IS THE BARGAINING TABLE BROKEN? IMPROVING NEVADA’S INTEREST
ARBITRATION PROCEDURE FOR CLARK COUNTY SCHOOL DISTRICT AND ITS
TEACHER’S UNION

By Robin Gonzales

I. Introduction

Nevada’s public schools consistently rank among the worst, if not the worst, in
the country. 1 From funding problems, 2 teacher shortages, 3 and low staff morale, 4 the causes are
numerous. And in the Clark County School District (“CCSD”)—the state’s largest and the
nation’s fifth-largest school district—, deteriorating labor relations cost the state millions of
dollars, decrease morale and cause ill will between teachers and the school district. 5 CCSD’s
labor relations problems are significant because CCSD educates almost 75 percent of all students
in Nevada spread across 357 schools throughout 8,000 square miles in Southern Nevada. 6 It is
also Nevada’s largest employer with over 40,000 employees. 7

Recently, for example, salary and benefits dispute between CCSD and its teacher’s
union—the Clark County Education Association (“teacher’s union”)—took almost a year to
resolve, costing the teacher’s union almost a million dollars, and forcing CCSD to allocate $52

2 Bruce Baker et. al., Nevada School Funding Shortchanges Students, EDUCATION LAW CENTER, (Mar. 16, 2016),
3 Anthony Rebora, Faced With Deep Teacher Shortages, Clark County, Nev., District Looks for Answers,
4 Amelia Pak-Harvey, Challenge For Next CCSD Superintendent: Low Employee Morale, LAS VEGAS REVIEW-
ccsd-superintendent-low-employee-morale/.
5 Amelia Pak-Harvey, Clark County Teachers Win Arbitration Over 2017-18 Contract, LAS VEGAS REVIEW-
7 Id.
million dollars in unexpected spending over the next two years. Similar problems in the past have forced CCSD to make tough choices and have led to a series of heated disputes in contract negotiation between CCSD and its teachers union—which represents about 18,000 educators and licensed professionals in the district.

When CCSD and its teacher’s union fail to reach negotiated collective bargaining agreements, they enter a process called interest arbitration. In Nevada, local government employees are prohibited from striking. Interest arbitration is an alternative to the right to strike and is a dispute resolution mechanism to resolve bargaining impasses. Through this process, a neutral third party resolves the dispute by imposing the terms and conditions of employment—essentially deciding the terms of the contract. This process differs from grievance arbitration because while the former concerns the making of a contract or a collective bargaining agreement, the latter concerns the interpretation of a contract or a collective bargaining agreement.

But interest arbitration is an imperfect process. Critics argue that it inhibits collective bargaining, is habit-forming for parties who use it, and is used by public officials and union leaders as political shelter for hard decisions that they must make. Proponents, on the other hand, argue that it is the best alternative to striking and enhances the collective bargaining process.

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8 Pak-Harvey, supra note 4.
Nevada employs a final offer model of interest arbitration for public school teachers—often called the “hydrogen bomb” of public sector bargaining.\textsuperscript{14} This model maximizes the risks for both parties because an arbitrator can only accept the final offer of one party, and that offer becomes the binding terms of the contract.\textsuperscript{15} Nevada’s model is an extreme version of the final offer model—called “final offer package” interest arbitration—because no matter how many issues there are, only one bargaining party’s terms are accepted on all the issues.\textsuperscript{16}

Professor Martin Malin suggests that interest arbitration models can be viewed on a continuum between two opposite ends—either it is a continuation of the parties’ collective bargaining process or it is an adjudicative process to resolve disputes over terms and conditions of employment.\textsuperscript{17} He argues that an interest arbitration model’s positioning along this continuum has significant consequences for the collective bargaining process. The more an interest arbitration model resembles a continuation of the collective bargaining process, the more it mitigates the disadvantages and drawbacks of interest arbitration. But the more it resembles an adjudicative model, the more it exacerbates its disadvantages.\textsuperscript{18}

This article will explore the development of interest arbitration in public-sector labor disputes, look at the different models of interest arbitration, and summarize the major theories supporting and criticizing interest arbitration. This article will then look at the Nevada model for resolving CCSD-teacher’s union disputes and recommend changes that enhance the promotion of negotiated settlements—casting it more closely to what Martin Malin distinguishes as a

\textsuperscript{14} Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes, 10 AM. REV. INT’L ARB. 383, 388 (1999) [hereinafter FOA].

\textsuperscript{15} This is different from other models where an arbitrator can decide to pick and choose terms from both parties, or craft new terms, in creating a collective bargaining agreement.

\textsuperscript{16} Martin H. Malin, Two Models of Interest Arbitration, 28 OHIO ST. J. ON DISP. RESOL. 145, 147 (2013) [hereinafter Malin].

\textsuperscript{17} Id. at 168; Similar discussions by other scholars also advocate that the best view of interest arbitration is that it is a legislative rather than judicial process. See Anderson, supra note 7, at 753.

\textsuperscript{18} Malin, supra note 11, at 168.
bargaining model. Finally, a brief conclusion will be made based on the feasibility of the proposed recommendations.

