TO: Chris Collins and LVPPA Executive Board
CC: Mike Tedesco, Esq.
FROM: Kathy Collins / David Roger

The following is in response to your request for an opinion regarding whether the September 10-12 interest arbitration between the LVPPA and the City, County and Department was legal. It is our opinion that it was. This conclusion is based upon the express language in the actual interest arbitration statute, found at NRS 288. This memo will primarily address the concerns being raised by Commissioner Steve Sisolak over the past couple of weeks, as well as issues set out in a legal opinion issued by Clark County's legal counsel, Mary-Anne Miller, as to the legality of the award.

Ms. Miller has advised Commissioner Sisolak that the award is illegal for the following reasons:

1) the arbitrator was not selected from a panel of seven names provided by one of two national arbitrator organizations;

2) the award lacked the "statutorily required paper trail" (deemed by Ms. Miller to be a "glaring deficiency");

3) there is no written record of the final offers that both parties made, despite the presence of a court reporter;

4) the arbitrator's initial order did not meet legal requirements because it included no rationale for his decision, failed to identify the final positions of the parties, didn't indicate what party's proposal was selected and did not state the financial cost of the award;

5) the arbitrator's supplemental award doesn't pass muster either in that it does not make an initial determination that the employer has the financial ability to pay or consider all available revenue while keeping in mind funding for the current year being negotiated, and it does not consider compensation of other government employees.

Each of Ms. Miller's concerns will be addressed. However, as set forth above, we believe her conclusions are not supported by statute.

**First: Ms. Miller's seems to argue that the award is not legal as the arbitrator was not selected from a panel of seven names provided by one of two national arbitrator organizations.**

Ms. Miller's memo states that an arbitrator must be selected by striking names from panels provided by either AAA or the FMCS. This is not accurate. Rather, NRS 288.215(3) states that if the parties have not been able to resolve their dispute, they shall "submit the issues remaining in dispute to an arbitrator who must be selected in the manner provided in NRS 288.200 . . ." NRS 288.200 provides that:

> If the parties are unable to agree on an impartial fact finder or a panel of neutral arbitrators within 5 days, either party may request from the American Arbitration Association or the Federal Mediation and Conciliation Service a list of seven potential fact finders. . . .

This statute clearly allows for an arbitrator to be selected by mutual agreement of the parties, as was done in this case. (As an aside, this is exactly how the arbitrator was selected for the arbitration hearing regarding the 2011-2013 contract dispute, though that contract was ultimately resolved prior to hearing. In fact, the decision to mutually agree upon an arbitrator in the 2011-2013 dispute was

made at the negotiation table and in the presence of both City and County representatives, neither of whom complained about it at that time.)

**Second: Ms. Miller argues that the award is not legal because it lacks the "statutorily required paper trail" (deemed by Ms. Miller to be a "glaring deficiency").**

Ms. Miller asserts that the arbitrator is charged with ensuring that a full and complete record of the hearing is kept. She goes on to argue that although a certified court reporter was engaged for the hearing, the parties violated statute by waiving the reporting of the final arguments in support of their last best offers and as a result there is no record of this important phase upon which the arbitrator presumably based his decision.

To start, NRS 288.215(4) does require that "the arbitrator shall arrange for a full and complete record of the hearings." This was done. The local court reporting firm, Maiming, Hall & Salisbury, LLC, was present throughout the three-day proceeding and recorded the entire matter. However, nothing in this nor any other statute requires final arguments. To say that the award is illegal because it lacks a record of final arguments, the "statutorily required paper trail" as Ms. Miller refers to it, is absurd.

Further, nothing in the statute requires that the record be reduced to a transcript. As such, and in an effort to save time and money, the parties agreed to forego the significant time and expense involved in obtaining a transcript of the proceeding and writing lengthy "closing briefs". Frankly, the parties would have thought this would have been a move that the City and County would applaud. In any event, the express provision of the statute was complied with. Nonetheless, since questions have come up, we understand that the Department has ordered a copy of the transcript to provide to Commissioner Sisolak which should be completed in the next few weeks, despite the associated expense.

**Third: Ms. Miller believes the award is illegal as there is no written record of the final offers that both parties made, despite the presence of a court reporter.**

NRS 288.215(8) provides that at the recommendation of the arbitrator, before final offers are submitted, the parties may enter into negotiations which may ultimately result in a final and binding agreement by the parties. If, however, the parties do not agree, NRS 288.215(9) states that the parties shall submit a single written statement containing its final offer for each of the unresolved issues.

In this matter, the parties agreed in their ground rules that they would exchange pre-hearing final offers of settlement on August 30, 2013. Thereafter, pursuant to the ground rules, the parties reserved the right to amend their final offers prior to the close of the evidentiary record, or at a later date as might otherwise be agreed upon by the parties or permitted by the arbitrator. These ground rules, as well as the written pre-hearing offers are both Joint Exhibits that were used at the arbitration hearing (Joint Exhibits 1-3) which were available to both the City's and County's representatives who were present throughout the course of the hearing. Additionally, the LVPPA understands that the Department has provided all exhibits (1 binder of joint exhibits, 2 binders of LVPPA exhibits, and 1 binder of employer exhibits) to Commissioner Sisolak for his review.

