or public interest.

B. This argument was never made below, and is therefore waived.

As discussed above, this Court will not entertain an argument that was not previously raised below. Dayton, at no point, raised the issue of R.C. 731.231 affecting the outcome of this case. As a consequence, there is no question of great general or public interest, because the matter has been waived. *Goldfuss*, 79 Ohio St. 3d at 121.

C. “Governed” means “controlled,” in any event.

The OML again rehashes (using the same dictionary as Dayton) the argument that “governed” means “influenced,” not controlled. Again, the OML is using the second definition, and ignores the longstanding precedent of this Court that uses “governed” to mean “controlled.” *Ricketts, supra; Brooks, supra*. The proposition is simply incorrect, and there is no question of great general or public interest.

Response to Amicus’ Proposition of Law No. II

Hearsay evidence, in administrative proceedings and in the absence of an administrative board’s adoption of the Ohio Rules of Evidence, may be admitted by the administrative board, and the court of appeals cannot disregard evidence that was admitted at the administrative level.

This proposition of law again makes two assumptions: (1) that the Board did not adopt the Ohio Rules of Evidence (as discussed above, this is incorrect); and (2) the court of appeals has the authority to overturn incorrect legal decisions.

As discussed above, *Henley* controls the authority of the appellate court to reverse the trial court on a legal decision. The Second District acted within its authority in reversing the trial court on a legal issue as to the admissibility of the evidence.

With regards to whether the drug tests were admissible, as noted by the Second District, this matter is controlled by *Haley* (although like Dayton, the OML does not cite to it). Incompetent evidence cannot be the foundation for an administrative agency’s decision. There was no error, and as a consequence, there is no question of great general or public interest. Jurisdiction over this proposition of law should be denied.

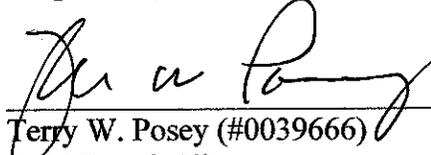
CONCLUSION

Dayton and the OML would have this Court believe that there is a travesty occurring, whereby the civil service boards of this state are being bound by the rules of evidence. The

Second District acknowledged its prior precedent on these issues (even if the other parties did not), and properly held that incompetent evidence is inadmissible and inappropriate for consideration in an administrative hearing. The Second District acted within the scope of its authority in overruling the trial court's incorrect legal determination.

The propositions of law in this case do not present a question of great general or public interest for three primary reasons. First, the disputed issues were correctly decided. Second, there is no indication that the decision in this case will affect any other party (as Dayton is changing its rule, and the OML did not describe any other municipality using identical language for its Civil Service Board). Finally, adopting the propositions of law as suggested would not affect the outcome, the Second District has not yet addressed Dayton's admitted failure to order DOT tests as required by the Contract. Jurisdiction over this case should be declined.

Respectfully submitted,



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CERTIFICATE OF SERVICE

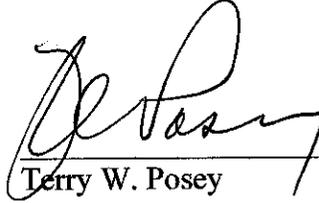
I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this __ day of September, 2011:

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