

ORIGINAL

In the
Supreme Court of Ohio

RONALD L. ROYSE,

Petitioner-Appellee,

v.

CITY OF DAYTON,

Respondent-Appellant.

: Case No. 2011-1477
:
: On Appeal from the
: Montgomery County
: Court of Appeals,
: Second Appellate District
:
: Court of Appeals Case
: No. 24172

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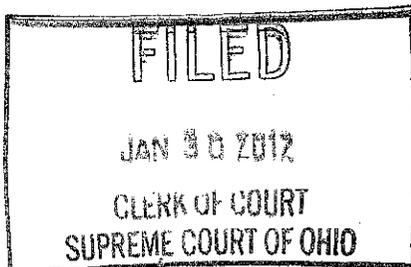
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STATEMENT OF THE FACTS

Appellant, City of Dayton, Ohio (“City”), pursuant to its Notice of Appeal and its Memorandum in Support of Jurisdiction, appealed from the judgment of the Second District Court of Appeals (“Court of Appeals”) rendered July 15, 2011. This Court accepted jurisdiction over this case on November 16, 2011 after reviewing memoranda from both sides as well as an additional memorandum in support of jurisdiction submitted on behalf of the Ohio Municipal League.

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, 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”).

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)¹ 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.

¹ Civil Service Rule 13(2)(I) prohibits “Violation of any enacted or promulgated statute, ordinance, rule, policy, regulation, or other law”.

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 of a positive drug test. 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.

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.

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. (Tr. 71: 21).

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 31st 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.

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.

It is a "long-accepted principle that considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer." *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 382, 627 N.E.2d 538 (citing *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 155; *Jones Metal Prods. Co. v. Walker* (1972), 29 Ohio St.2d 173, 181). It is inappropriate for a court to supplant an agency's own interpretation of such a rule "unless it is unreasonable or conflicts with a statute covering the same

subject matter.” *Id.* (citing *Youngstown Sheet & Tube Co. v. Lindley* (1988), 38 Ohio St.3d 232, 234). *Nestle R&D Ctr., Inc. v. Levin*, 122 Ohio St. 3d 22, 31; 2009-Ohio-1929; 907 N.E.2d 714.

It is a settled point of law in Ohio that the Ohio Rules of Evidence do not directly apply in administrative proceedings. This Court, in its very recent decision in *Plain Local Schools Board of Education v. Franklin County Board of Revision*, stated “at the outset, we observe that the Ohio Rules of Evidence do not directly apply in administrative proceedings, Evid.R. 101(A), but that an administrative tribunal such as the BOR or the BTA is justified in consulting the rules for guidance,” see *Orange City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St. 3d 415, 417, 1996 Ohio 282, 659 N.E.2d 1223; *Plain Local Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 130 Ohio St. 3d 230, 234-235, 2011 Ohio 3362; 957 N.E.2d 268.

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.” Nowhere, in the Dayton Civil Service Board Rules, is there ever one mention of the “Rules of Evidence,” Ohio or otherwise. In an administrative hearing, these rules should not be construed as adopting the Ohio Rules of Evidence. A more reasonable interpretation, as noted in Judge Hall’s dissent, 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, 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.

Rule 14, Section 5(A), which again states that “the admission of evidence shall be guided by the rules applied by the Courts of Ohio in civil cases”, is intended merely to guide the Board. Additionally, the “rules applied by the Courts of Ohio in civil cases” include the well established rule that the Rules of Evidence do not apply in administrative proceedings.

Again, Dayton Civil Service Board Rule 14, Section 5(A) states what “the admission of evidence shall be governed by...” 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. There are multiple definitions for the word “govern,” each with varying degrees of influence.

Dayton Civil Service Board Rule 14, Section 5(A) does not exist in a vacuum. Dayton Civil Service Board Rule 14, Section D, once again, states “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.” (Emphasis added.) The word ‘full’ is defined as follows: lacking restraint, check, or qualification; complete especially in detail, number, or duration; being at the highest or greatest degree.” *Merriam-Webster Dictionary*, 2011 Ed. Thus, the Board, had plenary authority to admit or exclude the reports and the testimony related to the positive drug tests.

Ohio Revised Code §731.231 authorizes the legislative authority of a municipality to adopt standard ordinances and codes, prepared and promulgated by the state. The publication required

by Section 731.21 of the Revised Code, “shall clearly identify such code, shall state the purpose of the code, shall state that a complete copy of such code is on file with the clerk of the legislative authority for inspection by the public and also on file in the law library of the county or counties in which the municipality is located and that said clerk has copies available for distribution to the public at cost.”

The City of Dayton’s Civil Service Board Rules do not clearly identify the Rules of Evidence. Rather, Rule 14, Section 5(A), once again, states that “the admission of evidence shall be *governed by the rules applied by the Courts of Ohio in civil cases.*” (Emphasis added.) In no way is this clearly identifying the Rules of Evidence, let alone expressly adopting them.

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 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. Indeed, the constitutional authority under which the rules were promulgated extends only to “rules governing practice and procedure in all courts of the state.” Section 5(B), Article 4, Ohio Constitution. Similarly, R.C. 119.09 states that “the agency shall pass upon the admissibility of evidence...” Ohio administrative agencies are to determine what evidence is to be admitted in their proceedings.

The City of Dayton’s Civil Service Board Rules demonstrate an intention to be able to consider any and all evidence it considers relevant, probative, and reliable. In an administrative hearing, absent a specific declaration, these rules should not be construed as adopting the Ohio Rules of Evidence.

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 this 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.*, 50 Ohio St.3d 157 (1990). '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 (1990).

In an appeal to the court of appeals brought pursuant to R.C. § 2506, the scope of review is even more limited in scope than it is 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, following a review of the entire record of the proceedings before the Dayton Civil Service Board, the Montgomery County Court of Common Pleas found that the testimonial evidence presented before the Civil Service Board was sufficient for them to find that Appellee had a second positive drug test result in violation of City rules. 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 between the City of Dayton and Appellee's Union, I.A.F.F., Local 136. 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 urine collection is inspected and sealed. (Tr. 28: 21). He explained that the collection agent secures the water in the restroom by putting tape around the apparatus so that the employee can't turn the water on and off. (Tr. 29: 10). He explained that they put a bluing agent in the toilet so that the urine specimen can't be altered. *Id.* Mr. Thomas also 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 Department of Transportation standards to make sure that the collection of the specimen is done in a secure environment. (Tr. 30: 1). 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. (Tr. 27-28, 32-33, 123-24, 126).

The Civil Service Board also heard testimony that 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. (Tr. 33: 1). 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. (Tr. 34: 1). The color of the specimen is also observed. *Id.* 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. (Tr. 24: 8). 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. (Tr. 36: 1) 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. (Tr. 34: 19). 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. (Tr. 40: 1). 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. (Tr. 173: 1). Thereafter, the laboratory sends all test results to the Medical Review Officer ("MRO") 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. Id. 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. (Tr. 47: 14) 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. *Id.*

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. (Tr. 17: 2). 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.” (Tr. 18:20-19:5). 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. (Tr. 114:23-115:11).

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, thus not contesting the fact that he provided a urine sample that contained cocaine metabolites. Finally, Appellee did not offer any evidence suggesting that the test results were unreliable or inaccurate; nor did he ever deny 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, and the Court should find that a municipal safety administrator is an “other qualified witness” for the purposes of the admissibility of drug test reports.

To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the ‘custodian’ of the record or by some ‘other qualified witness.’” *Weissenberger’s Ohio Evidence Treatise*, (2007 Ed.), § 803.73. The only issue in the instant case is whether there was an “other qualified witness” to properly authenticate the drug reports. Appellee has not offered any evidence to suggest that the source of the information or the method and timing of the information is untrustworthy.

The term “other qualified witness” should be given broad interpretation. *State v. Vrona*, 47 Ohio App. 3d 145, 547 N.E.2d 1189 (9th Dist. 1988) (authenticating witness qualified even though not custodian). *Accord Hardesty v. Corrova*, 27 Ohio App. 3d 332, 501 N.E.2d 81 (10th Dist. 1986). “The requirement of authentication or identification as a condition precedent to

admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evid.R. 901(A). Among other methods, a witness with knowledge can testify that a matter is what it is claimed to be. Evid.R. 902(B)(1). A business record is admissible if authenticated by testimony of a custodian or other qualified person. Evid.R. 803(6). The custodian or other qualified person need not have first-hand knowledge of the making of the record. *State v. Wallace*, 7th Dist. No.05MA172, 2007-Ohio-3184, ¶ 21 (customer service assistant at BMV permitted to lay foundation for driving record regardless of whether he is “keeper of records”); *State v. Scurti*, 153 Ohio App.3d 183, 2003-Ohio-3286, 792 N.E.2d 224 (7th Dist.). Rather, the witness need only demonstrate that he or she is sufficiently familiar with the operation of the business and the circumstances of 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 as per the elements of Evid.R. 803(6). *Id.* See also *State v. Mitchell*, 7th Dist. No. 05 CO 63, 2008-Ohio-1525; *State v. Knox*, 18 Ohio App.3d 36 (9th Dist. 1984).

In the case at bar, the City laid its foundation through the testimony of Ken Thomas, the City of Dayton’s Safety Administrator. He is familiar with the City’s drug testing procedures from “start to finish” (Tr. 22:9-13), and provided extensive testimony regarding his knowledge of the specimen collection and the drug testing procedures. The collection of the specimen, the transportation of the specimen, the testing, and the analysis is conducted under the authority of the City of Dayton’s contractual agent, Concentra (and Concentra’s sub-contractors, ATN and ASTS). (Tr. 23:12-19, 25). Mr. Thomas thoroughly illustrated the operation and the circumstances of preparation, maintenance, and retrieval that Concentra, ATN, and ASTS use in the specimen collection process and testing, including variations in the testing process. (Tr. 38:13-21). He

explained the threshold standards for a positive test including specifying the types of testing conducted, such as an immune assay drug screen and gas chromatography mass spectrometry test. (Tr. 87:7-20; 44:17-18; 45: 1-2). Mr. Thomas has seen the collection site at Concentra, and supervises the administration of the City's drug testing policy in his capacity as Safety Administrator. (Tr. 63: 20-22; 70: 14-71:17; 15:6-9).

Moreover, Mr. Thomas has knowledge of the process of reporting and knows how the report was transmitted to his office. Specifically, he reviews all positive results received from the City's contracting agent for his handling in the regular course of his business. (Tr. 103 24-104:2) Furthermore, he uses the positive result in the regular course of his business to aid him in administering the City's drug policy. On the basis of his knowledge, this Court should find that Mr. Thomas is an "other qualified witness" and properly authenticated the relevant drug testing reports.

Mr. Thomas actively supervises the administration of the City's drug policy, including the work performed by its contracting agent, Concentra. An exhibit can be admitted as a business record of an entity, even when that entity was not the maker of the record. *See State v. Mitchell*, 7th Dist. No. 05 CO 63, 2008-Ohio-1525 *citing Great Seneca Financial v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, ¶ 14, 869 N.E.2d 30 (1st Dist.) (where one entity relied on records of other entity to arrive at figures). *But see Babb v. Ford Motor Co.*, 41 Ohio App.3d 174, 177, 535 N.E.2d 676 (8th Dist. 1987) ("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)."). Regardless, since the positive result and drug analysis record was prepared by the contractual agent of the City of Dayton for the use and maintenance of the City, it can be considered to have in fact been prepared by the City of Dayton itself. *See State v. Mitchell*, 7th Dist. No. 05 CO 63, 2008-Ohio-1525.

Mr. Thomas is sufficiently familiar with the operation of the business and the circumstances of preparation, maintenance, and retrieval of the drug test results 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. Accordingly, proper foundation was laid by some "other qualified witness" and the drug test reports constitute records of regularly conducted activity not to be excluded by the hearsay rule. Therefore, even if this Court finds that the City's Civil Service Board must operate under the Ohio Rules of Evidence, the drug test reports are admissible.

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 Dayton Civil Service 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 while ensuring 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,

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City Attorney



JONATHAN W. CROFT* (0082093)

**Counsel of Record*

Assistant City Attorney

NORMA M. DICKENS (0062337)

Assistant City Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been sent by ordinary U.S. Mail, postage prepaid, this 30th day of January, in the year 2012, to the following:

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Dayton, Ohio 45342


Jonathan W. Croft
Assistant City Attorney

APPENDIX A

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
:
:

APPELLANT CITY OF DAYTON'S NOTICE OF APPEAL

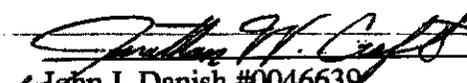
John J. Danish (#0046639)
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Phone (937) 333-4100
Facsimile (937) 333-3628
Counsel for Appellant, City of Dayton

Terry W. Posey (#0039666)
7460 Brandt Pike
Dayton, Ohio 45424
Counsel for Appellee, Ronald Royse

Appellant, City of Dayton, Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County, Ohio, Second Appellate District, entered in Court of Appeals Case No. 24172 on July 15, 2011. Said notice is being filed contemporaneously with a Memorandum in Support of Jurisdiction.

