STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

Clark County, Petitioner, v. Nevada Service Employees International Union Local 1107, Juvenile Justice Probation Officers Associations and Juvenile Justice Supervisors Association, International Association of Fire Fighters Local 1908, Clark County Prosecutors Association, Clark County Defenders' Union and Clark County District Investigators Association. Respondents.	Case No. 2024-016 **NOTICE OF HEARING**

TO: Petitioner, by and through its attorney, Scott Davis, Esq., of Clark County District Attorney Civil Division; and

TO: Respondent Nevada Service Employees International Union Local 1107, by and through its attorneys, Evan L. James, Esq., and Dylan J. Lawter, Esq., of Christensen James & Martin, Chtd;

TO: Respondents Juvenile Justice Probation Officers Associations and Juvenile Justice Supervisors Association, by and through their attorney, Andrew Regenbaum, J.D., of Nevada Association of Public Safety Officers;

TO: Respondent International Association of Fire Fighters Local 1908, by and through its attorney, Sarah Varela, Esq., of McCracken, Stemerman & Holsberry;

TO: Respondents Clark County Prosecutors Association, Clark County Defenders' Union and Clark County District Investigators Association, by and through their attorneys Daniel Marks, Esq., and Adam Levine, Esq., of Law Office of Daniel Marks.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE pursuant to NRS 233B.121(2), that the Government Employee-Management Relations Board ("Board") will conduct a hearing in the above-captioned matter:

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Panel

This case has been assigned to the full Board. The Presiding Officer shall be Chair Brent C. Eckersley, Esq. Board member Michael A. Urban, Esq. has recused himself.

Dates and Times of Hearing

Wednesday, February 12, 2025, at 8:30 a.m.

Location of Hearing

The hearing will be held in the Tahoe Conference Room, which is located on the fourth floor of the Nevada State Business Center, 3300 W. Sahara Avenue, Las Vegas, NV 89102. The hearing will also be held virtually using TEAMS. The attorneys of record, witnesses, court reporter, one or more of the Board members and the Commissioner will be present in-person. The Deputy Attorney General assigned to the agency and the remaining Board members will be present via TEAMS. Preliminary motions will be heard at the beginning of the hearing. The Panel may deliberate and take possible action on this case after the hearing has concluded.

Details Regarding Events Prior to the Hearing

1. Pursuant to NAC 288.273, the EMRB Commissioner will hold a prehearing conference on **Monday, December 16, 2024 at 11:00 a.m.** The prehearing conference will be held using TEAMS. The Board Secretary will send log-in instructions to the attorneys of record prior to the prehearing conference. The prehearing conference will use the TEAMS online software platform so that the computer, software, camera, and microphone may be tested.

Also, at the prehearing conference an attempt will be made to formulate or simplify the issues; obtain admissions of fact which will avoid unnecessary proof; and establish any other procedure which may expedite the orderly conduct and disposition of the proceedings.

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Details of Hearing

1. The legal authority and jurisdiction for this hearing are based upon NRS 288.110, NRS 288.280 and the Nevada Administrative Code, Chapter 288.

2. The time allotted for the hearing, which shall only consist of oral argument, shall be two (2) hours for the Petitioner and two (2) hours for the Respondents, including cross-examination.

3. The Petitioner shall be responsible for retaining a certified court reporter to take verbatim notes of the proceedings. Pursuant to NAC 288.370, the cost of reporting shall be shared equally by the parties and the Board shall be furnished the original of the transcript so taken. Petitioner shall work with the court reporter to ensure that the court reporter will also be able to attend online using the afore-mentioned software product.

Statement of Issues Involved

Based upon the prehearing statements filed in this matter, and pursuant to NRS 233B.121(2)(d), the issues to be addressed at the hearing are identified as follows:

Petitioners' Statement of Issues

1. When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and fact-finding?
2. When an employee transfers from one bargaining unit to another after a collective bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and fact finding?
3. When a prior agreement is unresolved before negotiation for a successor agreement begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?
4. Does the retroactive provision in NRS 288.215(10) authorize a factfinder to change the terms of a party's final offer that included specified effective dates?

5. When the parties agree to a reopener during the term of an agreement, do the fact-finder procedures automatically apply to reopener negotiations?

Respondents' Statement of Issues

1. When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and fact-finding?
2. When an employee transfers from one bargaining unit to another after a collective bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and fact finding?
3. When a prior agreement is unresolved before negotiation for a successor agreement begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?
4. Does the retroactive provision in NRS 288.215(10) authorize a factfinder to change the terms of a party's final offer that included specified effective dates?
5. When the parties agree to a reopener during the term of an agreement, do the fact-finder procedures automatically apply to reopener negotiations?

This Notice of Hearing will further serve as notice to all parties herein that, upon conclusion of the Hearing or as otherwise necessary to deliberate toward a decision on the petitioner, the Board may move to go into closed session pursuant to NRS 288.220(5).

DATED this 12th day of November 2024.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY _____
BRUCE K. SNYDER, Commissioner

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 12th day of November 2024, I served a copy of the foregoing **NOTICE OF HEARING** by mailing a copy thereof, postage prepaid to:

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

In the matter of CLARK COUNTY.

petition for declaratory order

CASE NO. 2024-016

PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

When a union declares an impasse and pushes negotiations away from the bargaining table and towards the statutory fact-finding processes, a change occurs to the ordinary bargaining dynamic.

One notable way in which the dynamic changes is in the amount of time that is consumed by fact-finding. This is just a practical reality of the process and turns on variables such as a fact-finder's availability. And when that fact finding process extends out far enough, beyond the expiration date of a collective bargaining agreement, it creates a gap between expiration of the former agreement and the date at which a successor agreement can be finalized. The questions presented in this petition largely arise out of this gap.

During the gap period employees will still come and go. This petition asks the Board to look at the impact that the gap period has on the employees who separate from employment or transfer to another bargaining unit during the gap and before a successor agreement is finalized. This Board has previously indicated that an employee separating from employment during the gap cannot be covered by the successor agreement, and

subsequent decisions from this Board have confirmed the doctrinal foundations of the Board's prior decision, specifically that upon separation, a person is no longer a "local government employee" and is no longer covered by the Act. The County asks the Board to confirm its prior order on this point and clarify that upon separation a bargaining agent cannot continue to represent a former employee, and therefore cannot negotiate their behalf after separation. The County asks the Board to also confirm that this same outcome also applies to employees who transfer out of a represented bargaining unit during the gap.

This petition also asks the Board to provide guidance on the bargaining obligations under the Act when the factfinding process fails to produce a finalized collective bargaining agreement before a new round of negotiations commence, resulting in simultaneous negotiations with the same bargaining agent. Specifically, the Board should declare that when the unsettled status of the first negotiation creates an uncertainty affecting the second negotiation that the parties are justified in temporarily deferring negotiations until the first agreement can be finalized.

Finally, the County asks the Board to declare that the fact-finding procedures do not apply automatically to negotiations taking place under a reopener contractual provision.

II. IDENTIFICATION OF PETITIONER

Pursuant to NAC 288.380(3) the petitioner is Clark County, 500 S. Grand Central Pkwy, Las Vegas, Nevada 89155. The appropriate telephone number is 702-455-4164.

III. STATEMENT OF INTEREST

This Board invites the use of declaratory order petitions in order to resolve questions about the rights and duties owed under the Government Employee-Management Relations Act, NRS Chapter 288 ("the Act").

Consistent with this invitation, and in order to best navigate the Act's current impasse resolution process whist maintaining fidelity to the good faith bargaining obligations of the Act, and to be able to grasp the full import of the applicable procedures and potential liabilities created through the statutory factfinding process, Clark County now seeks clarification and guidance from this Board concerning the rights, duties and obligations that

obtain when a union declares impasse and the negotiations move from the typical back-and-forth at the bargaining table to the fact-finding impasse resolution steps outlined in NRS 288.200.

A. Specific Questions Presented to the Board

1. When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and fact-finding?

2. When an employee transfers from one bargaining unit to another after a collective bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and fact finding?

3. When a prior agreement is unresolved before negotiations for a successor agreement begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?

4. Does the retroactive provision in NRS 288.215(10) authorize a factfinder to change the terms of a party's final offer that included specified effective dates?

5. When the parties agree to a reopener during the term of an agreement, do the fact-finding procedures automatically apply to reopener negotiations?

B. Overview of the Current Impasse Resolution Process

In Nevada, a fiscal year begins on July 1 and ends on June 30 of the following calendar year. Nev. Const. art. 9 §. 1; NRS 354.526. It is not surprising then that every local government collective bargaining agreement that is currently maintained on this Board's website has a beginning date of July 1 and an ending date of June 30.

Nevada law also provides that a bargaining agent must request to negotiate a successor agreement by February 1 of the year that an agreement expires. NRS 288.180(1). With an agreement expiring on June 30, this effectively creates a 5-month window (February

through June) for the parties to negotiate a successor agreement in order to prevent a gap between agreements. And this is also overlayed by the statutory budget process laid out in NRS Chapter 354 that local governments must follow.

During that 5-month window, a public employer and a bargaining agent must bargain in good faith and must do so with some haste, acting with promptness in conducting negotiations. *Washoe County School Dist. v. Washoe School Principals Assoc.*, Item No. 895, EMRB Case No. 2023-24, pp. 7-8 (2024). For general units, the parties must have at least six meetings of true good faith negotiations before a valid impasse may be declared. NRS 288.200(1)(a); NRS 288.032(2) (importing a good faith requirement to negotiations); *Washoe School Principals Assoc.*, Item No. 895, pp. 14-15. Ideally the give-and-take that occurs during these meetings at the bargaining table will lead to a successor agreement.

However, it is not always the case that an agreement can be reached at the bargaining table. When the ordinary method fails to produce an agreement, the parties are at impasse. The Act recognizes that an impasse is a possibility and provides for a process to unclog the blockage and resolve an impasse on the mandatory subjects of bargaining. NRS 288.200.

The current impasse resolution process provides for a two-step fact-finding process beginning with a non-binding hearing and culminating with the second fact-finding that is deemed "final and binding." See NRS 228.215(10); NRS 288.200(6). The default position for an agreement that is submitted to this sort of fact-finding is for a one-year contract. NRS 288.200(7)(c).

While the Act has scheduled some benchmarks to help this process moving along to completion, the reality is that the time involved in each step adds up. These steps, including the scheduling of a fact-finding hearing can sometimes perdure for months at a time before an agreement can become final. An example of this is recounted in this Board's decision in *Churchill County Education Assoc. v. Churchill County School Dist*. Item No. 386, EMRB Case No. A1-045594 (1996) which typifies the scheduling realities of the fact-finding process. In *Churchill County*, the parties had been in negotiations for an agreement that ended in 1995 (presumably June 30, 1995) but no agreement was reached before the

agreement expired and impasse was declared, which pushed the negotiations for the successor agreement to a factfinding process. The factfinder was not available to even hold a hearing until March of 1996, nine months after the contract expired. The Board's decision in *Churchill County* reflects that this sort of delay is not an act of bad faith by the parties, it is simply a practical reality owing to circumstances such as the factfinders' s availability.

Even after a factfinding hearing is scheduled and eventually held, a factfinder may still ask the parties to submit post-hearing briefs. After briefing, the factfinder can then take an additional month (30 days) to issue the report and recommendations. NRS 288.200(4). The statutory benchmarks are not firm deadlines; the parties retain discretion to extend nearly all of the deadlines associated with fact finding. NRS 288.200(8).

If this factfinding does not lead to an agreement, the process is repeated with a different factfinder, which the principal difference that the second factfinder can delay the factfinding for up to 3 additional weeks to encourage additional negotiations, NRS 288.215(8) and at the culmination of the process, the parties each submit a final written offer, one of which must be accepted by the factfinder. NRS 288.215(9), (10).

At the conclusion of this factfinding process, a final agreement must still be submitted to the governing board for review and potential approval. NRS 288.153(1). Depending upon whether the parties have also agreed to union ratification[1] a final agreement may also need to be submitted to union membership for a ratification vote before the process can be completed. *See e.g. Hertz Corp.*, 304 N.L.R.B. 469 (1991) ("… ratification is only a permissive subject of bargaining" but may still be insisted upon when an agreement has been made); *Washoe School Principals Assoc.*, Item No. 895 at p. 8-9 (recognizing ground rules as a non-mandatory subject of bargaining). This Board recently suggested that if there is to be a union ratification vote, the approval under NRS 288.153 should be delayed indefinitely until after a union's ratification vote. *International Union of Elevator Constructors v. Clark*

[1] The Act has no provision calling for mandatory ratification by a union. The condition for union ratification is thus something that must be established by reciprocal agreement between the employer and a union, usually through the ground rules. *In the Matter of City of Reno*, Item No. 86, EMRB Case No. A1-045315 (1978).

County, Item No. 891, EMRB Case No. 2022-018 (2024).

C. The Gap Between Agreements

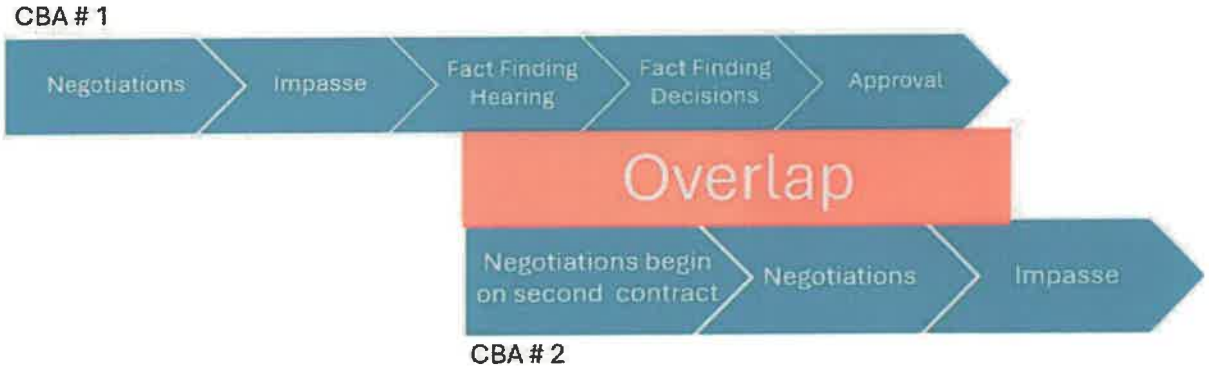
When impasse is declared and the fact-finding process is not completed before the expiration of the current contract, as was the case in *Churchill County*, it creates a gap between the expiration of the old agreement and the finalization of the successor agreement.

The gap is nothing new. The Board has previously addressed this phenomenon. It has stated that during this gap, the parties must maintain the status quo as it concerns mandatory subjects of bargaining. *Reno Police Protective Assoc. v. City of Reno*, Item No. 175, EMRB Case No. A1-045390 (1985).[2] And consistent with *Reno Police Protective Association*, the County maintains the status quo for its employees on mandatory subjects pending the completion of a successor agreement. The status quo rule effectively plugs the gap for those individuals who remain current employees through the entire gap. But the status quo rule does not cover the issue of employee turnover. During the gap employees retire or resign and there are still employee transfers. And the issue has come up concerning those individuals who leave the bargaining unit during this gap.

[2] The implication within *City of Reno* is that the duty to maintain the status quo following impasse is a trade-off for the Act's regulation of the common law no-strike rule that applies to public sector bargaining. *City of Reno* noted a difference between the obligations imposed by the National Labor Relations Act, which allows for an employer to make unilateral changes after an impasse and various public sector bargaining statutes that do not allow for unilateral changes to be made after an impasse. Under the public sector approach the impasse resolution processes are "one aspect of the collective bargaining, or negotiation, process." *United States Immigr. & Naturalization Serv. & Nat'l Border Patrol Council Am. Fed'n of Gov't Emps.*, 55 F.L.R.A. 69, 76 (Jan. 12, 1999). Should the anti-strike rules of the Act ever be altered, the status-quo-after-impasse rule of *City of Reno* would need to be revisited.

D. The Overlap in Negotiations Caused By Short Term Agreements

Another side effect of resorting to fact-finding to unclog the impasse is the prospect of concurrent and overlapping negotiations for two contracts between the same parties. As noted above, it is not unheard of for factfinding hearings to stretch into the spring of the succeeding year or later. But by the spring of the succeeding year, specifically by February 1st, it is also time to start negotiations for the agreement that will be the successor to the agreement that is currently up in the air in fact finding. NRS 288.180(1). In other words, there is an overlap; there will be two contracts simultaneously up in the air that are being decided.



By way of an example, the County currently faces this very situation of dual negotiations with the Clark County Prosecutors Association. A one-year agreement between the County and the CCPA for the fiscal year July 1, 2023-June 30, 2024 is currently in fact-finding, and at the same time negotiations for a successor agreement to begin on July 1, 2024 have also been ongoing. (Declaration of Curtis Germany, Exhibit 1).

The overlap is of course only a temporary condition. It resolves itself after the first agreement finalized and approved per NRS 288.153. The same sort of overlapping situation can also potentially develop when the parties are negotiating a reopener.

The County contends that any negotiations that take place during this overlap would still be subject to the requirement of good faith bargaining by both parties. However, in this scenario the fact that the prior agreement is still an unknown quantity and that greatly hampers a local government employer's ability to adequately assess many of the articles in

the agreement, particularly the financial articles. Any subjects that are still in the fact-finding process from the first agreement are unknown variables, at least during the gap period.

III. DESIGNATION OF THE SPECIFIC PROVISION, REGULATION OR DECISION IN QUESTION

Questions Concerning Former Employees and Employees that Transfer to a New Unit: This issue invokes NRS 288.050 (defining local government employee); NRS 288.133 (defining bargaining agent) NRS 288.150(1) (obligation to bargain with a bargaining agent) and the application of this Board's prior decision in in *Bahlman v. Washoe County Fire Commissioners*, Item No. 107, EMRB Case No. A1-045340 (Jan. 6, 1981).

Overlapping Negotiations. This issue invokes the good faith provisions of NRS 288.032, NRS 288.150(1) and the fact-finding requirements contained in NRS 288.200 and those of NRS 288.215 that are incorporated.

Retroactivity of an Agreement Reached Through Factfinding: NRS 288.200 and NRS 288.215(10).

Re-opener Processes: NRS 2588.150(2)(w); NRS 288.200.

IV. CLEAR AND CONCISE STATEMENT OF THE COUNTY'S POSISTION

Former Employees Who Separate During the Gap Period. The County asks the Board to make the following declaration: A bargaining agent is statutorily authorized to bargain on behalf of current employees. Upon separation[3] of employment an individual is no longer a current employee and no longer covered by the Act. Therefore, a bargaining agent is not authorized to continue to bargain on behalf of former employees after they separate.

Employee Transfers During the Gap Period. The County asks the Board to make the following declaration for employees who transfer to another bargaining unit: Upon a transfer to a new bargaining unit the right of exclusive representation is held by the bargaining agent of the receiving unit. Therefore the bargaining agent of the prior unit has no authority to continue to bargain on behalf of an employee after their transfer to another bargaining unit.

[3] It should be noted that the County's request in this case does not include employees who are involuntarily terminated and who challenge that termination seeking reinstatement.

Overlapping Negotiations Issue. The County asks the Board to make the following declaration regarding bargaining obligations during overlapping negotiations: The parties are required to negotiate in good faith, which means an honest effort to try to reach an agreement. Because meaningful offers cannot be made on subjects that are still unresolved until the prior contract is completed, the parties may temporarily defer negotiations on the second agreement until the first agreement is at least tentatively made.

Retroactivity of An Agreement Reached by Fact-Finding. County asks the Board to make the following declaration: The retroactivity provision of NRS 288.215(10) does not prevent the parties from submitting offers with specified dates attached to contractual terms.

Re-Opener Clauses. During the life of a collective bargain agreement, the parties' statutory bargaining obligations are satisfied, and they are not required by the Act to negotiate further. Any negotiations that take place as a re-opener are therefore solely a function of the contract and not a statutory bargaining obligation. The statutory impasse procedures do not apply to reopener negotiations.

V. MEMORANDUM OF POINTS AND AUTHORITIES

A. Employees Who Leave During the Gap Between Contracts Are no Longer Covered by the Act and Cannot Be Represented by Their Former Bargaining Agent

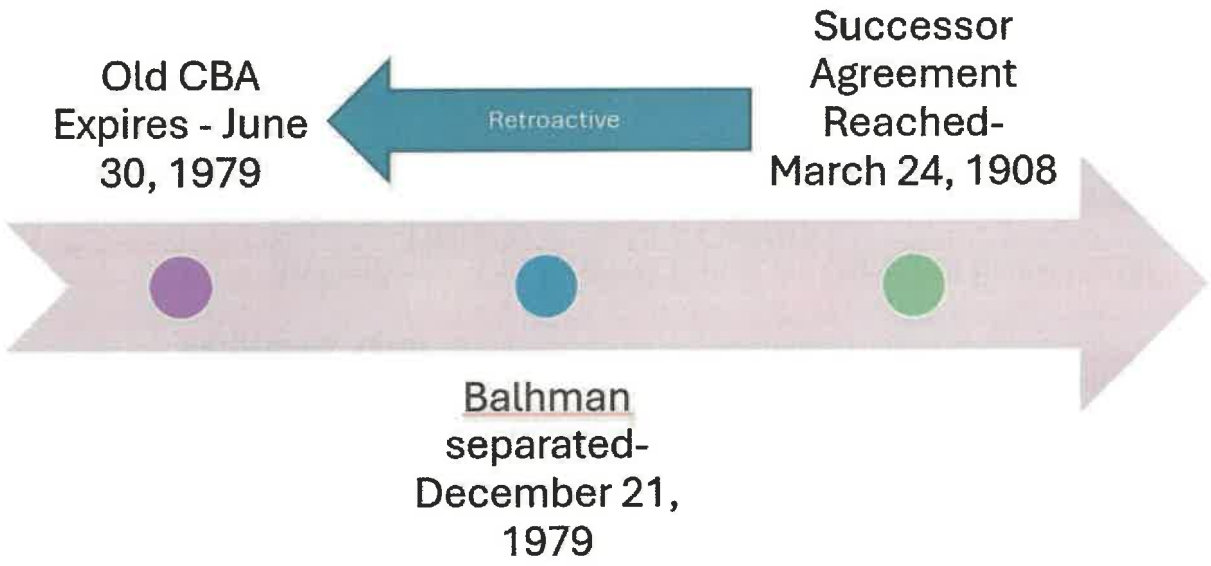
1. An Employee Who Separates During the Gap is Not Entitled to the Negotiated Benefits of the New Contract

This issue of bargaining on behalf of former employees during a gap has come before the before the Board once before in *Bahlman v. Washoe County Fire Commissioners*, Item No. 107, EMRB Case No. A1-045340 (Jan. 6, 1981).

Bahlman concerned the very same sort of gap scenario discussed above and illustrates the issues presented in this petition. In *Bahlman* the petitioner had been employed under an agreement that had expired in June of 1979. The petitioner was separated from employment six months later on December 21, 1979. At the time of the separation, a successor agreement had not yet been reached, but impasse had been declared and the employer and the union were going through a final and binding factfinding in order to reach the successor

agreement.[4]

The fact-finder's award on the successor agreement was issued on March 24, 1980, roughly 3 months after Bahlman had been separated. The agreement was retroactive to July 1, 1979, a date that was nearly 6 months prior to Bahlman's separation. In other words, Bahlman was separated roughly 2/3 of the way through a 9-month gap between agreements.



Bahlman sought to have the retroactive agreement applied to himself and filed his complaint with this Board after the employer refused to do so.

The employer in that case sought dismissal of the EMRB complaint, arguing among other things that "that the provisions of any retroactive collective bargaining agreement apply only to individuals who are employees at the time settlement is reached." *Id.* at p. 1. And this Board apparently agreed. It granted the dismissal on the grounds that the petitioner had not raised a matter under the Act, although the extent of the Board's analysis is succinct and does not elaborate. Even so, subsequent decisions from this Board confirm the sound rational doctrinal foundation upon which such a dismissal in *Bahlman* would rest.

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[4] In 1977 the legislature implemented a final and binding impasse resolution process for firefighters that is similar to the current fact-finding process described above. *Compare* NRS 288.200; 1977 Stat. Nev. Ch 462, pp. 916-917.

2. The Board Has Consistently Held that the Act Covers Only Current Employees

The Act covers "local government employees." NRS 288.050. If petitioner is not covered by the Act, then a complaint filed with this Board will automatically fail to raise a matter under the Act.

When the Act speaks of a "local government employee" it does so in the present tense, meaning a current employee and not a former employee. The Board has confirmed this point on multiple occasions since *Bahlman. e.g. McElrath v. Clark County School District*, Item No. 423, EMRB Case No. A1-045634 (Feb. 12, 1998) ("Retirees are not 'employees' within the meaning of NRS Chapter 288"); *Ebarb v. Clark County*, Item No. 843-C, EMRB Case No. 2018-006, p. 2 (Sept. 21 , 2020); *see also Washoe County Sheriff's Deputies Assoc. v Washoe County*, Item No. 271, EMRB Case No. A1-045479 (July 25, 1991); *Austin v North Las Vegas Police Officers Assoc*. Item No. 437, EMRB Case No. A1-045648 (Dec. 10, 1998).

The formula for determining whether a person is covered by the Act is simple enough. Where the Board has had to consider the plight of a former employee, it has relied upon the former employee's status at the time that the operative event occurred. If the person was a current employee at the time of the event, they are covered by the Act, but if a former employee at the time of the event then they are not covered by the Act. Thus in *Ebarb*, the fact that the petitioner was not a current employee at the time of the alleged unilateral change was dispositive. In contrast, *Ebarb* noted the contrary scenario - that a petitioner who was a current employee when the unilateral change occurred was covered by the Act. *Ebarb* at pp. 2-3 (distinguishing between the situation in *Ebarb* and the petitioner in *Boykin v. City of N. Las Vegas*, Item. No. 674E, Case No. A1-045921 (2010)).

3. Bargaining Obligations do not Attach to Former Employees

When it comes to bargaining, the prevailing rule is that a public employer's statutory duty to bargain does not extend former employees. *Aeneas McDonald Police Benev. Ass'n, Inc. v. City of Geneva*, 92 N.Y.2d 326, 332, 703 N.E.2d 745, 748 (1998); *David Hadley v.*

Multnomah County Deputy Sheriff's Association, Or. PERB, Case No. Fr-1-08 2008 WL 1966712, at 2 (2008) ("Neither the County nor the Association had a legal obligation to bargain about the employment relations of retirees or former employees who voluntarily resigned their employment with the County and who, as a result, are no longer members of the bargaining unit").

