

IN THE SUPREME COURT OF OHIO

RONALD ROYSE,)	CASE NO. 2011-1477
)	
Petitioner-Appellee,)	On Appeal from Montgomery County Court
)	of Appeals, Second Appellate District
vs.)	Court of Appeals Case No. 24172
)	
CITY OF DAYTON,)	
)	
Respondent-Appellant.)	
)	

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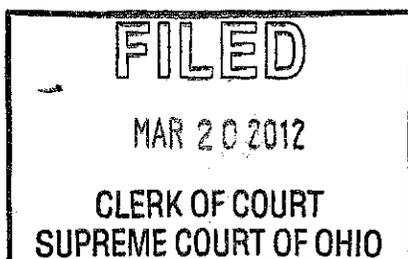
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I. INTRODUCTION

On November 16, 2011, this Court accepted jurisdiction over the instant case, which involves a City of Dayton (“Dayton”) firefighter (Mr. Royse) terminated after a hearing before the Dayton Civil Service Board (“Board”). The Board, at the time of the hearing, was governed by a rule stating that “admission of evidence” is “governed by the rules applied by the Courts of Ohio in civil cases.”

At Mr. Royse’s hearing before the Board (pertaining to drug test results), Dayton introduced the tests, where collection is performed by a third party, the actual test by a fourth party, and the analysis of the test by a fifth party, by claiming they were admissible under a hearsay exception as business records. While the Board and the trial court agreed that the records were admissible, the Second District Court of Appeals did not.

Dayton sought review before this Court, proposing three propositions of law. Amicus Ohio Municipal League (“OML”) also raised two propositions of law.

Apparently as a consequence of this case, Dayton has since amended the relevant rule to eliminate the reference to being “governed” by anything, and the rule now expressly states that “The Board or Hearing Officer shall **not** be bound by the Rules of Evidence” (emphasis added).

Dayton now argues before this Court that: (1) it did not adopt the Rules of Evidence; (2) that the drug test results were admissible under some relaxed hearsay standard; and (3) the drug test results were admissible under the business records exception (despite the fact it had not made this argument consistently below).

The facts and law will actually show: (1) Dayton adopted the Rules of Evidence (and any arguments to the contrary are incorrect or waived); and (2) the Second District Court of Appeals properly reversed the legal errors of the trial court in holding that the test results were

inadmissible hearsay. In any event, because Dayton has changed the rule in question, the issues in this case will not present themselves again. Finally, in the event the Court is inclined to reverse the court of appeals, there is a secondary issue that remains pending.

II. STATEMENT OF FACTS

A. Ronald Royse

Ronald Royse joined the Dayton Fire Department in 1995, and had been an exemplary employee. Prior to his service to the City of Dayton, Royse was a four year veteran of the United States Marine Corps, from which he was honorably discharged.

B. Dayton's Drug Testing Procedure for Firefighters

Dayton's ability to drug test its firefighters for disciplinary purposes is governed by Article 33, Section 1, of the Labor Agreement between the City of Dayton and the International Association of Firefighters, Local 136, A.F.L.-C.I.O ("Labor Agreement"). Transcript of Proceedings, July 22, 2008, at 16 ("Transcript"); Transcript, City Exh. 1.

The Labor Agreement is explicit that Department of Transportation ("DOT") testing standards will be used. Article 33, Section 7(B)(6) states that "the method of **collecting, storing, and testing** the split sample will follow the Department of Transportation guidelines." Transcript, City Exh. 1 (emphasis added). Moreover, Article 33, Section 12, requires that for random drug testing procedures, "urine samples will be collected per DOT standards." Transcript, City, Exh. 1. Dayton has acknowledged that the Labor Agreement required DOT testing, and that there is a difference between DOT testing and non-DOT testing. Transcript, 87-

88. Dayton did not know whether the testing ordered for a “non-DOT” test was the same for a “DOT test.” Transcript, 92.¹

According to the witness for the City of Dayton, the process of drug testing requires four steps and three separate companies:

- (1) Dayton contracts the process out through Concentra Medical Center, located on Troy Street in Dayton, Ohio. Transcript, 23-24.
- (2) Concentra is responsible for collecting the urine specimen. *Id.*
- (3) They send the specimen to a lab, ATN, in Memphis, Tennessee. *Id.* That lab does the actual testing. *Id.*
- (4) However, that lab communicates the information regarding the test to Alternative Safety and Testing Solutions (“ASTS”) which provides a “Medical Review Officer” who verifies the test results and communicates information regarding positive results to Dayton. *Id.*

However, no individual affiliated with any of these companies testified. Moreover, no individual involved with the drug testing for Royse (discussed below) testified as to the testing procedure. Ken Thomas, Safety Administrator for the City of Dayton, testified that in previous hearings before the Board, Dayton has called the individuals who performed the tests to testify as to the accuracy and procedure of the individual test. *Id.*, 238. No such testimony was supplied here.

C. Royse’s Drug Tests

On May 14, 2007, Royse was ordered to submit to a random urinalysis pursuant to Article 33, Section 1, of the Agreement between the City of Dayton and the International Association of Firefighters, Local 136, A.F.L.-C.I.O (“I.A.F.F.”). Transcript, 68. He complied with this order without objection.

