[Cite as *Fraternal Order of Police, Ohio Labor Council, Inc. v. Erie Cty. Sheriff*, 2010-Ohio-4702.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Fraternal Order of Police,
Ohio Labor Council, Inc.

Appellant

v.

Erie County Sheriff, et al.

Appellees

Court of Appeals No. E-10-005

Trial Court No. 2009 CV 0459

DECISION AND JUDGMENT

Decided: September 30, 2010

* * * * *

Kay E. Cremeans and Paul L. Cox, for appellant.

Marc A. Fishel, for appellee, Erie County Sheriff.

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Sandy J. Rubino, Chief Assistant Prosecuting Attorney, for appellees,
Erie County Board of Commissioners and Erie County, Ohio.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, in which the trial court granted summary judgment to appellees, the Erie County Sheriff ("sheriff"), the Erie County Board of Commissioners ("commissioners"), and Erie

County ("county"), and dismissed an application to confirm an arbitration award filed by appellant, the Fraternal Order of Police, Ohio Labor Counsel, Inc. ("FOP").

{¶ 2} On appeal, appellant sets forth the following two assignments of error:

{¶ 3} "First assignment of error:

{¶ 4} "The common pleas court erred to the prejudice of the appellant when it granted appellees' motion for summary judgment and dismissed appellant's application to confirm [the] arbitration award.

{¶ 5} "Second assignment of error:

{¶ 6} "The common pleas court erred to the prejudice of the appellant when it failed to award back pay and interest to the bargaining unit members when the appellees refused to comply with the arbitration award."

{¶ 7} The relevant, undisputed facts are as follows. In December 2005, a collective bargaining agreement ("Agreement") was entered into by the sheriff and the FOP. The sheriff was defined in the Agreement as the "Employer." The Agreement was ratified later that month when the commissioners approved Resolution 05-510.

{¶ 8} In late 2007, the Erie County Common Pleas Court judges decided to begin using a metal detector and x-ray equipment as an added security measure at the county courthouse. The equipment was already owned by the county, but had never been used. Since the sheriff historically had provided the courthouse with security, the judges approached the sheriff about finding personnel to operate the equipment. However, they were told that all available deputies were being used in other capacities in the courthouse.

The sheriff asked the commissioners to provide funding for more full-time deputies; however, his request was denied. The sheriff then approached the FOP with the concept of hiring part-time deputies to run the equipment; however, the FOP refused to consider such an arrangement. Accordingly, Juvenile Court Judge Robert C. DeLamatre, who was the presiding judge at the time, decided to hire civilian personnel, paid out of his court budget, to run the equipment. Judge DeLamatre developed a job description for four part-time workers and posted those jobs. Eventually, four civilian screeners were hired to work at the courthouse.

{¶ 9} Judge DeLamatre's efforts were opposed by the lieutenants and sergeants of the FOP, which filed two separate grievances pursuant to Article 5 of the Agreement. Both grievances were denied. In addition, on February 22, 2008, the FOP filed a complaint in which it asked the trial court to issue an injunction prohibiting the commissioners from providing funds for Judge DeLamatre to use in hiring the civilian screeners. After an evidentiary hearing, the trial court denied the request for an injunction. Thereafter, the FOP filed a request for arbitration under Article 5, Section 5.03, Step 4 of the Agreement.

{¶ 10} On December 16, 2008, the arbitrator issued a decision in which he found that the sheriff was the "Employer." The arbitrator also found that, pursuant to Article 23, Section 23.05 of the Agreement the sheriff and the county may not contract out work with any party other than the FOP for services "customarily performed by the bargaining unit." According to the arbitrator, the prohibition against contracting out work included

using county funds to pay civilians to perform security-related work at the courthouse. The arbitrator found that Judge DeLamatre is also prohibited from hiring non-union workers because he "is an official of the County."

{¶ 11} As to the facts of the case, the arbitrator found that the sheriff's deputies could easily master the skills necessary to use the screening equipment. He also found that, when read in the context of the entire Agreement, Section 23.05 "unmistakably reflects the agreement of the parties to prohibit the sort of action taken in this situation." The arbitrator stated that the hiring of civilian security officers was not one of three listed exceptions to the agreed-upon prohibition against contracting out work.[1]

{¶ 12} Ultimately, the arbitrator stated that "The Employer is directed to cease and desist from utilizing non-bargaining unit personnel to perform security tasks at the Courthouse." Because the arbitrator did not find that the FOP presented evidence that its members suffered a monetary loss, the FOP's request for damages was denied.