A bargaining agent is authorized to negotiate on behalf of a bargaining unit, which is in turn a group of current "local government employees." NRS 288.134. As the scope of a bargaining agent's authority extends only to the employees in the unit, which are current employees, it loses its authority to negotiate on behalf of an individual upon separation. At that point they are no longer in the bargaining unit and no longer covered by the Act. And this does not change even if a contract is retroactive, as it was in *Bahlman*, because the authority to continue to represent an individual through collective bargaining is foundational to the ability to negotiate any agreement on their behalf, even a retroactive one. *Nevada Highway Patrol Ass'n v. State, Dep't of Motor Vehicles,* 107 Nev. 547, 815 P.2d 608 (1991) (a public sector collective bargaining must occur within the parameters of the statutory authorizations). Hence, the fact that a petitioner was separated before the retroactive successor agreement was reached would compel the same outcome in *Bahlman* that the matter was not covered by the Act irrespective of the retroactive language in the agreement.

The law of agency further corroborates this point. In order for an agent to lawfully come to an agreement on behalf of a principal, the agent must have actual or apparent authority to do so at the time the agreement is made. Restatement (Second) of Agency § 26-27 (1958); *Schlater v. Winpenny*, 75 Pa. 321, 324 (1874). The same is true of a bargaining agent – a bargaining agent must hold the authority to negotiate on behalf of the principals that it represents, which are the current employees in the bargaining unit, at the time that it acts. Once an individual leaves the bargaining unit that authority is forfeit; a bargaining agent no longer holds authority to bargain on his or her behalf. Hence the end result that a contract that is formed after separation occurs cannot retroactively be made to include one for whom there was no bargaining authority at the time the agreement was reached. In other

words, the same result that this Board reached in *Bahlman*.

A former employee, being situated outside the parameters of the Act at the time the agreement is being negotiated, cannot lawfully be included in the agreement.

4. Other Implications of Former Employees Being Excluded From Bargaining

It is worth noting that this same rationale, when consistently applied, also protects unions from liability for a breach of the duty of fair representation claim that occurs after an employee's separation. *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 181 (8th Cir. 1984) (reasoning that a union owed no duty of fair representation to former employees because "a union's duty of fair representation arises from its status as exclusive representative of the employees within the bargaining unit, which deprives individual employees of the ability to deal directly with their employer. Thus the union's duty runs to the employees in the bargaining unit. It follows that the union owes no duty to persons who are not employees in the bargaining unit.") (internal citations omitted).

Based upon the foregoing principles, the County asks the Board to confirm its decision in *Bahlman* and to clarify that a bargaining agent is not authorized to continue bargaining on behalf of former employees who voluntarily separate during the gap and before a successor agreement is reached. A successor agreement, even a retroactive one, cannot encompass individuals who separate from employment before the successor agreement is finalized.

B. An Employee Cannot be Simultaneously Represented by Two Different Bargaining Agents

A related question arises when an employee transfers from one bargaining unit to another. In this situation a transferring employee is still a current employee and thus still covered by the Act. The question in that case, however, is which bargaining agent is authorized to negotiate on behalf of an employee.

The principle of exclusive representation should provide a rather clear answer to this question.

When an employee organization becomes recognized as the bargaining agent for a given unit, it is entitled to the status of exclusive representative of all employees of the unit. NRS 288.133; *UMC Physicians' Bargaining Unit v. Nevada Serv. Employees Union*, 124 Nev. 84, 178 P.3d 709, 715 (2008) ("the interests of employees whose bargaining units are exclusively represented by one employee organization cannot be simultaneously represented by another employee organization").

The same approach that applies when employees separate from employment ought to apply here as well. It dictates that the date that an employee transfers to the new bargaining unit is determinative - only the recognized bargaining agent for the new unit is entitled to negotiate on behalf of the employee from that point on. Any contrary approach would result in a scenario where a bargaining agent is negotiating on behalf of an employee in another bargaining unit. Hence the Board should declare that negotiations, including fact-finding that occur after the date of the transfer must exclude the transferring employee, even if the agreement purports to be retroactive.

The same rationale also extends to employees who promote to a non-union or management position. Upon their promotion, the employee is no longer in the bargaining unit and the bargaining agent no longer has standing to negotiate on the employee's behalf. See *International Association of Firefighters, Local 1265 v. City of Sparks*, Item No. 136, EMRB Case No. A1-045362 (1982).

C. Good Faith Bargaining Will Temporarily Excuse Negotiations Over Terms in a Successor Agreement that are Dependent Upon Unsettled Terms in a Prior Agreement that has Not Been Finalized

The Act imposes a good faith bargaining requirement on bargaining agents as well as local government employers. This obligation requires unions and employers to each act with a sincere desire to reach an agreement. *City of Reno v. IAFF, Local 731*, Item No. 253-A, EMRB Case No. A1-045472, 1991 WL 11746841, p. 4 (Feb. 8, 1991). What constitutes good faith is not a static determination; rather good faith depends upon all of the applicable circumstances. *Id.* The good faith standard should therefore account for temporary uncertainties that might arise in the bargaining process.

1. The Bargaining Obligation Can be Suspended During Temporary Uncertainties

There are times when a temporary situation arises which deprives a party of important information that is relevant to bargaining. In such cases the party is justified in temporarily suspending bargaining over the relevant articles until the uncertainty is resolved. *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 709 (5th Cir. 1960).

In *Minute Maid*, an employer had refused to discuss economic terms of an agreement whilst there was a temporary embargo in place on the use of frozen fruit, which in turn "…had created such economic uncertainties as prevented Minute Maid from knowing what it might be able to do with respect to such questions." *Id.* at 710. When this sort of uncertainty arises, it is fruitless to require the parties to negotiate until the uncertainty is resolved. *Id.* at 709 ("To say that Minute Maid should have been required, at that time, to bargain on economic matters would be to attribute to it, as of that time, a knowledge of the extent of the freeze damage and a power of making an accurate prophecy that it would be permitted to use frozen fruit within then determinable limits. We will not assume that Minute Maid was gifted with a clairvoyance…").

The same principle finds purchase in the public sector when a public entity faces uncertainty about its financial status and obligations. The California Public Employment Relations Board has tackled the issue by acknowledging that the whole point of requiring good faith bargaining is to try to reach an agreement, and in light of that purpose, at times, it simply makes sense that economic uncertainty will present an obstacle to that purpose:

> …we do not view DPA's determination to defer negotiations until the legislative process was completed as an outright refusal to bargain with ACSA. In situations best exemplified by the instant case, an uncertain financial picture may pose a serious impediment to fruitful negotiations and thus present a legitimate basis for postponing the inception of negotiations with the employee organization. Awaiting final budget action from the Legislature, under such circumstances, cannot be said to contravene SEERA's mandate.

California Department of Personnel Administration, 10 PERC ¶ 17089 (1986).

In a similar vein the Wisconsin Employment Relations Commission also recognizes that a public employer's refusal to bargain in light of a temporary uncertainty does not violate its good faith bargaining obligations. The Wisconsin commission holds that when there are unique circumstances "… a temporary suspension of negotiations to allow for the resolution of significant matters of law with a direct impact on the bargaining process does not constitute an unlawful refusal to bargain." *IBEW, Local 965* v. *Public Utility Commission of the City of Richland Center*, MP-4655, Decision No. 33281-B, 2012 WL 2674296 at 4 (2012).

The Wisconsin commission also spoke approvingly of the existing and accepted custom to temporarily suspend negotiations in light of uncertainties, noting that "…parties to municipal collective bargaining in the past on occasion faced uncertainty over funding, the customary approach was to delay bargaining until the funding questions were resolved. *Id.* at p. 3.

2. An Unsettled Prior Contract Creates Temporary Uncertainty Affecting the Successor Contract

The jumble that ensues when negotiations overlap is the same sort of situation that was at issue in *Minute Maid, California Department of Personnel* and *IBEW Local 965* – a temporary uncertainty that briefly prevents meaningful discussion over financial terms in the short term but would allow for meaningful bargaining after the uncertainty has been resolved.

When financial articles are at stake in a successor agreement the prior agreement serves as a baseline for those discussions. But if the baseline is itself an unknown variable, then meaningful discussion cannot realistically ensue. Especially as to financial matters, there is a missing variable that is needed in order to complete the equation.

The extent to which ongoing negotiations for the first contract will affect the second contract will depend on the specifics of the terms are still up-in-the-air in the first contract, as the parameters of the Act's good faith bargaining obligation are always situationally-driven. *E.g. Washoe School Principals' Assoc*. Item No. 895 at p. 3. By way of one example,

this Board has indicated that cost-of-living adjustments are a mandatory subject of bargaining. *SEIU Local 1107 v. Clark County*, Item No. 810, EMRB Case No. 2015-011 2015 WL 8106772 at p. 6 (2015). And a cost-of-living adjustment is an (usually) upward adjustment made by applying a percentage to a baseline rate. But an upward adjustment of this sort is itself dependent upon the prior rate of being a fixed and known quantity.

The Board should recognize the practical realities that ensue from overlapping negotiations and should declare that when those realities create an uncertainty affecting the second contract, that a party may temporarily defer negotiations on the successor agreement until after the first contract is finalized.

Alternatively, if the Board is unable to declare that bargaining on a successor agreement may be temporarily deferred, the Board should declare that negotiation sessions taking place during the overlap should not be counted toward the six-meeting minimum. Each of the six meetings in NRS 288.200(1)(a) should be a meeting infused with authentic good faith negotiations. Due to the uncertainty caused by the overlap, a meeting during the overlap on matters that depend on the terms of the first contract cannot satisfy the statutory obligation to bargain in good faith. A meeting consisting merely of surface bargaining should not count toward the total. *Washoe School Principals Assoc.* Item No. 895 at p. 6; *City of Reno v. IAFF Local 731*, Item No. 253-A at p. 6 (excoriating a union for its "reprehensible" surface bargaining where it "…never intended to bargain in good faith and that it was simply posturing for factfinding and arbitration. Such conduct is clearly in violation of NRS 288.270(2)(b))."

The six-meeting minimum in NRS 288.200 means six meetings of authentic good faith negotiations. And as the ability to negotiate in good faith can be frustrated by economic uncertainties when there are overlapping negotiations, it is contrary to the intent of Chapter 288 to count meetings towards the minimum where good faith negotiations can occur.

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D. In a Final And Binding Factfinder, the Parties Retain the Ability to Craft the Terms of their Offers and a Factfinder May Not Change the Terms of the Offers

The County seeks guidance concerning the "retroactive" provision of NRS 288.215(10).

When a second factfinding takes place, NRS 288.200(6) specifies that certain features of the police/fire factfinding process apply. The police/fire fac finding process is set forth in NRS 288.215. That process calls for "…each of the parties [to] submit a single written statement containing its final offer for each of the unresolved issues." NRS 288.215(9) (emphasis added).

After each final offer is submitted, the factfinder "…shall, within 10 days after the final offers are submitted, accept one of the written statements…" NRS 288.215(10) (emphasis added). Subsection 10 goes on to state that "[a]ny award of the arbitrator is retroactive to the expiration date of the last contract." This last bit has generated some confusion concerning offers that have included in their terms a specified trigger date, for example a wage increase offered specified to begin on December 1 instead of July 1. It is, at a minimum, important for the parties to know ahead of time what the stakes are in such a factfinding.

1. The Parties Are Free to Include Trigger Dates When Submitting an Offer to a Factfinder

The single final offer given to the factfinder is authored by each respective party. NRS 288.215(9) Each may thus craft the terms of its final offer how it best sees fit.

Beyond the plain statutory language of subsection 9, this comports with general principles of collective bargaining laws. It is a useful legal fiction for the Board to look to decisions under the National Labor Relations Act for guidance, where appropriate. *Truckee Meadows Fire Prot. Dist. v. IAFF, Loc. 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993). And it is a foundational doctrinal point under the NLRA that the Act does not dictate, one way or another, what the provisions of any agreement ought to be. The Act specifies the topics that are to be negotiated, but the actual terms surrounding those topics are in the

domain of the parties to craft as they best see fit. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970). In *HK Porter* the Supreme Court specifically pointed to section 8(d) of the NLRA to support the notion that the NLRB should not be involved in "…controlling the settling of the terms of collective bargaining agreement." *Id.* at 106. Notably, identical language is also included in NRS 288.032, which states that the collective bargaining obligations under the Act "…do[] not compel either party to agree to a proposal or require the making of a concession."

As the author of the final written offer under NRS 288.215(9), each party has the ability to write the terms of that offer in the manner they best see fit, including the option of providing a trigger date attached to any given term of the agreement.

2. A Factfinder is Not Permitted to Alter the Terms of the Offer

As noted above, the process calls for the parties to submit an offer and for a factfinder's to simply "…accept one of the written statements…" NRS 288.215(10) (emphasis added). "Offer" and "acceptance" are terms laden with meaning in the context of forming an agreement. Restatement (Second) of Contracts § 24 (1981) (defining offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited.." It is basic contract law that in order to accept an offer, one cannot alter or change the offer in any way. *E.g. Eliason v. Henshaw*, 17 U.S. 225, 228 (1819). By specifying that the factfinder must accept one of the final offers, the legislature clearly signaled that a factfinder is bound by the terms of each offer submitted; the factfinder can select between the competing final offers but in so doing cannot change the offers.

The Board should thus declare that in a fact-finding governed by NRS 288.215(9) and (10), a party may structure its final offer on the terms that it chooses, including potential trigger dates, and that a factfinder is not permitted to change the terms of the final offers.

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E. The Impasse Resolution Procedures Do Not Automatically Apply to Mid-Contract Re-openers

The final question upon which the County seeks guidance concerns the application of NRS 288.200 to non-statutory bargaining during a contractual reopener.

NRS 288.150(2)(q) states that the duration of a collective bargaining agreement is a mandatory subject of bargaining. During the term of agreement, the parties cannot be compelled to negotiate further, even on matters that are deemed mandatory subjects of bargaining. *E.g. Dep't of Navy, Marine Corps Logistics Base, Albany, Ga. v. Fed. Lab. Rels. Auth.*, 962 F.2d 48, 56 (D.C. Cir. 1992) ("…is well-recognized that the parties to a collective bargaining agreement have no obligation to engage in mid-term negotiation over subjects covered by the agreement.") (citing numerous examples).

On occasion, a party may include a reopener provision in an agreement. A reopener provision is a that allows for a mid-term modification of an existing agreement. See e.g. *NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.,* 789 F.2d 121, 125 (2d Cir. 1986) ("Reopener clauses in collective bargaining agreements allow both parties an opportunity to modify their existing agreement in order to meet changing economic conditions.")

The plain language of NRS 288.200 disclaims the notion that the statute's impasse resolution procedures automatically apply to negotiations under a reopener provision. Subsection 1 specifies the conditions in which NRS 288.200 applies, including the condition that "the parties have failed to reach an agreement…" NRS 288.200(1)(a). Reopener clauses, by definition, arise only in the context of an existing agreement; that is to say they arise only where the parties have succeeded in reaching an agreement. As reopener negotiations occur in a scenario not covered by NRS 288.200, the statute should not automatically apply.

Moreover, re-opener clauses are not mandatory subjects of bargaining except as they pertain to a fiscal emergency, otherwise they are permissive subjects of bargaining. NRS 288.150(2)(w); *see also Clark County Public Employees Assoc. v Housing Authority*, Item No. 270, EMRB Case No. A1-045478, p. 16 (1991) (stating that NRS 288.180's February 1st

deadline for a union to request negotiations operates as a statutory bar against compelled mid-term negotiations). Hence any negotiations that take place under a reopener clause, unless in situation of a fiscal emergency, are not negotiations that are compelled by the Act in the first place. The impetus for such a reopener clause is purely a matter of contract.

As a matter of contract, it does not follow that the statutory impasse resolution procedures of NRS 288.200 automatically apply to a reopener.

Since a reopener is purely a function of an agreement, the parties to an agreement would still be free to agree to follow a procedure like NRS 288.200 in a reopener negotiation, or to agree to follow any other procedure for that matter. Such agility in an agreement should be encouraged rather than constrained by automatically handcuffing reopener negotiations to the NRS 288.200 factfinding process. It is sufficient in this case to simply clarify that NRS 288.200 does not automatically apply to reopener negotiations.

VI. CONCLUSION

The Board should give the County and its bargaining agents a fair expectation of what is involved when a union declares an impasse and a gap is created. The Board should confirm its decision in Bahlman that upon separation a former employee is no longer covered by the Act and a bargaining agent loses standing to negotiate on behalf of the former employee from that point on.

The Board should confirm that under the principle of exclusive representation an employee transferring from one unit to another can no longer be represented by the bargaining agent for the employee's' former unit from that point on.

The Board should confirm that when an unsettled prior contract creates uncertainties when negotiating a successor agreement, the parties are justified in temporarily deferring negotiations until the uncertainty can be resolved.

The Board should confirm that a factfinder conducting a factfinding hearing under NRS 288.215(9) and (10) cannot alter the terms of each party's final offer.

The Board should confirm and declare that the statutory impasse resolution procedures of NRS 288.200 do not automatically apply to contractual reopener negotiations.

Answering these questions will provide employers and unions a clearer understanding of the framework governing negotiations.

DATED this 6th day of May 2024.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: _____

SCOTT R. DAVIS
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500 South Grand Central Pkwy. 5th Flr.
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Attorney for Clark County

EXHIBIT 1

DECLARATION OF CURTIS GERMANY (NRS 53.045)

CURTIS GERMANY makes the following declaration:

1. That I am employed as the Director of Human Resources for Clark County. In that capacity I have knowledge of the information contained herein.

2. Clark County recognizes the Clark County Prosecutors Association (CCPA) as the bargaining agent for a unit comprised of non-civil deputy district attorneys.

3. The County and CCPA are currently in the statutory fact-finding process for a one-year agreement covering the fiscal year of July 1, 2023-June 30, 2024.

4. The County and CCPA are also currently in the negotiation process for a collective bargaining agreement with a target on July 1, 2024.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045)

EXECUTED on this 1st day of May 2024.

CURTIS GERMANY

STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

In the matter of CLARK COUNTY's Petition for Declaratory Order	Case No.: 2024-016

JOINT ANSWERING BRIEF IN RESPONSE TO CLARK COUNTY'S PETITION FOR DECLARATORY ORDER

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On behalf of Respondent International Association of Fire Fighters Local 1908

NEVADA ASSOCIATION OF PUBLIC SAFETY OFFICERS
ANDREW REGENBAUM
Executive Director
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Henderson, NV 89015
On behalf of Respondents Clark County Juvenile Justice Probation Officers Association and Clark County Juvenile Justice Supervisors Association

NAME AND ADDRESS OF PETITIONER AS REQUIRED BY NAC 288.390(2)(A)

The Petitioner is Clark County whose address is 500 South Grand Central Pkwy., Las Vegas, NV 89115-2215.

NAME AND ADDRESSES OF RESPONDENTS AS REQUIRED BY NAC 288.390(2)(b)

This Joint Answering Brief is submitted by the following employee organizations:

Service Employee International Union Local 1107 (hereafter "SEIU Local 1107")
2250 S Rancho Dr STE 165, Las Vegas, NV 89102

International Association of Firefighters Local 1908 (hereafter "IAFF Local 1908")
6200 W Charleston Blvd, Las Vegas, NV 89146

Clark County Prosecutors Association (hereafter "CCPA")
PO Box 2365
Las Vegas, NV 89125-2364

Clark County Defenders Union (hereafter "CCDU")
201 South Las Vegas Blvd., #2173, Las Vegas, NV 89125

Clark County District Attorney Investigators Association (hereafter "DAIA")
PO Box 2472, Las Vegas, NV 89125

Clark County Juvenile Justice Probation Officers Association (hereafter "JJPOA")
145 Panama St. Henderson, NV 89015

Clark County Juvenile Justice Supervisors Association (hereafter "JJSA")
145 Panama St. Henderson, NV 89015

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STATEMENT OF THE FACTS, INCLUDING THE TIME AND PLACE OF THE OCCURRENCE OF THE PARTICULAR ACTS DESCRIBED IN THE PETITION AND THE NAMES OF PERSONS INVOLVED AS REQUIRED BY NAC 288.390(2)(b)

NAC 288.390(2)(b) requires this Response to contain "[a] clear and concise statement of the facts, including the time and place of the occurrence of the particular acts described in the petition and the names of persons involved". However, Clark County's Petition for Declaratory Order does not contain a statement of any such "particular acts" or the time or place of such occurrences to which this Brief can respond.

Because Clark County failed to include a statement of "particular acts," Respondents can only guess as to the impetus for the County's Petition. More likely than not the Petition was filed because of the multiple declarations of impasse and resorts to the NRS 288.200 impasse procedures by the Clark County Prosecutors Association (hereafter "CCPA") and the Clark County Defenders Union (hereafter "CCDU") for fiscal year ("FY") 2022 (July 1, 2022 through June 30, 2023) and thereafter, as well as litigation and a scheduled grievance arbitration between Clark County and CCDU following Clark County's refusal to comply with provisions of the CBA following fact finding between Clark County and CCDU.[1]

CCPA negotiated a multiyear collective bargaining agreement with Clark County for July 1, 2021 through June 30, 2024. Article 36 of that CBA provided a four- and one-half percent (4.50%) salary schedule adjustment for FY 2022. However, there were no such specified salary schedule

[1] Respondents Clark County District Attorney Investigators Association (hereafter "DAIA") and Juvenile Justice Supervisors Association (hereafter "JJPSA") likewise declared impasse and resorted to the statutory impasse procedures for successor CBAs for fiscal year 2022 and were scheduled for a joint fact-finding hearing before Arbitrator Jay Fogelberg on January 18, 2023. However, both impasses resolved shortly before, or on the day of, the schedule fact finding hearing.

adjustments or Cost of Living Adjustments ("COLAs") for FY 2023 or FY 2024. Instead, the parties agreed to reopener clauses for such COLAs. [2]

When CCPA and Clark County could not agree upon a COLA for FY 2022, impasse was declared and the parties went to fact finding before Arbitrator John Kagel. Arbitrator Kagel issued his fact-finding Recommendation on December 27, 2022. (Exhibit "A"). While CCPA immediately communicated it was willing to accept Kagel's Recommendation, Clark County refused to take any action on the Recommendation, neither accepting nor rejecting the Recommendation when the matter was set before the Board of County Commissioners (hereafter "BOCC") pursuant to NRS 288.200(8). This failure to take action necessitated the selection of an interest arbitrator, and the hearing was scheduled for May 22, 2023.[3] On May 16, 2023, Clark County finally agreed to accept Arbitrator Kagel's Recommendation.

During the same period, CCDU and Clark County went to fact finding before Arbitrator Paul Roose who issued his Recommendations on April 10, 2023. (Exhibit "B"). CCDU immediately communicated its willingness to accept Roose's Recommendations; Clark County again refused to take any action on the Recommendations, neither accepting nor rejecting when the matter came before the BOCC as required by NRS 288.200(8). Due to Clark County's inaction, on June 13, 2023, CCDU was forced to request a strike list from FMCS to schedule an interest arbitration. Thereafter, Clark County finally agreed to settle the contract on terms recommended by Arbitrator Roose.

One of the Recommendations of Arbitrator Roose was that those members of the CCDU bargaining unit who gave a five-percent (5%) salary reduction as a concession during the Covid 19 pandemic receive a lump-sum payment equal to that five-percent (5%) salary concession. The parties

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[2] Because all collective bargaining agreement are on file with the Board, excerpts of such agreements are not attached to this Brief.

[3] While NRS 288.200(6) speaks in terms of "binding" fact-finding for non-police and non-firefighters, it adopts "subsections 8 to 13, inclusive, of NRS 288.215". Therefore, any binding proceeding will be referred to in this Brief as interest arbitration and a binding fact-finder as an interest arbitrator.

agreed to and ratified contract language providing that any employee who gave such a concession, and who was still employed as of July 1, 2022 (the retroactive date of the contract), would receive the reimbursement. Due to the length of time it took to go to fact-finding and ultimately settle the bargaining agreement in 2023, there were a number of members of the bargaining unit who were employed as of July 1, 2022, but who left after this date (many to become judges).

Clark County refused to pay these former employees, and refused to recognize the grievance filed on their behalf by CCDU or to arbitrate the dispute, claiming that it was unlawful for CCDU to bargain for "former employees". CCDU was forced to obtain an order compelling arbitration from the district court. (Exhibit "C"). Clark County ultimately agreed to pay the former employees on the eve of the grievance arbitration without prejudice to assert in the future its argument that a union cannot bargain on behalf of employees who are no longer employed at the time the bargaining agreement is finally ratified.

Because CCPA and Clark County again reached impasse over the COLA reopener for FY 2024, they went to nonbinding fact-finding yet again, where Arbitrator Katherine Thomson issued her Recommendation for a six-percent (6%) COLA on June 3, 2024. (Exhibit "D"). Once again, CCPA was willing to accept the recommendation, and once again the BOCC refused to take any action to accept or reject the Recommendation. An interest arbitration is currently scheduled for October 21, 2024.

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QUESTION NUMBER 1

Question Number 1 posed by Clark County is "When an employee separates from employment after expiration of the agreement and before a new agreement is reached, does a bargaining agent lack standing to negotiate for the former employees".

Position of The Unions: Employees who leave during the gap between contracts may remain covered by Chapter 288 and may be represented by their bargaining agent for purposes of any bargaining agreement applied retroactively to cover periods of employment.

A. The Board Has Not Issued a Decision on the Issue of Employees Who Have Separated From Their Bargaining Unit Position For Reasons Other Than Retirement.