Respectfully submitted,

FILED
AUG 29 2011
CLERK OF COURT
SUPREME COURT OF OHIO


Jonathan W. Croft #0082093
Assistant City Attorney
Norma M. Dickens #0062337
Assistant City Attorney
Jonathan W. Croft #0082093
Assistant City Attorney

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

The Supreme Court of Ohio

FILED

NOV 16 2011

CLERK OF COURT
SUPREME COURT OF OHIO

Ronald L. Royse

Case No. 2011-1477

v.

ENTRY

City of Dayton, et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Montgomery County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Montgomery County Court of Appeals; No. 24172)



Maureen O'Connor
Chief Justice

APPENDIX B



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CLERK OF COURTS
MONTGOMERY CO. OHIO
36

R

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

FINAL ENTRY

CITY OF DAYTON, et al.
Defendants-Appellants

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. Paul, 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

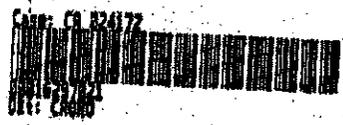
MICHAEL T. HALL, JUDGE

Copies mailed to:

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Hon. Barbara P. Gorman



FILED
COURT OF APPEALS

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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	:	

OPINION

Rendered on the 15th day of July, 2011.

Terry W. Posey, Atty. Reg. No. 0039666, 7460 Brandt Pike, Dayton, OH 45424

Attorney for Plaintiff-Appellant Ronald L. Royse

John J. Danish, Atty. Reg. No. 0046639, Norma M. Dickens, Atty. Reg. No. 0062337, Jonathan W. Croft, Atty. Reg. No. 0082093, 101 West Third Street, P.O. Box 22, Dayton, OH 45401

Attorneys for Defendant-Appellee City of Dayton

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 *Lorsain 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 25th day of August 20 11.

[Signature], Clerk

Clerk of Common Pleas

Court of Montgomery County, Ohio

By *[Signature]* Deputy

Copies mailed to:

- Terry W. Posey, Esq.
- John J. Danish, Esq.
- Norma M. Dickens, Esq.
- Jonathan W. Croft, Esq.
- Hon. Barbara P. Gorman

APPENDIX C

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

RONALD L. ROYSE,

Plaintiff,

CASE NO.: 2008 CV 8296

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 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 as 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.

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



General Divison
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 P. Gorman

Barbara P. Gorman

APPENDIX D

**BEFORE THE CIVIL SERVICE BOARD
OF THE CITY OF DAYTON, OHIO**

**IN THE MATTER OF CIVIL SERVICE
CHARGES AND SPECIFICATIONS
AGAINST RONALD L. ROYSE,
DEPARTMENT OF FIRE
CITY OF DAYTON
DAYTON, OHIO**

ORDER ON APPEAL

This cause was heard on the 22nd day of July, 2008, upon the written notice of appeal of Ronald L. Royse, Appellant. Pursuant to Rule 14, Section 2.(e), of the Civil Service Rules and Regulations, this appeal was heard by the Civil Service Board members. Attorney Terry Posey, represented the Appellant, and Attorney Norma Dickens represented the Appellee, the City of Dayton. Attorney Robert J. Eilerman served as legal advisor to the Board.

The Civil Service Board, after due consideration of the record, does hereby **AFFIRM** the February 12, 2008, Findings whereby the City Manager did approve the order of the Director and Chief of the Department of Fire that the Appellant, Ronald L. Royse, be discharged from his employment with the City of Dayton.

This decision, which constitutes the **FINAL ORDER** of the Board is subject to appeal procedures as provided by general law, and is based on the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Ronald L. Royse, Appellant, was a 14 year employee of the Department of Fire, City of Dayton, Ohio. On May 14, 2007, the Appellant tested positive for cocaine. As a result of this test, the Appellant was placed on unpaid leave and required to complete a drug and alcohol education program at EmployeeCare. He was also required to submit to eight random drug tests following his return to duty. On June 21, 2007, the City of Dayton was notified by EmployeeCare that the Appellant had completed the education program and he returned to work. On November 16, 2007, as a result of a random test, the Appellant again tested positive for cocaine.

City of Dayton Firefighters are covered by an agreement between the City and the International Association of Firefighters, Local 136 A.F.C. - C.I.O. which provides in Article 33 as follows:

"Section 1. Policy

To further our commitment of maintaining a drug and alcohol-free workplace in order to provide a safe work environment for employees and safe service delivery to the public, it is our policy to:

Conduct random drug testing in accordance with the provisions contained herein.

Section 7. Test Results

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

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. . . . 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.

Section 8. Discipline

A. On the first occurrence of a confirmed positive drug test or a confirmed positive alcohol test, the employee is referred to a substance abuse professional for evaluation and rehabilitation.

C. The second occurrence of a confirmed positive alcohol test initiated through the reasonable suspicion provisions of this policy or confirmed positive drug test initiated through the reasonable suspicion or random testing provisions of this policy will result in discharge from employment.”

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.

As a result of the Appellant testing positive for cocaine a second time, a hearing was held before the Director and Chief of the Department of Fire. The Appellant entered a plea of "no contest" and was found guilty and ordered discharged from employment with the City of Dayton effective February 14, 2008. It is from this discharge that the Appellant has timely appealed.

CONCLUSIONS OF LAW

The Appellant claims that the Board improperly admitted evidence over counsel's objection. Specifically, Appellant argues that the Civil Service Board has set forth rules that govern how disciplinary matters are to be handled. The Appellant cites Section 5 of the Civil Service Board Rules and Regulations, titled Procedure at Hearings. It is as follows: "The admission of evidence shall be governed by the rules applied by the courts of Ohio in civil cases." The Appellant argues that the Board is held to the same standard in admitting evidence as a Court.

The controlling case that speaks to the issue of what process is due an employee in a pre-termination hearing is Cleveland Bd. of Edn. v. Loudermill (1985) 470 U.S. 532. In Loudermill the Supreme Court set forth the basic requirements as follows:

"The essential requirements of due process, and all that respondents seek or the court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement . . . The tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employee's evidence and an opportunity to present his side of the story . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

In Case No. 97-5207, Common Pleas Court of Montgomery County, Ohio dealing with the discharge of a Dayton Police Officer, Judge David A. Gowdown held:

“Yet the general rule is that 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 and Provident Sav. Bank & Trust Co. v. Tax Commission (1931), 10 O.O. 469, 474 (holding that as a general rule, even apart from specific statutes, administrative agencies are not bound by the strict rules of evidence applied in court). Furthermore, in reviewing the decision of an administrative board, the 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 (quoting Univ. of Cincinnati v. Conrad (1980), 63 Ohio St. 2d 108, 111; Gordon v. Ohio Dept. of Adm. Serv. (March 31, 1988), Franklin App. No. 86 AP-1022, unreported. On appeal, a reviewing court in an administrative appeal must look at all the evidence contained in the record “without attempting to weed out and disregard that evidence which would likely be inadmissible in a courtroom setting.” Binger v. Whirlpool (1996), 110 Ohio App.3d 583, 589 quoting Simon v. Lake Geauga Printing Co. (1982), 69 Ohio St.3d 41, 44.”

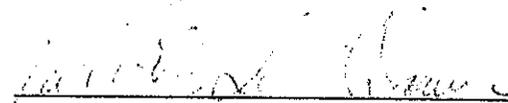
In this case, the Appellant was given written notice of the time and place for his hearing before the Civil Service Board, including the charges against him. He was present at the hearing with his attorney and was presented with the evidence against him. He was afforded an opportunity to present his side of the story to the Board. Other than objecting to the admission of the evidence, no other defense was presented by the Appellant.

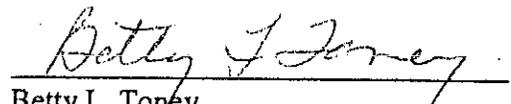
CONCLUSION

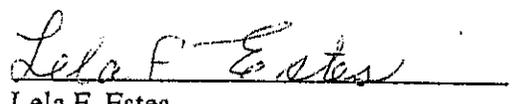
After taking into consideration the appearance of each witness on the stand, his or her manner of testifying, the reasonableness of the testimony, the opportunity the witness had to see, hear and know the things concerning about which he testified, the witnesses' accuracy of memory, frankness or lack thereof and all possible bias on the part of the witnesses, together with all of the facts and circumstances surrounding the testimony, we find the Appellant guilty of the charge and specification filed against him.

Based on the foregoing Findings of Fact and Conclusions of Law, it is the ORDER of the Board that the discharge of the Appellant, Ronald L. Royse, be affirmed.

APPROVED:


Talbert L. Grooms, Chairperson


Betty L. Toney


Lela F. Estes

Signed and entered into the Records
of the Civil Service Board this
21st day of August, 2008.

CSB:smc

APPENDIX E

RULES AND REGULATIONS



OF THE CIVIL SERVICE BOARD

FOR THE CITY OF DAYTON, OHIO

Board Members

Talbert L. Grooms, Chairperson

Betty L. Toney

Lela F. Estes

Interim Secretary and Chief Examiner

James M. Moore

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE PREAMBLE **RULE** _____

AUTHORITY. Under Section 93 of the Charter of the City of Dayton, Ohio, the Civil Service Board is established.

POLICY. It is the policy of the Civil Service Board to comply with Section 96 of the Charter, providing for appointment and employment in all positions in the classified service, and Section 98, providing for promotions to all positions in the classified service, based on records of merit, efficiency, character, conduct, and seniority. The Civil Service Board must consider relative abilities, knowledge, and skills in the performance of these duties.

It is the intent of the Civil Service Board to comply with all pertinent sections of the Charter in the development and implementation of its Rules.

Upon approval of the Rules by the City Commission, these Rules shall be binding upon the Civil Service Board, all City departments, City employees in the classified service, and all other departments and/or employees for which these Rules apply.

APPROVED BY COMMISSION	DATE ISSUED	SUPERSEDES ISSUE DATED	PAGE
July 25, 1984	August 13, 1984		1 of 1

CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE ORGANIZATION AND DUTIES OF THE BOARD **RULE** 1

Section 1. ORGANIZATION. By Charter provision, the Civil Service Board shall consist of three members appointed by the City Commission. At the first regular meeting held in January of each year, the Board shall elect one of its members as Chairperson.

Section 2. DUTIES AND FUNCTIONS. The Board shall:

A. Adopt and amend rules and regulations:

- 1) for the recruitment, selection, appointment, and advancement to all positions in the classified service based on merit, fitness, efficiency, character, and industry;
- 2) for the regulation of such other personnel actions as are within the Board's authority, such as transfers, demotions, and layoffs;
- 3) for conducting hearings on appeals for disciplinary or nondisciplinary actions regarding suspensions, demotions, and terminations;
- 4) for the conduct of its business.

Upon approval of these Rules and Regulations by the City Commission, the Board shall enforce these Rules. **EXCEPTION:** By special resolution approved by the City Commission, the Board may suspend any specific provision of these Rules.

B. Select, appoint, or remove a Secretary and Chief Examiner and, on his/her recommendation, may appoint such examiners, clerks, and other employees as may, by appropriation, be provided for.

APPROVED BY COMMISSION	DATE ISSUED	SUPERSEDES ISSUE DATED	PAGE
July 25, 1984	August 13, 1984		1 of 3

CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE ORGANIZATION AND DUTIES OF THE BOARD **RULE** 1

- C. Assure that all employment practices and other staff actions under these Rules adhere to the principles of merit and fitness.
- D. Submit an annual report and such periodic special reports, as needed, to the Commission enumerating its activities and making such recommendations as it may deem to be in the best interests of the City.
- E. Conduct such investigations as it deems necessary concerning the enforcement and effect of the Charter provisions regarding Civil Service and of these Rules and, in conducting any investigation, the Board shall have the power to subpoena and require the attendance of witnesses and the production of pertinent documents - and to administer oaths to such witnesses.
- F. Conduct-background investigations through the Department of Police for applicants to vacant positions where a high degree of public trust is required, and act upon the findings of said investigations.
- G. Maintain minutes of its official meetings, which shall be authenticated by signatures of the Chairperson as well as the Secretary and Chief Examiner. Said minutes shall be available for public inspection.
- H. Conduct or provide for the hearing of appeals authorized by the City Charter.
- I. Adopt and publish, as necessary, policies which prescribe the procedures under which Civil Service Rules and Regulations shall be implemented.