{¶ 13} No motion to vacate, modify or correct the award was filed by any of the parties. However, on May 26, 2009, the FOP filed an application to have the arbitrator's award confirmed in the Erie County Court of Common Pleas. In support of its application, the FOP filed a memorandum in support, in which it argued that the award should be confirmed for two reasons. First, the FOP argued that the application to

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[1]The listed exceptions in Article 23, Section 23.05 of the Agreement are: "entering in a Mutual Aid Agreement with, or from providing contractual law enforcement protection or services to, any political subdivision within Erie County, Ohio, or from making an agreement with another political subdivision to house prisoners in the event the jail population exceeds the legal capacity of the jail."

confirm was timely filed pursuant to R.C. 2711.09, which provides that an arbitration award shall be confirmed, provided that the application is filed "[a]t any time within one year after an award in an arbitration proceeding is made, * * * unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code. * * *" Second, the FOP argued that confirmation of the award was proper because no motion to vacate, modify or correct the award was filed pursuant to R.C. 2711.13, which requires a party to contest the award within three months after it is delivered to the parties.

{¶ 14} The FOP sought five forms of relief through confirmation of the award:

{¶ 15} 1. Confirmation of the award.

{¶ 16} 2. An order for the sheriff, the commissioners and the county ("respondents") to immediately stop using non-bargaining unit members to perform security-related duties at the courthouse.

{¶ 17} 3. An order for respondents to pay each grievant an equal share of the total amount of time paid to the courthouse screeners at each grievant's overtime rate.

{¶ 18} 4. An award of interest pursuant to R.C. 1343.03.

{¶ 19} 5. An order for respondents to pay all costs assessed in the action.

{¶ 20} The county and the commissioners filed a joint motion to dismiss the application pursuant to Civ.R. 12(B)(1) on June 2, 2009, in which they argued that the application failed to state a claim on which relief may granted, and that the trial court lacked jurisdiction to confirm the award. In an attached memorandum, they asserted that

the arbitrator's award cannot be enforced against Judge DeLamatre because he is not the "Employer" described in the Agreement. The county and the commissioners further argued that, as a matter of law, they are not subject to the arbitration award, and the arbitrator did not have the authority to order Judge DeLamatre to stop hiring security screeners or to order the commissioners to deny funding for the Judge's employees.

{¶ 21} Finally, the county and the commissioners argued that the trial court did not have authority to order the payment of interest or overtime pay, since the arbitrator denied those requests and the FOP did not file a motion to vacate, modify or correct the arbitration award in a timely manner pursuant to R.C. 2711.10, 2711.11 and 2711.13. Attached to their memorandum were various exhibits, including the trial court's April 7, 2008 judgment entry denying the FOP's request for an injunction; copies of the Agreement and the FOP's grievance report forms and the arbitrator's decision; and copies of decisions in other arbitration proceedings that were cited in the motion to dismiss.

{¶ 22} The sheriff filed an answer on June 3, 2009, in which he asked the trial court to dismiss the FOP's application to confirm the arbitrator's award. In an attached memorandum in support, the sheriff asserted that neither the county nor Judge DeLamatre are employers under the terms of the Agreement. Accordingly, they are not bound by the arbitrator's decision. In support, the sheriff citied a 2004 arbitration proceeding between the FOP and the sheriff's office, in which the parties stipulated that "the Erie County Commissioners are the legislative body of the County and signatories to the [collective bargaining] contract but they are not the Employer." The sheriff also

relied on *SERB v. Columbiana County Bd. Of Commrs*, SERB 99-019 (6/17/99), in which the State Employee Relations Board found that, for purposes of collective bargaining, a board of county commissioners is not a co-employer with a sheriff's office. See, also, R.C. 4117.10 (Stating that the "public employer" is the entity that negotiates a collective bargaining agreement with a representative, after which approval for funding must be sought from the appropriate "legislative body," such as "board of commissioners * * *.")

{¶ 23} Based on the foregoing, the sheriff argued that the arbitrator's award is limited to directing the "Employer" to "cease and desist from utilizing non-bargaining unit personnel to perform security tasks at the Courthouse." The sheriff concluded that, since the he did not employ the civilian screeners, and Judge DeLamatre, the county, and the commissioners are not designated as the "Employer" in the Agreement, the FOP's application to confirm the award and enforce it against Judge DeLamatre, the sheriff, the county and the commissioners should be dismissed.

{¶ 24} On June 16, 2009, the FOP filed a memorandum in opposition to the motions to dismiss. In support, the FOP argued that this case involves a "special statutory proceeding" which is not governed by the Civil Rules. The FOP further argued that, while the sheriff is the actual "Employer" governed by the Agreement, the county and the commissioners are nonetheless "parties" to the collective bargaining agreement by virtue of Section 23.05 of the Agreement. The FOP further argued that the remedy sought is not barred by the past denial of injunctive relief by the trial court since the terms of the collective bargaining unit were not at issue in that case. Finally, the FOP

argued that the trial court has subject matter jurisdiction over Judge DeLamatre because the trial court is not being asked to restrain the Judge from the duties for which he was elected and, if the Judge and the county wanted to challenge the arbitration award, they should have filed a timely motion to vacate pursuant to R.C. 2711.10, 2711.11 and 2711.13. As to the overtime issue, the FOP argued that it is only seeking a monetary award from the time the arbitrator's decision was rendered; thus, the arbitrator's denial of such an award is not binding on the trial court.