The County first argues that "[t]his issue of bargaining on behalf of former employees during a gap has come before…the Board once before." *See* Petition at p. 9, ll. 20-22 *citing Robert H. Bahlman vs. Truckee Meadows Fire Protection District*, Item No. 107, EMRB Case No. A1-045340 (Jan. 6, 1981) (hereafter "*Bahlman*"). The County provides a brief synopsis of the case background in *Bahlman* with no citations and without attaching any exhibits. *See* Petition at p. 9, l. 23 to p. 10, l. 17. However, the less-than-two-page *Bahlman* Order does provide much as far as the underlying facts are concerned:

> By Complaint filed October 6, 1980, the Complainant seeks the Board's determination that the contract settlement via the binding arbitration award of March 24, 1980, which conferred benefits to the union retroactive to July 1, 1979, should be applicable to him as well, notwithstanding his termination as an employee of Respondent effective December 21, 1979. The Complainant contends that the action of the Respondent which denied him these benefits is arbitrary and unjust.
>
> In addition to denying the allegations of the Complaint, the Respondent moves to dismiss because it was not filed in a timely manner and the Board lacks jurisdiction to resolve the matter. The Respondent states that nowhere in the Complaint does the Complainant allege any violation by the Respondent of the provisions of Chapter 288. Further, **the Respondent believes that the provisions of any retroactive collective bargaining agreement apply only to individuals who are employees at the time settlement is reached.**

Id. at pp. 1-2 (**emphases added**). According to the County, "this Board apparently agreed" with the **bold** language above because it granted dismissal, although the County concedes "the extent of the Board's analysis is succinct and does not elaborate." *See* Petition at p. 10, ll. 18-23.

In fact, the Board granted dismissal in *Bahlman* only because "Respondent's Motion to Dismiss, **in so far as the Board lacks jurisdiction** in that the Complaint contains no alleged violation of any provision of Chapter 288 by the Respondent, is well taken." *See Bahlman* Order at p. 2 (emphasis added). The Board provided no analysis, and made no finding, as to the separate retroactive argument made in *Bahlman*. The Petition references the Board's *subsequent decisions* purporting to confirm what Clark County refers to as "the sound rational doctrinal foundation" upon which the *Bahlman* dismissal rests. *Id.* at p. 10, ll. 23-24. However, the County does not cite to any of these purported decisions. Regardless, confirmation of the *Bahlman* dismissal could only speak to jurisdiction, not the application of a retroactive collective bargaining agreement, as the former is the only basis on which the Board granted dismissal. It is an understatement to say that the County is reaching in citing *Bahlman* in support of its argument.

B. The Board's Prior Orders Concern Retired Employees.

The County next makes a jurisdictional argument as to which employees are covered under the Act. *See* Petition at p. 11, ll. 3-5. NRS 288.050 defines a *local government employee* as "any person employed by a local government employer"[4] and *local government employer* is in turn defined in NRS 288.060 as "any political subdivision of this State or any public or quasi-public corporation organized under the laws of this State."[5]

[4] There does not appear to be any Nevada case law interpreting NRS 288.050.

[5] The only Nevada case interpreting NRS 288.060 is *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, which only held that a fire protection district qualified as a *special district* under the statute. 109 Nev. 367, 369, 849 P.2d 343, 345 (1993).

The County cites to several prior EMRB decisions which held that a retired employee no longer qualifies as a local government employee under NRS 288.050. *See* Petition at p. 11 *citing Washoe County Sheriff's Deputies Association, Washoe County District Attorney Investigator's Association, Washoe County Employees Association and International Association of Firefighters, Local 2487 (Intervenor) vs. County of Washoe*, Item No. 271, EMRB Case No. A1-045479 (July 25, 1991) ("The Associations have consistently denied that they were attempting to negotiate on behalf of persons who have already retired."); *Peggy McElrath vs. Clark County School District*, Item No. 423, EMRB Case No. A1-045634 (Feb. 12, 1998) ("Retirees are not 'employees' within the meaning of NRS Chapter 288.") (internal quotations altered) *citing* NRS 288.050; *Joseph Austin vs. North Las Vegas Police Officers Association, Local 41*, Item No. 437, EMRB Case No. A1-045648 (Dec. 10, 1998) ("As a retired member, Austin is not a 'local government employee' as defined in NRS 288.050.") (internal quotations altered); and *Ebarb v. Clark County*, Item No. 843-C, EMRB Case No. 2018-006 (Sept. 21, 2020) *citing Austin* ("dismissal of matter as a retired member is not a local government employee and no standing to bring a complaint").

Notably, none of these prior EMRB decisions speak to employees who have transferred bargaining units or separated from employment for any reason other than retirement.

C. Bargaining Obligations May Attach to Former Employees.

In arguing that "a public employer's statutory duty to bargain does not extend to former employees," the County once again relies on legal authority that is either non-binding precedent, or that does not speak to employees separated from employment for reasons other than retirement. *See* Petition at p. 11, ll. 26-27. The County cites to a New York case where the issue was "whether retired municipal employees, who are no longer members of any collective bargaining unit, may enforce a past practice in civil litigation with their former municipal employer," and an unpublished Oregon Employment Relations Board decision which concerned bargaining on behalf of former employees

who retired or voluntarily resigned. *See* Petition at p. 11, l. 27 to p. 12, l. 5 *citing Aeneas McDonald Police Benev. Ass'n, Inc. v. City of Geneva*, 92 N.Y.2d 326, 330, 703 N.E.2d 745, 747 (1998) and *quoting* David Hadley, Linda Hadley, Jeff Cordes, Bret Burton, and Ofelia Mcmenamy, Complainants Multnomah County Deputy Sheriff's Association and Multnomah County, Respondents, 2008 WL 1966712, at *2.

The County misrepresents the definition of *bargaining unit* set forth in NRS 288.134 as limited to current local government employees. *See* Petition at p. 12, ll. 6-7. NRS 288.134 does not include such a qualification, defining *bargaining unit* as "a group of local government employees recognized by the local government employer as having **sufficient community of interest appropriate for representation** by an employee organization for the purpose of collective bargaining" (**emphasis added**).

The County also cites to *Bahlman* again, misrepresenting the holding, which was based on jurisdiction (i.e., the fact that that the underlying complaint did not allege a violation of a statute under NRS Chapter 288). In *Nevada Highway Patrol Ass'n v. State, Dept. of Motor Vehicles & Pub. Safety, Nevada Highway Patrol Div.*, also cited in support of the County's argument, the Nevada Supreme Court only held that "Nevada law prohibits collective bargaining representation on behalf of state employees unless the representative is recognized by the State." 107 Nev. 547, 551, 815 P.2d 608, 611 (1991).

In discussing the law of agency, the County cites to the Restatement (Second) of Agency and an archaic Pennsylvania case, which held that the dissolution of a partnership revokes a power of attorney, and the attorney after such dissolution has no authority to give notes in the settling of the firm. *See* Petition at p. 12, ll. 19-22 *citing* Restatement (Second) of Agency §§ 26, 27 (1958) and *Schlater v. Winpenny*, 75 Pa. 321, 325 (1874). As to the Restatement, actual or apparent authority to do an act can be created by conduct of the principal which, reasonably interpreted, causes the agent or third person to

believe that the principal desires him so to act on the principal's account. Restatement (Second) of Agency §§ 26, 27 (1958).

In short, none of the authority the County relies on stands for the proposition that the principals a bargaining agent represents "are the current employees in the bargaining unit, at the time that it acts." *See* Petition at p. 12, ll. 23-25.

D. The County Asks the Board to Confirm an Inapposite Decision.

Relying on an Eighth Circuit decision, the County argues that unions are not liable "for a breach of the duty of fair representation claim that occurs after an employee's separation." *See* Petition at p. 13, ll. 6-8 *citing Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177 (8th Cir. 1984), *on reh'g*, 752 F.2d 1293 (8th Cir. 1985). As with most of the legal authority the County relies on, *Anderson* concerned retired employees. *Id.* at 181 ("Because plaintiffs are retirees the Union owes them no duty of fair representation."). As indicated *supra*, an employee can be separated from a bargaining unit for reasons other than retirement.

Finally, the County asks the Board to confirm the *Bahlman* Order "and to clarify that a bargaining agent is not authorized to continue bargaining on behalf of former employees." *See* Petition at p. 13, ll. 15-16. This request contradicts the Petition's prior indication that the Board has already confirmed *Bahlman*. *Id.* at p. 10, ll. 23-24 ("subsequent decisions from this Board confirm the sound rational doctrinal foundation" in *Bahlman*). As previously indicated, there was/is nothing for the Board to confirm, at least not as to the specific question presented to the Board in the Petition.[6]

> The Respondent's Motion to Dismiss, **in so far as the Board lacks jurisdiction in that the Complaint contains no alleged violation of any provision of Chapter 288** by the Respondent, is well taken. Accordingly, it is ORDERED that the Complaint be, and the same hereby is, dismissed.

[6] "When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and factfinding?" *See* Petition at p. 3, ll. 5-8.

(**emphasis added**). Likewise, there is nothing for the Board to clarify. The *Bahlman* Order did not address the other two arguments set forth in the underlying motion to dismiss – i.e., timeliness and the applicability of provisions in a retroactive CBA.

The Board should recognize Clark County's arguments for what they really are – part of a broader attack on retroactivity. However, an employee organization is not bargaining on behalf of individual employees; it is bargaining on behalf of the *bargaining unit as a whole. See,e.g.*, *Permanente Med. Group, Inc.*, 332 N.L.R.B. 1143 (2000) ("the employer's conduct necessarily tends to undercut the bargaining representative exclusive relationship with the employees and to hinder the union's ability to effectively represent the bargaining unit as a whole"). If a collective bargaining agreement is implemented retroactively, either by agreement of the parties or by operation of law under NRS 288.215(10), any employee who is part of the bargaining unit during the term of the agreement is entitled to the benefits of the agreement for the duration that they remained within the bargaining unit.

By way of example, if a contract is retroactive to July 1, 2022, and an employee within the bargaining unit leaves their employment with the County on December 31, 2022, that employee would be entitled to any negotiated COLA for the six (6) months they remained in the bargaining unit. Likewise, if such an employee transferred from one Clark County bargaining unit to another effective January 1, 2023, that employee would be entitled to the pay or benefits provided under the bargaining agreement covering their employment from July 1, 2022 through December 31, 2022, and thereafter such pay and benefits would be adjusted (either upward or downward) effective January 1, 2023 based upon the terms of the bargaining agreement covering the bargaining unit the employee transferred into.

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QUESTION NUMBER 2

Question Number 2 posed by Clark County is "When an employee transfers from one bargaining unit to another after a bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and fact finding?"

Position of The Unions: A bargaining agent can negotiate retroactive benefits for employees who later transfer to another bargaining unit without violating the principle of exclusive representation.

The principle of exclusive representation does not prohibit a union from negotiating for retroactive benefits for employees who have since transferred out of the bargaining unit. Exclusive representation means that each bargaining unit gets one bargaining representative, and the employer is obligated to deal with that representative—and that representative alone—concerning the bargaining unit. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43–45 (1937); *UMC Phys. Barg. Unit v. Nev. SEIU Local 1107*, 124 Nev. 84, 93 (2008). It is just a one-representative-per-unit principle.

The County argues that negotiation over retroactive pay for members who transfer to a different unit in the midst of the retroactivity period "would result in a scenario where a bargaining agent is negotiating on behalf of an employee in another bargaining unit." Cty. Pet. at 14. But that is a misleading way to describe what is really happening.

An employee who transfers out of the bargaining unit is entitled to retroactive pay from the retroactivity date until the date the employee transferred. That is the period the employee was still part of the bargaining unit. After the employee goes to "another bargaining unit," their right to retroactive pay ceases. So, the exclusive representative is only bargaining about the employee's pay *during the time they were a member of the bargaining unit.* It is not bargaining about the employee's pay for the time they are in "another bargaining unit."

The one-representative-per-unit principle is not threatened by this type of bargaining. There is still only one representative per unit. There is an exclusive representative for the employee's former bargaining unit. And there is an exclusive representative for the employee's new bargaining unit. The employer only bargains over the terms and conditions of employment for each bargaining unit with the unit's respective representative. The employee's terms and conditions as a member of each bargaining unit are determined by those negotiations with each unit's representative.

There is no reason to prohibit unions and employers from bargaining over this subject. Even if this were accurately characterized as bargaining over employees outside of the bargaining unit (which it is not), it would be a permissive subject of bargaining in the private sector—not a *prohibited* one. *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178–79 (1971); *Supervalu, Inc.*, 351 NLRB 948, 949–50 (2007); *cf. Cooper v. Gen. Motors Corp.*, 651 F.2d 249, 250–51 (5th Cir. 1981) (discussing negotiations over accrual of seniority by supervisors). But more importantly, as a practical matter, having more subjects on the table for bargaining allows unions and employers more flexibility in bargaining. That flexibility makes it easier for them to reach a deal. Allowing negotiation over the scope of retroactivity––e.g., a longer retroactivity period in exchange for transferees or terminated employees not being entitled to retroactivity—provides the opportunity for compromise. These are deals that employers and unions do, in fact, make.

Unions that represent multiple bargaining units have a particular interest in negotiating this type of retroactive benefits. Unions are permitted to represent separate bargaining units of supervisory and non-supervisory employees. *See IAFF Local 1908 v. Clark Cty.*, Item No. 43, Case No. A1-045270 (1975). The County couches this issue as one of transfer between units represented by a different "bargaining agent." Cty. Br. at 14. But some—perhaps many—of those transfers are actually between units represented by the same bargaining agent, such as when a firefighter is promoted to Battalion Chief. *See IAFF Local 1908*, *supra*. Negotiating retroactive pay for employees who have

been promoted ensures that they are not penalized for their promotion by losing an increased rate for their time in the non-supervisor unit.

There is no legal reason to prohibit negotiation over retroactive pay for employees who have since left the bargaining unit. There are strong policy reasons *not* to prohibit such negotiations.

QUESTION NUMBER 3

Question Number 3 posed by Clark County is "When a prior agreement is unresolved before negotiations for a successor agreement begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?"

Position of The Unions: An unresolved prior agreement subject to the impasse procedures of NRS 288.200 et seq. does not constitute the type of "uncertainty" which would permit a party to temporarily defer negotiations on the successor agreement. This should particularly be the case where no effort is made by one party to expedite the resolution of the prior agreement.

A. An Unresolved Prior Agreement Does Not Result In Any Significant "Uncertainty" Which Would Excuse Bargaining For A Successor Agreement.

As noted by Clark County on pages 7-8 of its Petition, occasionally there is an "overlap" in negotiations caused by (1) "short-term agreements" and (2) the availability of fact-finder/arbitrators and their desire to receive transcripts and post-hearing briefs. However, short-term agreements are usually the product of the language contained within NRS 288.200(7)(c) which states "If the parties mutually agree to arbitrate a multiyear contract, the fact-finder must consider the ability to pay over the life of the contract being negotiated or arbitrated." The language "mutually agree to arbitrate a multiyear contract" means that *both* parties must agree to anything other than a short-term agreement. If one party will not so agree, the other party has no choice but to accede to a single year agreement.

In support of its argument that a party should be able to temporarily defer bargaining until prior agreements are finalized, Clark County cites to a Fifth Circuit decision *NLRB v. Minute Maid Corporation*, 283 F.2d 705 (5th Cir. 1960) to claim that a party is justified "in temporarily suspending bargaining over the relevant articles until the uncertainty is resolved". (Petition at p. 15 of 22). In *Minute Maid,* there was a "severe and crippling freeze" on December 11 and 12, 1957 which paralyzed the entire industry in Florida. The employer did not refuse to bargain; rather, it simply requested at a bargaining session on December 19, 1957 that the union defer decisions regarding contract negotiations for less than 30 days, until January 16, 1958, so that the company could evaluate the effect of the freezes. 283 F.2d at 706-707. Following some additional freezes in January, the Union filed a charge with the NLRB on January 14, 1958. Thereafter a petition was filed by an employer on February 21, 1958, to decertify the union. *Id.* at 708-709.

The NLRB found that the employer had failed to bargain in good faith and thereafter sought enforcement of the Board's order. The Fifth Circuit declined to enforce the order noting that "the apprehensions regarding the effects of the freezes had been so far put at rest by the latter part of February" and therefore the evidence did not "justify a conclusion that refusal to bargain on such questions at an earlier date would have been a bad faith refusal." 283 F.2d at 710.

Clark County likewise cites the decision of the California Public Employment Relations Board in *Association of California State Attorneys and Administrative Law Judges v. California Department of Personnel Administration*, 1986 Cal. PERB LEXIS 19 (1986) to suggest that PERB condoned the Department of Personnel Administration's ("DPA") determination to defer negotiations on wages until the legislative budget process was completed. However, PERB did reject DPA's argument that it could not negotiate on wages holding:

> This is not to say, however, that we accept DPA's insistence that it could not negotiate on wages until an agreement was reached with the Legislature. The Governor is free to negotiate with employee organizations while making it clear that the agreed-upon

> provisions require legislative approval. In sum, SEERA's statutory provisions do not specifically mandate that negotiations with the employee organization must precede or follow final legislative action. Negotiations with the employees' representative and with the Legislature may and often do occur simultaneously. What is imperative to statutory compliance is that negotiations be conducted in such a manner that, based on the totality of circumstances, it is apparent that the party possessed the subjective intent to reach an agreement.

Finally, Clark County cites a decision of the Wisconsin Employment Relations Commission in *IBEW Local 965 v. Public Utility Commission of the City of Richland Center*, 2012 WL 2674296 (2012) wherein the Commission found that Governor Scott Walker's signature of Act 10, which "dramatically changed the landscape of collective bargaining in the public sector," along with Circuit Court injunctions against the implementation of Act 10, constituted "unique circumstances" permitting a temporary suspension of negotiations to allow for the resolution of significant matters of law with a direct impact on the bargaining process".

None of the cases cited by Clark County support the argument being advanced that impasse proceedings which have not been completed for prior agreements justify deferring negotiations of a successor agreement. *Minute Maid* arose in the private sector and involved a "severe and crippling" natural disaster. Not only was the period of delay sought by the employer extremely short, the National Labor Relations Act contains no analogous provision to NRS 288.150(6)(a) which grants an employer the ability to reopen a collective bargaining agreement "during a period of fiscal emergency", or subsection (b) which authorizes a government employer to take whatever action may be necessary in situations of non-fiscal emergency.

Department of Personnel Administration involved bargaining for a State bargaining unit, not a local government bargaining unit. It appears that California law is similar to the provisions of NRS 288.400 et seq. governing collective bargaining for the Executive Department of the State of Nevada. Under such statutes the financial provisions of a collective bargaining agreement are subject to actual legislative appropriations to support such provisions. See NRS 288.505(1)(c) and 288.505(5)(c).

However, even the State of Nevada is not excused from bargaining with its bargaining units until such time as the legislative process is completed.

Financing of local governments is extremely different than State financing. Clark County is subject to the Local Government Budget and Finance Act, NRS 354.470 et seq. Under NRS 354.596 local governments are required to prepare and submit a tentative budget to the Department of Taxation on or before April 15 of every year. It has never been suggested by this Board that a local government may defer negotiations based upon the "uncertainty" as to whether the Department of Taxation will ultimately approve the submitted "tentative" budget. Indeed, such a concept would be at odds with NRS 288.180(1) which requires written notice of a desire to negotiate matters requiring the budgeting of money be given by February 1st of any given calendar year.

Reliance upon *IBEW Local 965 v. Public Utility Commission of the City of Richland Center* is particularly inappropriate. As the Board will recall, the passage of the controversial Act 10 in Wisconsin eviscerated public sector collective bargaining (with the exception of police, firefighters and sheriff's deputies). This, in the words of the Wisconsin Commission, constituted "unique circumstances" of the sort not present in Nevada.

In fact, an unresolved bargaining agreement subject to ongoing statutory impasse procedures under NRS 288.200 et seq. does not create any *significant* uncertainty at all. This is because, as a result of the fact-finding process, local governments will already know the likely financial implications of the conclusion of the impasse process.

A good example of this principle is illustrated by the impasse proceedings by CCPA and Clark County for the FY 2022 COLA reopener. As documented in Arbitrator Kagel's "Opinion and Nonbinding Recommendation" of December 27, 2022, Clark County was offering a COLA of three-percent (3%), while CCPA was seeking a COLA of five-percent (5%). Because Clark County has calculated how much a one-percent (1%) COLA for the bargaining unit will cost as a function of

costing its own proposal of three-percent (3%), it also knows the cost of the of the union's proposal of five-percent (5%) should that proposal be recommended by a fact-finder, or awarded by an interest arbitrator.

An even *better* example is the interest arbitration between CCPA and Clark County currently scheduled for October 21, 2024 as a result of the County's refusal to accept Arbitrator Thompson's fact-finding Recommendation of a six-percent (6%) COLA. (Exhibit "D"). As reflected in Thompson's Recommendation, Clark County is only offering a COLA of five-percent (5%). Because an interest arbitrator under NRS 288.200(6) and 288.215(10) must accept either CCPA's written statement of six-percent (6%) (the fact-finding recommendation), or Clark County's five-percent (5%) offer, Clark County knows that the "uncertainty" is only one-percent (1%), which is $270,000. (See Exhibit "D" at p. 9 identifying the cost of one-percent (1%) for the bargaining unit).

Consequently, when engaging in negotiations for a successor agreement beyond the fiscal year for the impasse proceedings, Clark County *already knows* the full range of the possible costs. Given that Clark County's Operating Budget was 1.95 *billion* dollars for FY 2024, the cost difference between the County's proposal, and a union's proposal, currently $270,000, does not even amount to a mathematical rounding error.

Moreover, what a union might be reasonably requesting in negotiations for a successor agreement is not dependent upon that which it may receive as a result of the statutory impasse process for the prior year. Under NRS 288.200(7)(a) and NRS 288.215(7)(a), a fact-finder or interest arbitrator is to determine "the financial ability of the local government employer based on all existing available revenues as established by the local government employer and within the limitations set forth in NRS 354.6241, with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision."

Once a "determination of financial ability to grant monetary benefits" is established, a recommendation or award is to be determined by "to the extent appropriate, compensation of other government employees, both in and out of the State and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute". NRS 288.200(7)(b) and 288.215(7).[7]

Simply put, what is recommended or ultimately awarded for a prior fiscal year has little or no relationship to what should be recommended or awarded in a next year's successor agreement. Rather, such determination is to be made based upon economic conditions and the statutory criteria governing the impasse process.

B. Permitting Employers To Defer Negotiations Based Upon Unresolved Impasse Proceedings Will Simply Incentivize Employers To Delay Even More Than They Currently Do.

There is no actual reason that there should be any significant "gaps" between short-term agreements if Clark County were to devote adequate resources to its bargaining obligations. It is well-established that the obligation to bargain in good faith requires an employer to select its own bargaining representatives and to pursue bargaining in a timely manner. As explained by the NLRB "The negotiation of a collective-bargaining agreement is as important as any business transaction" and an employer's good faith "may be tested by considering whether it would have acted in a similar manner in the usual conduct of its business". *Reed & Prince Manufacturing Co.*, 96 NLRB 850, 852 (1951) enfd. 205 F.2d 131 (1st Cir. 1953); *In Re: Pony Express Courier Corp.*, 1996 NLRB LEXIS 83 at p. 44.

[7] The "normal criteria for interest disputes" referenced in the statute include such matters as the interest and welfare of the public, comparable wages and working conditions, cost-of-living (including changes in the cost-of-living), ability to attract and retain personnel and other factors depending upon the specifics of the issue that are presented to the arbitrator or fact-finder. Barry Winograd, *An Introduction to the History of Interest Arbitration in the United States*, Labor Law J., fall 2010, pp. 164-168.

The Act's obligation to bargain at reasonable times requires an employer "to provide a representative who could conduct negotiations with the degree of diligence expected and required of it by the statute." *Insulating Fabricators, Inc.*, 144 NLRB 1325, 1328 (1963), enfd. 338 F.2d 1002 (4th Cir. 1964). "The Act does not permit a party to hide behind the crowded calendar of his negotiator, whether he be a busy labor attorney or an overworked company officer." *Radiator Specialty Co.*, 143 NLRB 350, 369 (1963). Thus, it is Clark County's "statutory obligation for each separate bargaining unit to furnish negotiators who could devote adequate time to attend reasonably prompt and continuous negotiating sessions." *Imperial Tile Co.*, 227 NLRB 1751, 1754 (1977).

In contravention of its bargaining obligations, Clark County elects to utilize one, single Chief Negotiator, Christina Ramos, for all of its approximately one dozen bargaining units. This results in Ms. Ramos usually only being available once per week per bargaining unit. This means that the minimum six (6) bargaining sessions provided for under NRS 288.200(1)(a) will take a minimum of six weeks. If there are any scheduling issues regarding either sides' bargaining team, this will extend the length of bargaining even further. There is no reason why Clark County cannot employ multiple "Chief Negotiators" to increase the frequency of bargaining sessions.[8]

Once impasse is declared, the statutory process itself is designed to move expeditiously. Non-police and non-firefighter bargaining units are required to go to mediation after declaration of impasse. NRS 288.190. Under subsection (2) of the statute, the parties are to attempt to agree upon a mediator within 5 days. Under subsection (3) of the statute the mediation is to take place within 30 days, and the mediator is empowered with the authority to "compel the parties to attend".

Likewise, the parties are to attempt to agree upon the fact-finder "within 5 days". If such an agreement is not reached within 5 days either party may request a list of 7 potential fact-finders from

[8] By way of example, the County's Director of Human Resources, Curtis Germany, advertises his collective bargaining experience; yet Clark County does not utilize him to conduct bargaining sessions.

either AAA or FMCS. The parties are required to strike names within 5 days. NRS 288.200(2). A schedule of dates and times for the hearing is to be established within 10 days after selection of the fact-finder. NRS 288.200(4). Recommendations from fact finding are to issue within 30 days after the conclusion of the hearing. Id.

The governing body of the local government is to hold a public meeting within 45 days after receipt of the fact-finder's report. NRS 288.200(8). However, there is no reason that the governing body must wait the full 45 days, as a matter may be put on the agenda much sooner.

If both parties have not previously agreed to make the fact-finding binding, or if one party rejects the recommendation(s), the matter proceeds to binding interest arbitration. See NRS 288.200(6) (non-police and non-firefighters) and NRS 288.215(3) (police and firefighters). This process is designed to be even quicker than fact-finding. An interest arbitration hearing is to be scheduled "within 10 days after the arbitrator is selected, and after 7 days written notice is given to the parties". NRS 288.215(4).[9]

Unless the arbitrator recommends that the parties enter into further negotiations for a period not greater than 3 weeks, each of the parties is to "submit a single written statement containing its final offer for each of the unresolved issues." NRS 288.215(9). The arbitrator is required to accept one of the parties' final written statements within 10 days. NRS 288.215(9).