¹ Counsel for Royse: So you don’t know if the testing is different for a DOT standard versus a non-DOT standard?

Ken Thomas: No, sir, I would not.
Transcript, 92.

There was no testimony from the individual who collected the specimen on this date. No party testified as to whether the matter followed the procedure described above. No witness testified with personal knowledge that the collection and testing procedures occurred as expected. A result was later sent from Alternative Safety and Testing Solutions, with no quantitative results, alleging by the Medical Review Officer (MRO) that the “Non-DOT Results” of the test was positive for Cocaine with comments that it was “Non-Contact Positive/Subject to Further Review.” Transcript; City Exh. 7.

As a result of the alleged positive result, Royse was required to attend a three day Employee Health Education Program, which he successfully completed. Transcript 77-80. He was ordered to submit to subsequent drug screening in the next four months, which were without incident. At least one of his negative follow-up tests (the Return to Work Test) on May 31, 2007 was a DOT Test. Transcript, 93, 137; City Exh. 9. The follow-up screening was posted on a notice that stated “NOTICE TO REPORT FOR DOT DRUG and/or ALCOHOL TEST.” Transcript; City, Exh. 9. When a negative drug test was received, Dayton received no notice of the results.

On November 15, 2007, Royse was ordered to again submit to testing. Transcript, 145-146; City Exh. 12. The Exhibit again, states at the top “(NON-DOT TESTING).” *Id.* The Dayton employee in charge of sending the order admitted that Royse was not sent for a DOT test. Transcript, 157.

Royse reported to Concentra Lab, 1 Franciscan Way, Dayton Ohio and submitted a “split sample” urine. Transcript; City Exh. 5. The “Custody and Control” form in City Exh. 5, is particularly telling. The top of the form explicitly states: “Do not use this form for D.O.T. collections.” *Id.* He was subsequently notified that he had tested positive for cocaine in a “Non-

DOT Test,” again with no quantitative results, alleging by the Medical Review Officer (MRO) of a “Non-Contact Positive/Subject to Further Review.” Transcript, City Exh. 13.

There was no testimony from any party involved in determining the quantitative results. There was no testimony from any party involved in interpreting the quantitative results.

D. The Hearing Before the Dayton Civil Service Board

Under the Labor Agreement, Royse appealed his decision to the Dayton Civil Service Board, where he was entitled to a *de novo* review of the facts leading to the termination. The Dayton Civil Service Board rules in effect at the time provided “The admission of evidence shall be governed by the rules applied by the Court of Ohio in civil cases.” Rule 14, Section 5 (A) Procedure at Hearings of the Rules and Regulations (“Board Rules”).

At the hearing, Dayton initially attempted to introduce the drug test results through the Dayton Human Resources representative who had no involvement with the test. Transcript, 104. After an objection, the City Attorney switched to asking whether Dayton “[kept] those test results in the ordinary course of business” *Id.*, 105. Dayton then attempted to introduce the exhibit as admissible evidence. *Id.* Counsel for Royse objected. *Id.*

At the end of the hearing, the counsel and the Civil Service Board were reviewing the admissibility of exhibits. Counsel for Royse again objected to the admission of the drug tests, pointing to the fact that business records exception did not apply to records generated by third parties. *Id.*, 225-226.

In response, counsel for Dayton stated “We believe that the City absolutely has met the criteria in Rule 803(6). That rule does not say that the data contained in the document has to be done by the person from the City of Dayton.” *Id.*, 229.

The Civil Service Board considered the objection and then overruled it, admitting the exhibits. *Id.* at 231. The Civil Service Board issued a decision affirming the termination on the basis of the disputed exhibits.

E. The Trial Court's Decision

Royse filed an appeal to the Montgomery County Common Pleas Court on two grounds. He argued (1) that the exhibits were inadmissible hearsay, not subject to the business records exception, and consequently, the decision of the Civil Service Board was wrong on the merits; and (2) in any event, the tests were “non-DOT tests” and in violation of the Labor Agreement.

In response, Dayton's brief **no longer** contended that the tests constituted business records (the phrase “business records” does not appear in Dayton's trial court filings), but instead argued that the Civil Service Board was not bound by the strict rules of evidence. *Brief of Appellee City of Dayton, Ohio* (filed 6/17/2010). They further argued that the testimony of their witnesses with regards to the differences between the DOT test and the non-DOT test was sufficient to find that a non-DOT test was a DOT test.

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

F. The Second District Appeal

Royse further appealed to the Second District Court of Appeals, re-raising his same arguments made to the trial court.

Dayton again reiterated their argument that the Civil Service Board was not bound by the strict rules of evidence. *Brief of Appellee City of Dayton, Ohio* (filed 10/20/2010). The phrase

“business records” does not appear in this brief, much less any discussion of an exception to the hearsay rule.

The Second District reversed the trial court. *Royse v. City of Dayton*, 195 Ohio App.3d 81, 2011-Ohio-3509, 958 N.E.2d 994 (2d Dist.) (“Decision”). In the Decision, the court noted that this outcome was mandated by the fact “the Board itself chose to adopt a rule that requires it to apply the fundamentals of the rules of evidence in its proceedings.” Decision, ¶ 20. The Second District held that it was “undisputed” that the drug test results inadmissible hearsay unless they qualified as an exception, but that no exception applied. Decision, ¶¶ 22, 30.