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE ORGANIZATION AN DUTIES OF THE BOARD **RULE** 1

Section 3. SCHEDULE OF MEETINGS. The Board shall conduct at least one regular meeting monthly, which shall be open to the public. Notice of the regular meeting(s) shall be posted in a manner directed by the Board at least five (5) working days in advance of such meeting(s). A quorum, consisting of two (2) members, must be present to conduct business. The Board may conduct Executive meetings as necessary.

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE DUTIES OF THE SECRETARY AND CHIEF EXAMINER **RULE** 2

The Secretary and Chief Examiner shall:

Section 1. Keep the minutes of all proceedings of the Board, develop meeting agendas, and bring to the Board's attention all policy and procedural matters requiring Board resolution.

Section 2. Recommend to the Board the appointment and removal of subordinate staff, within the budgeted authorization approved by the City Commission.

Section 3. Maintain employment records of all employees, including class title and pay status, and other records as may be required by the Board in fulfilling its responsibilities.

Section 4. Certify each payroll authenticating that the persons paid thereon have been properly appointed to the class title and pay rate indicated. The Director of Finance shall refuse to pay any person for whom the Secretary and Chief Examiner's certification is lacking. The Secretary and Chief Examiner is hereby empowered to examine vouchers for payment for personal services to assure compliance with these Rules.

Section 5. Make reports on matters affecting the classified service as the Board shall request, or that he/she believes relevant on his/her own initiative, and make such investigations as the Board shall authorize.

Section 6. Prepare and implement the use of such forms, reports, and procedures as he/she finds necessary to carry out the intent of these Rules.

Section 7. Develop and implement procedures for the recruitment of applicants for the classified service, with due attention to the principles set forth in Rule 1. In exercising this function he/she shall, to the extent he/she deems necessary, call upon officials of any City department for assistance.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE DUTIES OF THE SECRETARY AND CHIEF EXAMINER **RULE** 2

Section 8. Supervise all examinations for entry into or promotion within the classified service. In the exercise of this function, and in addition to the use of Civil Service Board staff, he/she may nominate, for Board approval, such persons, private-sector employees, or City employees deemed fit to act as special examiners to assist in the conduct of any examination. Special examiners who are regular employees of the City of Dayton shall be required to serve in such a capacity as part of their official duties. All such examiners shall perform this function under the direction of the Secretary and Chief Examiner.

Section 9. Compile eligible lists from the results of examinations, showing the names of all persons who, by the examination, have demonstrated their relative potential to perform the work required of the job classification. However, no eligible list may be modified after promulgation without the approval of the Board. Such eligible lists shall be forwarded to the appointing authority.

Section 10. Certify the qualifications of applicants considered for employment in the noncompetitive class.

Section 11. In accordance with Section 97 of the City Charter and these Rules, make appointments to the classified service.

Section 12. Perform such other work as is from time to time assigned by the Board.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE COMPETITIVE, NONCOMPETITIVE AND LABOR CLASSES **RULE** 3

Section 1. UNCLASSIFIED SERVICE. The unclassified service consists of those positions defined in Section 95 of the City Charter, and is beyond the scope of these Rules.

Section 2. CLASSIFIED SERVICE. The classified service includes all positions not included in the unclassified service by Section 95 of the City Charter. The classified service is divided into three (3) classes:

- A. The competitive class shall include all positions and employment for which it is practicable to determine the merit and fitness of applicants by competitive examination.
- B. The noncompetitive class shall consist of all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character, as may be determined by the Rules of the Board.
- C. The labor class shall include ordinary unskilled labor.

The Board shall determine, in all cases, those positions which comprise the three aforementioned classes in the classified service.

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE POSITION CLASSIFICATIONS

RULE 4

Section 1. CLASSIFICATION SPECIFICATIONS. Whenever a new classification is created, a position reclassified or retitled, or the duties of a classification are changed in such a manner as to require creation of a new classification, the City Manager shall submit to the Board a class specification showing the title, duties and responsibilities, and minimum qualifications. Whenever the duties and responsibilities shown on a class specification are unclear or undistinguishable from another class, the Board shall reject said class specification. The Board shall determine whether the position class is competitive, noncompetitive, or of the labor class, in accordance with Section 2.

Section 2. CLASSIFICATION PLAN. The official classification plan shall be maintained by the Secretary and Chief Examiner and distributed annually to each of the departments and agencies of the City. The plan shall consist of the titles and class specifications for all positions in the classified service, show whether the class is competitive or noncompetitive, or of the labor class, and identify the job series, if applicable.

Section 3. DETERMINATION OF JOB SERIES. For purposes of promotion, demotion and layoff, a class of positions may be placed in a job series. The Secretary and Chief Examiner, after consultation with the City Manager, shall determine the appropriate job series for each class of positions based upon the progressive nature of duties, responsibilities and minimum qualifications.

Section 4. CLASSIFICATION CHANGES. Whenever the duties or responsibilities of a position are changed, the following will occur:

- A. If all positions within a class are equally affected and if the position class remains in the same ranking relationship to other related position classes, employees shall be placed in the new class without process of examination.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE POSITION CLASSIFICATIONS **RULE** 4

- B. In all other instances, if the duties of a reallocated position under its new classification are on a higher level than those performed under the original classification, the new position must be filled by appointment from an eligible list or a certification list. If no eligible or certification list exists for the class, a temporary appointment may be made in accordance with Rule 9.
- C. In all other instances, if the duties of a reallocated position, under its new classification, are on a lower level than those performed under the original classification, it may be filled by voluntary demotion, or as otherwise provided by these Rules.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE RECRUITMENT AND APPLICATION FOR ORIGINAL
APPOINTMENT

RULE 5

Section 1. **NOTICE.**

- A. Notice of open competitive examinations for original appointment to the classified service shall be given at least two (2) weeks prior to the date set for an assembled examination. The minimum advertising shall be: (1) by posting notices of examinations in the Civil Service Board Office and (2) by advertisement in at least one newspaper of general circulation in the City of Dayton. Additional advertising shall be at the discretion of the Secretary and Chief Examiner, with the objective of providing reasonable assurance that interested and qualified persons will be made aware of the examination and the requirements therefor.
- B. Notice of noncompetitive appointment opportunities and the advertisement of such opportunities, shall be made in such manner as determined by the Secretary and Chief Examiner.

Section 2. **APPLICATION FORMS.** The Secretary and Chief Examiner shall devise one or more application forms which shall be the exclusive method of applying for entrance into the classified service. This form shall require the applicant to state his/her name, address, education, training and experience, employment record and such other information as the Secretary and Chief Examiner shall require; and require the applicant to sign the application by hand or acknowledge electronically, provided that the form shall not require the inclusion of any discriminatory information.

Section 3. **SUPPORTING DATA.** The Secretary and Chief Examiner may require any applicant to submit adequate proof to verify any statement made on the application form.

Section 4. **FILING DATE.** Any applicant wishing to compete in an examination must file his/her application with the Civil Service Board Office no later than the closing date and time set forth in the examination announcement. The closing date and time will be determined by the Secretary and Chief Examiner.

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**TITLE RECRUITMENT AND APPLICATION FOR ORIGINAL
 APPOINTMENT**

RULE 5

Section 5. REJECTION OF APPLICATIONS. The Secretary and Chief Examiner may refuse to accept an application for any of the following reasons:

- A. It was not filed within the prescribed time period;
- B. The applicant does not meet the requirements of the position as set forth in the position description included in the examination announcement;
- C. The application contains a false statement of a material fact;
- D. Any Police Recruit applicant who, eight (8) years or less prior to beginning the background investigation process, has ever illegally possessed, used, sold or distributed any "controlled substance" or abused, sold or distributed a "dangerous drug" as defined by State of Ohio law, will be disqualified;
- E. Any Police Recruit applicant who has personally used marijuana two (2) years or less prior to the beginning of the background investigation will be disqualified;
- F. Persons convicted of a felony are not eligible for positions in the sworn forces of the Police Department.
- G. Former full-time and part-time employees who participated in the 2008 City of Dayton Voluntary Separation Plan (VSP) will not be eligible to apply for any position or sit for any examination for any position with the City of Dayton for a period of three (3) years from the effective date of their separation.

The appropriate use of legally prescribed and non-prescription medications will not disqualify a Police Recruit applicant.

If information comes to the attention of the Secretary and Chief Examiner, following acceptance of the application and prior to the promulgation of an eligible list, which would have resulted in rejection of the application, the applicant may be disqualified.

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**TITLE RECRUITMENT AND APPLICATION FOR ORIGINAL
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RULE 5

Section 6. EQUAL EMPLOYMENT OPPORTUNITY. Applications will be accepted without regard to ethnic background, sex, age, citizenship or physical handicap, except for those classifications for which the Board determines that a bona fide occupational qualification exists.

Section 7. UNSKILLED LABORERS. Applicants for unskilled positions may be recruited, examined, certified and appointed in the same manner as applicants in the competitive class.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE OPEN COMPETITIVE EXAMINATIONS

RULE 6

Section 1. CONDUCT OF EXAMINATIONS. All examinations shall be conducted under the supervision of the Secretary and Chief Examiner subject to the policy direction of the Civil Service Board.

Section 2. EXAMINATIONS TO BE JOB-RELATED. All examinations shall be designed to test the relative qualifications of applicants to discharge the duties of the particular position(s) which they seek to fill. All examinations shall deal with the knowledge, skills and abilities necessary for satisfactory work performance. No question shall relate to the race, ethnic background, gender, sexual orientation, political affiliation or opinion, religious belief or age of any applicant.

Section 3. CONTENTS OF EXAMINATIONS. Examinations may consist of any one or more of the following types of tests:

- A. **Written Test.** This part, when required, shall include a written demonstration designed to show the familiarity of the competitors' skills, knowledge and abilities involved in the class of positions to which they seek appointment and to ascertain special aptitudes, when required.
- B. **Performance Test.** This part, when required, shall include such tests of performance as would determine the ability of candidates to perform the work involved.
- C. **Oral Test.** This part, when required, may include a personal interview with competitors for classes of positions where the ability to deal with others, meet the public, make an oral presentation or other similar qualifications are to be determined. This part may also be designed to elicit a demonstration of the criteria enumerated in subsection (A) above.

Section 4. TRAINING AND EXPERIENCE REQUIREMENTS. Training and experience may be assessed from the statements of education and experience contained in the application form or from supplemental data as may be required. Results of reference checks, if made prior to oral tests, may be part of the evaluation of training and experience.

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TITLE OPEN COMPETITIVE EXAMINATIONS

RULE 6

Section 5. SCORING EXAMINATIONS. Examination grades shall be computed in a manner consistent with professional psychometric standards. Parts of an examination, or a combination of parts, may disqualify an applicant from further consideration in the examination process. The Secretary and Chief Examiner shall have the authority to establish pass/fail cutting scores for each examination.

Section 6. BREAKING TIES. If, after adding all appropriate credits, two (2) or more candidates have the same scores on an examination, the tie will be broken by a random selection method or by such other methods as may be determined by the Secretary and Chief Examiner in advance of an examination.

Section 7. INSPECTION OF PAPERS. Any person, or his/her authorized representative, may inspect his/her examination papers under the following criteria:

- A. For any competitive examination, candidates will be permitted to review their individual examination paper for conformance with the following:
- 1) Civil Service personnel will grade all papers, but scores will not be computed.
 - 2) Beginning the third (3rd) workday following the examination, examinees may review their test papers one (1) time during the following three (3) day work period.
 - 3) The examinees may review only those questions which were graded as incorrect on their examination papers.
 - 4) Examinees will not be permitted to review copyrighted, standardized tests which have been purchased by Civil Service from test publishing agencies, nor will they be permitted to review test questions on exams which have been developed by outside consultants or the Civil Service Board, unless approved by the Secretary and Chief Examiner.

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TITLE OPEN COMPETITIVE EXAMINATIONS

RULE 6

B. Appeal of Examination Questions.

- 1) If an examinee believes that a question has been improperly graded, based upon substantiating material, he/she may appeal such question using the appropriate form provided by the Civil Service office.
- 2) Following the review period, any appealed items will be presented to selected experts for ruling. Such experts will be chosen by the Secretary and Chief Examiner. The experts' ruling, with the Chief Examiner's approval, shall be final.
- 3) Subsequent to the experts' decision, exam papers will be regraded if necessary, scores computed and an eligible list promulgated. Each complainant shall be notified by mail of the result of his/her appeal.

Section 8. CONCEALMENT OF IDENTITY. The Secretary and Chief Examiner shall adopt procedures to assure that the identity of candidates is properly concealed and that each candidate is credited with his/her own exam results.