There are many ways to speed up the statutory process if there are concerns that the process for a short-term agreement will not be completed before bargaining commences for a successor

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[9] While NRS 288.200 does not explicitly specify the same 10 days as NRS 288.215, the statute should be construed to require the same time limit as the two statutes are "in para materia". Statutes are in para materia "when they involve the same classes of persons or things or seek to accomplish the same purpose or object." *Division of Insurance v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 995 P.2d 482 (2000). The reason that interest arbitration hearings may be scheduled so quickly is that it is not a "do over" from fact finding. The arbitrator will have a full transcript of all of the testimony from the non-binding fact-finding, as well as all of the exhibits bearing on the issues in dispute.

agreement. Nothing within the statutory impasse scheme prevents the parties from pre-selecting both a fact-finder, or even an interest arbitrator, and scheduling hearings for both prior to completing mediation. If the mediation is successful, such hearing dates may be vacated.

However, Clark County refuses to take any such commonsense steps to expedite the impasse process. By way of example, in connection with the recent declarations of impasse by CCPA, CCDU and DAIA, Clark County's outside counsel refused to even *select* a fact-finder until the mediation process was completed. (Exhibit "E"). After the parties mutually agreed upon Commissioner Herman Brown from the Las Vegas FMCS Office (Exhibit "F"), Clark County's counsel refused to make the County available for the dates provided by Commissioner Brown claiming that all t"he County Folks" were not available for those dates. (Exhibit "G"). Of course, nothing within the statutory scheme requires that a party's "entire" bargaining team attending mediation; all that is needed is *one person with authority*. The result of Clark County's refusal to attend resulted in the mediation, which Clark County insisted must take place before a fact-finder could even be selected, occurring *outside* of the statutory 30 days under NRS 288.190(3).

Of course, the quickest method of resolving impasse is for both parties to accept the recommendation(s) of a fact-finder. It is notable that it is only Clark County that has refused to accept such recommendation(s) from a fact-finder at the time of issuance, and only ultimately accepted such recommendations at the 11th hour prior to an interest arbitration hearing.

As set forth in the Statement of Facts above, when the Recommendation(s) from the CCPA and CCDU fact-findings were presented to the BOCC, the BOCC declined to take any action to accept or reject, leaving the bargaining process in limbo and forcing the Unions to seek interest arbitration. In connection with the most recent demand for interest arbitration by CCPA, the Parties mutually selected Arbitrator Nancy Hutt, who provided dates of availability at the end of September, 2024. It

was the County that claimed "the only date that works for all the County's witnesses is October 21" – which is *almost 3 months* after the Arbitrator was selected. (Exhibit "H").

There is nothing within NRS 288.200(6) which requires interest arbitration to await availability of "all witnesses". Again, interest arbitration is not a "do over" for fact-finding, and the testimony of the County's witnesses is already preserved from the court reporter transcripts of the fact-finding. Rather, as explained by Arbitrator Allen Miles Ruben, Editor-in-Chief of Elkouri & Elkouri *How Arbitration Works,* a fact-finder's recommendation should not be lightly disregarded, and should only be set aside by an Interest Arbitrator "on those relatively rare occasions" where "the judgment of the Fact-Finder has been improvidently exercised". *The City Of Amherst -And- Ohio Patrolmen's Benevolent Association*, 2002 WL 35018798 (Reuben 2002); *The City Of Mentor -And- The Ohio's Patrolmen's Benevolent Association*, 1999 WL 35298090 (Reuben 1999).

Respondents do not mean to suggest that extensions and scheduling courtesies have not been extended by Clark County, and its outside counsel, to its Unions and their representatives. The schedules of both parties have historically been accommodated under principles of comity. However, if the Board determines that Clark County may temporarily defer negotiations for a successor agreement until statutory impasse proceedings are completed, the result will necessarily be the elimination of that comity and a refusal to permit fact-finding/interest arbitration scheduling to include consideration of witness and counsel schedules. This would not foster good labor relations, and would be an unfortunate outcome given the fact that, as set forth above, the "uncertainty" which forms the basis for Clark County's request is not significant.

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QUESTION NUMBER 4

Question Number 4 posed by Clark County is "Does the retroactive provision in NRS 288.215(10) authorize a fact-finder to change the terms of a party's final offer that included specified effective dates?"

Position of The Unions: In a final and binding arbitration under NRS 288.200(6) and/or 288.215(3)-(10) all of the terms of an award must be retroactively applied to the expiration date of the last contract.

The County's argument hinges on a reading of NRS 288.200 and NRS 288.215 that is inconsistent with Legislative intent and public policy. For the reasons detailed below, the Board must confirm that the retroactive provision of NRS 288.215(10) applies to the award in its entirety, including the effective date of all terms within the award. Such a ruling will result in no prejudice to the County or any other government employer. The County itself has stated that its main purpose in posing the question is to know what the stakes are during the arbitration process ahead of time. Now the Board can make the provision crystal clear to any who may have misunderstood.

A. The Plain Language Of The Statute Supports The Unions' Interpretation.

The Legislature uses words "in their usual and natural meaning." *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997) ("the plain meaning of a statute's words are presumed to reflect the legislature's intent"). The arbitrator's role is to grant an award, which, by operation of law, is made retroactive in its entirety, such that any improved economic package (eventually) becomes effective on the day following expiration of a prior contract. *See* NRS 288.215(10). The County's proposed interpretation—which is that the arbitrator provisions of NRS 288.215(9) and (10) invalidate or supersede the retroactivity provision of NRS 288.215(10)—violates the rule that tribunals must interpret a statute's "provisions as a whole so as to read them in a way that [will] not render words or phrases superfluous or make a provision nugatory." *Sunrise Hosp. & Med.*

Ctr., LLC v. Eighth Jud. Dist. Ct., 544 P.3d 241, 247 (2024) (citing *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)). Therefore, the proper interpretation is that where retroactivity is not accounted for in the final offer selected by the arbitrator, the offer must necessarily be amended to comply with the required statutory retroactivity provision. Any ruling to the contrary would be inconsistent with Nevada law as announced by the Supreme Court.

B. Retroactivity Exists To Balance Anti-Strike Requirements.

Public-sector unions and their members need the retroactive provision found in impasse procedures, because, unlike private-sector employees, they cannot strike. *See* NRS 288.700. Engaging in or threatening a strike against the State or local government employer subjects the union, its officers, and striking employees to harsh penalties such as an injunction, fines of up to $50,000 per day for unions, up to $1,000 in fines for union officers, and dismissal, suspension, and wage withholding of striking employees. *See* NRS 288.705 to 288.715.

Retroactivity provisions are enacted to provide more balance to the public-sector collective bargaining process, in recognition of the fact that the loss of strike rights severely weakens a union's bargaining power. As explained by one arbitration panel,

> In the private sector, retroactivity is, indeed, used as . . . [a tactic for collective bargaining and not granted automatically], but there, as a counterweight, unions have the right to strike. In contrast, employees in the public sector have been denied that right and the collective bargaining strength of each side has thereby been drastically changed. If retroactivity is withheld, the employees would suffer an economic loss for each day there is no agreement after a deadline, while the employer would enjoy an economic gain, not only from the continuing work of its employees, but from the withheld economic improvements it had offered. Such an imbalance might force a union to accept an unsatisfactory offer but would place no compensating compulsion on the public employer to make its best offer. A bad offer would in fact save it money.

In re Triborough Bridge and Tunnel Authority and American Federation of State, County and Municipal Employees, District Council 37, Local 1396, 49 Lab. Arb. Rep. (BNA) 1212, 1968 Lab. Arb. LEXIS 13, *41–42 (Feinberg, Stockman, Wolf, Arbs.). The same panel held that "[a]nything less than

full retroactivity would...penalize [employees] for the exercise of their...right to reject the tentative agreement and to seek changes . . . while peacefully and responsibly continuing to perform their assigned duties." *Id.* at *43.

Given that impasse statutes with retroactivity provisions are adopted to equalize the unions' bargaining power with the employers, they must be interpreted in a manner that achieves this goal. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 200, 179 P.3d 556, 560 (2008) (statutes "must be interpreted in accordance with what reason and public policy indicate the Legislature intended").

When unions and government employers reach impasse, they run the risk that an arbitrator will rule in a manner that they dislike. In other words, by enacting NRS 288, the Legislature crafted a procedure under which unions and government employers are incentivized to reach agreements. However, the retroactivity requirement stated in NRS 288.215(10), which was intentionally included by the Legislature, partially mitigates the risk to which unions are exposed by ensuring that no matter how long an impasse lasts, any new contract will be effective retroactively to the date following expiration of a prior contract. Accepting the County's interpretation of NRS 288.215(10) would produce an absurd result—providing government employers like the County with a perverse incentive to (i) make unreasonable offers while bargaining, (ii) force unions to go to impasse, and then (iii) propose to the arbitrator a non-retroactive economic final offer. Under the County's proposed reading of the statute, government employers could be rewarded for making "bad offers," which would permit them to greatly minimize the risk to which they are intentionally exposed under NRS 288, and permit them to "enjoy an economic gain, not only from the continuing work of its employees, but from the withheld economic improvements [they] had offered." *In re Triborough*, at *42.

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The Board must therefore reject the County's effort to neuter NRS 288.215(10). *See Eller Media Co. v. City of Reno*, 118 Nev. 767, 770, 59 P.3d 437, 439 (2002) ("[S]tatutes should always be construed so as to avoid absurd or unreasonable results."). To give effect to the plain language of the statute, and to achieve the purposes of the Legislature in enacting NRS 288 (consistent with the rationale explained in the *In re Triborough Bridge* arbitration award) the EMRB should rule that public-sector employees are entitled to receive full retroactivity as to all of the terms of any new collective bargaining agreement awarded by an arbitrator.

C. Government Employers And Arbitrators Must Follow The Law.

The Nevada Legislature has declared that public-sector bargaining agreements are retroactive. The County's hubris is on full display when it argues that (a) it can override the Nevada Legislature by drafting an effective date into a final offer, and (b) an arbitrator has no power to change the effective date to comply with the statute. If the County is correct, then unions would have similar rights to frustrate Nevada statutes. For example, a union could avoid the antistrike provision of NRS 288.700 through 288.715 by persuading an arbitrator to accept a final offer stating that the union may engage in a strike without suffering any penalties. Should anything of the sort occur, there is no doubt that the County would seek intervention from a court or the EMRB, arguing that the arbitrator had no power to change statutory requirements. The Board should therefore deny the County's Petition on the basis that neither government employers nor unions have the power to add to, detract from, or ignore Nevada law.

Government employers cannot be permitted to submit offers that are inconsistent with the law. To the extent a government employer submits an unlawful offer, an arbitrator must be empowered to revise the offer to be consistent with the law. The County's Petition appears to be an attempt to alter the rules and common practices of the government employers and bargaining agents to save the County money and deprive County employees of expected salary increases, in violation of the express

requirements of Nevada law. This Board should not presume that it has the power to grant to the County what it seeks, because the County is entitled only to the rights provided for by the Legislature.

D. The NLRA And EMRA Are Not Compatible In This Instance.

In its Petition, the County is trying to devise a way to avoid the clear dictates of NRS 288, *et seq.* by relying on the National Labor Relations Act ("NLRA") and basic contract law. The NLRA governs private employers only. 29 U.S.C. § 152(2) (the term "employer" does not include any state or political subdivision thereof). Public-sector employees are not subject to the NLRA, and any concerns or policy considerations (such as not allowing a public-sector employers to delay wage increases through protracted bargaining) specific to public-sector employees are not addressed in the text of the NLRA or in decisions interpreting the NLRA. On the other hand, the Employee-Management Relations Act ("EMRA") explicitly governs the relations between government employers and their employees. *See, e.g.*, NRS 288.060.

The County's reliance on the NLRA and any interpretations of the NLRA is misplaced and demonstrates the County's continued desire to weaken labor unions through a misapplication of private-sector labor law to public-sector labor policy established by the Nevada Legislature.[10] Notably, there is no provision in the NLRA using the word "retroactive" or any of its variants or synonyms. Thus, with regard to the procedures arising out of failed negotiations between parties in the public sector, the NLRA has absolutely no bearing on the matter.

In its Petition, the County conflates the duty to bargain in good faith with the procedures governing parties that reach impasse. *See* Petition at 19:2-7. Although the mutual obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a

[10] This is not to say that the Board cannot or should not look to the NLRA for guidance, where appropriate. *See, e.g., Truckee Meadows Fire Prot. Dist. v. IAFF, Loc. 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993). The NLRA can be instructive when addressing issues that can arise in labor relations generally, regardless of the public or private status of the employers and employees. But NRS 288.215 simply addresses an area of law that the NLRA cannot and does not encompass.

concession" (NRS 288.032), the landscape changes when impasse procedures are invoked. The change occurs because a third party—a fact-finder or an arbitrator—is called in to hear each party and resolve the disputes between them. *See* NRS 288.200(6). Contrary to the County's understanding, the arbitrator's *statutory role* is to impose a contract on one party that the other party will likely find objectionable. NRS 288.215(10). But regardless of other aspects of the offers presented to the arbitrator, the statute is clear that retroactivity is required. *Id.*

Unlike the NLRA, the EMRA specifically addresses what occurs after impasse. Offers are presented to the arbitrator and then one is accepted by said arbitrator, on the basis of the criteria provided in NRS 288.200. *See* NRS 288.215(9) and (10). Instead of providing analysis regarding the "retroactive" provision, the County focuses on basic contract law, which the Legislature need not regurgitate without a specific purpose. As detailed herein, the specific purpose for which the "retroactive" provision was put into place is that offers accepted (*i.e.*, "awards") must be retroactive in their entirety. NRS 288.215(10).

Legislatures regularly interject specific requirements into collectively bargained employment contracts. For example, "If break time is required to be compensated pursuant to a collective bargaining agreement entered into by an employer and an employee organization, any break time taken [to express breastmilk] by an employee which is covered by the collective bargaining agreement must be compensated." NRS 608.0193(2). Per the County's logic, it could avoid this statutory requirement by having an arbitrator impose a final offer on a union that states such breaks will not be compensated. The County is essentially declaring that it may ignore Nevada law.[11] Compliance with statutory wage and hour provisions is absolutely required, regardless of what any contract states. The same is true of NRS 288.215(10). Arbitrators must follow the dictates of the statute and any award they make is, by

[11] Such positions are not new to the County. *See The Clark County Dep't of Aviation v. S. Nev. Labor Mgmt. Cooperation Comm.*, 517 P.3d 240, 2022 Nev. Unpub. LEXIS 707, *4 (rejecting the argument that the County's Department of Aviation is not subject to Nevada's prevailing wage laws).While NRS

operation of law, retroactive to the date of expiration of the previous contract. Where the award concerns wage rates, those wage rates must be retroactive under the clear language of the statute.

The Board should confirm that an arbitrator issuing an award under NRS 288.215(9) and (10) must conform the offer to the requirements of the "retroactive" provision of the statute and make all terms retroactive to the expiration date of the last contract.

QUESTION NUMBER 5

Question Number 5 posed by Clark County is "When the parties agree to a reopener during the term of an agreement, do the fact-finding procedures automatically apply to reopener negotiations?"

Position of The Unions: Impasse resolution procedures under NRS 288.200 et seq. do apply to mid-contract reopener clauses.

A. Negotiated Re-Opener Clauses Are Not "Non-Statutory" As Characterized By Clark County.

Clark County's Petition seeks guidance "concerning the application of NRS 288.200 to non-statutory bargaining during a contract reopener." (Petition at pp. 20-22). This request for guidance arises out of the 2021-2024 collective bargaining agreement negotiated by the CCPA and the County which did not provide for Automatic Cost of Living Adjustments (COLAs) every year under Article 36 "Compensation". Rather, CCPA and Clark County agreed that prior to July 1 of 2022, and July 1 of 2023, the article "may be reopened, at the written request of either party, to determine if a cost-of-living adjustment will be awarded".

At the outset, Respondents disagree with Clark County's characterization of negotiations pursuant to a reopener clause in a collective bargaining agreement as being not "non-statutory". As noted in the County's Petition, a reopener provision is a tool available to the parties to allow an opportunity to modify their existing agreement in order to meet changing economic conditions citing

NLRB v. Pratt & Whitney Air Craft Division, United Technologies Corporation, 789 F.2d 121, 125 (2d Cir. 1986).

B. The Obligation To Bargain In Good Faith Includes The Statutory Impasse Procedures And Such Procedures Apply When The Parties Have Negotiated Re-Opener Clauses.

NRS 288.150(1) provides "Except as otherwise provided in subsection 6 and NRS 354.6241, every local government employer shall negotiate in good faith through one or more representatives of its own choosing concerning the mandatory subjects of bargaining set forth in subsection 2 with the designated representatives of the recognized employee organization, if any, for each appropriate bargaining unit among its employees." Nothing within the statute limits the obligation to negotiate in good faith only to periods following expiration of a bargaining agreement.

The County's Petition argues that "re-opener clauses are not mandatory subjects of bargaining". (Petition at p. 20). However, this argument ignores the fact that nothing compels either a government employer, or an employee organization, to agree to reopener clauses. [12] However, where both parties so agree, and a provision is reopened, the statutory obligation to bargain in good faith must apply. This is particularly so where the subject of the reopener covers a subject of mandatory collective bargaining such as "Salary or wage rates or other forms of direct monetary compensation" which would apply to a COLA re-opener. In *Reno Police Protective Association v. City of Reno*, Case No. A1-045672, Item No. 460A (2000) the Board held that the obligation to bargain in good faith did apply to reopening of negotiations.

Courts and labor boards in other jurisdictions have recognized that such statutory impasse proceedings are a substitute for a union's right to strike. *See e.g. Nat'l Union of Hosp. & Health Care Employees Dist. No. 1199,* 149 N.M. 107, 245 P.3d 51 (2010) citing Peter Feuille, *Final Offer*

[12] In the absence of re-opener clauses, government and employee organizations would be reluctant to negotiate multiyear agreements. Clark County has always asserted in negotiations that it desires multiyear agreements.

Arbitration and the Chilling Effect, 14 Indus. Rel. 302 (Oct. 1975); *American Federation of State, County & Municipal Employees, Dist. Council 83 v. Commonwealth, Pennsylvania Labor Relations Bd.*, 123 Pa. Commw. 205, 553 A.2d 1030 (1989); *Sauk County v. Wisconsin Employment Relations Commission*, 158 Wis. 2d 35, 461 N.W.2d 788 (1990); *Dearborn Fire Fighters Union v. Dearborn*, 394 Mich. 229, 317, 231 N.W.2d 226, 264 (1975); *In re NJ Transit Bus Operations*, 125 N.J. 41, 592 A.2d 547 (1991); see also *In Re Hurley Hospital and American Federation of State, County and Municipal Employees, Council 29, Locals 1603, 1603b and 825*, 56 Lab. Arb. Rep. (BNA) 209, 1971 Lab. Arb. LEXIS 54 (Roumell 1971).[13] Because NRS 288.700 *et seq.* prohibits such strikes, the statutory impasse proceedings would have to apply in the absence of a mutually agreed upon alternative impasse resolution procedures.[14]

It is beyond dispute that statutory impasse procedures under NRS 288.200 et seq. are part and parcel of the collective bargaining process itself. *See, e.g., Carson City Firefighters Association v. Carson City Board of Supervisors et. al*, Case No. A1-045285 Item No. 39 (1975) ("Bargaining collectively is defined as the entire bargaining process, including factfinding"); *Stationery Engineers, Local 39 v. City of Elko*, Case No. A1-045505 Item No. 295 (1992) (failure of City to participate in fact-finding constituted a failure to bargain in good faith). The County's Petition cites no case law from either this Board, or any of its counterparts throughout the country, to support its argument that statutory impasse procedures do not apply to reopener clauses. California's PERB has held that

[13] As noted by Arbitrator Roumell, because statutory impasse is a substitution for the right to strike "[t]herefore, it is reasonable for a Fact-Finder to consider what result the parties may have reached if there had been a strike or a continuation of a strike."

[14] The parties could certainly contractually agree to skip non-binding fact-finding and move directly to binding interest arbitration.

statutory fact-finding and interest arbitration procedures are not limited to disputes for a new contract, but also apply to *all* bargaining disputes concerning matters within the scope of representation including mid-term reopeners and effects bargaining over non-mandatory subjects. See *City and County of San Francisco and SEIU Local 1021*, 2014 Cal. PERB LEXIS 48 (November 24, 2014); *County of Contra Costa and AFSCME Local 2700*, 2014 Cal. PERB LEXIS 14 (April 16, 2014).

DATED the 28th day of August, 2024.

LAW OFFICE OF DANIEL MARKS

ADAM LEVINE, ESQ.
On behalf of Respondents Clark County Prosecutors Association; Clark County Defenders' Union; and Clark County District Attorney Investigators Association

MCCRACKEN, STEMERMAN & HOLSBERRY

/s/Luke N. Dowling, Esq.
SARAH OWENS VARELA, ESQ.
LUKE N. DOWLING, ESQ.
on behalf of Respondent International Association of Fire Fighters Local 1908

CHRISTENSEN JAMES & MARTIN, CHTD.

Dylan Lawter, Esq.
EVAN JAMES, ESQ.
DYLAN LAWTER, ESQ.
On behalf of Respondent Service Employee International Union Local 1107

ANDREW REGENBAUM

/s/Andrew Regenbaum
Executive Director
on behalf of Respondents Clark County Juvenile Justice Probation Officers Association and Clark County Juvenile Justice Supervisors Association

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and that on the 28th day of August 2024, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with first class postage fully prepaid thereon, a true and correct copy of the above and foregoing ANSWER TO COMPLAINT, to the address as follows:

STEVEN B, WOLFSON
District Attorney
CIVIL DIVISION
State Bar No. 001565
By: SCOTT DA VIS
Deputy District Attorney
State Bar No. 10019
500 South Grand Central Pkwy.
Las Vegas, Nevada 89155-2215
(702) 455-4761
Fax (702) 382-5178
E-Mail: Scott.Davis@ClarkCountyDAnv.gov
Attorneys for Petitioner Clark County
Attorneys for Complainant

An employee of the
LAW OFFICE OF DANIEL MARKS

Joi Harper

From: Dylan Lawter <DJL@CJMLV.COM>
Sent: Wednesday, August 28, 2024 11:25 AM
To: Adam Levine; Sarah Varela; Luke Dowling
Cc: Andrew Regenbaum; Joi Harper
Subject: Re: Signature Page

For ease, you are authorized to insert my electronic signature.

Dylan Lawter
Christensen James & Martin
7440 W. Sahara Ave.
Las Vegas, NV 89117
(702) 255-1718
(702) 255-0871
Email: djl@cjmlv.com

From: Adam Levine <ALevine@danielmarks.net>
Sent: Wednesday, August 28, 2024 11:19 AM
To: Sarah Varela <svarela@msh.law>; Luke Dowling <ldowling@msh.law>
Cc: Dylan Lawter <DJL@CJMLV.COM>; Andrew Regenbaum <aregenbaum@aol.com>; Joi Harper <JHarper@danielmarks.net>
Subject: Signature Page

Sarah:

Are you going to send me a signed page, or do you want to just authorize me to use a /S/ as an electronic signature on the Brief? Dillon sent me a scanned signature; Andrew is authorizing the electronic /S/

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
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Joi Harper

From: Luke Dowling <ldowling@msh.law>
Sent: Wednesday, August 28, 2024 11:28 AM
To: Adam Levine; Sarah Varela
Cc: Dylan Lawter; Andrew Regenbaum; Joi Harper
Subject: RE: Signature Page

If it is easier, you can also just use my electronic signature.

From: Adam Levine <ALevine@danielmarks.net>
Sent: Wednesday, August 28, 2024 11:19 AM
To: Sarah Varela <svarela@msh.law>; Luke Dowling <ldowling@msh.law>
Cc: Dylan Lawter <DJL@CJMLV.COM>; Andrew Regenbaum <aregenbaum@aol.com>; Joi Harper <JHarper@danielmarks.net>
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Are you going to send me a signed page, or do you want to just authorize me to use a /S/ as an electronic signature on the Brief? Dillon sent me a scanned signature; Andrew is authorizing the electronic /S/

Adam Levine, Esq.
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alevine@danielmarks.net

Can I call you later

11:39 AM

Tuesday, August 27

Returned your call

4:17 PM

I'm out of town for a conference. Can you sign for me on the papers or do you need me to find someplace to print and scan ?

4:19 PM

I can use an e-signature

4:20 PM

Perfect. Thanks

EXHIBIT A

EXHIBIT A

IN FACTFINDING PROCEEDINGS PURSUANT TO THE
NEVADA REVISED STATUTE 288.200

CLARK COUNTY PROSECUTORS ASSOCIATION,	]	
	]	Opinion
	]	and Nonbinding Recommendation
	]	
Union,	]	of
and	]	
	]	John Kagel
	]	Fact Finder
CLARK COUNTY, NEVADA,	]	
	]	
Employer.	]	December 27, 2022
	]	
	]	Palo Alto, California
Re: Cost of Living Increase	]	

APPEARANCES:

For the Union: Adam Levine, Esq., Law Offices of Daniel Marks, Las Vegas, NV

For the Employer: Mark Ricciardi, Esq., Allison Kheel, Esq., Fisher & Phillips, Las Vegas, NV

ISSUE:

County's final proposal:

> "Effective July 1, 2022, the salary schedules for all employees covered in Appendix A will be adjusted by the annual percentage increase to CPI-U All Items In West-Size Class B/C, All Urban Consumers, Not Seasonally Adjusted (Series ID CUURN400SAO) for the calendar year ending December 2021. The adjusted percentage increase in salary schedules shall be a minimum of 2 % and a maximum of 3.0%. the adjusted percentage increase is based on U.S. Bureau Of Labor Statistics data (https://data.bls.gov/timeseries/cuurn400sao)."