G. After the Decision

Apparently in response to this case, Dayton successfully legislated an amendment to Rule 14. See Exhibit A to Royse’s Notice Regarding Jurisdictional Status (“Notice,” filed 1/3/2012). The first rule change deletes Section 5(A) (“the admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases”) and replaces it with the previous Section 5(B).

The second change of relevance amended the former Section 5(D) (discussing the authority of the Board or Hearing Officer in conducting a hearing) to add “the Board or Hearing officer shall not be bound by the Rules of Evidence.” Exhibit A, Section 5(C).

These changes completely vitiate the underpinning of the Second District’s Decision: that the Civil Service Board had agreed to be governed by the Rules of Evidence.

H. The Rules of Evidence and Other Administrative Bodies

With respect to this Court’s decision on jurisdiction, Royse believes that any pronouncement of law by the Court in this case would only apply to the parties *inter se*, because Dayton had the only civil service commission mandating the application of the Rules of Evidence. Below is a chart showing the other relevant agencies and the appropriate rules:

Chart of Administrative Agencies and Application of Evidentiary Rules			
Entity	Rule	Language Regarding Evidence	Governed by Rules of Evidence
Akron Civil Service Commission	Rule 10(4)(3) ²	“[T]he Commission need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the matter through oral testimony and records presented at the hearing”	No (express rejection)
Cincinnati Civil Service Commission	Rule 17(5)(b) ³	“[T]he admission of the evidence shall be governed by the decision of the Civil Service Commission or trial hearing board.”	No
Cleveland Civil Service Commission	Rule 9.70 ⁴	“The Commission shall announce its decision after reviewing all of the testimony, exhibits, briefs and arguments of counsel.”	No
Columbus Civil Service Commission	Rule 14(A)(3)(c) ⁵	“The Commission shall rule on all matters of evidence. In so doing, the Commission shall not be strictly bound by the Rules of Evidence”	No (express rejection)

² A copy of the relevant portion of the Rule is attached as “Exhibit B” to the Notice. In fact, the Ninth District has held that this rule does not require the formal rules of evidence to apply before the Akron Civil Service Commission. *Steiner v. City of Akron*, Ninth Dist. No. 19978, 2000 Ohio App. LEXIS 3080 (July 12, 2000).

³ Available online at <http://www.cincinnati-oh.gov/cityhr/pages/-6061/>.

⁴ The Rules document is available for download at <http://www.cleveland-oh.gov/CityofCleveland/Home/Government/CityAgencies/CivilServiceCommission/CivilServicePublications>.

⁵ Available online at http://csc.columbus.gov/rule_pdf/RULE_XIV.pdf.

Chart of Administrative Agencies and Application of Evidentiary Rules			
Entity	Rule	Language Regarding Evidence	Governed by Rules of Evidence
Findlay Civil Service Commission	Rule IX(3)(d) ⁶	“The introduction of evidence on the hearing of appeals and the Commission’s decision thereof shall be governed in general by the burden of proof applied by courts in civil cases. Court rules of evidence shall be a useful guide but may be relaxed by the Commission for its hearing.”	No (express relaxation)
Toledo Civil Service Commission	Rule 110.03 ⁷	“[T]he commission need not strictly follow the rules of evidence usually applied by the courts in civil cases.”	No (express relaxation)
State Personnel Board of Review	O.A.C. 124-9-02	“The board may permit the introduction of evidence otherwise excludable as hearsay. A foundation, establishing both the reliability of the testimony and its necessity, shall be laid before hearsay may be admitted.”	Yes, “except as modified by these rules”) (OAC 124-9-01)
State Industrial Commission	R.C. 4123.10 ⁸	“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.”	No (express rejection)
State Department of Job and Family Services (Unemployment)	R.C. 4141.281(C)(2)	“Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure.”	No (express rejection)
Ohio State Medical Board	O.A.C. 4731-13-25	“The “Ohio Rules of Evidence” may be taken into consideration by the board or its hearing examiner in determining the admissibility of evidence, but shall not be controlling.”	No (express relaxation)

⁶ Available online at

<http://www.ci.findlay.oh.us/uploads/File/CivilServiceCommission/FORMS/Civil%20Service%20Rules%20and%20Regulation%202009.pdf>.

⁷ A copy of the relevant portion of the Rule is attached as “Exhibit C” to the Notice.

⁸ See *State ex rel. Domjancic v. Industrial Comm'n*, 69 Ohio St.3d 693, 695, 635 N.E.2d 372 (1994) (where this Court acknowledged that the Rules of Evidence do not apply in hearings before the Industrial Commission).

Chart of Administrative Agencies and Application of Evidentiary Rules			
Entity	Rule	Language Regarding Evidence	Governed by Rules of Evidence
Ohio Liquor Control Commission	O.A.C. 4301:1-1-65	“In all hearings before the 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”	<i>Yes</i>

As far as can be reasonably ascertained, Dayton was the **only** civil service employer to expressly codify that the admission of evidence before the Civil Service Board “shall be governed by the rules applied by the Courts of Ohio in civil cases.”