Section 9. NOTIFICATION OF EXAMINATION RESULTS. Each person who takes an examination shall be notified of his/her grade and/or rank on the eligible list.

Section 10. CANCELLATION OF EXAMINATION. The Secretary and Chief Examiner may cancel, postpone, reschedule or reannounce any examination for any good and sufficient reason deemed in the best interest of the service. All such incidents shall be reported to the Board and appear in the minutes with the reason for such action.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE OPEN COMPETITIVE EXAMINATIONS **RULE** 6

Section 11. FIREFIGHTER RECRUIT EXAMINATION.

- A. A person obtaining a passing grade on an open competitive examination for the position of Firefighter Recruit is eligible to receive preference points as set forth below. Five (5) preference points are the maximum preference points that a person may receive.
- 1) A person who prior to the date of examination has been honorably discharged from service with any branch of the United States military is entitled to have five (5) preference points added to that person's passing grade; or
 - 2) A person who prior to the date of examination is employed by the City and has satisfactorily completed six (6) or more months of full-time employment with the City, as documented by City performance evaluations, is entitled to have five (5) preference points added to that person's passing grade.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE PROMOTIONS

RULE 7

Section 1. GENERAL. Except when inconsistent with any section of this Rule, the provisions of Rule 6 regarding the conduct of open competitive examinations shall apply to promotional examinations. A promotion means moving from a classification of lower maximum pay range into a classification which has a higher maximum pay range, exclusive of fringe benefits.

Section 2. POLICY. Whenever practicable, vacancies in positions above the lowest rank or grade within a series of similar classifications shall be filled by promotion. The Secretary and Chief Examiner, with approval of the Board, shall develop and post, and from time to time revise, a list of positions ordinarily filled by promotional examination, and showing the classifications eligible and the seniority required for each such classification.

Section 3. ELIGIBILITY FOR PROMOTIONAL EXAMINATION. No person shall be eligible for any promotional examination who:

- A. does not meet the criteria of Section 1 above;
- B. has not satisfactorily completed his/her initial probationary period;
- C. has been rated as less than satisfactory in his/her last two (2) performance appraisals or efficiency reports. (Exception: Where the person has not been in the service for a sufficient length of time to have received two (2) appraisals or reports, he/she must have been rated at least satisfactory in one (1) appraisal or report);
- D. is not employed at the time of examination in any of the eligible classes, as determined by the Board, and set forth in the promotional examination announcement for the required length of permanent service;
- E. was demoted as a result of disciplinary action during the twelve (12) month period preceding the promotional examination.

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TITLE PROMOTIONS

RULE 7

Section 4. NOTICE OF PROMOTIONAL EXAMINATION. Notice of promotional examination shall be posted in the Civil Service Board Office at least two (2) weeks prior to the date set for the examination.

Section 5. PERFORMANCE APPRAISAL CREDITS. In all promotional examinations, credits shall be added to an individual's passing grade, based upon the rating of his/her last performance appraisal(s). This credit shall be applied by policy established by the Civil Service Board.

Section 6. SENIORITY. After the final examination grade is computed in a promotional examination, there shall be added to any passing grade a credit for seniority, based upon the employee's length of service. In determining seniority or service time, no service shall be included prior to a period of absence which exceeded one (1) year, except for military leave. If, within a year, an individual who resigned from City service is reinstated by the Board, or obtains reemployment by selection from an eligible list, the calendar days from date of resignation until date of reemployment shall be deducted from his/her seniority. If the individual is not reappointed within one year from the date of his/her resignation from City service, his/her seniority will be computed from the date of reappointment. The amount of credit shall be one-fourth (1/4) of a percentage point for each year of service, for a maximum of two and one-half (2-1/2) points.

Section 7. BREAKING TIES. If two or more candidates receive the same total grade, including seniority and efficiency points, the tie shall be broken in favor of the candidate with the longest total City service. If a tie still exists, the tie shall be broken by a random selection method, or by such other methods as may be determined by the Secretary and Chief Examiner in advance of an examination.

Section 8. INSPECTION OF PAPERS. Candidates for promotional examination may review their test papers under the criteria outlined in Rule 6, Section 7.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE ELIGIBLE LISTS AND CERTIFICATIONS **RULE** 8

Section 1. ELIGIBLE LISTS. The Secretary and Chief Examiner will establish and maintain such eligible lists for the various classes of positions as he/she deems necessary to meet the needs of the service.

- A. Open Competitive Lists. Such lists contain the names and final grades in order of rank for those applicants attaining a minimum passing score on open competitive examinations.
- B. Promotional Lists. Such lists contain the names and final grades in order of rank for those applicants attaining a minimum passing score for promotional examinations, which are limited to persons already in City Service.
- C. Recall Lists. Such lists contain the names of permanent employees who were separated or demoted from their positions because of lack of work or funds, or whose positions were abolished as a result of departmental reorganization. The names of such employees shall be placed on the recall list in the inverse order of their layoff or demotion, and each name shall remain on the list for three (3) years, unless the employee is reappointed earlier. At the discretion of the Board, this period may be extended.
 - 1) Employees in their initial probationary status at the time of layoff are not entitled to have their names placed on the recall list, but instead, shall have their names restored to the top of the appropriate eligible list for a period of one (1) year from the date of layoff.
 - 2) Professional - Technical - Supervisor and Management employees in their initial probationary status at the time of layoff or involuntary conversion to a part-time appointment shall have their names placed on a noncompetitive certification list, for consideration, for a period of one (1) year from the date of layoff or change in type of appointment.

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TITLE ELIGIBLE LISTS AND CERTIFICATIONS **RULE** 8

Section 2. REQUISITION. Whenever a department director desires to fill an authorized vacancy in the classified service, he/she shall submit a requisition, approved by the City Manager, specifying the title of the position to be filled, the date he/she desires to make the appointment, and such other information as the Secretary and Chief Examiner requires.

The Secretary and Chief Examiner is authorized to investigate any requisition in order to assure that the position is properly classified.

No requisition shall specify the sex of the desired employee, unless sex is a bona fide occupational qualification.

Section 3. CERTIFICATION. On receipt of an approved requisition, the Secretary and Chief Examiner shall certify and refer to the department director the names of eligibles from the appropriate eligible list in the order in which they have placed, including credit for efficiency and seniority when applicable. Positions will be filled in accordance with such ranking.

Eligibles will be selected from lists in the following designated order:

1. Recall – Per Rule 15
2. Voluntary Demotion
3. Promotional
4. Reinstatement after Resignation
5. Open Competitive

If a department director decides not to fill the vacancy, the requisition shall be cancelled by the City Manager, and written justification of such action shall be submitted to the Secretary and Chief Examiner.

Section 4. CORRECTIONS TO ELIGIBLE LISTS. No eligible list may be changed without approval of the Secretary and Chief Examiner; such action shall be ratified by the Board in a subsequent meeting. Whenever in its judgment the interests of the public so require, the Board may correct or amend any candidate's score when it appears that an error has been committed.

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TITLE ELIGIBLE LISTS AND CERTIFICATIONS

RULE 8

In case of substantial errors or other irregularities in an examination, the Board shall have the power to rescind an eligible list and to order a new examination. Any appointment made prior to such action shall not be invalidated, and any referral in progress shall be continued to its conclusion.

Section 5. REMOVAL FROM ELIGIBLE LIST. The name of any person on an eligible list may be removed under the following conditions:

- A. where good cause exists, the City Manager or his/her designee, or the Secretary and Chief Examiner may request that a person's name be removed from the eligible list. The Board shall consider the reason(s) for each request, and if the reason(s) clearly relates to the suitability of the person for the position, the Board may cause his/her name to be removed;
- B. if the person declines the position;
- C. if the person fails to respond to an employment notice from the Board;
- D. if the person fails to report for interview or background check within five (5) workdays;
- E. if the person cannot be located by postal authorities;
- F. upon recommendation from the City Physician;
- G. if the eligible list results from a promotional examination, a resignation or other termination from the City service shall be cause for removal of a person from the eligible list;
- H. Any applicant for the safety forces, who, eight (8) years or less prior to beginning the background investigation process, has ever illegally possessed, used, sold or distributed any "controlled substance" or abused, sold or distributed a "dangerous drug" as defined by State of Ohio law, will be disqualified;
- I. Any applicant for the safety forces, who after 25 years of age, has ever illegally possessed, used, sold, or distributed any "controlled substance" or abused, sold or distributed a "dangerous drug" as defined by State of Ohio law, will be disqualified;

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TITLE ELIGIBLE LISTS AND CERTIFICATIONS **RULE** 8

- J. Any applicant for the safety forces, who has personally used marijuana two (2) years or less prior to the beginning of the background investigation will be disqualified;
- K. Any person convicted of an offense that disqualifies the applicant for the position under State or Federal Law.

The appropriate use of legally prescribed and non-prescription medications will not disqualify an applicant.

Written requests for reconsideration of removal from an eligible list must be received within ten (10) work days of notification of removal. Upon submission of a satisfactory explanation, the Board may restore an eligible to the list. Any appointment made prior to such action shall not be invalidated and any referral in progress shall be continued to its conclusion.

Section 6. REINSTATEMENT TO ELIGIBLE LIST AFTER RESIGNATION. A former full-time employee in the competitive class with permanent status for a minimum of one (1) year, who has resigned from the classified service in good standing may, within one (1) year following his/her resignation, be reinstated to a special eligible list which shall have a duration of one (1) year, for the classification in which he/she had served at the time of separation, and shall have first priority to appointment after appointment of any persons on an existing promotional eligible list for that classification. Reinstatement requests must be made in writing to the Board, and it may request a recommendation from the head of the department or agency in which the employee last served.

Section 7. DURATION OF ELIGIBLE LISTS. The term of an eligible list is fixed at one (1) year from the date of promulgation, provided that;

- A. The Board may, at its discretion, prior to the date of expiration of eligibility, extend the period of eligibility for any competitive position, provided the total period of eligibility shall not exceed two (2) years.

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TITLE ELIGIBLE LISTS AND CERTIFICATIONS **RULE** 8

B. When the Board anticipates that a current eligible list will not supply the needed number of job candidates, or when it is desirable to ensure that there is no delay between the expiration of one list and the establishment of a new list, it may schedule an examination and publish a consecutive eligible list which shall become effective after the current list is exhausted of candidates, or expires due to the time limitations stated in subsection A above.

C. Safety Forces – As it pertains to competitive examinations for safety forces positions, the Board, at its discretion and prior to the date of expiration of eligibility, may extend the period of eligibility on a year for year basis, provided the total period of eligibility shall not exceed four (4) years.

Section 8. REFERRAL FROM EXPIRED ELIGIBLE LIST. Employment referrals shall continue to be made from an eligible list that was active on the date that a Personnel Requisition was authenticated by the City Manager and received in Civil Service until:

- A. the position is filled, or;
- B. the eligible list is exhausted.

Section 9. WAIVER OF APPOINTMENT. An applicant may request a waiver of a referral due to temporary physical incapacity, active military duty, or other temporary inability. A request for waiver must be submitted in writing to the Board within five (5) work days of referral. The applicant requesting a waiver cannot withdraw such request. Upon receipt of a waiver request, referral to the vacant position(s) will be made from the remaining eligibles in accordance with their rank on the eligible list. The Board may grant or deny such waiver and shall enter upon its minutes the reasons for its action in each case. When a waiver is denied the applicant's name shall be stricken from the appropriate list. Unless the Board limits the duration of the waiver, a waiver once granted remains in effect until 1) the applicant notifies the Board in writing that the basis for waiver has ended, or 2) except for military waivers, the eligible list has expired.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE APPOINTMENTS

RULE 9

Section 1. **TYPES OF APPOINTMENTS.** Appointments in the classified service shall be one of the following types:

- A. **Permanent Appointment.** An original appointment to a full-time position made from a certified competitive or noncompetitive eligible list shall be a permanent appointment, but the incumbent is subject to the completion of a probationary period, as outlined in Rule 10.
- B. **Temporary Appointment.** When services are needed for a short-term period, a temporary appointment, without examination, may be made under any of the circumstances set forth below. Such appointment shall not exceed a six (6) month period in any twelve (12) month period.
1. In the absence of an eligible list and when there is an urgent need to fill a regular vacancy, a temporary appointment may be made for no more than four (4) weeks following the establishment of an eligible list.
 2. To fill a position vacated on a temporary basis because of illness, injury, or other legitimate reason for absence of a regular employee. Such appointment shall cease upon the termination of the leave of absence of the regular employee. In the event that regular employee terminates their employment, the provisions of Section 1 (B) (1) shall apply.
 3. To fill a position created for a limited period when additional work of a temporary nature must be performed within a specified time and regular staff is not adequate to meet the need. The duration of the period of temporary service shall be set at the time the position is filled.

