

In the
Supreme Court of Ohio

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

REPLY BRIEF OF CITY OF DAYTON

JOHN J. DANISH (0046639)
City Attorney

NORMA M. DICKENS (0062337)
Assistant City Attorney
JONATHAN W. CROFT* (0082093)
Assistant City Attorney
*Counsel of Record
101 West Third Street, 3rd Floor
Dayton, Ohio 45401
(937) 333-4111; (937) 333-3628 (fax)
jonathan.croft@daytonohio.gov

Counsel for Appellant City of Dayton, Ohio

MICHAEL DEWINE (0009181)
Attorney General of Ohio

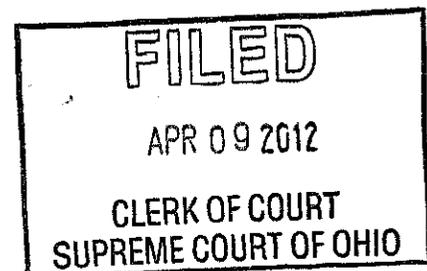
ALEXANDRA T. SCHIMMER* (0075732)
Solicitor General
*Counsel of Record
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980; (614) 466-5087 fax
alexandra.schimmer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae* State of Ohio

TERRY W. POSEY, JR.* (0078292)
* Counsel of Record
Thompson Hine LLP
Austin Landing I
10050 Innovation Drive, Suite 400
Dayton, Ohio 45424
(937) 443-6600; (937) 443-6635 fax
terry.posey@thompsonhine.com

TERRY W. POSEY (0039666)
7460 Brandt Pike
Dayton, Ohio 45424
(937) 236-6444; (937) 236-6000
twposey@daytonlawyers.com

Counsel for Appellee Ronald L. Royse



STEPHEN L. BYRON* (0055657)

**Counsel of Record*

REBECCA K. SCHALTENBRAND (0064817)

Ice Miller LLP

4230 State Route 306, Suite 240

Willoughby, Ohio 44094

(440) 952-2303; (216) 621-5341 fax

stephen.byron@icemiller.com

STEVEN J. SMITH (0001344)

Ice Miller LLP

250 West Street

Columbus, Ohio 43215

(614) 462-2700; (614) 462-5135 fax

stephen.smith@icemiller.com

JOHN GOTHERMAN (0000504)

Ohio Municipal League

175 South Third Street #510

Columbus, Ohio 43215

(614) 221-4349; (614) 221-4390 fax

jgotherman@columbus.rr.com

Counsel for *Amicus Curiae* Ohio Municipal League

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INTRODUCTION

This case involves a question of whether a municipal civil service board conducting an administrative hearing is bound by the Ohio Rules of Evidence. With this case, the Court has an opportunity to clarify the admissibility of hearsay in administrative proceedings and the ability of administrative hearing officers to interpret and apply their own rules as well as the Ohio Rules of Evidence.

In effect, the ruling of Second District Court of Appeals, if allowed to stand, would require all state and local agencies, boards, and commissions that conduct quasi-judicial administrative hearings to strictly apply the Ohio Rules of Evidence when considering hearsay evidence. Moreover, this ruling, taken to its logical conclusion, would require this strict application even when the evidence has substantial indicia of reliability.

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.

The City of Dayton’s Civil Service Board did not adopt the Ohio Rules of Evidence. 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 a 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 a manner of presenting evidence and a 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 governed by the rules applied by the Courts of Ohio in civil cases,” is intended to guide the Board. Additionally, the set of rules referred to by the phrase, the “rules applied by the Courts of Ohio in civil cases,” includes 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. Therefore, 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 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. Consequently, the Board had plenary authority to admit or exclude the reports and the testimony related to the positive drug tests.

R.C. 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

R.C. 731.21, “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 IV, Ohio Constitution. Similarly, R.C. 119.09 states that “the agency shall pass upon the admissibility of evidence...” In other words, 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.

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. When resolving evidentiary conflicts, the court of common pleas 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 it 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 Appellee 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 Appellee'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"), a facility which, as a condition to maintaining its certification, is regularly inspected, tested, and certified by the Department of Health and Human Services' National Institute of Drug Abuse ("NIDA"), and is the laboratory which processes and handles the testing of the urine specimen. (Tr. 24: 8). Article 33 of the CBA requires specimen testing to be in accordance with the guidelines of the NIDA-certified testing facility. 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 utilized with the laboratory which is regularly inspected, tested, and certified by the Department of Health and Human Services' National Institute of Drug Abuse that the City uses in

implementing the substance abuse policy pursuant to its Collective Bargaining Agreement in determining that Appellee 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 Appellee 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 Appellee 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 Appellee 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 Appellee 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, Appellee'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 Appellee'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 Appellee did not request that the split be tested.” In fact, the Board took note that during his pre-disciplinary hearing, Appellee 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 demonstrate that Appellee was guilty of the charge of having a second occurrence of a positive drug or alcohol test, which, under the Substance Abuse Policy outlined in Article 33 of the Agreement between the City of Dayton, Ohio and the International Association of Firefighters clearly states that the penalty for such an occurrence is discharge from employment. Accordingly, the Civil Service Board and the Montgomery County Court of Common Pleas were correct in their affirmances 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 this Court finds that the Ohio Rules of Evidence are to be strictly applied in this matter, the City maintains, as it has throughout the proceedings leading to this Court, that 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 potential 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, method, or 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 is bound by the Ohio Rules of Evidence, the drug test reports are admissible.

CONCLUSION

R.C. 2506.04 makes clear that the decision of an administrative agency should be upheld if it is supported by reliable, substantial, and probative evidence. Additionally, this Court has held that 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. The Dayton Civil Service Board explained its decision and the evidence considered and relied upon in reaching its conclusion to affirm Appellee's discharge. The Decision of the Court of Common Pleas is supported by reliable, probative, and substantial evidence and is in accordance with the law. That being said, 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 Appellee from his employment with the City of Dayton while ensuring that the decision of the Court of Appeals will not create law that effectively renders the legislative enactment of R.C. 2506.04 meaningless by requiring administrative agencies throughout the state to strictly adhere to the Rules of Evidence.

Respectfully submitted,

JOHN J. DANISH (0046639)
City Attorney


JONATHAN W. CROFT* (0082093)

**Counsel of Record*
Assistant City Attorney
NORMA M. DICKENS (0062337)
Assistant City Attorney
101 West Third Street, 3rd Floor
Dayton, Ohio 45401
(937) 333-4111; (937) 333-3628 fax
jonathan.croft@daytonohio.gov
Counsel for Appellant City of Dayton, Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served by U.S. Mail, postage prepaid, this 9th day of April, 2012, to the following:

Terry W. Posey, Jr.
Thompson Hine LLP
Austin Landing I
10050 Innovation Drive
Suite 400
Dayton, Ohio 45342

Terry W. Posey
7460 Brandt Pike
Dayton, Ohio 45424

Counsel for Appellee
Ronald L. Royse

Michael DeWine
Attorney General of Ohio
Alexandra T. Schimmer
Solicitor General
Michael J. Hendershot
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
State of Ohio

Stephen L. Byron
Rebecca K. Schaltenbrand
Ice Miller LLP
4230 State Route 306, Suite 240
Willoughby, Ohio 44094

Stephen J. Smith
Ice Miller LLP
250 West Street
Columbus, Ohio 43215

John Gotherman
Ohio Municipal League
175 South Third Street, #510
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Municipal League


Jonathan W. Croft
Assistant City Attorney