

ORIGINAL

In the  
Supreme Court of Ohio

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

**MERIT BRIEF OF AMICUS CURIAE STATE OF OHIO  
IN SUPPORT OF NEITHER PARTY**

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FILED  
 JAN 30 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## INTRODUCTION

This case implicates a number of important issues concerning the discretion of administrative agencies to consider and rely upon evidence that would, in the context of a civil trial, constitute inadmissible hearsay. The Court is faced with a threshold question concerning whether a City of Dayton Civil Service Board rule incorporates the formal Rules of Evidence applicable in Ohio's courts. The Court's resolution of that issue may prove dispositive of the case. But if the Court speaks more broadly about the use of hearsay in administrative proceedings, the State of Ohio respectfully asks the Court to preserve the longstanding principle of agency discretion in matters relating to the admissibility of evidence in administrative proceedings.

Ohio's legislature, like many other state legislatures and Congress, has established a large administrative structure for administering a wide range of governmental regulations. In Ohio, state boards, agencies, and commissions handle a broad spectrum of issues, including benefits determinations, health and safety regulations, and professional discipline, to name only a few.

As the administrative state has grown, the role of administrative adjudication has grown as well. Agency adjudication is a valuable tool, allowing agencies to resolve factual and legal issues affecting the regulated community in an efficient, fair, and cost-effective manner. Administrative adjudication runs the gamut from informal, non-adversarial proceedings to multi-day mini-trials in which parties are represented by counsel, testimony is taken, and formal opinions are issued. The factual issues resolved in these proceedings likewise vary greatly in complexity. Some are simple and straightforward, while some require extensive technical expertise. The type of proceeding used to handle a given issue is often tailored to the circumstances of the parties and the area of regulation.

Ohio courts have long recognized, at least implicitly, that the flexibility to tailor procedures to a particular set of circumstances is essential to efficient and effective agency adjudication. Courts have been careful not to require agency adjudications to conform to the strict procedural and evidentiary rules that apply in civil courts. This includes the treatment of hearsay evidence.

Administrative adjudication differs from traditional civil proceedings in a number of important ways. One difference is that administrative agencies often have the benefit of technical expertise and exposure to the regulated community. Agencies often use those experts in adjudications. These individuals, though technical experts in the regulated field, often may not be trained as lawyers. Yet they serve an important function. They are able to apply their expertise to the cases before them and are often able to evaluate evidence and conduct proceedings with reduced formality without sacrificing confidence in outcomes. Their task would no doubt be more difficult were they forced to follow and apply the strict evidentiary and procedural rules used by courts, particularly complex rules like those related to hearsay. Indeed, some agencies find it necessary to depend on certain kinds of reliable hearsay evidence in their administrative hearings—many of which serve to protect the public from dangerous or unscrupulous professionals—and might be unable to manage formal, court-level adjudicatory processes because that evidence is either impossible or prohibitively expensive to obtain in a manner that strictly complies with formal hearsay rules.

The hallmark of efficient and effective agency adjudication is flexibility. As discussed below, agency discretion is not and should not be unlimited. But the task of crafting appropriate procedures for resolution of a given issue is best left to agencies. This principle has particular force in the context of determinations related to the admissibility of evidence. Under the existing

framework for review of agency actions, courts play an important role in ensuring that agencies exercise their discretion in an appropriate manner. The discussion that follows is intended to highlight these issues and encourage this Court—to the extent it is inclined to speak on the subject—to adhere to the principles concerning agency discretion that currently serve the administrative state so well.

### STATEMENT OF AMICUS INTEREST

The Ohio Attorney General is the chief law officer for the state and is responsible for representing all state officers, departments, boards, and commissions. R.C. 109.02. The Attorney General represents over 100 agencies, boards, and commissions that conduct quasi-judicial administrative hearings. These agencies cover the regulatory spectrum, and each has its own subject-matter expertise. The Attorney General therefore has great interest in ensuring that administrative adjudication is sensible, fair, and efficient. Of critical importance is the continued vitality of the longstanding principle that administrative proceedings, absent some legislative or agency mandate, are not bound by the rules of evidence applicable to civil trials.