Union's final proposal:

> "Effective July 1, 2022, the salary schedules for all employees covered in Appendix A will be adjusted by the annual percentage increase to CPI-U Al Items In West-Size Class B/C, All Urban Consumers, Not Seasonally Adjusted (Series Id Cuurn400sao) for the calendar year ending December 2021 which calculates at four point nine four percent (4.94%), which will result in an increase to the salary schedules in Appendix A." (Er. Ex. 8, Tr. 164)

BACKGROUND:

Unlike a number of the Employer's eleven bargaining units, including its largest ones, the Union had a wage reopener for 2022-2023. Preliminarily, for the purposes of NRS 288.200.7, the financial ability of the Employer is not an issue in this matter within the meaning of that provision (Tr. 11-12):

> "...any fact finder, whether the fact finder's recommendations are to be binding or not, shall base such recommendations or award on the following criteria:
>
> (a) A preliminary determination must be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer and within the limitations set forth in NRS 354.6241, with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision...
>
> (b) Once the fact finder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, and subject to the provisions of paragraph (c), the fact finder shall consider, to the extent appropriate, compensation of other government employees, both in and out of the State and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute and the fact finder shall consider whether the Board found that either party had bargained in bad faith.
>
> (c) A consideration of funding for the current year being negotiated...."

The CPI West-Size Class B/C is not disputed to have increased 4.94 percent from December 2020 to December 2021. (Tr.82, 95, 161)

In prior years, the County had negotiated cost of living increases with almost all of its various bargaining units as it has proposed for an annual increase involved in this matter, between two and three percent. A number of bargaining units have that increase baked into their multi-year contracts, not having a current one-year wage reopener as does the Union here.

POSITIONS OF THE PARTIES:

Position of the Union:

That this is not a baseball-style binding interest arbitration, so that the Fact Finder can pick either the proposals of the Parties, or modify those proposals; that a COLA capped at three percent is unreasonable in the current inflationary economy; that the nonbinding fact finding between the City of Las Vegas and its Employee Association was for the prior fiscal year intentionally did not take into account the increasing inflation; that reliance on internal settlements within the County as appropriate comparators are unreasonable and unacceptable since they were developed from 2014 as products of historically low inflation; that that was shown by the changes in the West-Size Class B/C CPI throughout that period; that the Union did lock itself into a multi-year agreement as did other units; that the external comparators establish COLA's well above three percent; that there is no bar in the state Constitution to collective bargaining wage increases above three percent; that given the locked-in aspects of other County bargaining units' contracts

through fiscal year, there is no leap frog or competition between them, and the Union, with the impacts of inflation on those units, are for consideration for Fiscal Year 2025; that the County's concern that it needs to have COLAs remain at two to three percent for stability and predictability, rather than volatility, other governmental entities have been able to do so while recognizing increased inflation; that likewise, past bargaining with the Union and other units has shown that they can take into account changing economics, including, if that occurs, a return to two to three percent CPI; that cash payments are not an appropriate remedy due to the compounding effect of inflation.

Position of the Employer:

That under NRS 288.200(7), assessing the reasonableness of each proposal with due regard for the Employer to provide facilities and services guaranteeing the health, welfare and safety of the people of the County, shows that its strong internal pattern of COLAs has provided steady and predictable wage growth; that that pattern has provided a two-percent COLA since 2016, even in years when the national average has been 0.1 and 0.4 percent; that the Employer strives to maintain that consistent wage growth without regard to national economy volatility; that that growth along with annual merit increases and longevity pay shows for the Union that it has far outpaced the national average; that that consistent pattern promotes resolution of negotiations, preventing competition and unrest among Employer bargaining units; that a temporary fluctuation in the CPI is no reason to deviate from the pattern as the Union is seeking to exploit; that the Employer has to balance multiple competing objectives and needs to prioritize funding new FTEs and decrease capital funding deficit; that the Employer proposal for a three-

percent increase is consistent with the increases for bargaining units not at impasse; that Union Prosecutors receive annual merit increases and longevity increases averaging 4.7 percent in addition to any COLA; that the Union cannot show that its members are underpaid or there is difficulty recruiting Prosecutors; that the Employer proposal acknowledges an up-tick from the prior two percent pattern, taking into account many factors including the sustainability of a three percent compensation adjustment over time; that the Union did not counter the evidence that multiple indicators which forecast that inflation will drop to three percent in FY 2023, and down to two percent in 2024-2025; that the timing of the increases for other bargaining units does not make the pattern less reasonable in that those units, foreseeing post-pandemic volatility, chose to agree to the pattern for stability and predictability; that two other units accepted the three percent increase this year; that while there may be ability to pay the requested increase, other needs such as funding additional FTE positions, are priorities; that the Union's proposal, if adopted and establish a go-forward pattern for the Employer bargaining units, would cost $184,000,000 over ten years relative to the three-percent pattern, enough money to fund 1,211 FTE positions; that internal comparators are more reasonable to consider than external ones, which are not comparable to the County in terms of population, employee numbers, and past increases.

DISCUSSION:

NRS 288.200(7)(b) requires the Fact Finder

> "... consider, to the extent appropriate, compensation of other government employees, both in and out of the State and use normal

> criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute..."

In making the following recommendation, the undersigned has considered the full record of the proceedings, and, as outlined above, the full contentions of each Party.

The record demonstrated that, notwithstanding the Employer's claimed pattern of CPI increases of two to three percent since 2015-2016 throughout the County (Tr. 22), the relevant CPI rose almost five percent in a year's time. Notwithstanding that, the Employer seeks to maintain its stated internal CPI wage increase pattern on these basic grounds: That a two-to-three percent CPI increase is what its other bargaining units have accepted, that anything above that would upset the pattern leading to other units competing to leapfrog each other for ever-higher rates, that the Prosecutors have other sources of wage increases such as merit and longevity pay, showing their wage gains have been ample, that inflation is predicted to return to prior low levels, and that the Employer has need to preserve funds for its other vital services, including increasing FTEs, including Prosecutor FTEs, which have been diminishing per 1000 County residents.

With respect to these issues, the Employer already varied from its pattern by agreeing to the wage reopener with the Union that is involved here. That specifically was not an agreement to a two-to-three percent relevant-CPI increase. (Tr. 40, 147-148) That pattern may be clearly desirable for the Employer overall, and it has achieved stability and predictability for the Employer as long as the CPI hovered in that general area. (Tr. 21) But it now materially has not, and there is no basis to believe that if other units'

agreements were open, they would not be seeking greater than a three-percent increase due to the CPI increase. Here, it is just that this Unit was able to react to the change because of the reopener.

That much of the Unit may achieve merit increases, presumably because of the quality of their work (Tr. 85), and that a subset of the Unit has been grandfathered into longevity increases, are the results of other bargains. (Tr. 80) Those compensation elements have been thus earned, and to hold the entire Prosecutor Unit to a three-percent CPI increase would ignore that all in the Unit are nonetheless negatively affected by the CPI's increase. (*See* Tr. 30, 86, 96, 155)

On the other hand, under the Statute, the factfinding recommendations must be cognizant of the internal relationships within the Employer's bargaining units. The Employer is stipulated to be the largest and most complex governmental agency in the state. (Tr. 168) The external comparators cited by the Union do not fully compare with the Employer, not only as to size, but they have their own particular bargaining histories. (*E.g.*, Tr. 174) While the CPI increased as it did, that does not mean that the Union is necessarily to be automatically granted the increase in question. It is reasonable to hedge that increase given the federal prediction, or intention, to quickly seek to drive inflation back down towards two percent. (Tr. 87-88) If that does not materialize as hoped, this issue can be quickly revisited given the Contract's terms with further bargaining to begin in February 2023, to include consideration of the relevant CPI from December 2021 to December 2022. (Un. Ex. 1, Art. 36, Tr. 164) Further, the interest of the Employer as to the impact of the sought-for increase into the future, particularly if accepted, and then

also accepted by other bargaining units, needs to be considered. A more conservative COLA increase for FY 2022-2023 seems reasonable under all of the circumstances and in accord with NRS 288.200.

RECOMMENDATION:

Effective, July 1, 2022, the salary schedules for all employees covered in Appendix A should be adjusted by four (4) percent.

Fact Finder

EXHIBIT B

EXHIBIT B

Paul D. Roose
Arbitrator / Mediator
Golden Gate Dispute Resolution
510-466-6323
paul.roose@ggdr.net
www.ggdr.net
April 10, 2023

FINDINGS AND RECOMMENDATIONS
PURSUANT TO
NEVADA REVISED STATUTES 288.200

In the Matter of a Controversy Between	)	
Clark County, NV	)	
Employer	)	
and	)	Collective Bargaining Impasse
Clark County Defenders' Union	)	Factfinding
Union		

APPEARANCES:

For the Employer: Allison L. Kheel, Attorney
Mark J. Ricciardi, Attorney
Fisher & Phillips
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Las Vegas, Nevada 89101

For the Union: Adam Levine, Attorney
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610 South Ninth Street
Las Vegas, Nevada 89101

STATUTORY FRAMEWORK AND PROCEDURAL BACKGROUND

Under Nevada Revised Statutes (NRS) 288.200, local government employers and unions have access to factfinding in the event they are unable to resolve contract negotiations after at least six bargaining sessions and the use of mediation. At the request of either party, the parties are required to go through a factfinding process. Unless otherwise agreed, the recommendations of the factfinder are not binding. If either side rejects the recommendation of the factfinder, the parties may select a second neutral factfinder who has the authority to issue a binding decision.

Under the statute, the factfinder is required to consider, weigh, and be guided by the following criteria in formulating findings and recommendations, excerpted in relevant part from NRS 288.200.7:

> a) A preliminary determination must be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer and within the limitations set forth in NRS 354.6241, with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision…
>
> b) Once the factfinder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, and subject to the provisions of paragraph (c), the fact finder shall consider, to the extent appropriate, compensation of other government employees, both in and out of the state and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute and the factfinder shall consider whether the Board found that either party bargained in bad faith.

> The fact finder's report must contain the facts upon which the fact finder based the fact finder's determination of financial ability to grant monetary benefits and the fact finder's recommendation or award.

The Clark County Defenders' Union is the exclusive representative of a bargaining unit of deputy public defenders and special public defenders employed by the County. The unit has approximately 137 members. The County has 9300 employees, most of whom are represented by other unions / associations in ten other bargaining units.

The CCDU was first recognized as the bargaining representative for the County's public defenders in 2015. Deputy district attorneys, the public defenders' courtroom counterparts, were represented by the Clark County Prosecutors' Association prior to the deputy public defenders seeking union recognition.

The parties had a collective bargaining agreement (CBA) in place through June 30, 2022. That agreement had a two-year term.

The parties conducted negotiating sessions in 2022 but did not secure an agreement on a successor contract. Mediation also failed to produce an agreement. The parties proceeded to factfinding and selected the undersigned as the neutral factfinder pursuant to NRS 288.200.

From the outset of the process, the undersigned neutral explained to both parties that it is not his practice to recommend a middle ground between the parties' proposals, but rather to select one or the other proposal on each disputed issue. In a similar fashion to "last offer" interest arbitration, the neutral believes that the parties are best served by this process. Taking this approach encourages each side to move off their opening positions and make proposals that are more likely to win the support of the neutral factfinder (and potentially the other party). In conjunction with this approach, the factfinder also informed the parties that he welcomed modifications to the parties' positions up until the close of the record.

The factfinding hearing convened on November 29, 2022, and January 25, 2023, via the Zoom platform. The parties presented on-the-record evidence, testimony and argument concerning the issues in dispute.

The parties modified some of their final proposals prior to the final session in January 2023. The parties submitted written briefs on March 20, 2023, and the matter was submitted for findings and recommendation.

The Disputed Issues and the Parties' Proposals

Salary: Both County and Union proposals are in the context of a one-year agreement, to expire June 30, 2023.

The County proposes a 3% general salary increase effective July 2022. Its offer is based on the continuation of the salary formula from the prior contract. The formula dictates a salary increase equal to the increase in the consumer price index (CPI) over the prior calendar year, with a minimum of 2% and a maximum of 3%. Since the CPI increase in 2021 was 4.94%, the County's offer is the maximum in what it terms the "collar."

The County asserts that its offer to the Union is in line with its consistent historical approach to compensation. It provides moderate salary increases tied to inflation, but with a minimum of 2% to benefit employees during low inflation years, and a cap of 3% to protect the County's fiscal resources during higher inflation periods.

The Union proposes a 4% increase, also effective July 2022. The Union bases its proposal on two factors. First, inflation has driven up the CPI in recent years. The old formula is inadequate, the Union contends, to allow the Union's members to keep up with the cost of living. Second, the Union cites the recommendation of the factfinder in the parallel dispute between the County and the prosecutors' union.

The Clark County Prosecutors' Association (CCPA), representing the deputy district attorneys, is also in a factfinding process with the County. A hearing was held with factfinder John Kagel. The County proposed 3% and the CCPA proposed 4.94%. Factfinder Kagel issued his report in December 2022 and recommended a 4% increase. If either side does not accept the factfinder Kagel's recommendation, it may proceed to binding factfinding as a final step. As of this report-writing, the CCPA contract is pending.

Other County bargaining units have settled for the 2022-2023 fiscal year. The following units have accepted a 3% increase as part of an overall agreement:

Juvenile Justice Supervisors' Association
International Union of Electrical Constructors[1]
Service Employees International Union (SEIU - regular and supervisors)[2]
Juvenile Justice Police Officers' Association
Clark County Park Police Association
International Association of Firefighters (IAFF)

One unit, the District Attorneys Investigators Association (DAIA), received a 3.5% increase as a component of a two-year agreement that includes a second year (2023 – 2024) with an additional 3.5% increase.

Lump Sum Payment: Each side includes a lump sum payment in its proposal. The Employer proposes a 1% one-time off-schedule payment to the entire bargaining unit. The Association proposes a 5% lump sum payment to unit members who were employed as public defenders for the County in 2021 – 2022 and are still so employed.

The County's rationale for its 1% bonus is that it conforms to the pattern of what it has offered other bargaining units in this negotiation cycle. Also, it argues that the additional 1% addresses the recommendation by factfinder Kagel for a 4% increase. The County's proposal of 3% ongoing and 1% one-time, it argues, would match Kagel's recommendation in 2022-2023, leaving future years open for negotiation.

The County rejects the Union's proposal to restore the 5% concession. The County argues that the workweek was reduced for the unit members in exchange for the 5% pay reduction. The County also notes that no other County bargaining unit has had their COVID concession restored.

[1] A tentative agreement for 3% was signed and the increase was implemented. A dispute exists about whether the union's members ratified that agreement.
[2] The SEIU units constitute a substantial majority of represented County employees, with 4,580 unit members. The next closest is IAFF, with 740 unit members. Both the SEIU and the IAFF were not open for salary in 2022, since they were in longer term agreements that included the same CPI formula.

The Union's proposal is motivated by a concession the Union made in 2021. At the request of the County, the Union took a 5% salary reduction for one year to help the County deal with the COVID-generated economic slowdown. In exchange for the 5% pay cut, the Union was offered and agreed to a work schedule reduced by 5%.

The Union asserts that the schedule reduction for its unit members turned out to be a fiction. Since public defenders are FLSA-exempt (not eligible for overtime and paid the same salary regardless of hours worked in a week), the Union claims that the work schedule reduction was never implemented. Public defenders, for that one year, worked as many hours per week as they did before the concession, the Union contends.

The Union thereby proposes a restoration of the one-time 5% loss for those who incurred the loss. Its proposal also limits the payments to those who are still employed as Clark County public defenders.

Jessica Colvin is the chief financial officer for the County. She testified that the County received approximately $835 million in one-time funds from the federal government for COVID recovery. She testified that much, but not all, of these funds have been expended. The County deems it not prudent to spend these one-time funds on ongoing salary increases. She testified that no legal or regulatory restriction exists on the use of these funds for employee compensation.

Vacation Sellback: The current agreement allows unit members to "sell back" a portion of their unused vacation each year. Currently, they are permitted to sell up to eighty vacation hours per year. The Union proposes that the maximum amount available to cash out would be increased by forty hours to 120 hours per year.

The Employer proposes to maintain the status quo in this contract section.

The Union's argument in favor of its proposal is to achieve parity with their Clark County prosecutor counterparts, who already have this expanded sellback provision in their CBA. The Union also contends that this arrangement is beneficial to the County since it will result in more unit members available for more weeks to do their jobs of representing indigent defendants.

The County had offered this vacation sellback modification in a package offer earlier in bargaining but withdrew it when the entire package was not accepted by the Union.

Other Benefits: The Union proposes contract language to address perceived deficiencies in workplace health and safety. The proposals focus on clean indoor air and clean water. They require the County to conduct an air quality survey and maintain a specified air quality index level. The Union's proposal also requires the County to maintain one filtered water station per work floor.

The County argues that the Union's air and water proposals are outside the scope of mandatory bargaining. They also dispute the Union's contentions that there are unaddressed health and safety issues in the building where the public defenders have their offices.

Discussion and Recommendations on the Disputed Issues

1. **Salary:** The County conceded from the outset of the hearing that it was not claiming an inability to pay for the Association's economic proposals. Accordingly, the factfinder is not obligated to analyze the County's financial status and make an ability-to-pay determination.

Conceding the issue of ability to pay does not necessarily lead to the conclusion that the Employer should agree to the Union's economic demands. Like all public employers, the County must prudently apply its revenues to employee compensation but also to programmatic needs. The statute requires the factfinder to consider the "obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision."

Since ability to pay is not at issue in this case, other statutory factors are determinative. The statute at 288.200.7 requires the factfinder to consider both internal and external compensation comparability. It also requires the factfinder to apply "normal criteria for interest disputes," a broad mandate. To the extent that other "normal criteria" are relevant, they are noted below.

Neither party, in their closing briefs, focused on external comparability. This is understandable, since Clark County is in a "league of its own" when it comes to unionized public defenders in the State of Nevada. No other county has a stand-alone public defenders' unit with a collective bargaining agreement. Cities do not have this job classification.

The only relevant external comparables would have been unionized public defenders in adjacent states, such as California. NRS Section 288.200.7, after all, allows for comparisons to employees "both in and out of the state." Neither party chose to bring in those comparators. Had they done so, it would have been relevant to consider whether the market for the services of public defenders crosses state borders.

The Union did not make the case that its unit members are leaving County employment to work as public defenders in other Nevada counties or in other states because of inadequate compensation in their current positions.

Both sides addressed internal comparators. The County made a compelling argument that it has consistently applied a uniform salary offer to its myriad bargaining units. The pattern is strong, deep, and longstanding. The only exception in this round of bargaining was for a unit that agreed to a multi-year agreement. The DAIA, representing district attorney investigators, signed a deal that provided for a 3.5% increase in 2022 and a 3.5% increase in 2023. All other units have agreed to the 3% as proposed by the County.

The undersigned factfinder, as he explained to the parties from the outset, applies the "baseball" approach to each issue in dispute. In other words, he selects one of the parties' proposals, based on which one most closely conforms to the statutory criteria. Neither party proposed a 3.5% salary increase for the unit, so that is not an option for these findings and recommendations. It should also be noted that the 3.5% DAIA agreement was in the context of a two-year deal. Neither party in this instance has proposed a multi-year contract.

Cost of living is one of the "normal criteria for interest disputes" implied in NRS 288.200.7. It is not a factor that can be mechanically applied to calculate salary increases (or decreases, in the case of deflation). The County makes a persuasive argument that the "collar" has been consistently applied to cost-of-living increases in Clark County when inflation is high, low, or between 2 and 3%. This is a reasonable way to account for CPI fluctuations.

The Association points to factfinder Kagel's recommendation of a 4% increase for the counterpart unit, the Clark County Prosecutors' Association. Mr. Kagel did not employ the "baseball" approach. The County, in that instance, proposed 3%. The Association proposed

4.94%. Factfinder Kagel proposed a middle ground of 4%. As of this writing, there is no indication that Mr. Kagel's recommendations will be adopted by the parties.

The County's proposal of a 3% increase is better aligned with the statutory criterion of internal comparability. No other factors are present that tip the balance in favor of the Union's proposal.

Based on the above analysis, the County's salary increase proposal most closely conforms to the statutory factors.

2. **Lump Sum Payment:** The onset of COVID presented difficult challenges to the labor relations community. In Clark County, economic uncertainty triggered by quarantining and social distancing brought the parties back to the bargaining table in mid-contract. The CCDU, like all the County's unions, agreed to economic concessions to help the County weather the health emergency.

The concession agreed to by the Union, like the other exclusive representatives, was a 5% salary reduction in July 2020. Accompanying this reduction was an agreement that the employee workweek would also be reduced by 5%. Like all other units in the County, this 5% reduction was restored after one year. The result was a one-time loss of 5% of the annual salary for each unit member working during that time frame.

The CCDU, unlike most other County bargaining units, is composed entirely of employees who are FLSA-exempt. They do not receive additional pay for hours worked over forty in a week.

In unrebutted testimony, chief deputy public defender and Union president Rafael Nones recalled that public defender workload did not diminish during the one year when their salary was cut. They were not allowed to take off one day a month to compensate for the reduced salary unless they used earned leave. Their work changed dramatically, as court proceedings went online. But no evidence was in the record that a corresponding reduction in caseload or hours worked resulted.

Bargaining units of hourly employees certainly made similar sacrifices. But the presumption is that those employees were granted actual reduced work schedules, allowing them to spend more time with their families or even do non-county work to supplement their incomes.

As for the County's argument of internal comparability on this issue, no evidence was in the record that other County unions asked for this restoration.

On the face of it, the Union's 5% proposal appears to result in a one-time cost 4% higher than the County's 1% offer. However, the Union's proposal does not cover the entire bargaining unit. It excludes anyone who worked during the concession year and is no longer employed. The testimony in the record was that a considerable number of unit members have left County employment to work as judges or to set up private practices. Union president Nones testified that 20% of the bargaining unit's members have left County employment since 2020.The Union's proposal excludes unit members hired since July 2021.

The overall effect of this narrowing of the recipient group is that the cost differential between the County's proposal and the Union's proposal is less than the presumed 4%.

The County received one-time federal funds to address COVID-related costs. The County's chief financial officer stated at the November 2022 hearing that some of those funds were still available for County use and can be used for compensation. The County thinks it would be unwise to spend these one-time funds for ongoing salary increases, and the undersigned factfinder agrees. However, the factfinder's recommendation is that the County use these or other funds to reimburse the specified CCDU unit members for their COVID concession on a one-time basis.

Based on the above analysis, the Union's one-time payment proposal most closely conforms to the statutory factors.

3. **Vacation Sellback:** The Union is the moving party on this proposal to modify the CBA, while the Employer proposes the status quo. That the County offered to accept this Union proposal as part of a package offer rejected by the Union is not germane to this report. The factfinder's task is to analyze and make recommendations on each disputed item standing alone.

The Union argues that having public defenders use fewer vacation days would benefit the Employer. The Employer did not concur with this assertion. The Employer appropriately views this as a cost item. When unit members take their vacations, the department presumably does not backfill those positions with other employees on overtime. Vacation weeks "sold" back to the department simply add weeks of salary cost to the County's payroll.

Union witnesses stated that unit members have forfeited vacation weeks because they are not allowed to use them, but the Union presented no documentary evidence of that claim.

The Union has not met its burden to demonstrate why this CBA modification is needed. Based on the above analysis, the County's vacation sellback proposal of status quo most closely conforms to the statutory factors.

4. **Other Benefits:** The Union is the moving party on these workplace health proposals to modify the CBA, while the Employer proposes the status quo.

The Employer has argued that these air and water proposals are outside the scope of public sector mandatory bargaining in the state of Nevada. The parties did not fully brief this issue of scope, so no opinion on that will be offered here. Suffice it to say that employee health and safety measures are traditionally considered within the scope of bargaining unless they infringe on other management rights (such as the right to determine employee staffing levels).

In scope or not, the Union has not made a convincing case that these changes to the CBA are necessary. The Employer contested the presence of unhealthy conditions. Evidence of other earlier efforts by the Union to address these immediate issues of air and water quality would be the standard predicate to the ongoing contractual solutions proposed by the Union.

Both the State of Nevada and the federal government have Occupational Safety and Health Administrations. The job of those agencies is to enforce workplace health and safety standards. No evidence was in the record that the Union had attempted to seek outside regulatory assistance for these perceived workplace health issues.

The factfinder need not reach a conclusion on whether the health complaints were legitimate to offer a recommendation on this proposed contract change. The Union has not met its burden to demonstrate why this CBA modification is needed. Based on the above analysis, the County's Other Benefits proposal of status quo most closely conforms to the statutory factors.

Summary of Factfinder Recommendations

1. **Salary:** The neutral factfinder recommends the County's proposal of a 3% salary increase effective July 1, 2022.

2. **Lump Sum Payment:** The neutral factfinder recommends the Union's proposal of a 5% lump sum payment for all employees who were in the bargaining unit from July 25, 2020, through July 23, 2021, and are still in the bargaining unit as of the date the parties sign a tentative agreement.

3. **Vacation Sellback:** The neutral factfinder recommends the County's proposal of status quo.

4. **Other Benefits**: The neutral factfinder recommends the County's proposal of status quo.

Paul D. Roose, Neutral Factfinder

Date: April 10, 2023

EXHIBIT C

EXHIBIT C

CCDU

201 S Las Vegas Blvd # 2173 ◆ Las Vegas, NV 89125 ◆ info@DefendersUnion.org

August 7, 2023

JoNell Thomas, Special Public Defender
Office of the Special Public Defender
330 S. Third St, 8th Floor
Las Vegas, NV 89101

Darin Imlay, Public Defender
Office of the Public Defender
309 S. Third St, 2nd Floor
Las Vegas, NV 89101

Greetings Ms. Thomas and Mr. Imlay,

The Collective Bargaining Agreement effective July 1, 2022, thorough June 30, 2023, as ratified by the Clark County Commissioners on June 6, 2023, reads in pertinent part as follows:

> Article 1
>
> This Agreement is made and entered into this ***1st day of July 2022***, by and between the Clark County Defenders Union . . . and the County of Clark. . .

(***Emphasis added***). Article 36, paragraph 1, reads in pertinent part as follows:

> This agreement shall be ***effective July 1, 2022*** . . .

(***Emphasis added***). Article 31, paragraph 3, reads as follows:

> All employees covered by this agreement shall receive a one-time lump sum payment equivalent to the concession each individual employee gave as part of the Pandemic Related Concession. This lump sum payment shall equal 5% of each employee's annual salary from July 25, 2020, through July 23, 2021, to be calculated on an individual employee basis, ***for all employees who are still employed as of July 1, 2022***.

(***Emphasis added***).