III. ARGUMENT

Response to Dayton’s Proposition of Law I: A municipal civil service board is not strictly bound by the Ohio Rules of Evidence in administrative hearings unless specifically required by law.

Response to OML’s Proposition of Law I: Administrative bodies are not required to apply the Ohio Rules of Evidence and, therefore, the Ohio Rules of Evidence do not apply to an administrative proceeding unless the administrative body has clearly identified and adopted the Ohio Rules of Evidence.

For their first proposition of law, Dayton and the OML each argue: (1) that the Ohio Rules of Evidence **never** bind administrative proceedings; (2) the Board did not adopt the Rules of Evidence expressly because “governed” means “guided”; (3) the Board did not adopt the Rules of Evidence because Rule 14 does not expressly refer to them; and (4) the Board did not adopt the Rules of Evidence because R.C. 713.231 was not complied with. Each of these arguments are incorrect.

Dayton fails to acknowledge that under the Dayton Municipal Code and Ohio case law, administrative agencies are free to adopt whatever standards of admissibility they choose (and in fact, at least one Ohio agency adopts the strict application of the Ohio Rules of Evidence).

Second, the suggestion that “governed” means anything other than “controlled” is belied by the word’s usage throughout the state of Ohio. Third, the Board expressly adopted the Rules of Evidence, because the Board adopted “the Rules of the Courts of Ohio,” which according to Evid.R. 101, is the Rules of Evidence. Lastly, R.C. 713.231 does not apply, was not raised below, and is therefore waived (either directly or under the invited error doctrine), and cannot be used offensively.

A. The Ohio Rules of Evidence can be adopted by an administrative body.

Dayton cites *Plain Local Sch. Bd. of Educ. v. Franklin County Bd. of Revision* for the general proposition that the Ohio Rules of Evidence do not apply “directly” in administrative proceeding. Dayton Brief, 4; *Plain Local*, 130 Ohio St.3d 230, 234-235, 2011-Ohio-3362, 957 N.E.2d 268; citing *Orange City School Dist. Board of Educ. v. Cuyahoga County Bd. of Revision*, 74 Ohio St. 3d 415, 417, 659 N.E.2d 1223 (1996).

Neither of these cases are applicable in this matter. First, *Orange City* was addressing the fact that Evid.R. 101(A) (“These rules govern proceedings in the courts of this state...”) did not by its own language or enactment become applicable to administrative proceedings. *Id.* at 416.

Similarly, *Plain Local* was addressing the fact that the hearsay objection was made for the first time on appeal before this Court. *Id.* at 233. The actual holding of *Plain Local* was “that the school board’s failure to raise a hearsay objection disposes” of the matter. *Id.* at 235.⁹

Neither case addresses what internal rules governed the administrative proceedings, and neither case is therefore dispositive for the proposition that the Ohio Rules of Evidence cannot be adopted as governing. In fact, the State of Ohio, in its amicus brief, points out that the Ohio

⁹ In the *Plain Local* decision, this Court cited to a number of Liquor Control Commission cases for the failure to object to hearsay renders it waived. *Plain Local* at 235. As discussed above, the Liquor Control Commission is one of the few administrative agencies state wide to have expressly adopted the Ohio Rules of Evidence.

Liquor Control Commission has also adopted the Ohio Rules of Evidence as governing its administrative proceedings.

Dayton also ignores *Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 161, 250 N.E.2d 262 (10th Dist.1969), which is directly on point. In *Milton Hardware*, the court stated

an administrative agency may generally enact rules as to the standards of admissibility of evidence to be followed in its hearings. In a number of instances, general standards applicable to specific agencies are provided by particular statutes. These range from provisions that the agency shall not be bound by common-law or statutory rules of evidence *to provisions that the evidence shall be submitted as in the trial of civil actions.*

Id. (emphasis added and internal citations omitted). As discussed below, that is exactly what happened here.

B. “Governed” means controlled.

After the general argument that the Ohio Rules of Evidence cannot be adopted, Dayton and the OML shift gears to asserting that the Board did not adopt it. The Board Rule 14 uses the phrase “governed by the Rules of the Courts of Ohio.” Both Dayton and the OML assert that the **second** definition in the *Merriam-Webster Dictionary* for “governed” is what Dayton actually intended in the Board Rules. The second definition of “governed” is “to exert a determining or guiding influence in or over” Dayton and OML contend that use of this definition of “governed” show that the Rules of Evidence would not strictly apply. Dayton Brief, 5.

The argument holds no water. This Court uses the term “governed” throughout the Rules controlling the courts of Ohio.

Rule Set	Rule	Use of “Govern” as Mandatory
Rules of Evidence	Evid. R. 101(A)	“These rules govern proceedings in the courts of this state”

Rules of Appellate Procedure	App. R. 1(A) (see also 11.2(B)(4),(6))	“These rules govern procedure in appeals to courts of appeals from the trial courts of record in Ohio.”
Rules of Civil Procedure	Civ. R. 4.4(A)(1)	“Except in an action governed by division (A)(2)”
Rules of Criminal Procedure	Crim. R. 16(J)(2)	“[T]ranscripts are governed by Crim. R. 6.”
Supreme Court Rules of Practice	S.Ct. Prac. R. 5.7 (see also 6.1 and 10.9(A)(2)).	“[T]he creation, transmission, supplementation, and correction of the record shall be governed”
Federal Rules of Civil Procedure	Fed. R. Civ. P. 1	“[T]hese rules govern the procedure”
Federal Rules of Appellate Procedure	Fed. R. App. P. 1	“[T]hese rules govern the procedure”

Holding that “governed” meant “guided” would eviscerate the foundational rules of procedure in this state. “Governed” plainly means “controlled.”