### ARGUMENT

#### The State of Ohio's Proposition of Law:

*Because administrative proceedings are not subject to the procedural and evidentiary rules applicable in civil trials, hearsay evidence may be admitted and relied upon at the administrative level.*

**A. Administrative agencies are generally not bound by the Rules of Evidence, including those governing the admission of hearsay.**

By definition, administrative proceedings are not court proceedings and therefore are not subject to the strict procedural and evidentiary rules that govern civil trials. *State ex rel. Mayers v. Gray*, 114 Ohio St. 270, 275 (1926) (“ . . . [T]he rules of judicial hearing do not govern in executive and administrative matters.”). The hearsay rule and its attendant exceptions, a

common-law construct now codified in the Rules of Evidence, therefore does not apply in administrative hearings. *See, e.g., Bd. of Educ. for Orange City Sch. Dist. v. Cuyahoga Cnty. Bd. of Revision*, 74 Ohio St. 3d 415, 417 (1996) (*per curiam*) (noting that the Rules of Evidence expressly limit the scope of their effect to court proceedings and therefore do not, in and of themselves, apply to administrative agency adjudication). As a result, evidence that might normally be considered inadmissible hearsay may be admitted and relied upon by an administrative body. *Simon v. Lake Geauga Printing Co.*, 69 Ohio St. 2d 41, 44 (1982); *see also Fields v. CSX Transp., Inc.*, No. 96831, 2011-Ohio-6761, ¶ 11 (8th Dist.); *Haley v. Ohio State Dental Bd.*, 7 Ohio App. 3d 1, 17 (2d Dist. 1982). The discretion to consider hearsay evidence is not unlimited, however; in keeping with the administrative-law premium on reliability, that discretion must not be exercised in an arbitrary fashion. *Id.* And hearsay evidence may not be considered if it is “inherently unreliable.” *Vinci v. Ohio State Bd. of Pharm.*, Nos. 2008 AP 08 0052 & 2008 AP 08 0053, 2010-Ohio-451, ¶ 118 (5th Dist.); *see also Fields*, 2011-Ohio-6761 ¶ 11.

**B. The relaxation of strict evidentiary and procedural rules provides administrative agencies with the flexibility to ensure that administrative adjudication is fair, efficient, and economical.**

As discussed above, the General Assembly has created a large administrative state comprised of dozens of agencies and boards, each with its own area of expertise. As the administrative state has taken on increasing importance, administrative adjudication has taken on a central role in agency efforts to fulfill their regulatory mission. *See generally* Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. Kan. L. Rev. 473 (2003). Administrative adjudication has risen in prominence for several reasons. First, legislative bodies often lack the time and expertise to develop the detailed standards that are essential to an efficient and effective regulatory scheme. Second, relying solely upon judicial

enforcement of such standards would be impractical because the sheer volume of cases would quickly overwhelm the courts. *Id.* at 475. Third, administrative adjudication promotes the efficient resolution of regulatory issues. *Id.* Finally, administrative agencies bring to bear technical expertise developed by continuous contact with the regulated community that courts and legislatures simply cannot replicate because they must, by design, remain generalists. *Id.*

Administrative proceedings range from simple and informal hearings to adversarial proceedings where parties retain counsel and present evidence to an administrative tribunal. For example, the State Board of Building Appeals, when handling fire and building code matters, uses extremely informal proceedings, and litigants often appear pro se. Likewise, ODJFS proceedings involving the termination of a home-healthcare-provider agreement often utilize very informal procedures in which the providers do not have counsel. In contrast, ODJFS proceedings instituted for purposes of collecting overpayments to Medicaid providers—which can involve hundreds of thousands or millions of dollars—normally involve extensive discovery, expert testimony, and a trial-type proceeding in order to resolve all of the pertinent factual and legal issues.

The variety of procedures can be explained by the fact that not all regulatory decisions involve disputed issues of law and fact requiring formal trial-like procedures. In fact, many issues may be relatively minor and may well lend themselves to more informal resolution. *See Levy & Shapiro, Administrative Procedure* at 479; *see also, e.g., Henize v. Giles*, 22 Ohio St. 3d 213, 217 (1986) (observing in the unemployment context that “the [administrative] hearing is designed to be an administrative information gathering tool serving as an alternative to judicial resolution of every contested claim”). In the same way that there is no one-size-fits-all approach to regulation, agencies require flexibility in crafting procedures—particularly in the context of

how to handle evidentiary issues—in order to ensure they can provide fair processes without sacrificing efficiency. Levy & Shapiro, *Administrative Procedure* at 497-99.

Adherence to strict evidentiary and procedural rules creates challenges for administrative adjudication in a number of ways. First, increased formality—particularly in the context of evidentiary issues—will increase the complexity and cost of administrative adjudication. Second, and more importantly, rigid application of rules designed to operate in a jury system will impair the ability of agency decisionmakers—many of whom possess technical expertise but not legal training—to serve an adjudicatory function.

