

IN THE SUPREME COURT OF OHIO

RONALD L. ROYSE,	:	Case No. 2011-1477
	:	
Plaintiff - Appellee,	:	On Appeal from the
	:	Second District Court of Appeals
v.	:	Montgomery County, Ohio
	:	
THE CITY OF DAYTON	:	Court of Appeals
	:	Case No. 24172
Defendant - Appellant.	:	
	:	
	:	

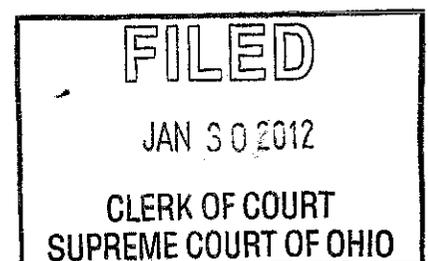
**BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF THE DEFENDANT-APPELLANT
THE CITY OF DAYTON**

STEPHEN L. BYRON (#0055657) (COUNSEL OF RECORD)
REBECCA K. SCHALTENBRAND (#0064817)
Ice Miller LLP
4230 State Route 306, Suite 240
Willoughby, Ohio 44094
Phone: (440) 951-2303
Fax: (216) 621-5341
E-mail: Stephen.Byron@icemiller.com

JOHN GOTHERMAN (#0000504)
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
Phone: (614) 221-4349
Fax: (614) 221-4390
E-mail: jgotherman@columbus.rr.com

STEPHEN J. SMITH (#0001344)
Ice Miller LLP
250 West Street
Columbus, Ohio 43215
Phone: (614) 462-2700
Fax: (614) 462-5135
E-mail: Stephen.Smith@icemiller.com

**COUNSEL FOR AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE**



JOHN J. DANISH (#0046639)
NORMA M. DICKENS (#0062337)
JONATHON W. CROFT (#0082093)
101 West Third Street
P.O. Box 22
Dayton, Ohio 45401

COUNSEL FOR DEFENDANT-APPELLANT
THE CITY OF DAYTON, OHIO

TERRY W. POSEY (#0039666)
Thompson Hine LLP
Austin Landing I
10050 Innovation Drive, Suite 400
Dayton, Ohio 45342

COUNSEL FOR PLAINTIFF-APPELLEE
RONALD L. ROYSE

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iv
INTRODUCTION.....	1
STATEMENT OF AMICUS INTEREST	2
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT.....	2
<u>Proposition of Law No. 1:</u>	
Administrative bodies are not required to apply the Ohio Rules of Evidence and, therefore, 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.	
	2
<u>Proposition of Law No. 2:</u>	
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, absent a finding that the discretion to consider hearsay was exercised in an arbitrary manner, cannot disregard evidence that was admitted at the administrative level.	
	6
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

PAGE

Cases

<i>Bivins v. Ohio State Bd. of Emergency Med. Servs.</i> , 165 Ohio App.3d 390, 2005-Ohio-5999.....	1,6
<i>Board of Education for Orange City School District v. Cuyahoga County Board of Revision</i> , 74 Ohio St.3d 415, 1996-Ohio-282.....	3
<i>Brown-Brockmeyer Co. v. Roach</i> , 148 Ohio St. 511, 76 N.E.2d 79 (1947).	9
<i>City of Jackson v. Stacey</i> , 96 Ohio App.3d 169, 644 N.E.2d 1032	4
<i>Eastern Ohio Distributing Co. v. Bd. of Liquor Control</i> , 98 N.E.2d 330 (1950)	7
<i>Erdeljohn v. Ohio State Bd. of Pharmacy</i> , 38 Ohio Misc.2d 1, 526 N.E.2d 117 (1987). 1,6	
<i>Haley v. Ohio State Dental Board</i> , 453 N.E. 2d 1262, 7 Ohio App.3d 1	1,6,7,8
<i>Hawkins v. Marion Corr. Inst.</i> , 62 Ohio App.3d 863	8
<i>Royse v. City of Dayton</i> , 2011-Ohio-3509	passim
<i>Brown-Brockmeyer Co. v. Roach</i> , 148 Ohio St. 511, 518, 76 N.E.2d 79 (1947).	9
<i>Simon v. Lake Geauga Printing Co.</i> , 69 Ohio St.2d 41, 430 N.E.2d 468 (1982)... 1,3,6,8,9	
<i>Westlake v. Ohio Dept. of Agriculture</i> , 2008-Ohio-4422	6

Statutes

R.C. 731.231	4, 5
--------------------	------

Other Authorities

Article 4, Section 5(B), of the Ohio Constitution	2
Black's Law Dictionary (5 Ed.Rev.1979) 1312.....	4
<i>Merriam-Webster Dictionary</i> , 2011 edition	5

Rules

Evid.R.101(A).....	2
Evid.R.102	3
Evid.R. 901(B)(9),	7
Rule 15.4(A) of the Rules and Regulations of the Civil Service Board of the City of Dayton.....	3, 5

INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of Dayton, urges this Court to reverse the decision of the Second District Court of Appeals (“Second District”) in *Royse v. City of Dayton*, 2011-Ohio-3509. The Second District held that the trial court erred in considering a drug test that, at the administrative hearing level, was not authenticated by the testimony of a person with knowledge of the drug testing process or system.