{¶ 25} The county and the commissioners filed a reply on June 25, 2009, in which they argued that dismissal pursuant to Civ.R. 12(B)(1) is not barred because, pursuant to Civ.R. 1, the Civil Rules shall not apply to special proceedings only "to the extent that they would by their nature be clearly inapplicable * * *." The county and the commissioners also re-asserted that they are not parties to the arbitration award and, therefore, they should not have been named as parties in the FOP's "complaint." In support, the county and the commissioners cited *Geauga Cty. Bd. Of Commr's v. Munn Road Sand & Gravel* (1993), 67 Ohio St.3d 579, in which the Ohio Supreme Court held that counties "may exercise only those powers affirmatively granted by the General Assembly." Id. at 582. They also argued that the FOP cited no authority, other than the arbitrator's decision, to support its statement that the county and the Commissioners are co-employers with the sheriff by virtue of their role as an entity that funds the sheriff's budget, and that neither the county, the sheriff, or the commissioners contracted with any

party to hire civilian screeners. They also pointed out that Judge DeLamatre was not named as a "party" in the complaint.

{¶ 26} The county and the commissioners further argued that neither the arbitrator nor the FOP can claim that the arbitrator had jurisdiction to order Judge DeLamatre to cease employing civilian screeners by forbidding the county to fund his budget and that the judge, the sheriff and the county were not required to challenge the arbitrator's award by filing a motion to vacate, since they were never parties to the Agreement in first place. Finally, they argued that the FOP members are not entitled to back pay and interest, since the FOP did not submit a timely request for modification of the arbitrator's award.

{¶ 27} On September 15, 2009, the trial court issued a judgment entry in which, after reviewing the entire record, it stated:

{¶ 28} "[t]he critical language [in the arbitrator's decision] obviously is, 'The Judge is an official of the County.' If that assessment is correct and the non-deputy screeners are employees of Erie County who are subject to having their employment terminated by the Erie County Board of Commissioners, then, pursuant to R.C. 2711.09, this court must confirm the Arbitration award as requested by Petitioner. If, on the other hand, Judge DeLamatre is not an 'official of the County' but rather a separately elected official who, as the employer of the non-deputy screeners, was not a party to the collective bargaining agreement and not bound by the terms thereof, then the Arbitrator was without jurisdiction to order the Judge to cease and desist from utilizing non-bargaining unit personnel to perform security tasks at the courthouse."

{¶ 29} The trial court concluded that the above-stated issue involved matters outside the pleadings, and converted the motion to dismiss to a motion for summary judgment. Both parties were granted leave to file supplemental and/or reply briefs, and the FOP was granted leave to file its own motion for summary judgment. On October 30, 2009, the county and the commissioners filed a supplemental brief in support of summary judgment.

{¶ 30} That same day, the FOP filed its motion for summary judgment, in which it argued that the issue of whether Judge DeLamatre is an official of the county is "immaterial and irrelevant in this case" because neither the county, the commissioners, the sheriff nor Judge DeLamatre filed a timely motion to vacate or modify the arbitration award.

{¶ 31} The sheriff filed a response and memorandum in opposition to the FOP's motion for summary judgment on November 3, 2009, in which he asserted that the FOP's motion should be denied because it did not address the issue stated by the trial court. In support, the sheriff argued that, as an elected official, Judge DeLamatre "is separate from the Erie County Sheriff's Office and the Erie County Board of Commissioners" and that R.C. 2151.13, which authorizes a juvenile judge to hire "employees as are necessary and [to] designate their titles and fix their duties, compensation, and expense allowances," does not allow the judge's discretion to be approved or rejected by either the sheriff or the county commissioners. The sheriff further argued that, as employees of the court, the civilian screeners are not subject to the terms of the Agreement.

{¶ 32} On November 9, 2009, the county and the commissioners filed a response to the FOP's summary judgment motion, in which they asserted that the FOP's motion should be denied because: (1) Judge DeLamatre was "acting as an independent elected public official" when he hired the screeners; and (2) Judge DeLamatre was not a party to the Agreement and is not bound by its terms. Accordingly, the county and the commissioners argued that the arbitrator exceeded his jurisdiction by ordering Judge DeLamatre to fire the civilian screeners. On November 13, 2009, the FOP again responded that any argument pertaining to the arbitrator's jurisdiction was waived because the arbitration award was not challenged within 90 days as required by R.C. 2711.10, 2711.11 and 2711.13.