C. Rule 14 expressly adopts the Rules of Evidence.

Continuing their litany of unsupported authority, Dayton contends that because “nowhere, in the [Board] Rules, is there ever one mention of the ‘Rules of Evidence,’ Ohio or otherwise,” that the Rules of Evidence were not adopted. Dayton Brief, 4. In support of this, Dayton cites Board Rule 14, Section 5(D) which 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 the hearing.” Dayton appears to be contending that because the Board can admit or exclude evidence with “full authority,” that the authority is unrestrained.

This matter is governed by general principles of statutory interpretation. *C.D.S., Inc. v. Gates Mills*, 26 Ohio St.3d 166, 168, 497 N.E.2d 295 (1986) (using general statutory

interpretation principles in the analysis of a municipal code). The Court's role "is to apply clear and unambiguous statutes as written and to engage in no further interpretation." *State ex rel Burrows v. Industrial Comm'n*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997); *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶ 22.

Again, Board Rule 14, Section 5(A) states, "The admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases." Having established above that "governed" means "controlled," the only question of statutory interpretation is what "rules" are "applied by the Courts of Ohio in civil cases" for the "admission of evidence"?

When considering the principles of statutory interpretation, that question is answered by Evid.R. 101(A): "these rules govern proceedings in the courts of this state." Dayton plainly chose to be governed by the Rules of Evidence.

D. R.C. 713.231 does not apply to the Rules of Evidence.

Evidently prompted by the OML's Memorandum in Support of Jurisdiction (as it is the first time the concept has been mentioned in this litigation), Dayton now contends that R.C. 713.231 bars the adoption of the Ohio Rules of Evidence by the Board. This assertion fails both on the merits and because it was not raised below.

R.C. 731.231 permits "the legislative authority of a municipality" to "adopt standard ordinances and codes . . . prepared or promulgated by a public or private organization which publishes a model or standard code, including but not limited to codes and regulations pertaining to fire, fire hazards, fire prevention, plumbing code, electrical code, building code, refrigeration machinery code, piping code, boiler code, or air conditioning code, by incorporation by reference."

1. *The failure to raise this argument below results in its waiver.*

This Court does not review issues that were not raised in the trial court. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). At no point in any of the proceedings below did Dayton contend that R.C. 731.231 barred the application of the Rules of Evidence in Board hearings.

2. *The invited error doctrine bars reversal on this basis and in any event, should not be used offensively.*

At the hearing before the Board, Dayton did not contend as they do today: (1) that the Rules of Evidence did not apply; or (2) that the Rules of Evidence were relaxed in administrative proceedings, rather they only argued that the drug test results were admissible as business records. At the appeal before the trial court and the court of appeals, Dayton did not contend that the Rules of Evidence did not apply, rather they only argued that the standards were “relaxed” in administrative proceedings. At no point, did they argue that the Rules of Evidence were somehow improperly adopted.

Given these facts, the invited error doctrine bars Dayton from taking “advantage of an error that he himself invited or induced the trial court to make.” *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 472, 692 N.E.2d 198 (1998).

It is for this reason that Dayton cannot enact an ordinance (now changed) promulgating a rule that states “The admission of evidence shall be governed by the rules applied by the Courts of Ohio in civil cases,” litigate under the Rules of Evidence before the Board, and once the decision of the Board is reversed because of the Rules of Evidence, **now claim the ordinance is invalidly enacted.** They cannot have it both ways.

3. *R.C. 731.231 applies to ordinances or codes of conduct, not procedural standards.*

There is no legislative authority cited for what types of “ordinances or codes” R.C. 713.231 applies to. The statute itself provides some guidance: “fire, fire hazards, fire prevention, plumbing code, electrical code, building code, refrigeration machinery code, piping code, boiler code, or air conditioning code” R.C. 713.231.

The listed codes are clearly referring to general codes of enforcement, not rules of procedural consideration. All of the codes listed in the statute are external (that is, generally applicable to citizens’ day to day life), and provide minimum standards for safety and welfare. Given these, “that which is clearly implied from the express terms of a statute is as much a part thereof and is as effectual as that which is expressed.” 85 Ohio Jurisprudence 3d, Implications and Inferences, Section 211 (2011); citing *Larkins v. Routson*, 115 Ohio St. 639, 5 Ohio L. Abs. 45, 155 N.E. 227 (1927). R.C. 731.231 should not be construed as applying to adopted rules relating to the procedure of administrative hearings.

Response to Dayton’s Proposition of Law II: A municipal civil service board’s decision which is supported by a preponderance of reliable, probative, and substantial evidence, even if said evidence is inadmissible hearsay under the Ohio Rules of Evidence, does not rise to the level of abuse of discretion.