The Clark County Defender's Union ("CCDU") was made aware on Wednesday, August 2, 2023, via telephone call with Christina Ramos, Assistant Director of Human Resources, that Clark County is refusing to pay employees who were covered by the agreement on July 1, 2022, who were still employed as of July 1, 2022 but have since then separated from the covered employment, the 5% lump sum as required by Article 31, paragraph 3. This is Clark County's stated position despite the fact that the contract language clearly states the payment is to be for all employees who were still employed as of July 1, 2022.

This disregard for the plain language of the contract triggers a grieveable offense on behalf of the following members, as well as any other similarly situated employees, including but not limited to, the following:

1. Curtis Brown
2. Stephen Spellman
3. Jonathan Cooper
4. Nadia Wood
5. Rebecca Saxe
6. Jennifer Schwartz
7. Deborah Westbrook
8. Xiomara Bonaventure
9. Patricia Palm
10. Katrina Ross

The contract language must be honored and the lump sum in Article 31, paragraph 3, must be paid immediately.

Pursuant to Article 10, Section 3, Grievance Procedures, this this letter shall serve as the written grievance on behalf of the above covered employees, and all other similarly situated covered employees, who were still employed as of July 1, 2022. To comply with the procedural requirement that the grievance be "in writing and submitted to the employee's department head within ten (10) working days of the contract violation," this letter is addressed to you. Article 10, Section 3, Step 1 (a).

Regards,

David Westbrook

David Westbrook
President
Clark County Defenders Union

Office of Human Resources

500 S Grand Central Pky 3rd Fl • Box 551791 • Las Vegas NV 89155-1791
(702) 455-4565 • Fax (702) 384-1405

Curtis Germany, Director • Christina Ramos, Deputy Director

August 16, 2023

Adam Levine, Esq.
Law Office of Daniel Marks
601 S. North Street
Las Vegas, NV 89101
alevine@danielmarks.net

Dear Mr. Levine,

On August 14, 2023, the Union submitted a grievance on behalf of various former employees. The statement of grievance specified: "Clark County's failure to pay certain former employees the 5% lump-sum payment required by Article 31, paragraph 3 as a result of statutory fact-finding proceedings."

Upon further review of the details of this grievance and taking into consideration that the employees referenced in this grievance are no longer employed by Clark County, this matter is not eligible for consideration through the steps of dispute resolution procedures as outlined in Article 10 of the CCDU collective bargaining agreement.

Sincerely,

Curtis Germany
Director, Human Resources

cc: David Westbrook, CCDU
Darin Imlay, Public Defender
JoNell Thomas, Special Public Defender
Sandra Seebeck, Senior Human Resources Analyst

Adam Levine

From: Scott Davis <Scott.Davis@clarkcountyda.com>
Sent: Thursday, August 17, 2023 3:12 PM
To: Adam Levine
Subject: Advancement of 5% reimbursement Grievance to Step 3 Arbitration

Mr. Levine,

I have been asked by Clark County to respond to CCDU's improper demand for arbitration and represent the County in this matter. Please be advised that you are not authorized to act on behalf of Clark County to request a strike list. Moreover please be advised that even in instances where arbitration is proper, FMCS is not an authorized source of a strike list.

CCDU's demand is on behalf of individuals who are not local government employees and therefore not entitled to collective bargaining rights under the Government Employee-Management Relations Act, and is predicated upon the theory that CCDU negotiated compensation for non-county employees. As you are aware, upon lawful separation of employment, an individual's status as a local government employee as defined by NRS 288.050 ceases. CCDU has no lawful authority to collectively bargain outside the parameters of Chapter 288. The notion that it may bargain on behalf of non-employees is therefore a legal impossibility, and an associated grievance on behalf of former employees is not lawful from the very outset. Moreover, an arbitrator does not get to make this determination. NRS 38.219(2).

The County therefore requests that CCDU withdraw the demand for arbitration. Please confirm by Wednesday August 23, 2023 that the demand has been withdrawn.

As to your reference to Mr. Wells, please be advised that a such a dispute over his compensation is premature and speculative, as his arbitration has not yet occurred. It is also duplicative, as any disputes about the compensation he would stand to receive in the event of a reinstatement already subsist within his existing grievance, which is a separate matter. In the event of a reinstatement in that case it will likely not present a dispute in any event; the County provides the compensation afforded under the CBA to employees who are reinstated, unless otherwise stated in a particulars of an arbitration award.

SCOTT DAVIS
DEPUTY DISTRICT ATTORNEY
OFFICE OF THE DISTRICT ATTORNEY | CIVIL DIVISION
500 SOUTH GRAND CENTRAL PARKWAY, SUITE 5075
LAS VEGAS, NEVADA 89155-2215
702 455 4761 | Scott.Davis@Clarkcountyda.com

From: Adam Levine <ALevine@danielmarks.net>
Sent: Wednesday, August 16, 2023 12:14 PM
To: Sandra Seebeck <Sandra.Seebeck@ClarkCountyNV.gov>; Curtis Germany <Curtis.Germany@ClarkCountyNV.gov>
Cc: Curtis Germany <Curtis.Germany@ClarkCountyNV.gov>; Christina Ramos <CRamos@ClarkCountyNV.gov>; JoNell Thomas <JoNell.Thomas@ClarkCountyNV.gov>; Darin Imlay <imlaydf@ClarkCountyNV.gov>; pdavidwestbrook@gmail.com; ccdutreasurer@gmail.com; Joi Harper <JHarper@danielmarks.net>; defenders.union@gmail.com; Joi Harper <JHarper@danielmarks.net>
Subject: RE: Advancement of 5% reimbursement Grievance to Step 3 Arbitration

Curtis:

ELECTRONICALLY SERVED
1/30/2024 10:30 AM

Electronically Filed
01/30/2024 10:29 AM
CLERK OF THE COURT

ORDG
LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
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ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
alevine@danielmarks.net
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536: FAX (702) 386-6812
Attorneys for the Clark County Defenders Union

DISTRICT COURT
CLARK COUNTY, NEVADA

CLARK COUNTY DEFENDERS UNION,

Plaintiff,

v.

CLARK COUNTY,

Defendant.

Case No.: A-23-877115-C
Dept. No.: 9

ORDER GRANTING MOTION TO COMPEL ARBITRATION

Date of Hearing: November 29, 2023
Time of Hearing: 9:00a.m.

This matter having come on for hearing on this 29th day of November 2023 on the Plaintiff's Motion to Compel Arbitration; and Plaintiff Clark County Defenders Union represented by Adam Levine, Esq. of the Law Office of Daniel Marks; and Defendant Clark County represented by Scott R. Davis, Deputy District Attorney of the Office of the District Attorney; and the Court having reviewed the pleadings and having heard oral argument of counsel;

///

///

Case Number: A-23-877115-C

IT IS HERE HEREBY ORDERED, ADJUDGED AND DECREEED that the Motion to Compel Arbitration is GRANTED. The Court finds that there is an enforceable agreement to arbitrate. The remaining arguments shall be decided by the arbitrator.

There being a dispositive order on file, the court CLOSES this case.

Dated this 30th day of January, 2024

5A6 DE4 1312 9F4A
Maria Gall
District Court Judge

Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS

/s/Adam Levine, Esq.
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
610 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff
Clark County Defenders Union,

Approved as to Form & Content:

OFFICE OF THE DISTRICT ATTORNEY

Scott R. Davis, Esq.
Scott R. Davis, Deputy District Attorney
Nevada State Bar No. 010019
500 South Grand Central Pkwy, Suite 5075
Las Vegas, Nevada 89155-2215
Attorneys for Defendant Clark County

EXHIBIT D

EXHIBIT D

KATHERINE J. THOMSON
Arbitrator, Mediator, Factfinder
El Cerrito, California
(510) 528-3005 (Phone and Fax)

Factfinder's Case No. 631-FLI

FMCS Case No. 241013-00340

IN FACTFINDING PROCEEDINGS PURSUANT TO NRS 288.200

CLARK COUNTY PROSECUTORS ASSOCIATION, **Employee Organization,** **and** **CLARK COUNTY,** **Employer,**	**FACTFINDER'S FINDINGS AND RECOMMENDATION** June 3, 2024

APPEARANCES:

On behalf of the Employee Organization:

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536

On behalf of the Employer:

Mark Ricciardi
Allison Kheel
Attorney at Law
Fisher & Phillips LLP
300 S. Fourth Street, Suite 1500
Las Vegas, NV 89101
(702) 252-3131

This matter is a factfinding proceeding after a bargaining impasse between Clark County, hereinafter the Employer, and the Clark County Prosecutors Association, hereinafter the CCPA. KATHERINE J. THOMSON was selected as Factfinder pursuant to Section NRS 288.200 and the procedures of the Federal Mediation and Conciliation Service, under which this report is advisory to the parties. The parties stipulated the matter is properly before the Factfinder.

The parties had full opportunity to call witnesses and present evidence and argument during an evidentiary hearing, which was held by videoconference on February 29, and March 18, 2024. Witnesses were sworn. A verbatim record of the hearing was prepared, and a transcript was made available. The record was closed on May 3, 2024, when the Arbitrator received post-hearing briefs.

RELEVANT STATUTE SECTIONS

NRS 288.200

7. Except as otherwise provided in subsection 10, any fact finder, whether the fact finder's recommendations are to be binding or not, shall base such recommendations or award on the following criteria:

(a) A preliminary determination must be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer and within the limitations set forth in NRS 354.6241, with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision. If the local government employer is a school district, any money appropriated by the State to carry out increases in salaries or benefits for the employees of the school district must be considered by a fact finder in making a preliminary determination.

(b) Once the fact finder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, and subject to the provisions of paragraph (c), the fact finder shall consider, to the extent appropriate, compensation of other government employees, both in and out of the State and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute and the fact finder shall consider whether the Board found that either party had bargained in bad faith.

(c) A consideration of funding for the current year being negotiated. If the parties mutually agree to arbitrate a multiyear contract, the fact finder must consider the ability to pay over the life of the contract being negotiated or arbitrated....

STATEMENT OF THE ISSUE

Whether there should be a Cost-of-Living Adjustment ("COLA") made to the wage schedules, and if so, how much?

BARGAINING AGREEMENT AND PROPOSALS

The parties' collective bargaining agreement, effective July 1, 2021 through June 30, 2024, (Association Exhibit 1) provides for a reopener as follows:

> Article 36 -- Compensation
>
> Both parties agree that prior to July 1, 2022, this article may be reopened, at the written request of either party, to determine if a cost-of-living adjustment will be awarded. Such request shall be provided to the other party no later than February 1, 2022.
>
> Both parties agree that prior to July 1, 2023, this article may be reopened, at the written request of either party, to determine if a cost-of-living adjustment will be awarded. Such request shall be provided to the other party no later than February 1, 2023.

County's Proposal

1. EFFECTIVE JULY 1, 2023, OR UPON APPROVAL BY THE CLARK COUNTY OF COMMISSIONERS WHICHEVER IS LATER, THE SALARY SCHEDULES FOR ALL EMPLOYEES COVERED IN APPENDIX A WILL BE ADJUSTED BY THE ANNUAL PERCENTAGE INCREASE OF FOUR-AND-ONE-HALF PERCENT (4.50%), WHICH WILL RESULT IN AN INCREASE TO THE SALARY SCHEDULES IN APPENDIX A.

2. EFFECTIVE JULY 1, 2023, OR UPON APPROVAL BY THE CLARK COUNTY BOARD OF COMMISSIONERS, THE SALARY SCHEDULES FOR ALL EMPLOYEES COVERED IN APPENDIX A WILL BE ADJUSTED BY AN ADDITIONAL 0.50%, REPRESENTING A TOTAL COST-OF-LIVING ALLOWANCE (COLA) OF 5.00%.

CCPA's Proposal

EFFECTIVE JULY 1, 2023, THE SALARIES FOR ALL EMPLOYEES COVERED IN APPENDIX [A][1] WILL BE ADJUSTED BY THE ANNUAL PERCENTAGE INCREASE OF NINE AND TWO-TENTHS PERCENT (9.2%) AND THE SALARY SCHEDULES IN APPENDIX [A] WILL BE ADJUSTED BY AN INCREASE OF NINE AND TWO-TENTHS PERCENT(9.2%).

[1] There appears to be a typographical error in CCPA Ex. 24, since Appendix B relates to a substance abuse program.

Clark County is home to over 2.3 million residents and had 40.8 million visitors in 2023. Its population is nearly 75 percent of Nevada's residents; the next largest county, Washoe County, has only 508,759 residents. It is responsible for providing municipal services to 1 million residents in unincorporated areas of the County in addition to funding County services like district attorney's and public defender's offices, the courts, assessor, and social services.

Bargaining Background

The County bargained contracts for most of the bargaining units in 2021, reaching agreements for a three-year term, July 2021, through June 2024. In several of those contracts, the unions agreed to a formula for determining the COLAs in mid-term years based on the CPI-U All Items In West - Size Class B/C, All Urban consumers, Not Seasonally Adjusted, but limited to a minimum of 2% and a maximum of 3%. However, CCPA refused to agree to the "collar" language, and instead bargained to reopen the contract for COLAs each year.

In FY 22, the bargaining units whose representatives had agreed with the collar language received 3% raises even though the CPI increase was 4.94%.

The County and CCPA bargained to impasse during the first reopener negotiations on wages in 2022-23. The County's final proposal was for an increase tied to the "annual percentage increase to CPI-U All Items In West-Size Class B/C, All Urban consumers, Not Seasonally Adjusted … for the calendar year ending December 2021. The adjusted percentage increase in salary schedules shall be a minimum of 2.0% and a maximum of 3.0%."

The Union's final proposal was for a 4.94% wage hike, which matched the annual percentage increase to the agreed-upon CPI for the calendar year ending December 2021.

After Factfinder John Kagel recommended a 4 percent COLA in December 2022, CCPA accepted the recommendation, but the County did not, until May 2023. (Co. Ex. 3) By that time, negotiations had begun on the CCPA 2023-24 COLA reopener.

The Clark County Defenders Association's collective bargaining agreement was a two-year contract ending in June 2022. The parties were unable to reach agreement in bargaining or mediation and went to non-binding factfinding. In April 2023, the factfinder recommended that the parties agree to the County's proposal of a 3% salary increase effective retroactively to July 1, 2022. (CX 19) The parties agreed. Another union that had an open contract, Juvenile Justice Supervisors Association, agreed to 3% raise for FY 23. The DA Investigator's Association agreed in January 2023, to a two-year contract with a 3.5% COLA in each of FY 23 and FY 24.

Going into COLA reopener negotiations for FY 2024, the parties were faced with an 8.2% annual increase to the CPI. CCPA's initial demand in early May, before the parties settled on the FY 23 salary increase, was an 11% salary hike. The County initially countered in mid-May with modified "collar" language: "The adjusted percentage increase in salary schedules shall be a minimum of 2% and a maximum of 3% unless the annual CPI … is less than 0%, then the adjusted percentage increase in salary schedules shall be 1%...." (CX 5) As a Union witness testified, this offer was worse than the original collar language since it guaranteed a floor of only 1% rather than 2%.

Despite the fact that many contracts were closed and were set to provide a 3% raise on July 1, 2023, the County agreed with those unions in June 2023, to amend the language in the Compensation sections of the contracts to call for a 4.5 % increase if the CPI increased above 5 percent.[2] In addition, it adjusted the salary schedules 1.5%. The effect was a 6% increase for employees in several bargaining units. (UXs 15-17)

At the same time, it was offering CCPA only the formula that would call for a 4.5% increase if the CPI increased above 5%, but not the extra 1.5% it agreed to pay employees in the other units. (CX 7) CCPA continued to demand 11%. No further movement in the parties' positions occurred until the week before the factfinding, when the Factfinder urged the parties to have further discussions.

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[2] The County recently began to negotiate with the other bargaining units COLA increases with a "collared" approach using CPI language, that restricted raises to between 2% and 3% for FY 23. However, for FY 24 the other unions signed agreements for an upper and lower "arm" to the collar providing that their bargaining units received 4.5% COLA when CPI increase exceeded 5% and a floor of 1% if the CPI decreased.

POSITION OF THE UNION

It is unreasonable to depart downward from the CPI. Inflation turned out to be anything but transitory. Arbitrator John Kagel gave a .94% downward deviation from the agreed-upon December-to-December CPI increase with the caveat that if inflation was not in fact transitory, it could quickly be corrected in the FY 24 negotiations. Inflation in FY 2022 turned out to be anything but transitory. Annual 2023 inflation was 4.2%. But the County is still offering only 5%, even though topped-out prosecutors—a third of the unit—lost 9.2% of purchasing power in two years.

The County's fear of a leap-frogging phenomenon where each union attempts to obtain more than previous agreements with other unions is overblown because the CPI is an objective factor that will constrain the parties. CCPA struck a different bargain than those that agreed to the collar language.

Offering CCPA only a 5% increase instead of the 6% hike it voluntarily opened contracts to offer to other units penalizes CCPA. The County has been "fair" only to the larger units that accepted collar language.

The County's General Fund budget alone is $1.95 billion. A one percent (1%) increase to CCPA costs approximately $280,000. The difference between the two proposals is less than $1.175 million which is approximately .06% of County's General Fund budget.

The Office of the District Attorney is facing recruitment and retention problems. That is why the County moved the ranges of the civil district attorneys upward after its management classification and compensation study. Currently, the bottom of the salary range for Attorneys in the Civil Division in Clark County is approximately 16% higher than the bottom of the range for Attorneys represented by the CCPA. (UX 26)

Washoe County has also determined that its attorneys were underpaid and shifted their ranges upward. As a result of a class and compensation study by Washoe County (CXs 28, 29), a Deputy District Attorney I now starts at $107,723 per year; the Deputy District Attorney III range tops out at $196,289. (CX 29, p. 7) Although the County

argues that Washoe County is not a valid comparator, its MPlan classification and compensation study used Washoe County as a comparator.

Annual merit increases are not a substitute for COLAs and should not be considered. A third of the unit does not receive merit increases because they are at the top of the range.

The recommended salary increase should be retroactive to July 1, 2023. The County wants to disincentivize utilization of impasse proceedings and put the union in the position that if it does not accept the County's offer (however inadequate), it will not receive the benefit until after the completion of the impasse proceedings. It incentivizes Clark County to hold firm to its initial offer in the hopes that non-retroactivity will convince a union to take an otherwise unreasonable offer. Members of the bargaining unit will still have to struggle with the effects of inflation during the impasse proceedings. The County's approach to non-retroactivity is contrary to Nevada's statutory impasse provisions. If the parties do not agree, the impasse dispute proceeds to a second and binding fact-finding under NRS 288.200(6). NRS 288.215, to which that section refers, makes the award "retroactive to the expiration date of the last contract." For the last 16 years all the agreements between the CCPA and the County have been retroactive.

POSITION OF THE EMPLOYER

Internal equity and an examination of the employer's treatment of its other employees is the most important factor to consider when evaluating the reasonableness of the parties' proposals. Every other bargaining unit (except the DAIA which negotiated a 2-year contract) received a total of 9.0% over the two years (FY 23 & FY 24). (*See* CX 9) Under the County's proposal, CCPA would have the same total percentage increase from 2016 through 2024 (23.75% total COLA increases), as all other bargaining units in the County.

If the Union's proposal was implemented, prosecutors could make nearly $8,000 more than defenders in Clark County. Consideration of external bargaining units would be inappropriate. Washoe County is not a reasonable comparator because it is a fraction

of the size of Clark County and 500 miles away, closer to the California labor market. Civil attorneys who receive the benefits of the MPlan should not be considered since they are not represented and move through the salary ranges only with merit increases.

Maintaining a consistent pattern across all County bargaining units is also essential to the County because it promotes timely resolution of negotiations and prevents competition and unrest among County employees, with each unit attempting to get more than the other.

The County was forced to cut 20% of its positions during the recession. County FTEs per 1,000 County residents in all positions declined 13.7% from 2009 to 2023: from 2.26 to 1.95. (CX 11, p.13.) At the same time, workload has increased. Funding for additional FTE positions is a priority. The District Attorney's Office requested 84 positions over a three-year period beginning in FY 23, with 36 positions requested in one year, but the County was only able to approve funding for 42 positions over two years, 18 of which are attorney positions. (CX 11, p.14)

The County needs to prioritize the allocation of surplus general fund to funding competing priorities, like hiring new employees and decreasing the capital deficit, among many other important programs, and services. The difference between the County's proposed 5% COLA and the Union's proposed 9.2% COLA would equate to a difference of close to $14.7 million in increase salary and benefit costs over 10 years, enough to fund 54 much needed additional positions. (CX12, p.10) If all 10 bargaining units bargained and received the additional 4.2%, it would result in an additional $420 million in total compensation over 10 years, $420 million the County could not use for capital improvements, community outreach projects or to fund the much needed 2,689 new positions. (CX 12, p. 11)

The prosecutors who are not topped out are not suffering from a decrease in purchasing power, since they receive merit increases of 3-5% on top of COLAs, as long as they meet standards of performance.

The County's history of the wage growth for salary schedules has kept pace with CPI. A 5% COLA, along with merit increases, adequately accounts for any recent spike in CPI.

Any recommended raises should not be retroactive. Making a proposal effective upon the date of agreement and Board of County Commissioners approval creates an incentive for bargaining units to quickly settle contracts before expiration of the prior contract's term. A retroactive recommendation rewards the Union for its refusal to meaningfully engage in the bargaining process.

DISCUSSION

Financial Ability

The compensation of prosecuting attorneys is about $27 million paid from the general fund. (CX 11, p.11) The cost of raising their compensation 1% would be approximately $270,000.

Under NRS 288.200, section 7 (a), the first determination the Factfinder must make is whether the County has the financial ability to grant monetary benefits. The County does not dispute that it has the ability to grant monetary benefits. If retroactive, the County's proposal totaling 5% would cost the County $1.35 million for FY 24.

Consideration of Funding for the Current Year

The statute also requires the Factfinder to consider "funding for the current year being negotiated." The evidence in the record concerning this issue was not well-developed. Property tax revenue was over 34% of the FY 24 general fund revenue, approximately $663 million, but there was no information how that amount compared to prior years, and no projection for FY 25.

The other major component of general fund revenue, Consolidated Tax revenue,[3] accounted for 44% of the FY 24 general fund revenue. (CX 11, p. 8) That would amount to about $858 million of the budgeted revenues of $1.95 billion. (CX 11, p. 9) The County asserted the rolling 12-month average growth in Consolidated Tax revenue slowed to about 4% as of May 2023 and 2.44% by November 2023. This relatively low growth followed a V-shaped negative 13.47 % (decrease in revenue) in May 2021, after hotels and casinos closed during the pandemic, and a quick spike to 38.9 % growth by May 2022, including short-term government stimulus funding. (CX 11, p.10) The record contains no projections for FY 25.

Other Obligations

The County has 6,051 employees in 10 bargaining units, as well as unrepresented employees. What one bargaining unit negotiates is often what all eventually receive.

Public safety costs constitute 48.7 % of general fund budgeted expenditures. (CX 11, p.11) General government expenses are the second largest category of expenditures, at 26.1%, and judicial system costs—including prosecuting attorneys expenditures—comprise 12.2%. Other categories of expenditures such as public works, health, parks and welfare are a small portion of the budget.

The County noted that it has been subject to unfunded mandates of $19 million and $15 million in the prior two legislative sessions (which occur every two years.) It needs approximately $120 million to maintain equipment and facilities, but has $395 million in deferred maintenance costs over the past 10 years. (CX 11, p. 15) It is difficult to place these facts in context since the record contains little specific information about growth in total general fund revenue.

Consumer Price Index

The primary impetus behind the CCPA's proposal is the 8.2% spike in the annual CPI measured in December 2022. Prices did not drop. They continue to climb, although

[3] Consolidated tax revenue is made up of sales tax, motor vehicle privilege tax, cigarette tax, liquor tax and real property transfer tax.

they increased only 4.1% in 2023. (CX 12, p. 3) The Federal Reserve, in December 2023, projected the CPI will soon show inflation leveling off under 3 percent. (CX 12, p.2)

The County recognizes this problem for its employees. It opened closed contracts to provide additional raises, modifying "collar" language for inflation over 5%. In addition, it adjusted the salary schedules 1.5%. The effect was a 6% increase for employees in many bargaining units. (UXs 15-17)

At the same time, it was offering CCPA only the formula that would call for a 4.5% increase if the CPI increased above 5%, but not the extra 1.5% it agreed to pay employees in the other units. (CX 7) Months later, in preparation for factfinding, the County added an additional .5% increase to its offer.

Looking back at the annual CPI increases in relation to salary increases in FY 2016 through FY 23, the past COLAs plus the County's FY 24 offer of 5% would leave the prosecutors approximately 1.5% behind inflation as of January 2023. (CXs 9, 10) Costs have not fallen. The annual CPI increase for 2023 was 4.1%, which continues to add a substantial cost to living expenses.

The County prefers to maintain consistent wage growth rather than hewing to spikes and ebbs in the CPI. Steady growth allows the County to meet growing vendor costs and meet unexpected or cyclical slowing of revenues. Salary increases are permanent, compound into the future, and are hard to unwind. As a County witness testified, limited, moderate increases could stave off the necessity to lay off employees. Even when viewed over the past eight years, however, the County's proposal is insufficient to meet the goal of keeping up with the CPI "over time" (Tr. 123).

The County argues that the prosecutors' salaries have grown far faster than inflation because they receive merit increases in addition to the COLAs. However, prosecutors do not receive step increases as many other County employees do; they must earn merit boosts, which range from 3% to 5%. And long-term employees who have "topped out" on their range are not eligible to receive them at all.

Internal Comparators

The County contends that its pattern of uniform raises across bargaining units also supports its 5% offer. It has shown that it strives to be consistent in its agreements for cost-of-living increases unless a unit wants another form of compensation instead. (*See* CX 9)[4] Several factfinders over the year have reinforced the pattern. (*See, e.g.*, CX 16)

While this internal parity in annual increases is very important, it is also important to examine the salary ranges of other attorneys within County employment, which are different.

The most comparable employees within the County are the public defenders who are working on the same cases in the same courtrooms as the prosecutors. For FY 24, the public defender top salary is $187,907, very close to what the top of the range would be for chief deputy DAs under the County's proposal. By contrast, under the CCPA's proposal, the top prosecutor salary would rise to $195,474 from its current $178,004.