If a person whose name is on the eligible list for regular appointment is offered a temporary position, acceptance or refusal to accept the temporary position shall not affect his/her eligibility for regular employment.

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No individual shall be eligible for subsequent temporary/seasonal appointment without a break in service.

Service as a temporary employee shall not be counted as time served toward the completion of a probationary period. The temporary appointment of an individual shall not confer on the appointee any rights of status, appeal, or related rights set forth under these Rules.

- C. Seasonal Appointment. A seasonal appointment may be made to encompass a growing season, recreational season, or the like. Upon approval of the Board, seasonal positions may be created which exceed six (6) months provided the specific starting and ending dates are established for such positions.

No individual shall be eligible for subsequent temporary/seasonal appointment without a break in service.

Service as a seasonal employee shall not be counted as time served toward the completion of a probationary period. The seasonal appointment of an individual shall not confer on the appointee any rights of status, appeal, or related rights set forth under these Rules.

- D. Emergency Appointment. An emergency, as the term is used herein, means any unforeseen condition which is likely to cause loss of life or damage to property, the stoppage of services, or serious inconvenience to the public. Upon receipt of a request from a department director citing such emergency condition(s), the Secretary and Chief Examiner may authorize one or more emergency appointments, for the duration of the emergency, not to exceed thirty (30) calendar days. The department director shall determine the qualifications of persons nominated for emergency appointment. Service as an emergency employee shall not be counted as time served toward the completion of a probationary period. The emergency appointment of an individual shall not confer on the appointee any rights of status, appeal, or related rights set forth under these Rules.

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RULE 9

- E. Part-Time Permanent Appointment. A part-time permanent appointment, except as defined in Rule 9, Paragraph F below, may be made to a position which requires the services of an employee thirty-five (35) or less hours a week. Part-time permanent employees may be selected through a process approved by the Board, but shall have no right to full-time except as set forth in Rule 9, Section 1 (A).
- F. Professional - Technical - Supervisor and Management Part-Time Appointment. A part-time appointment may be made to a Professional – Technical – Supervisor and Management classification which requires the services of an employee thirty-five (35) or less hours a week. Professional – Technical – Supervisor and Management part-time employees may be selected through a process approved by the Board, but shall have no right to full-time except as set forth in Rule 9, Section 1 (A).
- G. Student Appointment. A full-time student may be appointed for no more than six (6) months in any twelve (12) month period, or on a basis of no more than half-time for a twelve (12) month period. A student appointment can be made without competitive examination, on the basis of recommendations from the employing department director and the student's school.
- H. Firefighter Recruit Appointment. No person who is thirty-six (36) years of age or older shall receive an original appointment to the position of Firefighter Recruit.
- I. Police Recruit Appointment. No person who is thirty-five (35) years of age or older shall receive an original appointment to the position of Police Recruit.

Before appointment, all persons employed under this Section must meet the minimum educational, experience, and related qualifications set for the classification and be certified by the Civil Service Board staff.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE APPOINTMENTS

RULE 9

Section 2. REINSTATEMENT. A former full-time employee who has been reinstated to an eligible list, may be referred for appointment in accordance with Rule 8, Section 6. A reinstated employee is not subject to a new probationary period. If the individual is not reinstated within one (1) year from the date of his/her separation from City service, his/her seniority will be computed from the date of reinstatement. A physical examination will be required at the time of reinstatement if such separation exceeds ninety (90) days.

Section 3. NONCOMPETITIVE APPOINTMENT. When a vacancy occurs in the noncompetitive class, the City Manager shall notify the Secretary and Chief Examiner through a requisition. The Secretary and Chief Examiner may require the nominee(s) to submit documentation as deemed necessary to verify the candidate's education, experience and licensure. Applications and an unranked list of pre-certified individuals will be forwarded to the appropriate department director for interview and subsequent selection.

Section 4. PHYSICAL/PSYCHOLOGICAL QUALIFICATIONS. No appointment shall be made without prior physical and, when required, a psychological examination which demonstrates an individual's ability to successfully perform the duties of the position to which appointed.

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**CIVIL SERVICE RULES AND REGULATIONS
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TITLE PROBATION

RULE 10

Section 1. INITIAL APPOINTMENT. All persons initially appointed in the competitive or noncompetitive class shall be subject to a probationary period. This period is regarded as an integral part of the examination process and may be used to remove any employee who does not meet the required standards of professional and personal performance, with no right of appeal.

Section 2. LENGTH. The initial probationary period shall be for six (6) months following appointment. The probationary period shall be extended by the number of days during which the employee was absent without pay within his/her probationary period. A probationary employee may be discharged at any time within said period of six (6) months upon the recommendation of the director of the department or agency in which said probationer is employed, with the approval of the City Manager and the majority of the Board.

Section 3. PROBATIONARY REPORT. A performance appraisal must be submitted by the department director to the Secretary and Chief Examiner before the end of the probationary period, or at the time of probationary separation. If the employee's services are unsatisfactory and he/she is to be discharged, the performance appraisal must include reasons in support of removal. Additionally, the department director will provide the probationer with copies of any recommendation for discharge from service.

Section 4. STATUS OF SEPARATED PROBATIONARY EMPLOYEE. An employee separated prior to the end of his/her initial probationary period, or resigning in lieu of dismissal, has no right of appeal. The employee will also be ineligible for any appointment to the classified service for a period of two (2) years, unless, in the judgment of the Board, the cause of his/her removal would not affect the employee's usefulness in some other type of employment.

Section 5. PERMANENT EMPLOYEE. An employee who has served an initial probationary period is subject to an additional six (6) month probationary period upon promotion or appointment to a new classification under the competitive or noncompetitive process. An employee whose position is being changed to part-time status, voluntarily or involuntarily, will not serve an additional six (6) month probationary period. In the case of unsatisfactory performance of such an employee, the department director may submit to the Board a recommendation for his/her removal from the position under the following procedures:

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TITLE PROBATION **RULE** 10

- A. An employee who fails to qualify during his/her probationary period following promotion has the right to return to his/her last previous classification, or to an equal or lower position for which qualified. Such action will not cause the displacement or reduction of any other City employee.
- B. A department director's recommendation for a change in a permanent employee's status due to failure to satisfactorily complete the probationary period must clearly address those aspects of direct job performance which were unsatisfactory (such as the inability to operate new equipment, or the inability to learn and apply new job techniques, etc.). Incidents which would normally give rise to Charges and Specifications being brought against the employee because of misconduct should be administered through the Employee Discipline process, and should not serve as the basis for the reduction of an employee's status during the probationary period.

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TITLE TRANSFERS AND ASSIGNMENTS **RULE** 11

Section 1. TRANSFER. Upon prior written notification to the Board, the City Manager may transfer an employee from one department, agency, or division to another provided that:

- A. no change in classification is involved;
- B. the employee has already served the probationary period;
- C. no disciplinary action is pending before the Civil Service Board;
- D. no displacement of another employee occurs;
- E. no promotional eligible list exists.

Section 2. ASSIGNMENT. An employee in the classified service may be assigned duties of a different, but substantially equal, classification. Such assignments shall not exceed thirty (30) days without prior approval of the Secretary and Chief Examiner.

Section 3. VOLUNTARY TRANSFER. The City Manager may transfer an employee from one department to another, and a department director may transfer an employee from one division to another within the same department, at an employee's request, provided no change in classification is involved and no displacement of another employee occurs. No voluntary transfer from one department to another can be made unless the employee has served at least six (6) months in the department from which transfer is being made.

No transfer will be made if a promotional eligible list exists for the position to which transfer is recommended, unless the same promotional eligible list can be used to replace the transferring employee.

All interdepartmental transfers must be approved by the Civil Service Board.

Section 4. TRANSFER - GENERAL. A transferred employee is not subject to a new probationary period.

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TITLE DEMOTION

RULE 12

Section 1. VOLUNTARY DEMOTION. An employee may request demotion to a position that he/she held previously by permanent appointment. Such request will be granted only if a vacancy exists in the classification to which he/she seeks demotion. Approval of the City Manager and the Secretary and Chief Examiner is required. If a demotion is requested when no vacancy exists, the employee may be placed at the top of a promotional and/or open eligible list for the title to which the employee seeks demotion.

Section 2. VOLUNTARY DEMOTION – CHANGE IN TYPE OF APPOINTMENT. A Professional – Technical – Supervisor and Management employee, upon prior written notification, may request a voluntary change in type of appointment of thirty-five (35) or less hours per week. Such request shall be granted with the approval of the City Manager and Secretary and Chief Examiner. Employee may request to return to his/her last previous full-time classification with the approval of the City Manager and Secretary and Chief Examiner.

Section 3. DEMOTION BECAUSE OF PHYSICAL INCAPACITY. When an employee becomes temporarily or permanently incapacitated for the performance of his/her duties due to their physical or mental condition, as medically documented by the Department of Human Resources, the department director, with the approval of the City Manager, may demote the employee to a position in a lower grade for which he/she is qualified, and which is within his/her physical capabilities. Such a demotion may be temporary or permanent. Such a demotion can be made only if a vacancy exists, and the Board shall be notified of such action.

If the employee objects to demotion for disability reasons, he/she shall have the right of appeal to the Board.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE DISCIPLINARY OR DISMISSAL ACTION

RULE 13

Section 1. DISCIPLINARY/DISMISSAL POLICY. The tenure of every employee in the classified service shall be conditioned on the satisfactory conduct of the employee and continued, efficient performance of assigned duties and responsibilities. A permanent employee may be dismissed, demoted, or suspended for cause.

Section 2. CAUSES FOR DISCIPLINARY OR DISMISSAL ACTION. The following are among the non-exclusive causes which shall be sufficient for dismissal, demotion or suspension:

- A. Absence without leave or failure to return from leave;
- B. Conduct unbecoming an employee in the public service;
- C. Inability to perform job duties due to mental or physical disability of a permanent or temporary nature;
- D. Incompetency, inefficiency, or neglect of duty;
- E. Insubordination;
- F. Under influence of drugs or alcohol while on duty;
- G. Negligent or willful or wanton damage to public property or waste or unauthorized use of public supplies or equipment;
- H. Violation of any lawful or reasonable regulations or orders made and given by a superior;
- I. Violation of any enacted or promulgated statute, ordinance, rule, policy, regulation, or other law;
- J. Conviction of a felony or misdemeanor which adversely bears on the employee's suitability for continued employment;
- K. Violation of any provision of the City Charter.

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TITLE DISCIPLINARY OR DISMISSAL ACTION **RULE** 13

Section 3. ABSENCE WITHOUT LEAVE. No employee shall absent him/herself from duty without permission of his/her supervisor or other appropriate official.

After twenty-four (24) scheduled work hours of absence without reporting, the department director may declare the position vacant and report the employee as having resigned. Such a resignation may be set aside, upon the recommendation of the City Manager, with the approval of the Board, if the employee submits a reasonable explanation for his/her failure to report the absence.

Section 4. DISCIPLINARY DEMOTION. Any employee who is demoted as the result of disciplinary action shall not displace any permanent employee or probationary employee in good standing.

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TITLE PROCEDURE ON APPEAL

RULE 14

Section 1. DEFINITIONS.

- A. "Disciplinary Authority" means the officer, commission, board, or body having the power to dismiss, suspend, or reduce in rank any employee in the classified service.
- B. "Disciplinary Action" means the dismissal, reduction, or suspension of any employee in the classified service.
- C. "Appellant" means any employee in the classified service appealing a disciplinary action to the Civil Service Board.

Section 2. NOTICE OF APPEAL.

- A. Any employee in the classified service against whom disciplinary action is taken by the Disciplinary Authority may appeal therefrom to the Civil Service Board no later than ten (10) days from the effective date of such disciplinary action.
- B. Written notice of appeal shall be filed with the Civil Service Board. Such notice of appeal shall contain the name and current mailing address of the Appellant, the name of the Disciplinary Authority, the disciplinary action appealed, and the effective date of the disciplinary action. The Board will, on application, furnish to the Appellant a copy of the Charges and Specifications, and Findings, filed against him/her.
- C. When any employee of the City of Dayton in the classified service who has been suspended, reduced in rank, or dismissed from the service, appeals to the Civil Service Board, the Board shall schedule a hearing no later than forty-five (45) calendar days from the date of receipt of the appeal, or at such other time as may be agreed to by the Appellant and the Civil Service Board.

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D. Such hearing shall be open to the public unless otherwise requested by the Appellant and approved by the Board.