Response to OML’s Proposition of Law II: Hearsay evidence, in administrative proceedings and in the absence of an administrative board’s adoption of the Ohio Rules of Evidence, may be admitted by the administrative board, and the court of appeals, absent a finding that the discretion to consider hearsay was exercised in an arbitrary manner, cannot disregard evidence that was admitted at the administrative level.

For the second proposition of law, Dayton generically argues that the trial court’s review of the Board’s Decision was to be under the abuse of discretion standard, and that the evidence before the Board was sufficient to find that Royse failed two drug tests and termination was appropriate under the Labor Agreement. The OML argues generally that consideration of

hearsay evidence by an administrative agency does not constitute an abuse of discretion, and the Second District violated its mandate when it overruled the trial court.

These propositions of law both state noncontroversial principles, and attempt to seek error correction from this court.

A. The standards of review are clear and undisputed.

When a party appeals an administrative agency's decision to the common pleas court, 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. City of Youngstown Bd. of Zoning Appeals* 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). See, also, R.C. 2506.04. The court of common pleas "must weigh the evidence in the record," however, "this does not mean that the court may blatantly substitute its judgment for that of the agency" *Dudukovich v. Lorain Metropolitan Housing Authority*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979).

This court reviews administrative appeals "to determine only if the trial court has abused its discretion." *Board of Educ. of Rossford Exempted Village School Dist. v. State Bd. of Educ.*, 63 Ohio St.3d 705, 707, 590 N.E.2d 1240 (1992). Ohio courts of appeals do not have the ability to review any findings of fact or weigh the evidence in administrative appeals. See *Shields v. City of Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, 876 N.E.2d 972 (2d Dist.).

However, where a trial court's order is based on a misconstruction of law, it is not appropriate for a reviewing court to use an abuse of discretion standard. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 183, 2009-Ohio-2496, 909 N.E.2d 1237; *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist.1992).

“When the trial court’s discretionary decision is based on a misconstruction of the law or an erroneous standard, that decision will not be accorded the deference that is usually due to the trial court, but instead will be reviewed de novo; it is appropriate for an appellate court to substitute its judgment for that of the trial court where matters of law are involved.” *State v. Today’s Bookstore*, 86 Ohio App.3d 810, 823, 621 N.E.2d 1283 (2d Dist.1993). This is because “an important function of appellate courts is to resolve disputed propositions of law.” *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833, ¶ 12.

B. The Board adopted the Rules of Evidence, and the Rules bar hearsay testimony not subject to an exception.

As discussed in the response to the first proposition of law, Dayton adopted the Rules of Evidence. Because they adopted the Rules of Evidence, only competent evidence may be considered.

Rule of Evidence 801 defines “hearsay.” It is a “statement, other than made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A “statement” is 1) an oral or written assertion or 2) nonverbal conduct of a person, if it is intended by the person as an assertion. Evid.R. 801(A).

It is fairly noncontroversial that other than by exceptions outlined below, hearsay is not admissible. Rule of Evidence 802 states:

Hearsay is not admissible except as other provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

According to a brief review of the facts of this case according to the testimony before the Board, Royse’s urine was taken at Concentra on Franciscan Way. A clerk apparently took control of it, and placed it in a FedEx bag. It was shipped to Memphis, Tennessee to ATN,

where some unknown person tested it. After that person tested it, he or she apparently sent some sort of report to a doctor who works for ASTS in Wyoming, Michigan. Based on the lab results from Tennessee, the Michigan doctor issued a Non-DOT Result alleging a positive test for Royse. At the hearing before the Board, Dayton introduced this evidence by way of two human resource representatives. None of the individuals who actually performed the test, transferred the records, or issued the resulting report testified.

The drug test reports are plainly hearsay. They were: (1) statements of fact; (2) offered for the truth of the statement contained therein; and (3) made by an out of court declarant. As hearsay, they are inadmissible unless they qualify for an exception. As discussed below, Dayton has waived all arguments regarding the exceptions and they do not apply.

In this instance, the Second District's Decision did not step outside the mandates of the abuse of discretion standard. The Second District determined *as a matter of law*, that the Board had chosen to be governed by the Rules of Evidence (§ 20), that the test results were hearsay (§ 22), and that no exception applied (§§ 26-30). As discussed, errors of law are not subject to the abuse of discretion standard. *Schlotterer, supra*.

C. Even if the Board *did not* adopt the Rules of Evidence, the test results were inadmissible.

Even under a "relaxed" hearsay standard, the Board cannot act on inadmissible evidence. *Haley v. Ohio State Dental Bd.*, 7 Ohio App.3d 1, 6, 453 N.E.2d 1262 (2d Dist.1982), establishes the following principles: "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." (internal citations omitted). That "arbitrary manner" is exactly what happened here. There was no evidence of the authenticity of the results, the testing

procedure, or even the compliance (or demonstrated lack thereof) with DOT standards as required by the Labor Agreement.

The record before the Board establishes that Dayton knows that the right thing to do is to authenticate the drug test records using the testimony of the company performing the test. It has done this before, but chose not to do so in this case. It instead attempted to establish that the test results were themselves “business records.” It *immediately abandoned* this position after it was successful, not raising it again until this Court. The Board’s decision to admit the drug test records was the definition of arbitrary.