Also comparable are the civil deputy DAs, who work under the same DA, but are not represented due to a legislative prohibition. The County extends to them the same benefits as it provides the MPlan employees, although they are not management employees. After a Management Classification and Compensation study, the salary range of the attorneys on the civil side rose 3% in July 2022 (as it did for most bargaining units), and after another 6% hike in July 2023, is $90,022 - $162,676 annually. (UX 12, CX 30) The range for the civil Senior Attorney is $122,470 - $189,800. (UX 13) The ranges of the comparable criminal deputy DAs are $78,665 to $179,004.[5] (UX 20)

This disparity is relevant to the parties' concern about recruitment and retention. The District Attorney wrote a memorandum in August 2023 (UX 20) calling attention to

[4] The one bargaining unit with a higher cumulative COLA increase since FY 2019 is the Las Vegas metropolitan Police Department, for which the County pays two-thirds of the costs and sits at the negotiating table. That unit has received 1% more in raises. (CX 13)

[5] The County repeatedly pointed to the recommendation of Arbitrator Roose, who found the County's position more reasonable than the CCDU's demand in a proceeding wherein he chose to use a "baseball arbitration" approach. There is no indication that Arbitrator Roose was aware of the internal inconsistency between civil DA pay and public defender salary ranges at the time.

the fact that his "office faces severe challenges with both recruitment and retention of **deputy district attorneys**." (UX 20, 0367) CCPA describes a crushing workload. A CCPA witness serving on the hiring committee for criminal district attorney positions described the change in applicants interested in criminal DA jobs. He finds the overall applicant pool more limited geographically and less impressive than before.

While the County asserts that there are many differences in total compensation between the MPlan and the CCPA MOU, it did not provide any calculation of total compensation for either group. It is unlikely that the County provides lesser benefits to its managers than to its rank and file employees. Les Lee Shell testified MPlan benefits were as good or better than those of comparators. In any case, salaries are a primary consideration for recruitment purposes, particularly for new attorneys who need to pay off student loans.

The Factfinder's consideration of internal equity within the DA's office, the pattern of generally equivalent County-wide COLAs established over the past nine years, and the need to balance the availability for funding new DA positions while attracting and retaining attorneys leads to the recommendation of a 6% COLA retroactive to July 1, 2023. That would boost the bottom of the current salary range of the deputy DAs to approximately $83,300. It would raise the top salary of the chief deputy DA to approximately $189,700, almost in line with the civil senior attorney range maximum.

Although the bottom of the Washoe County DDA I and top of the DDA III ranges are higher, from $94,577 to $196,289, CCPA has not shown that the County has lost more than one attorney to Washoe County since January 2023.

RECOMMENDATION

Effective July 1, 2023, the salary schedules for all employees covered in Appendix A should be adjusted by six (6) percent.

DATE: June 3, 2024.

Katherine J. Thomson, Factfinder

EXHIBIT E

EXHIBIT E

Adam Levine

From:	Adam Levine
Sent:	Thursday, June 13, 2024 5:22 PM
To:	Kheel, Allison
Cc:	Ricciardi, Mark; Griffin, Sarah; Joi Harper; Christina Ramos (CRamos@ClarkCountyNV.gov)
Subject:	RE: CCDU and CCPA Follow Up

Better do it for DAIA as well. Impasse was declared yesterday.

Adam Levine, Esq.
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From: Kheel, Allison <akheel@fisherphillips.com>
Sent: Thursday, June 13, 2024 5:06 PM
To: Kheel, Allison <akheel@fisherphillips.com>; Adam Levine <ALevine@danielmarks.net>
Cc: Ricciardi, Mark <mricciardi@fisherphillips.com>; Griffin, Sarah <sgriffin@fisherphillips.com>; Joi Harper <JHarper@danielmarks.net>
Subject: CCDU and CCPA Follow Up

Dear Adam ,

This is to confirm our conversation earlier today that it is the County's position that it is not obligated to strike names to select a fact finder and/or schedule the matters for non-binding fact-finding until it has completed the mediation step. NRS 288.200 provides for fact finding only if "(1)(a) the parties have failed to reach an agreement after at least six meetings of negotiations and (b) the parties have participated in mediation. . ." Thus, the statute requires the completion of both steps prior to participation in fact finding.

I would also note that the County feels it is counterproductive to the mediation process to schedule fact-finding before the parties have given the mediation process a chance. The Union's insistence on scheduling fact-finding before even scheduling the mediation step sends the message that the Union is not making a

good faith effort to resolve the matter in mediation and just views this as a formality or " box to check" before getting to fact-finding. The Union's position suggests bad faith.

I will be contacting FMCS first thing tomorrow morning to arrange for a mediator in both the CCPA and CCDU matters.

Very truly yours,
Allison Kheel

Allison Kheel
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EXHIBIT F

EXHIBIT F

Adam Levine

From: Adam Levine
Sent: Friday, June 21, 2024 1:02 PM
To: 'Kheel, Allison'
Cc: Griffin, Sarah; Marc.DiGiacomo@clarkcountyda.com; David Westbrook; Jocelyn Scoggins; Ricciardi, Mark
Subject: RE: Mediation Dates from FMCS

Allison:

At this point please reserve July 17 and 18 and 23. We will do the CCPA on July 17, DAIA on July 18, and CCDU on July 23. CCPA and CCDU being bargaining units consisting of attorneys, they can handle a mediation without me being present. I will be present for the DAIA on July 18.

If you believe we can do two (2) mediations in one day, then I would prefer that day to be the 18th when I can be there.

Adam Levine, Esq.
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From: Kheel, Allison <akheel@fisherphillips.com>
Sent: Thursday, June 20, 2024 4:29 PM
To: Adam Levine <ALevine@danielmarks.net>
Cc: Griffin, Sarah <sgriffin@fisherphillips.com>; Marc.DiGiacomo@clarkcountyda.com; David Westbrook <pdavidwestbrook@gmail.com>; Jocelyn Scoggins <Jocelyn.Scoggins@clarkcountyda.com>; Ricciardi, Mark <mricciardi@fisherphillips.com>; Kheel, Allison <akheel@fisherphillips.com>
Subject: RE: Mediation Dates from FMCS

Adam,

Those were the first available dates for FMCS, but I will Reach out to Commissioner Brown and see if he can give us additional dates as it looks like those dates are not going to work for the parties.

The County is open to the possibility of a private mediator, and suggests Najeeb Khoury. Would you like me to reach out to him and see what his availability might be?

Let me know and thanks.

Allison Kheel
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From: Adam Levine <ALevine@danielmarks.net>
Sent: Monday, June 17, 2024 2:56 PM
To: Kheel, Allison <akheel@fisherphillips.com>
Cc: Griffin, Sarah <sgriffin@fisherphillips.com>; Marc.DiGiacomo@clarkcountyda.com; David Westbrook <pdavidwestbrook@gmail.com>; Jocelyn Scoggins <Jocelyn.Scoggins@clarkcountyda.com>
Subject: RE: Mediation Dates from FMCS

No earlier dates?

Of those dates I am only available on July 18. I am in arbitration with UMC of July 17, and start contract negotiations for FOP Lodge 21 with the State on July 23.

What about hiring a private (paid) mediator. I know several arbitrators who are experienced as fact finder's/interest arbitrators who could do a mediation.

They should run the scheduling through me as I suspect they will want me to be present.

Adam Levine, Esq.
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From: Kheel, Allison <akheel@fisherphillips.com>
Sent: Monday, June 17, 2024 1:31 PM
To: Adam Levine <ALevine@danielmarks.net>; Kheel, Allison <akheel@fisherphillips.com>
Cc: Griffin, Sarah <sgriffin@fisherphillips.com>
Subject: Mediation Dates from FMCS

Adam,

Commissioner Brown has provided the following dates that he is available: July 17th, July 18th and July 23rd. He said he was open to do them back to back or separate days whatever works for the Parties. I am reaching out to my clients now to see if any of these dates work for them.

I am presuming that Clark County will be reaching out to the Union representatives directly regarding scheduling (since the parties are handling the mediation directly and counsel will not be present). Let me know if you would like them to run the scheduling through you instead.

Thanks,

Allison Kheel
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EXHIBIT G

EXHIBIT G

Adam Levine

From: Adam Levine
Sent: Friday, June 21, 2024 2:03 PM
To: 'Kheel, Allison'
Cc: Griffin, Sarah; Marc.DiGiacomo@clarkcountyda.com; David Westbrook; Jocelyn Scoggins; Ricciardi, Mark; Joe DeMonte DAFSFWD
Subject: RE: Mediation Dates from FMCS

First and foremost, Clark County has an obligation to set the mediation ASAP. They do not need everybody from their entire bargaining team at mediation; they only need one person with authority. The obligation to bargain includes the obligation to do so expeditiously. That obligation carries over to the mediation which Clark County is demanding.

You may reach out to anybody provided that they can do in arbitration prior to July 17, 18 and 23. Otherwise, Clark County will simply have to show up on those dates with less than its full negotiating team. We are not waiting any longer.

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From: Kheel, Allison <akheel@fisherphillips.com>
Sent: Friday, June 21, 2024 1:59 PM
To: Adam Levine <ALevine@danielmarks.net>
Cc: Griffin, Sarah <sgriffin@fisherphillips.com>; Marc.DiGiacomo@clarkcountyda.com; David Westbrook <pdavidwestbrook@gmail.com>; Jocelyn Scoggins <Jocelyn.Scoggins@clarkcountyda.com>; Ricciardi, Mark <mricciardi@fisherphillips.com>
Subject: RE: Mediation Dates from FMCS

Adam,

The County folks were not all available on those days, but I think they were willing to consider private mediation.

Did you want me to reach out to Najeeb Khoury for his availability?

thanks

EXHIBIT H

EXHIBIT H

Adam Levine

From: Adam Levine
Sent: Monday, August 12, 2024 1:38 PM
To: 'Kheel, Allison'; Nancy Hutt
Cc: Marc DiGiacomo; Griffin, Sarah; Joi Harper
Subject: RE: Selection as Binding Fact-finder (Interest Arbitrator) for impasse between the Clark County Prosecutors Association and Clark County

While I would prefer an earlier date, and would be willing to move my other conflicting arbitrations in order to achieve such an earlier date, I am available on October 21.

Adam Levine, Esq.
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From: Kheel, Allison <akheel@fisherphillips.com>
Sent: Monday, August 12, 2024 1:38 PM
To: Nancy Hutt <nancyhutt77@gmail.com>; Adam Levine <ALevine@danielmarks.net>
Cc: Marc DiGiacomo <Marc.DiGiacomo@clarkcountydanv.gov>; Kheel, Allison <akheel@fisherphillips.com>; Griffin, Sarah <sgriffin@fisherphillips.com>
Subject: RE: Selection as Binding Fact-finder (Interest Arbitrator) for impasse between the Clark County Prosecutors Association and Clark County

Dear Arbitrator Hutt,

It looks like the only date that works for all the County's witnesses is October 21st. We will book a room at the government center and schedule the court reporter. I will provide this information once I have it.

Very truly yours,

Allison Kheel
Attorney at Law
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From: Nancy Hutt <nancyhutt77@gmail.com>
Sent: Thursday, August 8, 2024 11:03 AM

To: Adam Levine <ALevine@danielmarks.net>
Cc: Marc DiGiacomo <Marc.DiGiacomo@clarkcountydanv.gov>; Kheel, Allison <akheel@fisherphillips.com>
Subject: Re: Selection as Binding Fact-finder (Interest Arbitrator) for impasse between the Clark County Prosecutors Association and Clark County

Dear Parties:

Thank you for selecting me as the Factfinder for the above referenced case. I am available for a hearing on September 25, 30 and October 14, 21 & 23, 2024. Please confer and let me know which of these dates suit you both. The dates are held for two weeks.

My per diem rate is $3000.00. I charge one day's fee for each day, which is postponed or canceled without 30-calendar days advance notice to the hearing date. Study time is charged at $3,000.00 for each day spent preparing an arbitration opinion and award. This charge is prorated by the half day.

I appreciate your courtesy in promptly selecting a hearing date and look forward to seeing you at the arbitration.

Sincerely,

Nancy Hutt, Arbitrator
Member of the National Academy of Arbitrators
180 1/2 Hartford Street
San Francisco, CA 94114
Tele: (415) 971-7318

On Fri, Aug 2, 2024 at 12:29 PM Adam Levine <ALevine@danielmarks.net> wrote:

Good afternoon Arbitrator Hutt:

You have been mutually selected to be the fact finder for a **binding** fact finding (for all intents and purposes an interest arbitration) under NRS 288.200(6) arising out of statutory impasse between the Clark County Prosecutors Association ("CCPA") and Clark County (the County). I will be representing the CCPA; Clark County is represented by Allison Kheel who is copied on this email.

I have provided a link to the statute with this email. https://www.leg.state.nv.us/NRS/NRS-288.html#NRS288Sec200

Please provide us with dates of your earliest availability for what should only need to be a one-day hearing in Las Vegas, Nevada. Binding fact finding under the statute takes place after a non-binding fact finding which has already occurred, and for which a complete record was made with a court reporter. The parties can certainly provide you with a copy of that transcript, the exhibits, and the Recommendation(s) of Fact Finder Katherine J. Thomson dated June 3, 2024 prior to any hearing.

Also, please provide us with dates of availability for a hearing to be conducted virtually in case your availability for an in-person hearing would push the matter too far out.

Adam Levine, Esq.

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On behalf of the CCPA

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

In the matter of CLARK COUNTY. petition for declaratory order	Case No. 2024-016

REPLY IN SUPPORT OF PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

After reviewing the County's petition and the Unions' response, it should be clear to the Board that the County and the unions have a very different visions of the collective bargaining process.

The County's vision is for process that favors stable long-term agreements that are reached in a timely manner through mutual consent and a meaningful give-and-take at the bargaining table.

The Unions, on the other hand, envision a collective bargaining process that is practically perpetual, marked by only short-term contracts resulting in successive rounds of negotiations, and in some cases even overlapping negotiations, and for agreements are not finally reached not through mutual consent but rather imposed from the outside by a third-party factfinder after an adversarial factfinding hearing.

As the Board works through each of the five questions that are raised in this petition it should ask whether the County's position, or the union's position are more consistent with the

EMRA's purpose to foster harmony in labor relations, for this will be telling when it comes to providing an answer to each of these questions. Of course, the plain language of the statute will control when it is unambiguous, but even then, the plan language invariably counts in favor of the positions advanced by the County and against the positions advanced by the Unions.

II. FACTS

The Unions opposition attempts to inject facts into this case that were not presented in the County's petition. (Op. pp. 3-5). The Unions assert that the County "failed" to include a statement of the particular acts in involved in this case. But there was no such failure by the County in this case because the Board's regulations do not charge the County with tying is petition to a particular set of facts. NAC 288.380(3).

This appears to be a deliberate choice by the Board when codifying NAC 288.380 because unlike a fact-driven prohibited labor practice complaint, a declaratory order petition need not be based upon a prior occurrence and can be sought prospectively before there are existent facts that might support a prohibited labor practice charge. Indeed, the whole point of a declaratory order petition is to receive the necessary guidance to avoid a future violation.

This Board recently noted the difference between a petition for declaratory order and a prohibited labor practice complaint:

> It is clear to the Board that the overarching purpose of a Dec. Order is to seek advice or clarification from the Board before a party engages in a prohibited act or to clarify existing conduct, and therefore avoid a problem in the first place. Stated another way, a Dec. Order is meant to avoid a party ever having to file a prohibited practices complaint
> …
> The overarching purpose of a prohibited practices complaint is to correct an existing unfair labor practice. A prohibited practices complaint needs to contain a sufficient amount of information to sustain a justiciable controversy.

Nevada Service Employees Union v. Clark County, Order Granting Respondent's Motion to Partially Dismiss, Case No. 2024-010 (June 14, 2024) (*en banc*).

Hence it is sensible that the Board does not require a statement of facts giving rise to

the action when the action is a petition for declaratory order.

Even so, a party seeking a declaratory order from the board must still ground the petition in something more than speculation and pure hypotheticals. NAC 288.410(1)(a), and thus rather than a statement of facts, the Board requires only a statement of interest in declaratory relief and a statement of the position of the party seeking declaratory relief. NAC 288.380(3)(b), (d).

It is true that NAC 288.390(2)(c) does call for the response to a petition to include "a clear and concise statement of the facts" but when read in context this does not allow a respondent to change the call of the petition, to inject new facts or to attempt to litigate other pending matters. The statement of the facts in the response must be tailored to the petition itself. NAC 288.390(2)(c) ("clear and concise statement of the facts, including the time and place of the occurrence of the particular acts described in the petition and the names of persons involved" (emphasis added).

Here the Unions have ignored the Board's direction to confine their facts to those that are mentioned in the petition. This is immediately apparent from the Unions' brief which states that they are merely guessing at the relevant facts (Opp 3:8-10) and then goes on to recount a one-sided review of bargaining between the County and its prosecutors/defenders unions. This is improper under NAC 288.380(2)(c). The Board should thus ignore the unions factual narrative in this case.

III. ARGUMENT

A. QUESTION 1: NEGOTIATING ON BEHALF OF NON-EMPLOYEES IS NOT AUTHORIZED BY THE EMPLOYEE-MANAGEMENT RELATIONS ACT

The County's petition asks the Board to first confirm the point that an employee organization may not conduct a negotiation on behalf of a former employee after that employee has separated from employment.

The County's position depends upon two legal principles, each of which has already been established: First, that collective bargaining can only lawfully occur within the

parameters of the EMRA. And second, that former employees who have separated are not within the parameters of the EMRA. (Pet. pp. 11-12).

It logically follows from these two premises that collective bargaining cannot occur on behalf of former employees. Any other conclusion would be *per se* irrational and thus arbitrary. This Board's decisions should not be arbitrary. NRS 233B.135(3)(f).

1. Collective Bargaining Is Only Lawful Only When it Occurs Within the Parameters of the EMRA.

As to the first principle of law – that collective bargaining can only lawfully occur within the parameters of the EMRA – there can be no real dispute. This is because the principle has been established and announced by the Nevada Supreme Court in *Nevada Highway Patrol Ass'n v. State, Dep't of Motor Vehicles & Pub. Safety, Nevada Highway Patrol Div.*, 107 Nev. 547, 815 P.2d 608 (1991).

Nevada Highway Patrol Ass'n is a clear doctrinal pronouncement of Nevada law affecting public sector collective bargaining. Despite this, the Unions' opposition fails to comprehend the significance of *Nevada Highway Patrol Ass'n.* Indeed, the opposition contains only a single sentence addressing *Nevada Highway Patrol Ass'n;* and that single sentence only serves to misrepresent the actual holding in *Nevada Highway Patrol Ass'n* by slicing off half of the court's holding and artificially limiting the holding to the point that bargaining for state employees must occur with a state-recognized representative. (Opp. 9:16-17).

The other half court's statement of its holding in *Nevada Highway Patrol Ass'n*, the half that was omitted by the Unions, and in the court's own language is as follows:

> we adopt the majority common law rule and hold that absent express statutory authority, Nevada public officials and state agencies do not have the authority to enter into collective bargaining agreements with public employees…

Nevada Highway Patrol Ass'n, 107 Nev. at 551, 815 P.2d at 611 (1991) (emphasis added).

It is precisely this aspect of the court's expressly-stated holding that applies in this case and establishes the proposition that there is no lawful authority to bargain under Nevada law

outside of the statutory authorizations.

This was nothing new. The Nevada Attorney General has also repeatedly and consistently recognized that collective bargaining can only and exclusively take place within the confines of the allowances extended by the legislature. 1968 Op. Nev. Att'y Gen. 494 (public sector bargaining is illegal in the absence of specific legislation); 1991 Op. Nev. Att'y Gen. 91-2, p. 4 (stating "public employees have no authority to enter into collective bargaining agreements without specific statutory authority" and discussing numerous cases).

The principle that collective bargaining must take place within the allowances established in the EMRA, is not a principle that is seriously open to dispute. And apart from attempting to wave away *Nevada Highway Patrol Ass'n* by ignoring half of the court's actual holding, the Unions do not even try to contest this principle.

2. Former Employees Are Not Within the Parameters of the EMRA

The County's second legal principle – that a former employee is not within the parameters of the EMRA – is also well established through the repeated decisions of this Board.

And the Unions apparently agree with this principle as well. (Opp. 8:1-14) (recognizing the point "that a retired employee no longer qualifies as a local government employee under NRS 288.050" and citing *Washoe County Sherrif's Deputies Ass'n et al v Washoe County*, Item No. 271, EMRB Case No. A1-045479 (1991); *McElrath v. Clark County School Dist.*, Item No. 423, EMRB Case No. A1-045634 (1998); *Austin v. North Las Vegas Police Officers Ass'n,* Item NO. 437, EMRB Case No. A1-045648 (1998); and *Ebarb v. Clark County*, Item No. 843-C, EMRB Case No. 2018-006 (2020)).[1]

Rather than dispute the operative legal principle, the Unions offer only a red herring in

[1] The unions make a rather odd contention by claiming that none of these cases deal with employees who have left employment for any reason other than retirement. Firstly, it is not clear just why this would be of any significance at all, as it is the fact that employment has ceased, as opposed to the method by which it has ceased that determines whether an individual is a former employee. Second, the Unions' own interjection of facts into this case concern employees who have in fact retired. (Opp. 5:3-5). And finally, it is simply not true that all of these decisions concern retired employees. In particular the *Ebarb* decision did not involve an employee who had retired. See *Ebarb*, Item No. 843-C, p. 3 (referring to the fact that the employee had been terminated).

response by stating that a recognized union represents a bargaining unit. (Op. 9:6-11). This is true, but immaterial because a bargaining unit is defined as "…a group of local government employees…" NRS 288.134. And a "local government employee" means, in turn, a current employee; not a former employee as is established through NRS 288.050 and the foregoing litany of board decisions.

Hence the authority that the County provides does indeed establish the proposition that when a union acts, it acts on behalf of the current employees that comprise the bargaining unit.

3. A Union Cannot Bargain On Behalf of a Former Employee

a. *The Conclusion that a Union May Not Bargain On Behalf of Non-Employees is Logically Inevitable*

As the ability to bargain requires legislative authorization, and as legislative authorization to bargain does not include former employees, it logically follows that a Union cannot bargain on behalf of former employees. This conclusion stands on its own logical force and the Board should eliminate any lingering confusion on this point and expressly state that a bargaining agent lacks the authority to bargain on behalf of a former employee.

This means that if a union were to plod its way through the negotiations process, drawing it out after a prior contract has expired, or if it were to prematurely declare impasse to move the more union-friendly, but more time-consuming, fact-finding process the union will not be able to negotiate on behalf of an employee that separates during the period between the expiration of the prior agreement and the making a new agreement. The union has no standing to conduct a negotiation on behalf of a non-employee, including former employees. At a minimum this provides an incentive for a union to not drag its feet during negotiations.

b. *Bahlman Implicitly Confirms This Point*

This is where the Board's prior decision in *Bahlman* comes in. The Unions contend that in *Bahlman* the Board never reached the issue of a former employee's coverage under a retroactive agreement. (Op. 7:4-8). Even if the Board agrees with the Unions that *Bahlman* never reached this issue, this simply means that the issue is an open question and is now ripe for decision. In that case the Board should apply the foregoing syllogism to confirm that the

EMRA does not permit bargaining on behalf of non-employees.

But the Unions' contention that *Bahlman* left this issue unaddressed is not accurate as it does not present a coherent reading of *Bahlman*.

While *Bahlman* is admittedly a rather short decision, there is sufficient information in *Bahlman* to support the conclusion that the EMRA does not authorize negotiations on behalf of a former employee. This is implicit rather than explicit in *Bahlman*, hence the need for the current petition to make it explicit. But the fact that it is implicit does not mean that it is absent from *Bahlman*.

The issue of a retroactive agreement covering an employee who had separated in the interim period between agreements was quite clearly an issue before the Board in *Bahlman*. This board's description of the complaint in that case was as:

> seek[ing] the Board's determination that the contract settlement via the binding arbitration award of March 24, 1980, which conferred benefits to the union retroactive to July 1, 1979, should be applicable to him as well, notwithstanding his termination as an employee for Respondent effective December 21, 1979.

Bahlman v Truckee Meadows Fire Protection Dist., Item No. 107, EMRB Case No. A1-045340, p. 1 (1981).

And this Board summarized the issues that were before it on the motion to dismiss to include the argument:

> …that the provisions of any retroactive collective bargaining agreement apply only to individuals who are employees at the time [the] settlement is reached.

Id. at pp. 1-2.

By 1981 when *Bahlman* was decided, the retroactive requirement that is now found in NRS 288.215(10) was in place, having been added to the EMRA in 1977. 1977 Stat. Nev. Ch. 462 § 3(9), p. 440. Thus, by the time *Bahlman* arose, the issue of retroactive coverage of an agreement as a function of the EMRA, at least for firefighters, was an issue that would indeed have been within the scope of Chapter 288.

But when the Board granted dismissal in *Bahlman*, it did so by finding that "...the Complaint contains no alleged violation of any provision of Chapter 288." *Id.* at p. 2. The Unions assume this to be a separate argument from the issue of a retroactive agreement's exclusion of a former employee. (Opp. 7:7-8). But this view of *Bahlman* does not make sense. For the complaint had specifically charged that the agreement ought to apply retroactively, and there was a provision of Chapter 288 dealing with the issue of retroactive coverage of a collective bargaining agreement for firefighters when reached though binding arbitration. What then would explain the Board's determination in *Bahlman* that the complaint alleged no violation of any provision of Chapter 288? What explains this Board's rationale that it lacked jurisdiction over a complaint which was predicated upon the agreement being applied retroactively to include Mr. Bahlman? The Unions do not attempt to answer these questions.

But the Board's dismissal in *Bahlman* on jurisdictional grounds does make perfect sense when one realizes that this Board lacks jurisdiction over matters involving those persons who are not employees under the EMRA. NRS 288.110(2). And *Bahlman*, as a former employee, would not be within the scope of the EMRA. *McElrath v. Clark County School Dist.*, Item No. 423, EMRB Case No. A1-045634 (1998); *Austin v. North Las Vegas Police Officers Ass'n,* Item NO. 437, EMRB Case No. A1-045648 (1998); and *Ebarb v. Clark County*, Item No. 843-C, EMRB Case No. 2018-006 (2020)). Hence, at least the implicit import of Bahlman is that former employee cannot be covered by an agreement that is reached after the employee has separated.