{¶ 33} On January 5, 2010, the trial court filed a judgment entry in which it found, after reviewing the entire record and the filings of all the parties, that there were "two fundamental problems with the Arbitrator's findings." Specifically, the trial court disagreed with the arbitrator's conclusion that Judge DeLamatre was an "official of the executive branch of County Government," and also with the arbitrator's "apparent attempt to place with the Erie County Sheriff the authority to cease and desist from employing persons he did not hire." Accordingly, the trial court concluded that:

{¶ 34} "1) Judge DeLamatre is a separately elected official of the Judicial Branch of Government; 2) Judge DeLamatre, not the Erie County Sheriff, is the employer of the civilian security screeners; 3) Judge DeLamatre was not a party to the Collective Bargaining Agreement, the grievance process or the Arbitration proceedings; 4) since he

was not a party to the arbitration, Judge DeLamatre was under no obligation to file a motion to vacate, modify or correct the arbitration award as provided for by R.C. 2711.10 and R.C. 2711.11; 5) jurisdiction is a matter that may be raised at any time and at any stage of the proceedings; 6) the arbitrator had no jurisdiction over Judge DeLamatre's employees and no jurisdiction to order Judge DeLamatre to cease and desist from employing the civilian security screeners; 7) when construing the evidence that is before the court in a manner most strongly in favor of Petitioners [FOP], reasonable minds can only conclude that Respondents are entitled to judgment as a matter of law; 8) Respondents' [the county's and the commissioners'] Motion for Summary Judgment is found well taken and is granted; and 9) Petitioner's [FOP's] Motion for Summary Judgment is found not well taken and is denied."

{¶ 35} Based on the above conclusions, the trial court granted summary judgment in favor of the sheriff, the county and the commissioners, and denied the FOP's application to confirm the arbitration award. A timely notice of appeal was filed in this court on February 3, 2010.

{¶ 36} In its first assignment of error, the FOP (hereafter designated as "appellant") asserts that the trial court erred by refusing to confirm the arbitration award. In support, appellant argues that the only proper method for challenging the arbitrator's decision was the filing of a timely motion to vacate, correct or modify the award pursuant to R.C. 2711.10(D). Appellant also argues that, since no such motion was filed, the trial court was precluded from finding that the arbitrator lacked jurisdiction over Judge

DeLamatre and, therefore, had no choice but to confirm the arbitrator's decision in its entirety.

{¶ 37} We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 38} First, we must address the FOP's argument that the trial court improperly considered whether the arbitrator had jurisdiction over Judge DeLamatre. This argument is divided into two parts: (1) whether the arbitrator's award was challenged in a timely manner; and (2) whether Judge DeLamatre is bound by the arbitrator's interpretation of the terms of the agreement.

{¶ 39} Both state and federal courts recognize a strong presumption in favor of the resolution of grievances through arbitration. *Gettysburg Investments, LLC, v. Prime Holdings, LLC,* 2d Dist. No. 23303, 2010-Ohio-2134, ¶ 11; *Thompson-CSF, SA. v. American Arbitration Assoc.* (C.A. 2, 1995), 64 F.3d 773. Generally, Ohio courts have found that the failure to challenge an arbitration award within the 90-day period set forth in R.C. 2711.13 would waive any objections to the arbitrator's decision. *MBNA Am.*

Bank, N.A. v. Cooper, 3d Dist. No. 17-05-33, 2006-Ohio-2793, ¶ 7. However, at least one Ohio appellate court has held otherwise.

{¶ 40} In *Teramar Corp. v. Rodier Corp.* (1987), 40 Ohio App.3d 39, the Eighth District Court of Appeals considered a case involving a challenge to an arbitration award, made outside the 90-day statutory period, on the basis that the challenger was never a party to the original arbitration agreement. In that case Theresa Stakich, the president of Teramar Corporation, executed a personal guarantee of the company's debts. However, Stakich did not sign a separate merchandising agreement between Teramar and another corporation, Promafil, in which those two companies agreed to submit any disputes between them to arbitration. Later, Promafil sought, and obtained, an arbitration award against both Teramar and Stakich in settlement of a debt owed by Teramar. Four months after the award was issued, Stakich challenged it on grounds that she was never a party to the merchandising agreement and was therefore not bound by the arbitrator's award. The trial court affirmed the arbitration award against both Teramar and Stakich. Stakich appealed.