E. The appeal may be heard by the Board or a Hearing Officer appointed by the Board, either by direct employment or by contract. The Hearing Officer shall be an Attorney at Law. Appeals of disciplinary actions resulting in dismissals may be heard by a Hearing Officer only with the express consent of the Appellant.

Section 3. CONTINUANCES. The Board, or its Hearing Officer conducting the hearing, may grant continuances for good cause shown.

Section 4. CHARGES AND SPECIFICATIONS. The Board or its Hearing Officer shall hear the evidence upon the Charges and Specifications as filed with it by the Disciplinary Authority. No material amendment of or addition thereto will be considered. Charges that have been dismissed by the Disciplinary Authority shall not be considered.

Section 5. PROCEDURE AT HEARINGS.

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

B. The Disciplinary Authority shall be represented by the City Attorney or other counsel appointed by the City Attorney. The Appellant may represent him/herself or may be represented by any person of his/her own choosing.

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- C. The order of proof shall be as follows:
- 1) The Disciplinary Authority shall present its evidence in support of the Charges and Specifications and disciplinary action taken.
 - 2) The Appellant may then present such evidence as he/she may wish to offer in his/her defense to the Charges and Specifications and disciplinary-action taken.
 - 3) The Disciplinary Authority shall then present rebuttal evidence to issues raised by the Appellant in the presentation of his/her defense.
 - 4) The Board or its Hearing Officer may, in its or his/her discretion hear arguments.
- D. 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 take such other actions as are necessary and proper for the conduct of such hearing. In cases heard by the Board, the Board shall designate one of its members as the presiding member.
- E. All testimony shall be taken under oath or affirmation, and shall be recorded by a certified stenographic reporter. All testimony shall be subject to cross-examination by the party against whom it is offered.
- F. Where an appeal is heard by a Hearing officer, said Officer shall, upon due consideration of the evidence adduced at the hearing, oral argument, and/or briefs of the parties, submit to the Board within thirty (30) days of the completion of the hearing or the submission of written arguments or briefs whichever occurs later, a written report setting forth his/her findings of fact and conclusions of law, and a recommendation of action to be taken by the Board.

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Section 6. DECISION OF THE BOARD.

- A. A majority of the Board, after due consideration of the record and, when applicable, the report of the Hearing Officer, shall, within thirty (30) days after the hearing or filing of the Hearing Officer's report, whichever is later, issue a decision on the appeal in writing, which decision may be to affirm, disaffirm, or modify the disciplinary action of the Disciplinary Authority. In such decision, the Board shall state its findings of fact found separately from its conclusions of law.
- B. The Decision of the Board shall be filed with the Secretary and Chief Examiner, who shall forthwith serve copies thereof upon the Appellant and his/her representative and the Disciplinary Authority. The decision of the Board shall be a final order, and may be appealed by either the Appellant or by the Disciplinary Authority, as provided by general law.

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CIVIL SERVICE RULES AND REGULATIONS
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TITLE LAYOFF PROCEDURE

RULE 15

Section 1. LAYOFF PROCEDURE. (Except Sworn Police & Fire Personnel) Whenever a position is abolished, the employee with least City-wide seniority in the classification or, in a classification subsequently affected, shall be removed if no vacancy exists. If two employees so affected have identical City-wide seniority, the employee with the least service time in the classification shall be removed. In determining seniority or service time, no service shall be included prior to a period of absence which exceeded one (1) year, except for military leave, and no time served in the unclassified service shall be included. If, within a year, an individual who resigned from City service is reinstated by the Board or obtains reemployment by selection from an eligible list, the calendar days from date of resignation until date of reemployment shall be deducted from his/her seniority. If the individual is not reappointed within one year from the date of his/her resignation from City service, his/her seniority will be computed from the date of reappointment. Other deductions of service credit will be defined by a Civil Service Board published policy. The continued tenure of any employee so removed from a position shall be determined in the following manner:

- A. The employee shall be transferred to any other classification in the same grade previously held by permanent appointment.
- B. If not entitled to a position under the above, the employee shall be demoted to a lower grade position within the series in descending order, whether or not said employee has previously held such a position.

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- C. If not entitled to a position under the above, the employee shall be demoted to a lower grade position previously held by permanent appointment in descending order, commencing with the last previously held position.
- D. If not entitled to a position under the above, the employee shall be demoted to a lower grade position in the labor group. An employee who is demoted into the labor group shall displace the employee in the group with the least City-wide seniority.
- E. If the employee is not entitled to a position under the above, or waives his/her rights to a position under either A, B, or C above, said person may be appointed to a vacancy in the "labor group" as determined by the Secretary and Chief Examiner.
- F. In the event the employee is not entitled to any position, or waives his/her rights to all positions under the above, said person shall be laid off.

Any employee appointed or demoted to the labor group shall meet the minimum literacy and physical requirements, and any special qualification (e.g., driver's license) for such position.

Section 2. LABOR CLASS. Persons in the labor service shall be laid off consistent with the provisions affecting other groups of services; namely, that employees with least total time of actual employment shall be laid off first. The positions designated for inclusion in the labor group shall be determined by the Board and published as a policy.

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TITLE LAYOFF PROCEDURE **RULE** 15

Section 3. LAYOFF PROCEDURE. (Sworn Police and Fire Personnel) Whenever positions are abolished in Police and Fire, displacement will proceed from the highest position affected to successively lower positions. The employee with the least in-grade seniority shall be displaced.

Said employee shall be included with all other employees in the next lower grade. In-grade seniority will then be computed for this group and the person with the least in-grade seniority shall be displaced. Such computations will be made for each successively lower grade with the employee having the least seniority in the lowest grade subject to layoff.

Sworn Police and Fire personnel cannot displace persons in any other employee group. However, they may be appointed to a vacancy in the labor group as determined by the Secretary and Chief Examiner.

Section 4. REINSTATEMENT. Any employee in the classified service laid off under "Layoff" provisions may be reinstated, in accordance with Rule 8. An employee recalled from layoff shall be credited with his/her full seniority for all of his/her active service, for purposes of determining eligibility for promotional examinations. He/she shall not be subject to a new probationary period; but if he/she was laid off from a position in which original appointment is dependent in part upon passage of a physical examination, another physical examination will be required at the time of recall if such separation exceeded ninety (90) days.

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TITLE PERFORMANCE APPRAISAL

RULE 16

Section 1. APPRAISAL SYSTEMS. The City Manager will develop one or more systems for the appraisal of employee performance and will provide necessary training for each appraiser in the use of the system of which he/she is a part. To the extent possible, any system so devised will include provision for consultation between appraiser and subordinate as a part of the appraisal process. The Civil Service Board will determine the minimum acceptable standards for continued employment with the City.

Section 2. USE OF APPRAISAL SYSTEMS. Any system so adopted will include the overall appraisal of performance representing the judgment of the rater on the employee's total performance during the rating period. The appraisal system may be used for any of the following purposes:

- A. To counsel employees, so that they have a clear understanding of their duties and responsibilities, the work of their department, and the objectives toward which they should strive.
- B. To improve performance by describing strengths and weaknesses of employee performance, and suggesting means for improvement of any weaknesses.
- C. To evaluate employees for merit increases in salary within the salary range.
- D. As a step in the process of corrective disciplinary action.
- E. As an element in any competitive promotional examination in accordance with Rule 7.

Section 3. EMPLOYEE PARTICIPATION. Each employee rated in accordance with the Rule has the right to receive a copy of the rating, and to discuss it with the evaluator.

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TITLE MILITARY SERVICE RULE **RULE** 17

Section 1. POLICY. No City employee or person on an eligible list for City employment will be made to suffer any loss of job rights as a result of his/her being called into military service.

Section 2. RESTORATION TO POSITION. A classified employee called into active duty in any of the United States armed forces shall be returned to his/her City position if he/she makes application within ninety (90) days following discharge from active duty. If he/she was called into such duty during his/her City probationary period, the probationary period shall be extended by the number of calendar days absent in that period as a result of such duty.

Section 3. ELIGIBLES CALLED INTO MILITARY DUTY. If a person whose name is on an eligible list for City employment is called into military service, he/she may make application to the Board, within ninety (90) days following termination of his/her active duty, to have his/her name restored to the eligible list.

Section 4. LIMITATIONS. The foregoing does not apply to a person who holds only a temporary, seasonal, part-time, or emergency appointment in City service.

Section 5. VOLUNTARY ENLISTMENT INTO MILITARY DUTY.

- A. An employee who voluntarily enlists for military duty must request Board approval of an extended leave of absence, and the length of approved leave of absence shall be consistent with the limitations set forth in the Veterans' Reemployment Rights Statute in effect at that time. Application for return to his/her City position must be made within ninety (90) days following discharge from active duty. If he/she enlisted during his/her City probationary period, the probationary period shall be extended by the number of calendar days absent in that period due to said military service.
- B. A person whose name appears on an eligible list(s) for City employment, who voluntarily enlists for military duty, may, within ninety (90) days following termination of his/her active duty, make application to the Board to have his/her name restored to the eligible list(s).

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City of Dayton, Ohio

TITLE PROHIBITED PRACTICES **RULE** 18

Section 1. FRAUD IN EXAMINATIONS. If a candidate, during an examination, is found to be using, without permission, any extraneous information such as other candidates' papers, memoranda, crib notes, pamphlets and/or books of any kind or otherwise is found to have cheated, his/her exam papers shall be taken and the Secretary and Chief Examiner shall have them graded with a zero (0) and note on the exam papers the reason for such marking. Such applicant may be barred from taking any future examination as determined by the Civil Service Board.

Section 2. FRAUD BY EXAMINERS. No examiner, including special examiners either from other City departments or from outside the City service, shall willfully or corruptly make a false mark, grade, estimate, or report on an examination with respect to the proper standing of any person examined; or furnish to anyone special or secret information for the purpose of improving or injuring the prospects or chances for the appointment, employment, or promotion of any person examined or to be examined. If such person is in the employ of the City, he/she shall be subject to dismissal. If he/she is not a City employee, his/her contract for services to be provided with regard to this or any other civil service examination shall be cancelled, and no payment made thereunder for any services previously rendered.

Section 3. PARTICIPATION BY RELATIVES. No Civil Service Board staff member shall take any part in the preparation, administration, or grading of any examination in which a relative is a candidate. It shall be the obligation of the staff member to notify the Secretary and Chief Examiner whenever he/she learns that a relative is expected to be a candidate. Thereupon, the Secretary and Chief Examiner shall take all necessary steps to assure the integrity of the examination.

In case of willful failure to so notify the Secretary and Chief Examiner, the staff member shall be subject to disciplinary action, and if privileged information was transmitted from the staff member to the candidate, the candidate shall be disqualified from the examination, or if the examination has already been held, his/her name shall be removed from the eligible list, or if he/she has received an appointment, he/she shall be subject to discharge.

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE PROHIBITED PRACTICES **RULE** 18

Inasmuch as it is the intent of this section to maintain the integrity of the examination process, it shall not be necessary to establish that privileged information was actually transferred from staff member to candidate, in order to apply the penalty to the staff member.

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE REPORTS AND RECORDS

RULE 19

Section 1. REPORTS TO THE BOARD. Appointing officers shall make prompt and complete reports to the Board on the following matters, on forms prescribed or by letter where no forms are prescribed:

- A. Appointments of any type.
- B. Reinstatements, promotions, transfers, or any other change of employee status.
- C. Declination of appointments by persons certified for consideration of appointment.
- D. Disciplinary actions, including suspension, demotion, or dismissal.
- E. Salary changes.
- F. Creation of new positions, or material changes in duties of any positions.
- G. Changes of address of any employees.
- H. Copy of each payroll as submitted to the Director of Finance.

Section 2. PAPERS PROPERTY OF THE BOARD. All original papers, applications, examinations, certificates, legal documents, etc., are the property of the Civil Service Board and will be filed in the Civil Service Board Office and kept for not less than one (1) year, except that examination papers of those failing to qualify may be destroyed after sixty (60) days. The Secretary and Chief Examiner, with Board approval, will develop a retention schedule for all other records maintained under the supervision of the Board.

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE BOARD OF EDUCATION **RULE** 20

Section 1. **GENERAL.** In accordance with the authority conferred upon the Board by Section 124.40 of the Ohio Revised Code, the Board shall adopt separate Rules and Regulations of the Civil Service Board for the Dayton Public School District, which shall provide uniform standards for appointment, promotion and separation in the classified service of the Dayton Public School District.

Section 2. **PROCEDURE ON APPEAL.** Except as modified by the Rules for the Dayton Public School District, the procedure on appeal set forth herein will be applicable to all classified positions in the Dayton Public School District.