Consistent with the ground rules, once the evidentiary portion of the hearing was concluded, the parties exchanged amended final offers with one another. These amended offers were then orally communicated to the arbitrator. (This is the only area in which the parties admit that they did deviate from the statute - the very last offers communicated to the arbitrator were only oral and not in writing.) The arbitrator advised the parties that he felt he did not need closing briefs unless one or both parties wished to provide one. The parties mutually agreed to forego the time and cost associated with closing briefs, not to mention paying for a copy of the transcript to use in preparing closing briefs, and consented to the arbitrator issuing an expedited award.

**Fourth: Ms. Miller questions the legality of the award as the arbitrator's initial order did not meet legal requirements because it included no rationale for his decision, failed to identify the final positions of the parties, didn't indicate what party's proposal was selected and did not state the financial cost of the award.**

Per NRS 288.215(11), the decision of the arbitrator need only include "a statement: (a) giving the arbitrator's reason for accepting the final offer that is the basis of . .. [his] award, and (b) specifying the arbitrator's estimate of the total cost of the award." When Commissioner Sisolak questioned why the 9/23/13 award did not contain more information, the parties reached out to the arbitrator to ask him to address these deficiencies. He has done so. As his award and supplemental award fully address all that is required by NRS 288.215(11), there is no basis for arguing that it is not legal or binding. It should be noted that the Association does not believe this statute requires the arbitrator to list the parties' last positions nor to indicate which party's proposal was selected, and to the extent that the supplemental award does so, it goes beyond what is required by statute.

**Fifth: Although a supplemental award was provided to address the concerns raised by Commissioner Sisolak, Ms. Miller now opines that the arbitrator's supplemental award doesn't pass muster either in that it does not make an initial determination that the employer has the financial ability to pay or consider all available revenue while keeping in mind funding for the current year being negotiated, and that it does not look at compensation of other government employees.**

It is important to be very clear about what NRS 288.215 requires. NRS 288.215(10) states that if the parties do not ultimately agree, the arbitrator shall accept one of the written final offers of the parties within 10 days after the offers are submitted and shall report the decision to the parties. Although NRS 288.215(10) says that the arbitrator's acceptance of one of the parties' positions over the other must be based upon the criteria provided in NRS 288.200 (financial ability to pay, funding for the current year being negotiated and compensation of other government employees), there is absolutely nothing in the statute that requires that his consideration of these criteria be placed in writing. Rather, per NRS 288.215(11), the decision of the arbitrator must only include "a statement: (a) giving the arbitrator's reason for accepting the final offer that is the basis of . . . [his] award, and (b) specifying the arbitrator's estimate of the total cost of the award." Had the legislators wanted these other criteria listed above to be placed in writing, they would have said so. In fact, in NRS 288.200, discussing a report from *a fact finder,* as opposed to an *arbitrator,* NRS 288.200(7) states that "the fact finder's report must contain the facts upon which the fact finder based . . . [his] determination of financial ability to grant monetary benefits . . ." There is no such requirement for an arbitration award in NRS

288.251(11) as Ms. Miller would have everyone believe. Contrary to Ms. Miller's reported assertions, the arbitrator's award and supplemental awards completely comply with statute.

As noted above, the initial 9/23/13 award was arguably deficient in that it did not include the arbitrator's reasons for accepting the final offer that he did nor an estimate of the total cost of the award. This was rectified in his supplemental award, dated 10/9/13. In fact, the supplemental award goes beyond what is required by statute by specifying the final offer he selected. Regardless, the information that Ms. Miller alleges is missing from this supplemental award is simply not required by statute.

Ms. Miller's opinion seems to confuse the requirements placed upon the arbitrator, both in conducting the hearing and in issuing his award, with those imposed upon the governing body (here Metro) to later appear at a public meeting (the Fiscal Affairs meeting) to discuss the award. Specifically, NRS 288.215(12) goes on to state that:

> Within 45 days after the receipt of the decision from the arbitrator pursuant to subsection 10, the governing body of the local government employer **shall hold a public meeting** in accordance with the provision of chapter 241 of NRS. The meeting must include a discussion of:
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> (a) The issues submitted pursuant to subsection 3;
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> (b) The statement of the arbitrator pursuant to subsection 11; and
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> (c) The overall fiscal impact of the decision, which must not include a discussion of the details of the decision.
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> **-The arbitrator must not be asked to discuss the decision during the meeting.** (Emphasis added.)

**Conclusion:** Not only is the award in this case legal, the only slight deviation from statute was the fact that the very final offers communicated to the arbitrator were oral and not in writing.

It should be noted that there is often slight deviation from this statue and we would submit that if one looked into the particulars of any interest arbitration, deviations could and would be identified. However, there is nothing in the statute that calls for the setting aside of an award if there is deviation from the letter of the statute. This award is legal and is final and binding.

As an aside, the statute specifically precludes the arbitrator from discussing the award at the public meeting that is to occur before the Fiscal Affairs Board, of which Commissioner Sisolak is a member, and to the extent that Commissioner Sisolak it attempting to speak with the arbitrator directly about this award could certainly be construed as an attempt to circumvent, at least in spirit, this portion of the statute.