{¶ 41} On appeal, the appellate court held that the guaranty signed by Stakich was more in the nature of a surety and, therefore, she was not bound to pay Teramar's debts pursuant to the terms of an agreement she did not sign. Id, citing *WindowMaster Corp. v. B.G. Danis Co.* (S.D.Ohio 1981), 511 F.Supp.157. This finding formed the basis of two legal conclusions reached by the *Teramar* court. First, the appellate court concluded that, in spite of the strong policy in favor of arbitration, Stakich could not be compelled to

arbitrate any dispute which she never agreed to submit to arbitration. *Teramar*, supra, at 40, citing *Amalgamated Clothing Workers of Am. v. Ironall Factories Co.* (C.A. 6, 1967), 386 F.2d 586, 590; *Retail Clerks Internatl. Assn. v. Lion Dry Goods, Inc.* (C.A 6, 1965), 341 F.2d 715, 720; *Local Union No. 998 v. B & T. Metals Co.* (C.A. 6, 1963), 315 F.2d 432, 436. Second, the appellate court articulated the previously unaddressed issue of whether an individual who was never a party to an arbitration agreement could challenge the arbitrator's award outside the statutory 90-day period. Finding that Stakich had raised the issue of whether or not the arbitrator lacked subject matter jurisdiction, the appellate court concluded that:

{¶ 42} "[l]ack of subject matter jurisdiction may be raised at any stage in the proceedings, although not previously asserted in the action, including raising it for the first time on appeal. See *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 235, 238; *State, ex rel. Lawrence Development Co. v. Weir* (1983), 11 Ohio App.3d 86, paragraph two of the syllabus. Thus, an allegation that the arbitration panel lacked jurisdiction, based upon the absence of an arbitration clause requisite for the exercise of the panel's jurisdiction, is not waived by the failure to assert it within three months of the delivery of the award." *Teramar,* supra, at 41-42.

{¶ 43} On consideration, we find that the reasoning expressed in *Teramar* is applicable to the facts of this case and, therefore, the trial court did not err by considering the issue of whether the arbitrator's decision can be enforced against Judge DeLamatre. We feel particularly compelled to reach this conclusion because appellant's reasoning in

support of an across-the-board application of the statutory time limitation set forth in R.C. 2711.13 amounts to a statutorily mandated "black hole" whose gravitational pull would be universal and impervious to judicial review. Any person anointed as an "arbitrator" would then have the ability, under the pretext of R.C. 2711.13, to order the Chief Justice of the Supreme Court, or the Governor, or an innocent pedestrian, to cease and desist from undertaking any action the arbitrator wistfully decides, even though these third persons or entities have not subjected themselves to the terms of any contract, if the arbitrator's award is not challenged within 90 days. Having resolved the threshold issue of whether the trial court properly considered the merits of the arbitrator's award, we must now consider the more substantive issue of whether Judge DeLamatre can be bound by the terms of the Agreement, even though he was not a signatory of the document.

{¶ 44} Ohio courts have held that arbitration agreements are a matter of contract; however, "they must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *I Sports v. IMB Worldwide, Inc.*, 157 Ohio App.3d 593, 2004-Ohio-3113, ¶ 14. Similarly, the Supreme Court of the United States has held that:

{¶ 45} "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' [*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)]; [*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 571-571, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), (BRENNAN, J., concurring).] This axiom recognizes the fact that arbitrators derive their authority to

resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374, 94 S.Ct. 629, 635, L.Ed.2d 583 (1974)." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648. See, also, *Teramar Corp. v. Rodier Corp.* (1987), supra, at 40. Ultimately, the issue of intent to arbitrate is to be resolved by the court, not the arbitrator. *AT&T Technologies, Inc. v. Communications Workers of America*, supra, at 649. (Other citations omitted.)

{¶ 46} There are limited exceptions to the above-stated general rule. *I Sports v. IMB Worldwide, Inc.*, supra, at ¶ 13. These exceptions, which arise out of contract and agency law, include: 1) incorporation of an arbitration clause by reference in a separate contractual arrangement; 2) the non-signatory's assumption of the obligation to arbitrate; 3) application of traditional principles of agency; 4) traditional principles of corporate veil-piercing and alter ego; and 5) estoppel, where the non-signatory knowingly accepts the benefits of an agreement that includes the duty to arbitrate, and is thus estopped from refusing to arbitrate a dispute arising under the agreement. Id., citing *Thomson-CSF, S.A. v. Am. Arbitration Assn.* (C.A.2, 1995), 64 F.3d 773, 776-779.[2]

[2]Ohio courts have also recognized an "alternate estoppel theory" whereby the duty to arbitrate arises from a "close relationship between the entities involved, * * * and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations.'" *Thomson-CSF, S.A. v. Am Arbitration Assn.*, supra, quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers* (C.A.11, 1993), 10 F.3d 753, 757. However, this theory is usually limited in its application to instances where a non-signatory attempts to compel a signatory to arbitrate, and not the reverse. *I Sports v. IMB Worldwide, Inc.*, supra, at ¶ 14.