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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE AMENDMENTS

RULE 21

Section 1. PROCEDURE. These Rules may be amended, repealed, or supplemented by the Board at any time and new Rules adopted; provided that no amendment, repeal or supplement shall be adopted in less than seven (7) days after its proposal; and provided further, no such change will be operative until approved by the City Commission.

**APPROVED BY
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CIVIL SERVICE RULES AND REGULATIONS
City of Dayton, Ohio

TITLE SCOPE OF CIVIL SERVICE RULES - SAVINGS CLAUSE **RULE** 22

Section 1. GENERAL. If any section or part of a section of these Rules is held by a Court of competent jurisdiction to be invalid or unconstitutional, the same shall not invalidate or impair the validity, force, and effect of any other section or part of a section of these Rules unless it clearly appears that such other section or part of a section is wholly or necessarily dependent for its operation upon the section or part of the section held invalid or unconstitutional.

- A. Civil Service Rules shall supersede any rules, regulations, practices, or contracts inconsistent with its terms, unless approved by the Board.
- B. Nothing herein contained shall affect any examination held or any eligible list heretofore formed, and every eligible list duly formed under previous regulations shall in all respects be deemed to be formed under these Rules.

**APPROVED BY
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July 25, 1984

DATE ISSUED

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APPENDIX F

AGREEMENT

The City of Dayton, Ohio
and
International Association of
Firefighters, Local 136
A.F.L.-C.I.O.



Effective November 1, 2007
Through October, 31, 2010

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Article 33

Substance Abuse Policy

Section 1. Policy

The purpose of this policy is to assure our workers are fit for duty and to protect our employees and the public from the risks posed by the use of drugs and alcohol.

The public expects services provided by the City of Dayton to be delivered in the safest and most conscientious manner possible. Involvement with drugs and alcohol can take its toll on job performance and employee safety. Our concern is that employees are in a condition to perform their duties safely and efficiently, in the interests of their fellow workers and the public as well as themselves. The presence of drugs and alcohol on the job, and the influence of these substances on employees during working hours, are inconsistent with our objective to maintain a drug and alcohol-free workplace.

Employees who think they may have an alcohol or drug usage problem are urged to voluntarily seek confidential assistance from the Employee Assistance Program Counselor. While the City will be supportive of those who seek help voluntarily, the City will be equally firm in identifying and disciplining those who continue to be substance abusers and do not seek help.

To further our commitment of maintaining a drug and alcohol-free workplace in order to provide a safe work environment for employees and safe service delivery to the public, it is our policy to:

Ensure that employees are not impaired in their ability to perform their work in a safe, productive manner.

Conduct pre-employment, reasonable suspicion, drug and alcohol testing.

Conduct random drug testing in accordance with the provisions contained herein.

Encourage employees to seek professional assistance any time alcohol or drug use adversely affects their ability to perform their work assignments.

Section 2. Education of Employees

- A. All employees shall have access to the Fire Department's Drug Testing policy.

- B. Employees will be provided with information concerning the impact of the use of drugs on job performance, the manner in which these drugs tests are conducted, the reliability of the tests performed, circumstances which subject employees to testing, what the tests determine, the types of substances to be screened, and the consequences associated with testing. All new employees will be provided with the information when they are hired.
- C. Management will answer in writing, all written questions posed by the Union members concerning this policy. Management will generate a "Frequently Asked Questions (F.A.Q.)" addressing the common questions concerning this drug and alcohol testing policy.
- D. Management will provide initial training to all employees covered herein during the term of this Agreement. The training session will be conducted by appropriate Management representatives and qualified professionals in the field of employee assistance, reasonable suspicion training, and random drug testing. Employees will be provided a city representative to contact with any questions. Management will provide a minimum of one yearly supplemental training throughout the term of this Agreement by video or other means.

Section 3. Employees Covered

This policy applies to all Employees covered by the I.A.F.F. Local 136 Contract.

Section 4. Prohibited Conduct

- A. Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl (rubbing) alcohol.
- B. Employees must not consume alcohol:
 - 1. On the job, during hours of work, during City meal periods (paid or unpaid), or during city rest periods.
 - 2. Up to eight hours following an accident or until the employee undergoes a post-accident test, whichever occurs first.
- C. Alcoholic beverages may be served at City organized and hosted functions only with the express written consent of the City Manager or designee. Employees working at the function are not to consume alcoholic beverages while on duty.

Employees in approved social attendance at functions where alcohol is served may consume alcoholic beverages so long as this is done in proper moderation and with decorum.

- D. Employees must not consume any controlled substance identified in Schedules I through V of Section 202 of the Controlled Substance Act (21 U.S.C. 812) and as further defined by 21 CFR 1300.11 through 1300.15 without a prescription from a licensed doctor of medicine or osteopathy. This includes: marijuana, amphetamines, opiates, phencyclidine (PCP), and cocaine.
- E. Employees must not refuse to take a required drug or alcohol test.
- F. Employees must not be under the influence of or in possession of alcohol or illegal drugs while on duty and must not carry/store illegal drugs or alcohol in the vehicle they are operating on duty.
- G. The unlawful manufacture, distribution, dispensing, possession or use of an illegal drug is prohibited in the City of Dayton workplace. Any employee convicted of violating a criminal drug statute in the workplace must notify the Human Resources Director no later than five days after such conviction.

Section 5. Legal Drugs

The appropriate use of legally prescribed medications and non-prescription medications is not prohibited. Employees are required to notify their supervisor of any medication, which is adversely affecting their ability to do their work. Employees may be assigned to work that can be safely performed or placed on paid or unpaid sick leave. If reasonable suspicion exists that employees are under the influence of an illegal drug or alcohol, a reasonable suspicion test should be conducted. Such information should be handled in a confidential manner, the same as any other medical information.

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.

The City shall ensure the following drugs are tested for: marijuana, cocaine, opiates, amphetamines, and phencyclidine. An initial immunoassay drug screen is conducted on each specimen. For those specimens that are not negative, a confirmatory gas chromatography/mass spectrometry (GC/MS) test is performed. The test is considered positive if the amount of the drug present is equal to or greater than the following amounts:

<u>Drug</u>	<u>Initial Test</u> ng/ml	<u>Confirmation</u> ng/ml
Amphetamines/Meth	1000	500
Cannabinoids/THC	50	15
Cocaine Metabolite	300	150
Opiates	2000	2000
Phencyclidine (PCP)	25	25

With regards to a confirmed alcohol test having a concentration of .04 percent or greater is considered to be a positive alcohol test, and is in violation of this policy.

Section 7. Test Results

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

A. Negative Results

If the initial test results are negative, the results will be reported in writing to the MRO and the sample will be discarded. Employees may request a copy of their negative test results from the Designated Employee Representative (DER).

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.
2. At the interview, the employee shall be provided an opportunity to provide the MRO with any prescriptions, along with the identity of the prescribing/dispensing physician or health care provider, or any other evidence. The MRO shall then contact the prescribing/dispensing physician or health care provider for confirmation.
3. The MRO shall contact the testing laboratory in an effort to verify that the prescription drug presented by the employee matches the drug identified in the positive confirmatory drug test. If the prescription drug and the drug identified in

the positive confirmatory drug test match, then the drug test result shall be considered as a negative drug test result and discarded.

4. Confirmed positive drug test and confirmed positive alcohol tests results are for administrative purposes only and shall not be used against the employee during any phase of any criminal proceeding.
5. An employee who questions the results of a required drug test may request that an additional test be conducted at a different USDHHS certified laboratory. The test must be conducted on the split sample that was provided at the same time as the original sample. The cost of the second test will be borne by the employee, unless the second test invalidates the first in which case, the City will fully reimburse the employee for the cost of the second drug screen test.
6. The method of collecting, storing, and testing the split sample will follow the Department of Transportation guidelines. The employee's request for a split sample test must be made to the Medical Review Officer (MRO) within 3 business days of notice of the initial test result. Requests after 3 business days will be accepted only if the delay was due to documentable facts that were beyond the control of the employee. If the confirmation test results are positive, the testing laboratory will retain the sample a period of time to allow for additional testing and employee appeals.

Section 8. Discipline

- A. On the first occurrence of a confirmed positive drug test or a confirmed positive alcohol test, the employee is referred to a substance abuse professional for evaluation and rehabilitation. Sick leave may be used while participating in a rehabilitation program prescribed by the Substance Abuse Professional. Otherwise, the employee will be on leave without pay, while it is available, until return to work following a negative alcohol/drug test and authorization to return to work by the substance abuse professional.
- B. Employees who request treatment for illegal drugs, legal drug misuse, or alcohol misuse, and have not been informed of a scheduled drug test shall receive treatment in lieu of disciplinary action pursuant to the Employee Assistance Program ("EAP"), or other substance abuse professional. Once an employee has been notified to appear for a drug test, a request for treatment will be honored but not in lieu of disciplinary action. This section shall not apply to follow up testing that occurs after an employee has returned to duty following a confirmed positive drug test result or alcohol test.
- C. The second occurrence of a confirmed positive alcohol test initiated through the reasonable suspicion provisions of this policy or confirmed positive drug test initiated through the reasonable suspicion or random testing provisions of this policy will result in discharge from employment. Failure to comply with the SAP's regimen of

- D. Positive drug or alcohol tests obtained through the reasonable suspicion or random testing process may only be kept in the DER's confidential and restricted employee's drug testing file, in his or her office. After five (5) years from the date of an employee passing a return to duty test or the date of the last drug or alcohol test mandated by the SAP, whichever date is later, a confirmed positive drug or confirmed positive alcohol test result shall be removed from the employee's file upon the request of the employee and shall not be considered in subsequent determination of discipline.

Section 9. Pre-appointment

The Civil Service Board has authority to promulgate drug and alcohol testing procedures at time of appointment.

Section 10. Reasonable Suspicion Testing

- A. Employees may be subject to drug and alcohol testing when there is a belief based on objective facts that drug or alcohol use is adversely affecting their ability to safely and effectively perform their job. Examples of conduct that may constitute reasonable suspicion include, but are not limited to:
1. Slurred speech;
 2. Alcohol odor on breath;
 3. Unsteady walking and movement;
 4. Physical altercation;
 5. Verbal altercation;
 6. Unusual behavior;
 7. Possession of alcohol or drugs;
 8. Information obtained from a reliable person with personal knowledge.
- B. Although the City representative (supervisor or other City employee designated by the Director of Human Resources) is not authorized to reach a conclusion that an employee's job performance impairment is due to alcohol or drug influence, the City representative is authorized to observe and document those job performance impairments consistent with reasonable suspicion characteristics and to require a reasonable suspicion test. The City representative must make a written record of the observations leading to a drug or alcohol test within 24 hours of the observed behavior or before the test results are reported, whichever is earlier.
- C. Any employee who demonstrates job performance impairments consistent with reasonable suspicion characteristics shall be relieved of duty with pay pending an investigation and verification of condition. Management transports the employee to

the sample collection location and to his/her home. If the employee refuses transportation but attempts to drive him/herself, the Police are notified.

- D. Employees with a confirmed negative drug test or confirmed alcohol test that is at or below .02 will be returned to their job if not otherwise in violation of the policy.
- E. An employee who has a confirmed alcohol test with a concentration of .04 percent or greater is considered to have a positive alcohol test, and is in violation of this policy. A confirmed alcohol test where the concentration is less than .04 percent and greater than .02 percent shall be considered as non-conclusive and the employee shall be placed on paid leave if available or unpaid leave if paid leave is not available for the rest of their scheduled duty day and no discipline shall result. This section shall not apply to follow-up testing that occurs after a confirmed positive drug test result or positive alcohol test.

Section 11. Random Drug Testing

- A. Random drug testing will be performed during the term of this contract.
- B. On July 1, 2005, random drug testing will begin.
- C. Random drug testing will occur at any time during the calendar year. All employees will be assigned a confidential identification number. The confidential identification numbers will be entered into a computer maintained by the MRO. An independent computerized probability-sampling process will be utilized. Simple random selection shall select approximately twenty (20) employees throughout each month to receive a random drug test.
- D. A list of selected identification numbers will be forwarded from the MRO to the Designated Employee Representative (DER), in Human Resources. The list shall be time-stamped. Notification of testing will be withheld from the selected employees until they report for their regularly scheduled tour of duty on the scheduled date of testing. The randomly selected individuals will be tested on their scheduled shift. Any employee who is off duty on an approved leave status of more than nine (9) calendar days during the scheduled testing process will have their number returned to the pool so that they may be tested in a subsequent test.

Section 12. Random Drug Testing Procedures

A. The Drug Testing Facility

All laboratory contracts shall require that the contractor comply with the Privacy Act, 5 U.S.C. 522a. In addition, laboratory contracts shall require compliance with patient access and confidentiality provisions of Section 503 of Public Law 100-71. The agency shall establish a Privacy Act System of Records such that the employee records will be maintained and used with the highest regard for employee privacy.