Although the type and complexity of administrative adjudications vary greatly, administrative proceedings are designed in part to provide less costly and more expeditious resolution of issues than traditional litigation. Administrative proceedings are intended to be streamlined so that interested parties may obtain quick and cost-effective resolution of issues. In fact, there are many contexts where administrative proceedings are designed to be informal and minimally adversarial, eliminating the expense and complexity that often arises when parties must face off against one another and be represented by counsel. Even where proceedings have a greater degree of formality, efficient resolution of issues is critical. *See, e.g., Griffin v. State Med. Bd. of Ohio*, No. 09AP-276, 2009-Ohio-4849, ¶ 9 (10th Dist.) (“We have held that administrative agencies must give licensees a fair hearing and determination as expeditiously as possible under the circumstances....”). At its core, administrative adjudication at all levels reflects a balancing of the competing interests of formality and rigor of process on the one hand and more efficient and less costly adjudication on the other. *See Levy & Shapiro, Administrative Procedure* at 504 (“[A]dministrative procedures often serve as substitutes for trials. The evolution of administrative procedures reflects a broad sense that they are far less costly than

trials and that varied and informal procedures can be followed without sacrificing the accuracy of agency decisions.”).

The hearsay rule, in particular, reflects the kind of technical legal construct that will not always be compatible with agency efforts to resolve issues in an efficient and cost-effective manner. The difficulties of applying the rule itself—not to mention the exceptions and exclusions—require significant technical expertise and can be frustrating to even the most skilled practitioners and jurists. It would therefore be unwise to import these concepts wholesale into the administrative context.<sup>1</sup>

Moreover, because many administrative agencies rely on non-attorney experts as decisionmakers, importing complex legal concepts such as the hearsay rule could serve to both confuse those experts and impair their ability to apply that unique technical expertise to the cases before them. One area where this may have particular force is in the context of professional licensing and discipline. Many such boards are made up of professionals who are familiar with documents and other evidence that may be pertinent to the issues raised in a particular case by virtue of their professional expertise. For example, healthcare professionals are familiar with medical records, radiographs, lab reports, etc., and possess the expertise (that a court may not) to allow them to evaluate the relevance and trustworthiness of such evidence. Because of their expertise, they may be able to determine that a record is incomplete, has been altered, is in some

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<sup>1</sup> This is not to say that there may not be circumstances where particular agencies may adopt formal rules of evidence or procedure—including the hearsay rule—should they determine that doing so would be beneficial. But it is important that agencies retain the flexibility to make those decisions on an individualized basis. *Compare* O.A.C. 4301:1-1-65(D) (“In all hearings before the [Liquor Control Commission], and the determination thereon, the production of evidence shall be governed in general by the rules of evidence and burden of proof required by Ohio courts in civil cases.”) *with* O.A.C. 4731-13-25 (“The ‘Ohio Rules of Evidence’ may be taken into consideration by the [State Medical Board] or its hearing examiner in determining the admissibility of evidence, but shall not be controlling.”).

other way unreliable, or, conversely, that the document is highly likely to be authentic and trustworthy. (And they may be able to draw this conclusion even though, were the evidence presented to a court, it would be inadmissible because it did not strictly comply with the hearsay rule.)

It is this expertise that enables regulatory decisionmakers to understand the limitations of particular types of documents and what weight they should be given. For example, members of the medical licensing board are uniquely qualified to review and assess the weight and relevance of medical literature, scientific studies, and other publications that might generally only be admissible in a court under some exception or exclusion to the hearsay rule. *See, e.g.,* Evid. R. 803(18) (concerning admission of statements from “learned treatises”). In a civil proceeding, the hearsay rule imposes significant limitations on these sorts of technical publications in large measure because of the danger that juries might lack the technical expertise to assign them proper weight. In the context of the medical review board, that concern is nonexistent as the medical professionals who would be tasked with reviewing this evidence possess the requisite expertise to assess its probative force.

Undoubtedly, there may be circumstances where hearsay evidence is of such pernicious character as to warrant its exclusion under any circumstances. Administrative agencies are free to exclude this kind of evidence. And, as discussed below, the courts play an essential role in protecting against just such a danger. Ultimately, the general inapplicability of the hearsay rule in administrative adjudication reflects a balancing of interests that is essential to the efficient and effective operation of the administrative state. And the decision about how to strike that balance in the context of administrative adjudication is best left to the agencies in the first instance. *See generally* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative*

*Process*, 55 Harv. L. Rev. 364 (1942) (observing that the diversity of agencies and agency procedures counsels reliance on agencies to exercise discretion to craft evidentiary rules tailored to individual agency procedures); *cf. also* Ervin H. Pollack & J. Russell Leach, *A Re-appraisal of the Ohio Administrative Procedure Act*, 11 Ohio St. L.J. 69, 82 (1950) (“It is granted that any attempt to apply all of the rules of evidence to the administrative field would be harmful, since they were evolved out of a lay jury system and their application to the administrative program would be untenable.”).