Again, the Second District’s Decision, as a matter of law, that the Board acted in incompetent evidence is appropriate, even under the abuse of discretion standard. There was no error by the Second District in its review of the case.

Response to Dayton’s Proposition of Law III: The phrase “other qualified person” contained in Rule 803(6) of the Ohio Rules of Evidence is not to be narrowly interpreted.

For its final proposition of law, Dayton now contends that the drug test results were business records, admissible under Evid. R. 803(6). This argument is the **sole** argument they presented regarding admissibility before the Board, and it was subsequently abandoned before the trial court and the court of appeals. This proposition of law, as written, is not controversial or in dispute. However, the argument made for this proposition of law fails under a factual predicate, as records received from a third party are not admissible as “business records,” and because it was waived.

A. The failure to raise this argument below results in its waiver.

This Court does not review issues that were not raised in the trial court. *Goldfuss*, 79 Ohio St.3d at 121. Although Dayton made this argument before the Board, it abandoned it in the subsequent appeals. It cannot resume it again before this Court.

B. The recipient of drug test results is not an “other qualified witness” under Evid.R. 803(6).

Dayton has never contested that the drug tests themselves constitute hearsay.¹⁰ Rather, before the Board and now again in this court, they contend that the business records exception embodied in Evid. R. 803(6) applies.

Evid. R. 803(6) provides that an exception to the hearsay rule for:

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.

Dayton argues that Ken Thomas, the Safety Administrator for the city, who received the records, qualifies as an “other qualified witness” because he was capable of testifying what was supposed to happen as to the records.

C. The recipient of drug test results ordered by that party, absent more, does not make the results the business records of that party.

Dayton cites *Great Seneca Fin. v. Felty*, 170 Ohio App.3d, 2006-Ohio-6618, 869 N.E.2d 30, ¶ 14 (1st.Dist) and *State v. Mitchell*, 7th Dist. No. 05 CO 63, 2008-Ohio-1525, for the

¹⁰ In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the U.S. Supreme Court held that chemical test results did constitute hearsay testimony.

proposition that because they **ordered** the drug tests from outside parties, they can be considered part of Dayton's business records. Neither case stands for that proposition.

In *Felty*, the assignee of a credit card company verified the amount it was seeking based on the records of a defaulted account. The affidavit supporting the records described how they obtained and maintained them for the use of collecting on the defaulted accounts. The affidavit further described how the authenticity of the records had been certified by the original credit card company. *Felty*, unlike here, was dealing with a scenario in which the records were transferred to the party actually possessing the legal interest in the action. Here, Dayton ordered the drug test analysis to be performed by one party, to be sent to another party to obtain a result, for its present use.

In *Mitchell*, the Columbiana County Coroner was responsible for investigating a murder.

- The Columbiana County Coroner had an investigator take photographs and examine the body.
- The body was transported to Cuyahoga County for a forensic autopsy under contract. The
- Cuyahoga County Coroner's Office produced the death certificate premised on the autopsy report. At trial, the Columbiana County Coroner testified as to how he selected the cause of death for the death certificate, and the trial court admitted the autopsy report as a business record.

Although the court said in dicta that "since the autopsy record was prepared by the contractual agent of the Columbiana Coroner for the use and maintenance of said corner, it can be considered to have in fact been prepared by the Columbiana County Coroner's Office itself" (2008-Ohio-1525, at ¶ 11), the Court *ultimately held* that the autopsy report was required to be maintained as a public record under R.C. 313.10, and was authenticated by the individual required to maintain it under Evid.R. 901(A), (B)(1), (7). In no way did the court generically

hold that a test result received from a contracted agent becomes a business record of the principal.

Notably, Dayton and the OML fail to cite where drug test records ordered from third, fourth, and fifth parties as part of an employment process become the business records of the employer. There are cases to the contrary. *State v. Juniors*, La. 03-2425, 915 So.2d 291, *cert. denied*, *Juniors v. Louisiana*, 547 U.S. 1115, 126 S.Ct. 1940, 164 L. Ed. 2d 669 (2006). In *Juniors*, a positive drug test was part of a prospective employee's file. The defendant attempted to introduce the drug test result under the business records exception, through the custodian of the employer's file. In that case, the Louisiana Supreme Court said

The Corning Laboratories test was obviously conducted by a third party for use by Fleet Boats. The form was not generated or made in the course of a regularly conducted business activity of Fleet Boats....[The employer's witness] was unable to verify that the entry was made by persons who had personal knowledge of the test or of the test results. In short, she was in no position to testify as to the reliability or trustworthiness of the report. As a result, the report was properly excluded by the trial court.

Juniors, 915 So.2d at 327.

Ohio law generally supports the proposition that documents received from third parties, not incorporated into the ongoing work of the receiving parties (*Felty* and *Mitchell*), are not "business records" subject to a hearsay exception. *Browning v. Fraternal Order of Eagles, Ironton Aerie No. 895*, 4th Dist. No. 1769, 1986 Ohio App. LEXIS 8151, 7-8 (Aug. 22, 1986); *Babb v. Ford Motor Co.*, 41 Ohio App.3d 174, 177, 535 N.E.2d 676 (8th Dist.1987); *State v. Jackson*, 11th Dist. No. 2007-A-0079, 2008-Ohio-6976, ¶ 32; *State ex rel. Shumway v. State Teachers Retirement Bd.*, 114 Ohio App.3d 280, 288, 683 N.E.2d 70 (10th Dist.1996).