B. Sample Collection

The following procedures will be utilized for random drug testing:

1. When a random list has been generated by the MRO and received by the Designated Employee Representative (DER), the DER will check the employee's work schedule and arrange with the collection agency for on site donation of a sample. No Fire Department employees shall have prior notification of this collection.
2. The details of on site sample collection procedure that may be unique to the Dayton Fire Department will be written in a policy that shall be agreed to by Management and Union prior to implementation of the random drug testing program and thereby made a part hereof.
3. Urine samples will be collected per DOT standards.
4. Employees will be required to sign an appropriate "Drug Screen Consent" form at the time of collection.
5. Random drug testing shall not include alcohol testing.

Section 13. Post Accident Testing

Employees are required to undergo drug and alcohol testing when an employee, on duty or driving a City Vehicle, may have caused a traffic accident involving either a fatality or causing "serious physical harm to a person" as defined in the Ohio Revised code, Section 2901.01(E), or causing "serious physical harm to property", as defined in Ohio Revised code, Section 2901.01 (F).

Following an accident, the employee is tested as soon as possible, but not to exceed eight (8) hours for alcohol testing and thirty-two (32) hours for drug testing. Any employee involved in an accident must refrain from alcohol use for eight (8) hours following the accident, or until he/she undergoes a post accident alcohol test. Any employee who leaves the scene of an accident without justifiable explanation prior to submission to drug and alcohol testing is considered to have refused the test.

Section 14. Return to Duty Testing

Employees who tested positive on a drug or alcohol test, and who are afforded the opportunity to return to work, must test negative for drugs or below .04 for alcohol and be evaluated and released to duty by the Substance Abuse Professional before returning to work.

Section 15. Follow-Up Testing

Employees are required to undergo frequent unannounced drug and alcohol testing during the period of time recommended by the Substance Abuse Professional. A minimum of six follow-up tests are conducted within the twelve (12) months following the employee's return to duty. Employees subject to follow-up testing will continue to perform their duties if not otherwise in violation of this policy.

Section 16. Who Pays For Post-Hire Testing

The City pays for all negative reasonable suspicion, post accident, drug and alcohol tests for employees. The City will also pay for all negative random drug tests.

Employees must reimburse the City through payroll deduction for all confirmed positive reasonable suspicion and post accident drug and alcohol tests. Employees must also reimburse the City for all confirmed positive random drug tests.

Employees must reimburse the City through payroll deduction for all return to duty and follow up drug and alcohol tests, whether positive or negative.

Section 17. Refusal to Submit to Testing/Union Representation/ Identification

- A. Refusals to comply with a request for testing, submission of false information in connection with a test, or attempts to falsify test results through tampering, contamination, adulteration, or substitution, shall be considered a refusal to submit to testing and will be treated the same as a positive test result. Refusal can include an inability to provide a specimen or breath sample without a valid medical explanation, as well as a verbal declaration, obstructive behavior, or physical absence resulting in the inability to conduct the test.
- B. The employee may make arrangements for a Local 136 representative to witness the testing procedure; however, the employee must obtain the witness within one hour of the scheduled test time. The witness will be prohibited from any action other than witnessing the test procedure. Management shall release said representative from duty if they are on duty. The representative will return immediately to their post

upon completion of witnessing the test procedure. The request for a witness will not extend the employee's two-hour window to provide a testing sample.

- C. Specimen testing will be in accordance with the guidelines of the NIDA certified testing facility. In the case of reasonable suspicion, random, and post-accident testing if the laboratory site is unavailable and the employee is not hospitalized, arrangements will have been provided for collection at an alternative site that complies with DHHS standards.
- D. The employee designated to give a sample must be positively identified prior to any sample being taken.

Section 18. Drug/Alcohol Treatment

Many persons experiencing problems with drugs and alcohol can be helped through counseling and treatment by substance abuse professionals. Employees so affected are encouraged to make use of the resources available for treatment through referral by the City, a union representative or self-referral.

Employees who test positive for the presence of illegal drugs or alcohol will be evaluated by a substance abuse professional. A substance abuse professional is a licensed or certified physician, psychologist, social worker, employee assistance professional, or addiction counselor with knowledge of, and clinical experience in, the diagnosis and treatment of drug and alcohol-related disorders. The substance abuse professional will evaluate each employee to determine what assistance, if any, the employee needs to resolve problems associated with prohibited substance abuse or misuse of alcohol.

Under certain circumstances, including positive drug or alcohol tests, employees may be required to undergo treatment for substance abuse. If an employee is not discharged, but is allowed to return to duty after such evaluation and/or treatment, he/she must properly follow the rehabilitation program prescribed by the substance abuse professional, must pass the return to duty drug and alcohol test(s), and be subject to unannounced follow-up tests for a period of one to two years as determined by the substance abuse professional or as required by Federal law. Any employee who refuses treatment when required, or fails to comply with the regimen prescribed by the substance abuse professional for treatment, aftercare, or return to duty, shall be subject to disciplinary action, up to and including discharge.

Section 19. Confidentiality

Positive and confirmed laboratory reports or test results shall not appear in an employee's general personnel folder. Information of this nature will be secured in a separate confidential medical folder in the Department of Human Resources. The reports or test results may be disclosed to City management on a strictly need-to-know basis and to the tested employee or his/her designee upon request.

Negative test results will be kept for two (2) years or longer if litigation is pending. After that, negative test results may be kept by the city for statistical purposes only; any such test result kept for statistical purposes will not have an employee identity associated with it.

The City may disclose information required to be maintained pertaining to an employee, to the employee or to the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol and/or controlled substance test administered under this part, or from the employer's determination that the employee engaged in prohibited conduct (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

Section 20. Employee Assistance Program (EAP)

- A. The City of Dayton and the Local 136 recognize that almost any problem can be successfully treated provided it is identified in its early stages and referral is made to appropriate modality of care. This applies whether the problem is one of physical illness, mental or emotional illness, marital or family distress, alcoholism, or drug abuse, or other concerns.
- B. The City of Dayton and Local 136 believe it is in the interest of the employee and the employee's family to provide an employee service, which deals with such persistent problems. Implementation of the program will be conducted on the basis of urging employees displaying patterns of poor job performance to participate in the program; however, the existing discipline, grievance, and arbitration procedures will remain in effect.
- C. The Employee Assistance Program has helped employees deal with many issues, such as drug and alcohol abuse and other emotional or social problems. If an employee goes to the EAP office, the EAP specialist will discuss with him/her what the special needs may be, and then will refer the employee to the appropriate resources for help. Many of the referred services and organizations may be covered by the City's health care providers; however, the employee may have to pay for some services.

- D. In instances where it is necessary, a leave of absence may be granted for treatment or rehabilitation for alcoholism and/or drug abuse on the same basis as it is granted for other ordinary health problems.

Section 21. Role of the Medical Review Officer (MRO)

- A. The Medical Review Officer (hereafter referred to as "MRO") is a licensed physician (medical doctor or doctor of osteopathy) knowledgeable of substance abuse and trained in the medical use of prescription drugs and the pharmacology and toxicology of all drugs.
- B. The MRO shall not be an employee or agent of or have any financial interest in the laboratory for which the MRO is reviewing drug testing results. The MRO's primary responsibility is to receive laboratory results generated by the employer's drug testing program and review and interpret positive test results obtained through the drug screening process and to evaluate those results together with medical history or any other relevant biomedical information to confirm positive drug test results or confirm positive alcohol tests. No other City employee or agent shall be informed of the positive confirmatory drug test or confirmed positive alcohol test until the verification interview is held. If the employee refuses to participate in the verification interview the MRO will report the confirmed positive test results to the designated employee representative (hereafter referred to as the DER) in Human Resources. If the employee cannot be contacted within three (3) business days the MRO shall contact the DER and determine the status of the employee. The DER will then determine if the tested employee is on valid departmental leave. If the employee is on valid departmental leave then the DER will have three (3) business days to contact the employee after they have returned to duty from that leave. If three (3) business days then elapse without conduction of the verification interview the MRO may report the confirmed positive test results to the DER in Human Resources. In fulfilling these responsibilities, the MRO is to adhere to the U.S. Department of Health and Human Services ("DHHS") mandatory guidelines for federal workplace drug testing programs.
- C. 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.
- D. The MRO must also assess and determine whether alternate medical explanations could account for any positive test result. In reviewing the laboratory results, the MRO shall conduct a medical interview with the employee, review the employee's medical history, or review any other relevant biomedical factors. MRO shall also

review any information provided by an employee attempting to show legitimate use of a drug.

- E. Any medical information provided to the MRO will be treated as confidential and not disclosed. If it is determined with reasonable certainty that there is a legitimate medical or other reason to account for the positive laboratory findings, no information identifying the specific employee will be disclosed and the test results will be reported as negative.
- F. If the MRO has a confirmed positive drug or confirmed positive alcohol test result, the information related to the confirmed positive test result will be disclosed in writing and in a manner designed to ensure confidentiality of the information to the Designated Employee Representative (DER), in Human Resources. The information will be disclosed to member's designee if a signed, written release is received by Human Resources from the employee.

Section 22. Definitions

Alcohol means beer or intoxicating liquor as defined in Section 4301.01 of the Ohio Revised Code.

Alcohol Misuse means the consumption of beer or intoxicating liquor as defined in Section 4301.01 of the Ohio Revised Code resulting in the presence in an on-duty employee of a concentration of four hundredths of one per cent (.04) or more by weight of alcohol in his/her blood or four hundredths of one gram (.04) or more by weight of alcohol per two hundred ten liters of his/her blood.

Alcohol Test means a procedure to identify the presence of a minimum specified level of alcohol in an employee. Breath tests to determine the level of alcohol must be given by a Breath Alcohol Technician (BAT) trained to proficiency and certified by the appropriate state agency in the operation of the Evidential Breath Testing instrument (EBT). If an employee is hospitalized, such blood/alcohol testing shall be conducted in accordance with the guidelines of the medical facility.

Collection Site means a fire station house or other place where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs. Such laboratory shall also be used for just causes or reasonable suspicion drug testing if the laboratory is available. If the employee is hospitalized or if the laboratory site is unavailable, the collection site will be either the location where the employee is hospitalized or the alternate site provided for in the contract.

Confirmatory Drug Test means a second procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. At this time, gas chromatography/mass spectrometry (GC/MS)

is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.

Confirmed Negative Alcohol Test means the presence in an on duty employee of a concentration of two hundredths of one per cent (.02) or less by weight of alcohol in his/her blood or two hundredths of one gram (.02) or less by weight of alcohol per two hundred ten liters of his/her blood.

Confirmed Negative Drug Test Result means the absence of illegal drugs in any form or metabolites in sufficient quantities such that the illegal drug or its metabolites is not at or above the specified cutoff level in accordance with the National Institute on Drug Abuse (NIDA) standard or the standards set forth in this policy or the absence of a confirmed positive result.

Confirmed Positive Alcohol Test means the presence in an on duty employee of a concentration of four hundredths of one per cent (.04) or more by weight of alcohol in his/her blood or four hundredths of one gram (.04) or more by weight of alcohol per two hundred ten liters of his/her blood.

Confirmed Positive Drug Test Result means a positive confirmatory drug test which has been confirmed by the Medical Review Officer (MRO).

Illegal Drug means any "controlled substance" as defined in Ohio Revised Code, Section 3719.01 (D), and any "dangerous drug" as defined in Section 4729.01 of the Ohio Revised Code, the possession or sale of which, without a prescription or license, is prohibited by law.

Illegal Drug Use means the use of any "controlled substance" or "dangerous drug" which not has been legally prescribed and/or dispensed, or the use of a prescription drug, which is not in accordance with the manner in which, it was prescribed, and to whom it was prescribed for.

Initial Drug Test (also know as Screening Test) means an immunoassay test to eliminate "negative" urine specimens from further consideration and to identify the presumptively positive specimens that require confirmation through further testing.

Legal Drug means any substance, the possession or sale of which is not prohibited by law.

Legal Drug Misuse means the overuse or inappropriate use of any legal drug.

Medical Review Officer means a licensed physician (medical doctor or doctor of osteopathy) knowledgeable of substance abuse and trained in the medical use of prescription drugs and the pharmacology and toxicology of all drugs. This physician must be on the approved DOT MRO list.

Prescription Drug means any "controlled substance" or "dangerous drug" for which possession and use are legal when "prescribed" by licensed medical personnel.

Prescribed means a written or oral order for a controlled substance for the use of a particular person given by a practitioner in the course of professional practice and in accordance with the regulations promulgated by the United States Drug Enforcement Administration, pursuant to the federal drug abuse control laws.