Even if *Bahlman* did not establish this of its own accord, the principles established in *Nevada Highway Patrol Ass'n* and *McElrath*, *Austin* and *Ebarb* confirm that a bargaining agent cannot conduct bargaining on behalf of former employees. The Board should now eliminate the confusion and make this point crystal clear.

B. QUESTION 2: THE BOARD SHOULD CLARIFY WHETHER EXCLUSIVE REPRESENTATION ALLOWS A UNION TO BARGAIN ON BEHALF OF AN EMPLOYEE IN ANOTHER UNIT

Question 2 raises a different question, for under the scenario presented in Question 2, an employee who transfers between bargaining units remains a current employee at all times;

in other words, they are covered by the EMRA. Hence there is a narrower and doctrinally distinct question of whether a union may continue "to bargain on behalf of a current employee who is in another bargaining unit."

The Unions assert that this is a misleading description of what is really happening, (Opp. 12:14-17) but offer no train of thought in support to show how this is supposedly misleading. Indeed, that is precisely what is happening in the scenario presented by Question 2. Consider the example of an agreement that expires on June 30th of this year. On July 30th the employee transfer to another bargaining unit and on August 30th the union and the County meet for negotiations, or for mediation, or for factfinding. By August 30th the employee is no longer in the bargaining unit. And when that happens an employer such as Clark County needs to know what rights and liabilities are at stake given that it may only negotiate with the recognized bargaining agent. *See e.g. Int'l Ass'n of Firefighters, Local 1265 v. City of Sparks*, Item No. 136, EMRB Case No. A1-045362 (1982) (prohibiting an employer from negotiating with a union that does not represent the affected employees).

The Unions claim that negotiating on behalf of transferred employees is a permissive subject of bargaining and that they ought not to be prohibited by the principle of exclusive representation from bargaining for employees in this scenario. (Opp. 13:7-17). But if this is the case then at a minimum the Board should clearly confirm that negotiating on behalf of transferred employees is a permissive subject of bargaining and that doing so does not violate the principle of exclusive representation. Since a public employer is obligated to bargain only with the proper representative both employers and unions would benefit from such clarity and assurances that negotiations involving transferred employees is permissible under the EMRA.

C. QUESTION 3: THE TEMPOARY UNCERTAINTY CAUSED BY OVERLAPPING NEGOTIATIONS PERMITS A DEFERRAL DURING THE PERIOD OF UNCERTAINTY

Question 3 asks the Board to address the ability to temporarily defer negotiations during a period of uncertainty created by overlapping negotiations.

The Unions' response to Question 3 is a good example of a strawman response. For the question posed by the County is only whether or not negotiations may be temporarily deferred

during the period of uncertainty. The County has never contended that negotiations are to be deferred during a period of certainty.

The Unions' response does not contest the foundational point that an uncertainty can justify a temporary deferral of negotiations. But from there the Unions ignore the scope of the question and instead address a scenario where uncertainty has been eliminated, or at least greatly reduced where the parties have submitted their final offers to a factfinder. (Opp. 17:20-18:11). To the extent that the submission of a final offer can confer enough certainty to resume negotiations, this does not mean that there can be no temporary deferral at all, as the submission of a final offer arrives at the very last stages of the process, just prior to a final decision. NRS 288.215(9)-(10). This is illustrated by the Unions' own Exhibit D which noted that the union in that case had maintained a radically different offer of an eye-popping 11% wage increase - nearly double its actual final offer of 6% - and that the union continued to sandbag its offer in this way during negotiations "until the week before the factfinding" when it finally relented to submit a somewhat reasonable offer for the factfinder's consideration. (Unions' Ex. D at p. 5). The Unions assert that in that case, after this final offer, the uncertainty was only $270,000, but prior to this last-minute change on the eve of factfinding the uncertainty was millions larger. And the larger the uncertainty the more it impedes meaningful negotiations on the subsequent agreement.

But even at $270,000 this can still have significant impacts on subsequent negotiations. Can that money be used to fund new positions in the unit thereby potentially affecting other aspects of the agreement? Will it be available to raise the bottom range of the pay scale to help recruitment and fill vacancies? Can it be devoted to other specialty pays? Questions such as this will not be known until the prior agreement is completed and approved by the governing board. NRS 288.153(1). Only then is there truly a fixed baseline number upon which a fixed calculation can be made. It not possible to solve the equation of $x \cdot y\% = z$ when x is unknown. It is quite another to solve that equation when x has some certainty. And the County's question in this petition is limited to those situations where x is not known with reliable certainty.

The Unions' other arguments (Opp. 19:12-23:20) are not really arguments at all, merely

an untethered denunciation of the County's Chief Negotiator and its Human Resources Director and a recount of a certain negotiation in which there was difficulty in scheduling the mediation. Scheduling a mediation is not a matter for this Board to concern itself with, as the scheduling a mediation is left entirely to the best judgment of the mediator. NRS 288.190(3). The Unions also complain that in that negotiation the County followed NRS 288.200(1)(b), which requires that there must be a mediation before the factfinding process can be invoked. None of this has any bearing on the actual question presented here and the Board should disregard this irrelevant screed.

Ultimately on question 3 the Unions do not contest the central point that it is proper to defer negotiations when there is an unknown variable. The board should confirm this uncontested point. And the Unions only suggest that when there are overlapping negotiations, the baseline variable affecting a wage increase becomes sufficiently known only once a final offer is submitted to a factfinder on the first agreement. Thus, there does not appear to be any dispute on the point that negotiations may be deferred during the period of uncertainty prior to submission of a final offer. But even after the final offers are submitted there is still a significant variance that can impact subsequent negotiations. In order to foster meaningful and good faith subsequent negotiations, rather than enable a union to simply go through the motions of the six-meeting minimum of NRS 288.200(1), the Board should permit the parties to defer negotiations on the second agreement until such time as meaningful negotiations can actually occur.

D. QUESTION 4: A PARTY CAN SUBMIT AN OFFER THAT INCLUDES FUTURE EFFECTIVE DATES

Question 4 asks the Board to confirm what a should be a rather basic point – that during a factfinding the parties can craft their final offers to include future effective dates, and that the factfinder may not alter the parties' respective offers. NRS 288.215(9) and (10). That so many of the County's unions mulishly oppose the County on this foundational point only confirms the need for this Board to step in and provide the necessary clarification.

On this question, the Unions stake out their most extremist position of all the questions

that are raised in this petition. For the Unions actually propose that a factfinder can, and even must, change the substantive terms of a party's final offer. (Opp. at 25:3-4) ("…the final offer selected by the arbitrator must necessarily be amended to comply with the required statutory provision"). In order to support this absurd conclusion, the Unions contend that NRS 288.215(10) prohibits the use of any future effective dates in an agreement. (Opp. 24:9-11) ("…the Board must confirm that the retroactive provision of NRS 255.215(10) applies to the award in its entirety, including the effective date of all terms within the award.").

It is hard to overstate just how destructive the Unions' position would be to the collective bargaining process, for it strikes at the very heart of negotiations – the ability of each side to control the terms of its own offer; and it decimates the very basis upon which multi-year agreements are based – the concept of future effective dates.

The EMRA requires negotiation over a certain limited slate of subjects, NRS 288.150(2), but it is disinterested as to the actual terms of any given agreement on those subjects. E.g *D'ambrosio v. Las Vegas Metropolitan Police Department*, Item No. 808, EMRB Case No. A1-046119 and A1-046121 (consolidated), p. 6 (Oct. 15, 2015)("The Act requires bargaining over certain terms of employment, but it does not dictate the substance of those terms of employment"). Thus, the issue of when a contract provision might kick in or how much a wage adjudgment might entail is not something that falls within the purview of this Board.

But now the Unions assert that the EMRA cuts radically against this grain and suddenly becomes interested in dictating the actual terms of an agreement, specifically the effective dates. The unions base this radical reversal of course on two notions – the plain language of NRS 288.215(10) and a perceived balancing of the equities.

1. The Plain Language of the EMRA Does Not Permit a Factfinder to Change the Terms of a Parties' Offer

The Unions do concede the point that a statute's plain language will control, and that a proper statutory interpretation is one that does not negate any portion of the statute. (Opp. 24:16-25:2). But despite correctly stating these rules, the Unions fail to correctly apply them.

The Unions simply assert, without supporting reason, that these principles require a factfinder to tinker with and change the terms of a party's final offer.

The plain language of NRS 288.215(9) and (10) actual compel the opposite of the Unions' position. The plain language of NRS 288.215(9) states that the parties must submit a submit a single final written statement containing its "final offer" to a factfinder and NRS 288.215(10) then states that the factfinder must "accept one of the written statements." As noted in the County's opening brief these sections allow each party to propose the terms of their own offer and then the factfinder is to simply pick one of the two offers by accepting it. A simple plain language analysis thus favors the County's position.

In order to reject this plain language, the Unions reject the provision requiring a factfinder to accept one of the offers and rely instead upon the retroactive provision of subsection 10 as authority to re-write a party's offer. In so doing the Unions assign an internal conflict to NRS 288.215(10), assuming that the retroactive language conflicts with and cancels out the requirement to "accept" one of the final written offers. The Unions proposal to resolve this perceived conflict apparently is to have the retroactive provision dominate over the accept-a-final-offer provision.

The Unions' contention does not lead anywhere because there is in fact no conflict within NRS 288.215(10) and hence no need to tread the path the Union proposes by negating the requirement for a factfinder to simply accept one of the final offers.

When plumbing whether or not there is a conflict between two statutory requirements, the Board should construe the statutes, if at all possible, in a way to avoid an actual conflict. *Walker v. Reynolds Elec. & Eng'g Co.*, 86 Nev. 228, 468 P.2d 1 (1970). Here, it is entirely possible for an agreement to be retroactive and apply as of a certain initial effective date and still provide for future effective dates that will kick in after the effective date of an agreement. This especially true on the matter of wage increases and this practice is remarkably common. An example of this is the most recent agreement between the County and one of the parties to this petition, SEIU Local 1107. That agreement provides for an effective date of July 1, 2021 but still specifies that there are some events that will not immediately kick in the contract's

effective date but will only kick in at a future effective date. Specifically, some of the wage increases that were agreed upon in that contract did not go into effect as of July 1, 2021, but depended upon future effective dates for wage increases to kick in. That agreement called for a round of wage increases to go into effect in July of 2022 and another round of increases to go into effect in July of 2023.[2] These are future effective dates embedded within an agreement that has a specific initial effective date. And an agreement reached under NRS 288.215(10) is no different. There is no reason why the effective date of an agreement can be retroactive, but a specific provision cannot be tied to a future effective date. Hence there is no actual conflict and no basis to override the statutory command that an arbitrator must "accept" one of the two final offers.

But even if there is a conflict the retroactive provision will not dominate. For if there truly is an irreconcilable conflict present in subsection 10 between the retroactive provision nor the accept-a-final-offer provision then the correct result is that neither of these provisions can be given effect. Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 189 (2012) ("when reconciliation of conflicting provisions cannot reasonably be achieved the proper resolution is to … deny effect to both provisions").

2. The Unions Public Policy Arguments Do Not Permit a Fact Finder to Change an Offer

The Unions' other contention is a public policy argument – arguing that retroactivity must dominate because is ballast to weigh against the unions' inability to strike. This argument is a *non sequitur*. As a starting point there is no reason to suppose that public sector union in Nevada is due any right to strike. Such a notion is nonexistent in the common law, 1965 Op. Nev. Att'y Gen. 233, and is contrary to the Nevada constitution. Nev. Const. art 1 § 2. Thus, it does not follow that there is any outstanding need to balance out a union's inability to strike. And as noted above it does not follow that a retroactive agreement must eliminate any and all

[2] Page 26 of the agreement. https://emrb.nv.gov/uploadedFiles/emrbnvgov/content/Resources/counties/Clark%20County%20and%20SEIU%20Clark%20County%20Non-Supervisory%20CBA%20-%20July%202021.pdf

future effective dates.

When the Board considers a public policy argument of this sort, it should do so with an eye towards the motivating policy behind the EMRA, which this board has recognized is to promote harmony in labor relations. *City of Reno v Reno Firefighters Local 731, et al.* Item No. 777-B, EMRB Case No. A1-046049 (Aug. 1, 2012) (Declaration # 4) ("The object of the Local Government Employee-Management Relations Act is to promote harmony in labor relations by establishing the collective bargaining rights and responsibilities of local government employers, local government employee and employee organizations"). Any construction of the EMRA should tend towards this purpose. *Ebarb v. State, Dep't of Motor Vehicles & Pub. Safety*, 107 Nev. 985, 987, 822 P.2d 1120, 1121–22 (1991) ("Statutes should be construed "with a view to promoting, rather than defeating the legislative policy behind them"). The Unions' proposal is contrary to the policy of the EMRA because it all but eliminates the possibility of a multi-year agreement.

A multi-year agreement is consistent with the EMRA's policy because "[m]ulti-year collective bargaining agreements are beneficial to both sides and provide stability and continuity for both management and public employees." *Albuquerque Police Officers' Ass'n v. City of Albuquerque,* 314 P.3d 677, 680 (NM. App. 2013). But if there can be no future effective dates in an agreement reached through fact finding, which is a necessary premise to the Union's argument and which the Unions expressly argue (Op. 24:9-11), there would be very little, if any, incentive at all for a union to accede to a multi-year contract because there could be no wage increases in year 2 or year 3 of a 3 year agreement. As noted above yearly wage increases are a function of future effective dates being placed into an agreement. The natural result then would be a staccato series of year-long agreements that require a new round of negotiations each year, commencing nearly as soon as the prior contract is reached. This in turn generates an even higher likelihood of the overlapping negotiations of the sort that are addressed in question 3. None of this resonates with the purpose of the EMRA.

The clear answer, the one that is supported both by plain language of NRS 288.215(9) and (10) as well as the policy behind the EMRA is that a party is permitted to submit a final

offer in factfinding that includes a future effective date.

E. QUESTION 5: NRS 288.200 DOES NOT AUTOMATICALLY GOVERN A MID-TERM REOPENER

Finally, question 5 asks the Board to speak to the dispute resolution process in the event of a mid-term contract reopener.

As noted above multi-year agreements serve the purpose of the EMRA by providing stability and continuity. And the Unions agree that a reopener is one of the mechanisms that facilitates multi-year agreements. (Opp. p. 31, n. 12). As with Question 4, the Board should prefer a view that tends to promote stability and harmony between employers and unions by facilitating multi-year agreements.

The Unions' opposition gets off on the wrong foot by stating an unsupported disagreement with the view of a reopener as being a non-statutory process. The basis of this objection is unknown for the notion of a mid-term negotiation is plainly outside the statutory duty to bargain. It is after all a fundamental of collective bargaining that once a party has fulfilled its duty to bargain over a mandatory subject by entering into a collective bargaining agreement it has, for the term of that agreement satisfied its statutory obligation to bargain in good faith. *See e.g. United States Dep't of Just. v. Fed. Lab. Rels. Auth.*, 875 F.3d 667, 669 (D.C. Cir. 2017) ("If a union and an employer in a collective-bargaining relationship reach an agreement on a subject during contract negotiations, neither side has a duty to bargain any further over that subject once the parties execute a collective bargaining agreement."). As the statutory duty to bargain in good faith is satisfied, a reopener, which is not a mandatory subject of bargaining under NRS 288.150(2) must necessarily be a non-statutory endeavor.

The Unions also contend that in a reopener the parties must negotiate in good faith. This is true and the County has never disagreed with this point. But the question raised in this petition is not whether the parties must negotiate in good faith; it is whether the cumbersome procedures of NRS 288.200 apply when there is a reopener, or whether the parties can agree to follow a different process to resolve any impasse.

The unions point to a pair of decisions from the California Public Employees Relations

Board that indicate that statutory fact finding procedures in California do apply if there is a reopener. The Board should not follow these decisions. The decisions cited by the Unions are based upon a California law that contains differences from Nevada law. These decisions were based upon amendments to California's Meyer-Milias-Brown Act that were codified in 2011, and which the California board referred to as AB 646. *City & Cnty. of San Francisco, and Service Employees International Union, Local 1021*, 39 PERC ¶ 72 (2014).

The California process allows for a union to unilaterally move a dispute to fact finding, Cal. Gov't Code § 3505.4(a), and most importantly provides that "[t]he procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived." Cal. Gov't Code § 3505.4(e).

In contrast, Nevada law does provide a statutory warrant for the parties to bypass NRS 288.200 by agreement, even in a full contract negotiation. NRS 288.180 states that "[a]s the first step, the parties shall discuss the procedures to be followed if they are unable to agree on one or more issues." If a statutory impasse procedure were set in stone and could not be altered as the unions contend, then what would be the purpose of requiring the parties to discuss what to do and specifically what procedures to follow in the event of an impasse? This provision of NRS 288.180 would be rendered nugatory, a result which the Unions elsewhere indicate is an unacceptable result. (Op. 24:23-25:2). And if the parties can agree to depart from NRS 288.200 during a full negotiation, what rationale is there to prohibit an agreement during a more limited reopener?

The correct answer is that, like many statutory rights, the right to recourse under NRS 288.200 can be waived by agreement. This is not really all that unusual or uncommon. For example, an employee normally has a process established by statute to handle their civil rights claims under Title VII, but the right to pursue the statutory process can be waived by means of an agreement. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); see also *City of Reno v. Reno Police Protective Ass'n,* 118 Nev. 889, 895, 59 P.3d 1212, 1216, n.9 (2002) (indicating that the parties can agree to bypass even the statutory prohibited labor practice process).

Cal. Gov't Code § 3505.4(e) prohibits a waiver of the impasse resolution process; but

Nevada law contains no such prohibition and allows for the parties to agree to a different process. NRS 288.180(3). As the underlying statutes are significantly different, the Board should not follow the California PERB decisions that are offered up by the Unions. Thus, at a minimum when the parties agree to a reopener, they are able to agree to some other process than NRS 288.200 to resolve any potential failure to agree.

And the Board should not automatically apply NRS 288.200 to resolve a dispute in a reopener because to do so is once again inconsistent with the purpose of the EMRA. Apart from the citation to the pair of California PERB decisions, the Unions offer no argument against the County's position that NRS 288.200 should not automatically apply in a non-statutory reopener. Because a reopener often involves only a single issue there is no opportunity for the give-and-take that inhabits full contract negotiations, the six-meeting requirement is arbitrary in the context of a reopener. And the end result, more often than not, is that the parties are litigating rather than negotiating the reopener. And as this sort of arrangement undercuts the policy of the EMRA, the Board should answer that NRS 288.200 does not automatically apply in the event of a mid-term contract reopener.

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IV. CONCLUSION

The County's overall contention is that agreements reached at the bargaining table and before the prior agreement expires are preferred and should be the goal in every negotiation. There may be cases where resort to impasse resolution procedures are necessary, but the proliferation of impasses and short term contracts should be discouraged. A factfinding should be the exception rather than the rule. The County's positions advanced in this petition trend in favor of stability and long-term agreements based upon negotiations that do not unnecessarily stretch out beyond the expiration of a prior agreement. The Board should provide the necessary guidance and answer the foregoing questions consistent with the County's proposals.

DATED this 23rd day of September 2024.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: */s/ Scott Davis*
SCOTT R. DAVIS
Deputy District Attorney
State Bar No. 010019
500 South Grand Central Pkwy. 5th Flr.
Las Vegas, Nevada 89155-2215
Attorney for Clark County

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 23rd day of September 2024, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR DECLARATORY ORDER** by e-mailing the same to the following recipients. Service of the foregoing document by e-mail is in place of service via the United States Postal Service.

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

In the matter of CLARK COUNTY.	Case 2024-016
petition for declaratory order	

PETITIONER'S PRE-HEARING STATEMENT

COMES NOW, Petitioner CLARK COUNTY, by and through District Attorney, STEVEN B. WOLFSON, through Scott R. Davis, Deputy District Attorney and presents its pre-hearing statement in this matter.

I. NEED FOR AN EVIDENTIARY HEARING WITH WITNESSES

Pursuant to this Board's order dated October 7, 2024 directing the parties to specifically address whether the parties "...believe the hearing should be an evidentiary hearing with nesses and exhibits or whether oral argument would suffice" Clark County's position is that oral argument would suffice.

Despite the position that the conglomerated unions take in their initial response, filed on August 28, 2024 this petition is not an attempt to litigate any particular prior negotiation. Nor is it necessary to delve into any prior negotiation as the requested relief in this petition is not seeking to undo any prior agreement or arrangement nor to restore any particular benefit of which the County was deprived. See NRS 288.110(2). Rather the requested relief is simply for this Board to provide guidance by answering the questions presented in this petition so that

the guidance given herein might inform and direct future negotiations.

As this petition is prospective, seeking clarity for future negotiations on pure legal issues, and not retroactively looking back at prior negotiations, there is no pressing need for evidentiary witnesses or to have exhibits.

In the event that the Board does call for an evidentiary hearing, the County's proposed witnesses are listed below.

II. STATEMENT OF THE ISSUES OF FACT AND LAW

As stated in the County's original petition, there are no specific issues of fact and the issues of law presented in this petition are as follows:

1. When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and fact-finding?

2. When an employee transfers from one bargaining unit to another after a collective bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and fact finding?

3. When a prior agreement is unresolved before negotiations for a successor agreement begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?

4. Does the retroactive provision in NRS 288.215(10) authorize a factfinder to change the terms of a party's final offer that included specified effective dates?

5. When the parties agree to a reopener during the term of an agreement, do the fact-finding procedures automatically apply to reopener negotiations?

III. MEMORANDUM OF LAW

The issues in this case have already been extensively briefed. The County's petition and reply both contain extensive memoranda of law and are incorporated herein.

IV. LIST OF POSSIBLE WITNESSES

1. Any witness identified by Petitioner

The following witnesses are c/o
Scott Davis, Deputy District Attorney
500 South Grand Central Parkway
Las Vegas, Nevada 89155

2. Curtis Germany – Clark County Human Resources Director

3. Christina Ramos – Clark County Chief Negotiator

4. Anna Danchik – Clark County Comptroller

V. ESTIMATE OF TIME

1 day.

VI. STATEMENT REQUIRED BY NAC 288.250(1)(c)

This Board has determined that Case No. 2024-019 should be stayed pending the outcome of this petition. As that matter is stayed, the hearing or oral arguments in this case should not be stayed pending the outcome of that matter.

DATED this 28th day of October, 2024.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

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Deputy District Attorney
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Attorney for Clark County

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 28th day of October, 2024, I served a true and correct copy of the foregoing **PETITIONER'S PRE-HEARING STATEMENT** by e-mailing the same to the following recipients. Service of the foregoing document by e-mail is in place of service via the United States Postal Service.

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/s/ Christine Wirt
An Employee of the Clark County District Attorney's Office – Civil Division

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

In the matter of CLARK COUNTY's Petition for Declaratory Order	CASE NO.: 2024-016

JOINT PREHEARING STATEMENT

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On behalf of Respondent International Association of Fire Fighters Local 1908

NEVADA ASSOCIATION OF PUBLIC SAFETY OFFICERS
ANDREW REGENBAUM
Executive Director
145 Panama St.
Henderson, NV 89015
On behalf of Respondents Clark County Juvenile Justice Probation Officers Association and Clark County Juvenile Justice Supervisors Association

I.

STATEMENT OF THE ISSUES OF FACT & LAW and MEMORANDUM OF LAW

The Respondents' Joint Answering Brief, filed with the Board on August 28, 2024, is hereby incorporated by reference.

II.

WITNESS LIST

If the Board believes that presentation of evidence is necessary in this case, Respondents reserve the right to call one or more of the following witnesses:

Clark County Prosecutor's Association

1. Adam Levine
2. Marc DiGiacomo
3. Binu Palal

Clark County Defender's Union

4. Adam Levine
5. David Westbrook
6. Rafael Nones
7. Katherine Currie-Diamond

Clark County District Attorney Investigators Association

8. Adam Levine
9. Joseph DeMonte
10. Jocelyn Scoggins

Nevada Service Employees Union ("NSEU")

11. Jason Klumb – Mr. Klumb is expected to testify regarding statements made about fact-finding during recent contract negotiations with Clark County.
12. Brenda Marzan – Ms. Marzan is expected to testify regarding the impact of fact-finding on bargaining unit representatives.

13. Curtis Germany – Mr. Germany is expected to testify regarding statements made about fact-finding during recent contract negotiations with NSEU.

Unless otherwise indicated, each witness was part of the negotiation team for their respective bargaining unit and can testify regarding the statements and actions of Clark County during bargaining and how such relate to the issues raised by Clark County in its Petition for Declaratory Order. The Respondents reserve the right to amend this list.

III.

ADMINISTRATIVE STATEMENT

There are certain questions presented in EMRB Case No. 2024-014 similar to those presented in this case that may be resolved by the Board before a hearing is held in this matter. The undersigned is not aware of any other pending cases that address the questions presented in the County's Petition.

IV.

ESTIMATE OF TIME

The Board has not issued a definitive order stating whether the hearing on Clark County's Petition will require oral argument alone or if the Board would need to consider witness testimony to resolve the issues in the Petition. Clark County has identified several employee organizations as Respondents, and nearly all of those employee organizations have a list of witnesses they intend to call if the presentation of evidence becomes necessary. Based upon this, the undersigned counsel for Local 1107 estimates that if witness testimony is necessary, the Respondents' portion of the hearing will require two to three days.

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If oral argument is considered alone, the undersigned believes Respondents would need no more than one day for a hearing.

DATED this 28th day of October, 2024.

CHRISTENSEN JAMES & MARTIN, CHTD.

By: */s/ Dylan J. Lawter*
Dylan J. Lawter, Esq.
Nevada Bar No. 15947
7440 W. Sahara Avenue
Las Vegas, NV 89117
Attorneys for Local 1107

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2024, I caused a true and correct copy of the foregoing Joint Prehearing Statement to be filed via email, as follows:

Employee-Management Relations Board
emrb@business.nv.gov

I hereby certify that on October 28, 2024, I served a true and correct copy of the foregoing Joint Prehearing Statement on Respondent via email to the following recipients:

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CHRISTENSEN JAMES & MARTIN, CHTD.

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