{¶ 47} Appellant does not assert on appeal that any of the traditional exceptions apply in this case. Rather, appellant argued in support of its summary judgment motion that, despite that fact that Judge DeLamatre did not personally sign the Agreement, he is an "official of the county" and is, therefore, bound by its terms. Appellant further argued that, as a county official, Judge DeLamatre is compelled to abide by the arbitrator's decision because the county and the commissioners ratified the Agreement, which prohibits them from contracting out work to non-union workers. We disagree, for the following reasons.

{¶ 48} First, the Preamble to the Agreement unequivocally refers to only the "Erie County Sheriff" as the "Employer." Article 1, Section 1.01, of the Agreement states that "The Employer [the sheriff] recognizes the Union [the FOP] as the sole and exclusive representative for the purpose of negotiating wages, hours, terms and other conditions of employment for the employees of the Employer in the bargaining units * * *."

{¶ 49} Several Ohio appellate courts have found that, if county commissioners were intended to be parties to a particular collective bargaining agreement, they could have been included within the definition of "Employer." *Jackson Cty., Ohio Sheriff v. The Fraternal Order of Police Ohio Labor Council, Inc.*, 4th Dist. No. 02CA15, 2004-Ohio-3535, ¶ 25; *Fraternal Order of Police v. Perry Co. Commrs.*, 5th Dist. No. 02-CA-14, 2003-Ohio-4038, ¶ 25. After analyzing the language of collective bargaining agreements similar to the one in this case, both the Fourth and Fifth District Appellate Courts concluded that:

{¶ 50} "'[w]hile the county commissioners are the legislative authority for the county, and are responsible for setting the amount of the sheriff's budget, it is erroneous to include them in the definition of employer under this contract * * *.'" *Jackson Cty., Ohio Sheriff v. The Fraternal Order of Police Ohio Labor Council, Inc.*, supra, ¶ 24; *Fraternal Order of Police v. Perry Co. Commrs.*, supra, ¶ 25.

{¶ 51} Similarly, in this case, if Erie County and/or the commissioners were intended to be "Employers" under the terms of the Agreement, that designation could have been made in the Preamble to the Agreement. Accordingly, we cannot conclude that the term "Employer," as used in the Agreement, refers to any entity other than the sheriff.

{¶ 52} Appellant further argued on summary judgment that the county and the commissioners are prohibited from funding the hiring of non-union screeners pursuant to Article 23, Section 23.05 of the Agreement. That provision, which governs "Contracting Out Work," states that:

{¶ 53} "The Employer and the County agree for the duration of this contract not to contract with any agency or persons for the performance of any duties and/or responsibilities customarily and currently being performed by employees of the bargaining units(s). * * *"

{¶ 54} It is undisputed that union screeners were not being used to operate metal detection devices at, or prior to, the time the Agreement was negotiated and signed. Accordingly, such work was not "customarily" or "currently" being performed by union

personnel. Furthermore, as set forth above, it was Judge DeLamatre who hired the screeners, not the county, the commissioners, or the sheriff. The relevant determination is, therefore, whether Section 23.05 of the Agreement forbids Judge DeLamatre from hiring the screeners because he is an "official of the county" whose budget is derived from county funds.

{¶ 55} The Ohio Supreme Court has held that:

{¶ 56} "The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph one of the syllabus, citing *State ex rel. Foster v. Lucas Cty. Bd. of Commrs.* (1968), 16 Ohio St.2d 89. In the specific context of whether a county is *required* to fund a court's budget, the Ohio Supreme Court, citing *State ex rel. Johnston v. Taulbee*, supra, further held that:

{¶ 57} "Ohio courts have the inherent power to order the funding necessary to fulfill their purposes. *State ex rel. Johnston v. Taulbee* [supra]; *State ex rel. Foster v. Lucas Cty. Bd. of Commrs.* [supra]. A coordinate branch of government may not impede a court's business by refusing reasonable funding requests. * * * The determination of necessary administrative expenses rests solely with the court, and another branch of government may not substitute its judgment for that of the court. See *Foster, supra*, paragraph three of the syllabus. * * * The doctrine of separation of powers underpins these principles. Courts must be free from excessive control of the legislative and

executive branches in order to ensure their independence and integrity." *State ex rel. Donaldson v. Alfred* (1993), 66 Ohio St.3d 327, 329. (Other citations omitted.)

{¶ 58} On consideration of the foregoing, we determine that, as a matter of law, it is Judge DeLamatre, not the county or the commissioners, who determines the funding of the Erie County Common Pleas Court's budget, and has the power to allocate those funds. Accordingly, Judge DeLamatre is not an "official of the county" simply because the commissioners supply funds for his budget. We further determine that, under the facts of this case, Article 23, Section 23.05 of the Agreement does not prohibit the county from funding the court's budget, even though some of those funds were used by Judge DeLamatre to hire part-time, non-union workers to operate the screening and x-ray machines at the Erie County Courthouse.