**C. The standard of review applicable to administrative decisions prevents improper or unjust consideration of hearsay evidence by administrative agencies.**

Concerns about reliability animate the general rule excluding hearsay statements and hearsay exceptions. *Weinstein’s Evidence Manual* § 14.01; *see also, e.g.*, Fed. R. Evid. 803 Advisory Committee Notes (“The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.”). Courts therefore use the hearsay rule and its exceptions as a safeguard for trustworthiness and reliability. Because administrative agencies have a freer hand in making admissibility determinations, they will be able to rely upon hearsay evidence that bears sufficient indicia of trustworthiness even though a court that must strictly adhere to the Rules of Evidence could not. Of course, agency discretion to consider hearsay evidence is not boundless. The standard of review applicable to administrative decisions ensures that agencies exercise that discretion in an appropriate way.

Courts applying this standard of review also police certain hearsay in administrative adjudications because they must examine the record supporting an agency decision in order to determine whether that decision can stand. Reviewing courts must examine the entire

administrative record to determine whether an agency decision is supported by *reliable*, probative, and substantial evidence and is in accordance with the law. *Our Place, Inc. v. Ohio Liquor Control Comm'n*, 63 Ohio St. 3d 570, 571 (1992) (citing R.C. 119.12).<sup>2</sup> The obvious linchpin of this standard for present purposes is that evidence supporting an order must be reliable, which this Court has defined as “dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.” *Bartchy v. State Bd. of Educ.*, 120 Ohio St. 3d 205, 2008-Ohio-4826, ¶ 39; *see also Our Place, Inc.*, 63 Ohio St. 3d at 571.

Therefore, administrative agencies face two significant limitations on their ability to admit and rely upon hearsay evidence. They must not exercise their discretion to consider hearsay evidence in an arbitrary fashion, nor may they rely upon hearsay evidence to support their decision if that evidence is not reliable.

One decision, though by no means the only one, that illustrates the role judicial review serves in cabining agency discretion is *Almondree Apts. of Columbus, Ltd. v. Bd. of Revision of Franklin Cnty.*, No. 87AP-1216, 1988 Ohio App. LEXIS 2665 (10th Dist.). The dispute between the parties centered on the proper valuation of an apartment building located in Franklin County. Following a sale of the property to the plaintiff-taxpayer, the county reassessed the value of the property based on the price in the title transfer documents. The taxpayer challenged that assessment and ultimately appealed to the Board of Tax Appeals. Following a hearing, the board concluded that the assessment should be lowered to reflect the fact that the sales price listed in

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<sup>2</sup> The vast majority of appeals of state agency adjudication occur under R.C. Chapter 119. However, certain administrative appeals are governed by slightly different statutes that use slightly different, though analogous, language concerning the standard of review to be applied by courts. *See, e.g.*, R.C. 5717.04 (governing review of decisions by the Board of Tax Appeals); R.C. 4141.282(H) (governing review of awards of unemployment compensation).

the deed did not reflect the value of the property because 1) the sale was not an arms-length transaction and 2) the sale price had been artificially inflated due to the inclusion of non-real-estate items in the terms of the sale. The board reached its conclusion by relying almost entirely on the testimony of an appraiser hired by the taxpayer, who arrived at his lower appraisal based on conversations he had with certain of the taxpayer's employees and review of transaction-related documents. *Id.* at \*3-4.

The Tenth District vacated the board's order, concluding that its reliance upon the appraiser's testimony constituted an arbitrary exercise of its power to admit and consider hearsay evidence. *Id.* at \*7-8. The court was troubled by the fact that the appraiser's testimony concerning the central issue of valuation was based almost entirely on conversations he had with the taxpayer's employees and documents he reviewed that were never admitted into evidence. Importantly, the court offered no objection to the board's consideration of hearsay generally. *Id.* Rather, the board's decision to rely on testimony comprising almost entirely of hearsay, without seeking any testimony from the actual parties to the transaction or even accounting for documentary evidence, presented the exact danger that core hearsay principles are meant to avoid. *Id.*

Because courts have extensive experience with the rules of evidence and the restrictions on the admission of hearsay, they are well-qualified to identify those situations in which an administrative body's reliance on hearsay evidence crosses the line between an acceptable exercise of sound discretion and improper reliance upon evidence of dubious character. This is not to say that judicial review of reliability should become simply a proxy for strict application of the hearsay rule. After all, if agencies are to have discretion to consider hearsay evidence, it cannot be the case that reviewing courts will set aside that evidence simply because, if presented

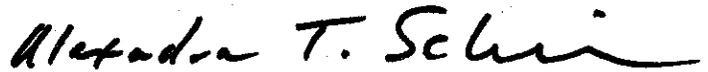
to a court, it would not be admissible. *See Simon*, 69 Ohio St. 2d at 45. Ultimately, administrative adjudication requires flexibility, and courts have adequate tools to police the use of that flexibility. The system as it exists works and should not be altered.

### CONCLUSION

Amicus the State of Ohio therefore offers the foregoing for the Court's consideration in resolving this matter.

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