Dayton is attempting to mix apples and oranges. There are clearly cases in which a party receives records from a third party, uses it in their own business in a transformational way, and

by such incorporation, establishes it as a “business record” subject to a hearsay exception. However, records ordered from third parties to establish a fact in a disciplinary proceeding subject to due process protections are not these types of records. The test results should have been authenticated in another manner (and Dayton knew how to do this and did this in the past) in order to be admissible.

Royse’s Alternative Ground for Affirmance I: A case premised on civil service commission rules that are modified during the pendency of the appeal does not present a question of great general or public interest when no other civil service commission uses the original rules.

Dayton is apparently the only civil service commission that adopted an evidentiary standard during disciplinary proceedings that incorporate the Ohio Rules of Evidence. Apparently having been made aware of the dangers of this standard by this case, Dayton has enacted legislation bringing the standard in line with those throughout the state that expressly disaffirm the Rules of Evidence as being applicable in hearings before the Board. That has left this case as an orphan, and no longer presenting a question of great general or public interest.

This Court’s “role as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest.” *State v. Bartrum*, 121 Ohio St.3d 148, 153, 2009-Ohio-355, 902 N.E.2d 961 (O’Donnell, J., dissenting). This is the same mandate provided in Section 2(B)(2)(e), Article IV of the Ohio Constitution (the Supreme Court may direct a court of appeals to certify its record “[i]n cases of public or great general interest”).

If, after accepting jurisdiction, the Court concludes that the case does no longer presents a question of public or great general interest, this court should dismiss the appeal as having been improvidently accepted. *Williamson v. Rubich*, 171 Ohio St. 253, 259, 168 N.E.2d 876 (1960)

(dismissing the appeal as having been improvidently accepted “where [the] case presented on the merits is not the same case as presented on motion to certify”).

Similarly, S.Ct. Prac. R. 12.1 contemplates dismissal under the instant circumstances (“When a case has been accepted for determination on the merits pursuant to S.Ct. Prac. R. 3.6, the Supreme Court may later find that there is no substantial constitutional question or question of public or great general interest, or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently accepted, or summarily reverse or affirm on the basis of precedent”).

The Board *previously had* a rule indicating that admission of evidence was “governed” by the Rules applicable in the courts of Ohio in civil cases. This fact was dispositive in the Second District’s Decision. Apparently as a result of the Decision, and to bring its Civil Service Board Rules in line with the rest of the major municipalities and state agencies, Dayton has changed that rule to eliminate the Rules of Evidence from consideration.

Neither Dayton nor the OML cite any other municipality with a similar rule. In fact, as highlighted above, no major municipality incorporates any Rules of Court as “governing.” Several (Akron, Columbus, Findlay, and Toledo) expressly contemplate the Rules of Evidence as **not** governing the proceeding.

The State of Ohio has similarly weighed on the issue as well. The State’s brief noted that over “100 agencies, boards, and commissions” conduct quasi-judicial administrative hearings. Ohio Brief, 3. The State noted that “courts have adequate tools to police” administrative proceedings and “the system as it exists works and should not be altered.” Ohio Brief, 12.

According to Dayton's own records, none of the positive tests were conducted under DOT standards, as required by the Labor Agreement. The Board's decision was unsupported by the evidence required by the Labor Agreement, and must be reversed. *Hall v. Johnson*, 90 Ohio App. 3d 451, 455, 629 N.E.2d 1066 (1993).

Because of its disposition of the evidentiary application issue, the Second District did not reach the DOT test issue raised by Royse in the appeal. In the event this Court is inclined to hold that the drug test results are admissible and reverse the Decision, it should either: (1) affirm the Second District's holding that the decision of the Board was in error because of the failure to order a DOT test; or (2) remand the matter for additional consideration by the Second District.

IV. CONCLUSION

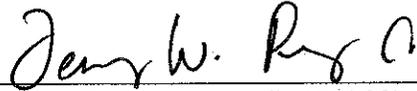
This case is this case. When this case began, Dayton's civil service board rules were apparently unique in that they required the application of the Rules of Evidence. Dayton, despite knowing that in other cases that they had called the third and fourth party testing agencies to authenticate the test results, in this case attempted to use Dayton employees to achieve the same function by describing the results as "business records," a term not mentioned again until this Court.

After Royse was successful in overturning the unsupported decision of the Board, Dayton added multiple new arguments before this Court and changed its rules so that this situation would never arise again, ensuring that this case would remain this case.

The law in Ohio is clear and, as noted by the State, does not need to be changed. Administrative bodies are free to adopt the Rules of Evidence (and Dayton did), the Rules of Evidence do not permit the admission of hearsay absent exception, and no exception was present in this case. The Second District properly reversed the legal errors committed by the trial court.

The Decision should be affirmed. In the alternative, the case should be dismissed as improvidently accepted.

Respectfully submitted,



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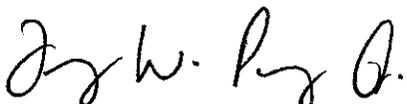
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