{¶ 59} This court has reviewed the entire record of proceedings that was before the trial court and, upon consideration thereof, and our prior conclusion regarding the arbitrator's jurisdiction, we find the trial court did not err by finding that Judge DeLamatre: (1) is not an Erie County official; (2) was not a party to the Agreement or the arbitration proceedings; (3) was not obligated to file a motion to vacate, modify or correct the arbitration award, [3] and; (4) is therefore not subject to the arbitrator's cease and desist order.

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[3]Since Judge DeLamatre was not a party to the arbitration agreement, he was never required to challenge the arbitrator's award within 90 days pursuant to R.C. 2711.13, which provides that, "[a]fter an award in an arbitration proceeding is made, *any party to the arbitration* may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award * * *" within 90 days after the award is made. (Emphasis added.)

{¶ 60} We further find that there remains no other genuine issue of material fact and, after considering the evidence presented most strongly in favor of appellant, appellees are entitled to summary judgment as a matter of law. Appellant's first assignment of error is not well-taken.

{¶ 61} In its second assignment of error, appellant asserts that the trial court erred by failing to award back pay plus interest to the union grievants for appellees' failure to comply with the arbitrator's cease and desist order. In support, appellant argues that R.C. 1343.03 "permits statutory interest to be awarded on an arbitration award from the date of the award" which, in this case, was December 16, 2008.

{¶ 62} Based on our determination as to appellant's first assignment of error, we find that appellant's second assignment of error is moot and therefore not well-taken.

{¶ 63} The judgment of the Erie County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____

JUDGE

Thomas J. Osowik, P.J.
CONCUR. _____

JUDGE

Keila D. Cosme, J., dissents and writes separately.

COSME, J., dissenting.

{¶ 64} The pivotal issue in this case is not whether the arbitrator had jurisdiction over Judge DeLamatre, but whether the trial court had jurisdiction to consider that issue. It is well-settled that the failure to challenge an arbitration award within the 90-day period set forth in R.C. 2711.13 divests the common pleas court of jurisdiction to consider any objection to the arbitrator's decision in a subsequent proceeding, including a proceeding to confirm the award under R.C. 2711.09. See *MBNA Am. Bank, N.A. v. Cooper*, 3d Dist. No. 17-05-33, 2006-Ohio-2793, ¶ 7; *Hess v. Dyer, Garofalo, Mann & Schultz*, 2d Dist. No. Civ.A. 20392, 2004-Ohio-6877, ¶ 6. The Supreme Court of Ohio has directly held, "When a motion is made pursuant to R.C. 2711.09 to confirm an arbitration award, the court must grant the motion if it is timely, unless a timely motion for modification or vacation has been made and cause to modify or vacate is shown." *Warren Edn. Assn. v. Warren City Bd. of Edn.* (1985), 18 Ohio St.3d 170, syllabus. See, also, *MBNA Am. Bank, NA v. Jones*, 10th Dist. No. 05AP-665, 2005-Ohio-6760, ¶ 14 ("If no motion to vacate or modify an award is filed, the court must confirm an arbitration award given a timely motion under R.C. 2711.09"); *Russo v. Chittick* (1988), 48 Ohio App.3d 101, 104 ("The common pleas court has no discretion if the motion [to confirm] is made within one year but *must* grant the confirmation unless a timely motion to vacate or modify has been made and grounds for modification or vacation are shown").

{¶ 65} Since an application to confirm the arbitrator's award was timely filed in this case, but no motion to vacate or modify the award was made, the trial court's only

authorized course of action was to confirm the award. In denying appellant's application to confirm on the purported ground that the arbitrator exceeded his powers, the trial court exceeded its powers.

{¶ 66} Nevertheless, the majority adopts an anomalous jurisdictional-issue exception that was proposed by the Eighth District Court of Appeals in *Teramar Corp. v. Rodier Corp.* (1987), 40 Ohio App.3d 39. In that case, the Eighth District held that "an allegation that the arbitration panel lacked jurisdiction * * * is not waived by the failure to assert it within three months of the delivery of the award." Id. at 41-42. In so holding, the court transplanted the principle that lack of subject matter jurisdiction *on the part of a court* can be raised at any stage of the proceedings, ignoring the fact that judicial review of arbitration awards is governed exclusively by the special statutory remedies afforded under R.C. 2711.09 through 2711.14, which "provide the only procedures for post award attack or support of an arbitration decision." *Lockhart v. Am. Res. Ins. Co.* (1981), 2 Ohio App.3d 99, 101. Under these special provisions, an arbitrator's lack of jurisdiction is not impervious to waiver or automatically subject to collateral review in subsequent judicial proceedings. Instead, the failure to file a motion to vacate precludes any judicial review of an arbitration award in any subsequent proceeding on any grounds, including that the arbitrator exceeded his or her powers under R.C. 2711.09(B).