The general rule, in administrative hearings, is that “evidence which might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in proceedings *** where relaxed rules of evidence are applied.” *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 44, 430 N.E.2d 468 (1982). Furthermore, “[t]he 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*, 453 N.E.2d 1262 at 1269, 7 Ohio App.3d 1 (1982),. See also *Bivins v. Ohio State Bd. of Emergency Med. Servs.*, 165 Ohio App.3d 390, 2005-Ohio-5999; and *Erdeljohn v. Ohio State Bd. of Pharmacy*, 38 Ohio Misc.2d 1, 526 N.E.2d 117 (1987).

The Second District, however, contrary to these general rules, has held that the Ohio Rules of Evidence apply in administrative hearings when an administrative body has not clearly identified and adopted the Ohio Rules of Evidence and only agreed to “be governed by the rules applied by the Courts of Ohio in civil cases.” *Royse* at ¶ 20.

This is bad law which should be reversed by this court.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of Ohio cities and villages. The Ohio Municipal League and its members have an interest in ensuring that administrative hearing officers and administrative boards, in the absence of an express adoption of the Ohio Rules of Evidence, are not required to apply the Ohio Rules of Evidence.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Merit Brief filed by the City of Dayton.

ARGUMENT

Proposition of Law No. 1: Administrative bodies are not required to apply the Ohio Rules of Evidence and, therefore, 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.

Administrative Bodies Are Not Required to Apply the Ohio Rules of Evidence

The Ohio Rules of Evidence were adopted by this Court in accordance with Article 4, Section 5(B), of the Ohio Constitution and “govern proceedings in the courts of this state.” Evid.R.101(A).

As this Court has noted, “Evid.R.101(A) does not mention administrative agencies as forums to which the Rules of Evidence apply. Indeed, the constitutional authority under which the rules were promulgated extends only to ‘rules governing

practice and procedure in all courts of the state.” *Board of Education for Orange City School District v. Cuyahoga County Board of Revision*, 74 Ohio St.3d 415, 417, 1996-Ohio-282. Administrative bodies are not courts and, therefore, are not bound by the Ohio Rules of Evidence. *Id.*

As noted above, the general rule, in administrative hearings, is that “evidence which might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in proceedings *** where relaxed rules of evidence are applied.” *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 44, 430 N.E.2d 468 (1982).

The Ohio Rules of Evidence Do Not Apply in an Administrative Proceeding Unless the Administrative Body has Clearly Identified and Adopted the Ohio Rules of Evidence

Rule 15.4(A) of the Rules and Regulations of the Civil Service Board of the City of Dayton (“Board”) provides: “[t]he admission of evidence shall be **governed** by the rules applied by the Courts of Ohio in civil cases.” *Royse* at ¶ 20. (Emphasis added.)

The Second District, in *Royse*, concluded that the Board’s adoption of this rule “requires it to apply the fundamentals of the rules of evidence in proceedings.” *Royse* at ¶ 20. The Board, however, did not clearly identify and adopt the Ohio Rules of Evidence. Neither did it incorporate the Ohio Rules of Evidence into the Rules and Regulations.

The purpose and construction of the Ohio Rules of Evidence “is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. The principles of the common law of Ohio shall supplement the provisions of these rules, and the rules shall be constructed to state the principles of the common law of Ohio unless the rule clearly indicates that a change is intended. These rules shall not supersede substantive statutory provisions.” Evid.R.102.

As the dissent in *Royse* noted, “administrative officials often are not legally trained or versed in the nuances of evidentiary rules.” *Royse* at ¶ 50. The Ohio Rules of Evidence are technical, and the interpretation of the rules is a matter for the courts and the officers of the court, trained legal personnel.¹

R.C. 731.231 authorizes the legislative authority of a municipal corporation to adopt standards and codes prepared and promulgated by the state. The adoption of such standards and codes, however, “shall clearly identify such code, shall state the purpose of the code, shall state that a complete copy of the code is on file ***.”