{¶ 67} Other Ohio appellate courts have accordingly rejected the argument that an allegation of lack of subject matter jurisdiction on the part of an arbitrator survives the failure to timely file a motion to vacate. In *Galion v. Am. Fedn. of State, Cty. and Mun.*

Employees, Ohio Council 8, AFL-CIO (Oct. 7, 1993), 3d Dist. No. 3-93-9, the Third District held:

{¶ 68} "R.C. 2711.10 specifies when an arbitration award can be vacated by the court. R.C. 2711.13 states the time frame when such motion is to be made. If we adopt the City's contention that the three month statute of limitations does not relate to R.C. 2711.10, we are, in effect, nullifying R.C. 2711.13 as [that section] expressly refers to R.C. 2711.10. If the legislature did not intend that the statute of limitations contained in R.C. 2711.13 was to apply, it would have specifically excluded R.C. 2711.10 from that section. Therefore, the three month statute of limitations is applicable to R.C. 2711.10(D), where the arbitrator exceeded his authority."

{¶ 69} In *Liberti v. Louisville* (Feb. 11, 1991), 5th Dist. No. CA-8242, the Fifth District held:

{¶ 70} "If judicial review of arbitration awards is limited solely to the grounds specified in R.C. 2711.10, then the statute of limitations contained in R.C. 2711.13 necessarily applies to those grounds, or it applies to nothing at all. We note also that R.C. 2711.13 expressly references R.C. 2711.10. We must construe these statutes so as to give full meaning to them. For these reasons, we * * * hold that the statute of limitations applies even to circumstances where the arbitrator allegedly exceeded his authority."

{¶ 71} In fact, the issue that the majority finds is not waived in this case by the failure to challenge the arbitration award within the 90-day period, i.e., whether or not a party agreed to submit to arbitration, was precisely the issue held not to be reviewable

upon an application to confirm in *MBNA v. Cooper* and *MBNA v. Jones*, supra. In *Cooper*, the trial court's denial of appellant's application to confirm on grounds that there was no evidence of a signed agreement to arbitrate was reversed by the Third District Court of Appeals. In *Jones*, the trial court's refusal to consider appellants' arguments that they never agreed to arbitration in granting appellee's application to confirm was upheld by the Second Appellate District. In both cases, the respective appellate courts held that the failure to file a timely motion to vacate or modify precluded the trial court from considering the jurisdictional arguments in opposition to the motion to confirm. *Cooper*, 2006-Ohio-2793, ¶ 7; *Jones*, 2005-Ohio-6760, ¶ 15-16.

{¶ 72} It is not surprising, therefore, that although *Teramar* has been cited in approximately 60 appellate decisions since it was decided 23 years ago, primarily for an earlier statement in the opinion that a party cannot be compelled to arbitrate, no appellate court outside of the Eighth District has cited to its jurisdictional-issue exception with approval. Instead, this aspect of *Teramar* has only been parenthetically referenced as being in contravention of prevailing case law that holds a party can be estopped from denying the arbitrator's authority in a subsequent judicial proceeding, *even where a motion to vacate or modify has been filed*. *E.S. Gallon Co., L.P.A. v. Deutsch* (2001), 142 Ohio App.3d 137, 141; *Vermilion v. Willard Constr. Co*. (July 19, 1995), 9th Dist. No. 94CA006008.

{¶ 73} Clearly, *Teramar* is discordant with established case law and inconsistent with the special statutory proceedings established under R.C. 2711.09 through 2711.14.

While I am sympathetic to some of the majority's concerns in this case, I am not willing to emasculate the integrity of the arbitration process, or override the General Assembly's clearly expressed policy to the contrary, by adopting the wayward subject-matter-jurisdiction exception in *Teramar*. Nor can I accept the majority's "statutorily mandated 'black hole'" argument as a justification for rewriting the statute and changing the landscape of binding arbitration.

{¶ 74} Respectfully, I find the majority's stated concerns over the virtual abdication of the entire governmental machinery to the hands of arbitration panels to be somewhat overstated. The question of the arbitrator's jurisdiction over Judge DeLamatre in this case arises only by virtue of the arbitrator's decision that the sheriff and county were essentially acting through the judge in hiring the security officers.

{¶ 75} All of the issues and arguments considered by the majority in this case were raised by the sheriff at both the arbitration and confirmation proceedings. There is no reason to suppose that the sheriff could not also have presented those issues and arguments upon a timely motion to vacate or modify pursuant to R.C. 2711.10 and 2711.11. In the absence of such a motion, the trial court and now this court are acting beyond their statutory authority in refusing to confirm the arbitration award in this case. Accordingly, I respectfully dissent.