“R.C. 731.231 pertains to technical ordinances. Technical terms mean ‘belonging or peculiar to an art or profession.’ *** R.C. 731.231 pertains to specialized applications requiring knowledge not in the ken of the average layman.” *City of Jackson v. Stacey*, 96 Ohio App.3d 169, 172, 644 N.E.2d 1032, quoting Black’s Law Dictionary (5 Ed.Rev.1979) 1312. The Ohio Rules of Evidence are a technical code specialized to the legal profession and the rules are not known and understood by the average citizen.

¹ Appellee, in his Memorandum In Response, points out that the Board’s rules require it to issue “conclusions of law” and, therefore, “Why the OML is concerned about unauthorized practice of law is confusing at best.” *Memorandum In Response of Respondent-Appellee Ronald Royse*, page 5. The League, in its Memorandum In Support of Jurisdiction, argued that strict application or adherence of the Ohio Rules of Evidence, a technical code, “would be difficult if not impossible for hearing officers who are not lawyers; consequently, requiring the strict adherence to the Ohio Rules of Evidence might put such individuals in the position of engaging in the unauthorized practice of law.” *Memorandum In Support of Jurisdiction of Amicus Curiae The Ohio Municipal League*, page 4. Conclusions of law, generally, are a document setting forth the decision of an administrative body. Conclusions of law may be drafted with the assistance of legal counsel, set forth the legal basis for a decision, and reference local codes and regulations. Conclusions of Law, however, are not a valid analogue to a hearing officer or administrative body interpreting and analyzing a technical code such as the Ohio Rules of Evidence, a document whose application requires special legal training.

R.C. 731.231 expressly applies to the legislative authority of a municipal corporation. The League respectfully suggests, however, that a lesser standard regarding technical code adoption should not be applied to administrative boards of a municipal corporation. That is, an administrative body must clearly identify the technical code it is adopting. Rule 15.4(A) does not clearly identify the Ohio Rules of Evidence and, therefore, the Board did not adopt the Ohio Rules of Evidence.

Governed Means to “Provide Guidance”

In Rule 15.4(A), however, the Board did provide guidance regarding the processes and procedures of admitting evidence by using the word “governed.” Govern is defined as “to exert a determining or guiding influence in or over.” *Merriam-Webster Dictionary*, 2011 edition. The use of the word “governed” in the Rules and Regulations requires the Board to look to the rules applied by the courts in the admission of evidence for guidance. It does not require strict application or adherence of the Ohio Rules of Evidence. Appellee, in his Memorandum in Response of Respondent-Appellee Ronald Royse, argues that the term “governed has always meant controlled.” *Memorandum in Response of Respondent-Appellee Ronald Royse*, page 9. Appellee, however, fails to cite any case law defining the term governed.

The Board’s choice not to incorporate the Ohio Rules of Evidence with specificity, and its use of the word “governed” indicates, as noted by the dissenting opinion in *Royse*, “that the rule refers to the manner of presenting evidence and the general procedure for conducting a hearing.” *Royse* at ¶ 39.

Proposition of Law No. 2: 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, absent a finding that the discretion to consider hearsay was exercised in an arbitrary manner, cannot disregard evidence that was admitted at the administrative level.

Hearsay Evidence May Be Admitted By an Administrative Board

This Court, in considering the admissibility of hearsay evidence in an unemployment compensation matter, concluded that "evidence which might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in proceedings *** where relaxed rules of evidence are applied." *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 44, 430 N.E.2d 468 (1982).

The Discretion To Consider Hearsay Cannot be Exercised in An Arbitrary Manner

The role of a hearing officer, as the trier of fact, is "to consider the evidence ***, along with the credibility of the individuals giving testimony before the board *** in reaching his decision." *Simon v. Lake Geauga Printing Co.* at 44. The discretion to consider hearsay, however, cannot be exercised in an arbitrary manner. *Haley v. Ohio State Dental Board*, 453 N.E.2d 1262, 7 Ohio App.3d 1 (1982); *Bivins v. Ohio State Bd. of Emergency Med. Servs.*, 165 Ohio App.3d 390, 2005-Ohio-5999; and *Erdeljohn v. Ohio State Bd. of Pharmacy*, 38 Ohio Misc.2d 1., 526, N.E.2d 117 (1987).

A hearsay statement that "is not inherently unreliable and constitutes substantial, reliable, and probative evidence" may be considered. *Westlake v. Ohio Dept. of Agriculture*, 2008-Ohio-4422 at ¶ 19. An administrative agency, however, "should not act upon evidence which is not admissible, competent, or probative of the facts which it

is to determine.” *Haley* at 1268, citing *Eastern Ohio Distributing Co. v. Bd. of Liquor Control*, 98 N.E.2d 330 (1950).

The Second District, in *Haley*, concluded that the administrative board properly considered certain newspaper clippings provided by third parties as the clippings “had an element of reliability sufficient to be considered as evidence.” *Haley* at 1269.

The evidence at dispute in this administrative proceeding was the result of a random drug test. City officials testified as to the urine sample collection process, security, testing procedures, and notification to employees with a positive drug test result.

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 decision.” *Royse* at ¶ 18. The Second District, however, concluded that such testimony was “insufficient.” *Royse* at ¶ 31. The Second District, citing Evid.R. 901(B)(9), concluded that the process or system use to obtain the positive cocaine drug result “must be established by the testimony of a person with knowledge of the process or system.” *Royse* at ¶ 31.

The Second District reached this conclusion despite the fact that there was no evidence that Royse’s urine specimen was tampered with or that Royse’s positive cocaine drug result was inaccurate or unreliable. Furthermore, as the dissent noted in *Royse*, “nothing in the record suggests that Royse ever denied having a cocaine-abuse problem.” *Royse* at ¶ 50. In the absence of evidence to the contrary, or even a challenge to the factual basis for the charge having been raised in the case, the Second District overstepped its role by finding uncontroverted testimony “insufficient.”

Appellee argues that “[i]ncompetent evidence cannot be the foundation for an administrative agency’s decision.” *Memorandum in Response of Respondent-Appellee Ronald Royse*, page 14. Appellee, however, in the Memorandum again fails to point any evidence, or even an inference that could be drawn from the evidence, that the test results were unreliable.

Drug tests, conducted in accordance with policies and procedures and applicable federal and state laws, are substantial, reliable, and probative evidence. The Board’s admission and consideration of Royse’s positive drug test, therefore, was not arbitrary as the drug test was probative of the alleged drug use and disciplinary issue before the Board and “had an element of reliability sufficient to be considered as evidence.” *Haley* at 1269.

The Court of Appeals Cannot Disregard Evidence That Was Admitted at the Administrative Level

A reviewing court, as this Court has held, should review “all the evidence accepted by the administrator and the referee without attempting to weed out and disregard that evidence which would likely be inadmissible in a courtroom setting.” *Simon v. Lake Geauga Printing Co.* at 45.

The trial court, noting that “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,” understood this rule of law. *Royse v. Dayton*, Montgomery County Common Pleas Court Case No. 2008 CV 8296, page 6, citing *Hawkins v. Marion Corr. Inst.*, 62 Ohio App.3d 863, 870. The trial court, after review of the testimonial

evidence before the Board, concluded that the positive drug test was competent and probative evidence of the facts relating to Royse's conduct.

The Second District, however, requiring the application of the Ohio Rules of Evidence, held that there was no evidence demonstrating that the positive drug test and "the ultimate conclusions reached therefrom were trustworthy." *Royse* at ¶ 30. This holding is contrary to this Court's instruction that "[t]he decision of purely factual questions is primarily within the province of the referee and the board of review." *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 518, 76 N.E.2d 79 (1947).

The Board, as previously discussed, did not act arbitrarily and the Second District, therefore, "cannot usurp the function of the triers of fact by substituting its judgment for theirs." *Simon v. Lake Geauga Printing Co.* at 45.

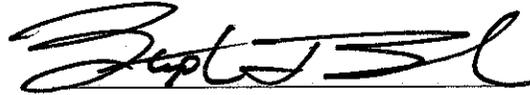
A Requirement that Administrative Bodies Comply with the Ohio Rules of Evidence Will Result in Additional Costs to Public Entities and Taxpayers

The Ohio Rules of Evidence are a technical code specialized to the legal profession, and any court-imposed requirement that administrative bodies comply with the Ohio Rules of Evidence will result in additional costs to public entities and their taxpayers. These additional costs include legal counsel costs, costs associated with providing training to all administrative bodies on the content of, the application of, and the interpretation of the Ohio Rules of Evidence, and costs associated with additional administrative appeals arising from the alleged misapplication of the Ohio Rules of Evidence. It is unreasonable to impose these additional costs at a time when all levels of government are expected to find ways to operate more efficiently and effectively with fewer resources.

CONCLUSION

Based upon the foregoing, the League respectfully requests this Court to reverse the Second District's judgment.

Respectfully submitted,



Stephen J. Smith (#0001344)
Stephen.Smith@icemiller.com
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
Phone: (614) 462-2700
Fax: (614) 462-5135

*Counsel for Amicus Curiae
The Ohio Municipal League*

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae the Ohio Municipal League, In Support of the Defendant-Appellant the City of Dayton* has been sent via regular U.S. mail, postage pre-paid this ____ day of January, 2012 to:

John J. Danish
Norma M. Dickens
Jonathon W. Croft
101 West Third Street
P.O. Box 22
Dayton, Ohio 45401

Terry W. Posey
Thompson Hine LLP
Austin Landing I
10050 Innovation Drive, Suite 400
Dayton, Ohio 45424



Stephen J. Smith (#0001344)