II. Development of Interest Arbitration in the Public Sector

a. The Impact of the Boston Police Strike

The Boston Police strike of 1919 distinctly shaped how public-sector bargaining evolved. Ironically, the direct cause of the Boston police strike was the Boston Police Commissioner prohibiting police officers from joining a union affiliated with the AFL.19 Police officers sought union membership because of commonplace complaints—such as low wages, long hours, and poor working conditions.20 The union’s response to the commissioner’s action was a strike of three-fourths of the police force.21

The Boston police strike only lasted for three days but had disastrous consequences. Law and order broke down, crime was rampant, and property damage was estimated in the hundreds of thousands of dollars.22 When it was all over, all 1,147 strikers were fired.23 The aftermath of the strike also left an indelible mark on public sector labor unionism. Though the Boston police strike was atypical, it exemplified how public-sector strikes can lead to human hardship, damage to property, and loss of life.24 For decades after the strike, policymakers and judges viewed public-sector unionism through the dire consequences of the Boston strike.25

b. The Right to Strike and Developing Alternatives to Resolve Bargaining Impasses in the Public Sector

20 Id. at 389.
21 Malin, supra note 11, at 145.
22 Slater, supra note 19, at 389.
23 Id.
24 Id.
The 1960s saw a significant growth of public workers forming and joining unions. Between 1962 and 1968 alone, the total number of public workers in unions doubled—from about one million to over 2.2 million members.\[26\] During the same period, the number of strikes grew exponentially. In 1958, for example, there were only fifteen public employee strikes—resulting in 7,510 working days lost. By 1968, there were 254 public employee strikes—resulting in 2,545,200 working days lost.\[27\]

Until 1959, public-sector labor law was essentially judge-made. Judges saw striking as the public-sector labor union’s primary way for resolving impasses—just as it is with private sector labor unions.\[28\] And Judges opposed government employees forming unions because they saw no alternatives to striking for public-sector unions.\[29\] Two court decisions in 1940, one from Texas and one from New York, exemplified this judicial attitude.\[30\] Both decisions quote: “[t]o tolerate or recognize any combination of . . . employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded.”\[31\]

In 1959, Wisconsin Governor Nelson signed a bill into law that gave most employees of the county and municipal government statutory rights to join and be represented by unions in negotiations over wages, hours and working conditions.\[32\] But the statute left unclear one important question: what should happen if union negotiations reach an impasse?\[33\] Subsequent

\[27\] Malin, supra note 11, at 165 (citing BUREAU OF LABOR STATISTICS, 348 WORK STOPPAGES IN GOVERNMENT, 1958-1968 (1970)).
\[28\] Slater, supra note 19, at 390.
\[29\] Id.
\[30\] Id. at n.23.
\[31\] Id. at 390.
\[32\] Id. at 394 (the bill excluded public safety workers and state employees).
\[33\] Id.
amendments of the Wisconsin statute sought to answer this question. In 1962, the law provided for mediation and advisory fact-finding, if both parties requested it after impasse.34 In later years, the law also provided binding interest arbitration to settle bargaining impasses.35 A later amendment even permitted strikes, but in very limited circumstances.36

The Wisconsin law sparked a national trend. By 1966, over sixteen states had laws granting some organizing and bargaining rights to some public employees. By 2000, twenty-nine states and the District of Columbia allowed these rights to all major groups of public employees; thirteen states allowed one to four types of public workers to bargain—most often including teachers and firefighters—and only eight did not allow any public workers these rights.37

But the right to strike to settle impasses in public-sector labor disputes remains highly controversial and infrequently allowed. At the national level, the federal government makes it a felony for federal employees to strike.38 At the state level, none of the 1960s public sector labor laws allowed strikes. By 2000, barely a dozen states allowed some public workers to strike and some employees—such as police officers and firefighters—are prohibited from legally striking anywhere in the U.S.39

Declaring strikes illegal does not do away with impasses in the public sector collective bargaining process. Thus, most of the states adopt alternative procedures to resolve public-sector bargaining impasses. Thirty-six states use mandatory or optional mediation and thirty-four use fact-finding.40 But these alternatives are limited because they are non-binding, which led to the

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34 Id.
35 Id. at 395 (a separate statute was passed to give similar rights to employees of Wisconsin’s state government).
36 Id. at n.47.
37 Id. at 395.
39 Slater, supra note 19, at 395.
40 Id.
preference for interest arbitration—binding settlements which are imposed upon the parties.\textsuperscript{41} This process became a popular, and often the preferred, substitute for strikes when public workers are involved.\textsuperscript{42} Nearly thirty states, including the District of Columbia, have adopted some form of interest arbitration as the final step in public sector impasse disputes.\textsuperscript{43}

III. Interest Arbitration

Interest arbitration is the arbitration of disputes arising from negotiations for a new contract or collective bargaining agreement (generally after the old one has expired).\textsuperscript{44} These disputes frequently concern wages and other economic issues “at the core of the bargaining relationship.”\textsuperscript{45} This process involves a neutral third-party, or sometimes a group of neutral third-parties, that evaluates evidence, follows specified legal steps and criteria, and ultimately makes a binding decision as to what the final terms of the contract, or collective bargaining agreement will be.\textsuperscript{46} The selection process for an arbitrator and the type of evidence allowed in an arbitration hearing depends on the specifications of a statute.\textsuperscript{47}

a. Benefits Interest of Arbitration

Interest arbitration bears many of the benefits associated with arbitration in

\textsuperscript{41} MARTIN H. MALIN et al., PUBLIC SECTOR EMPLOYMENT CASES AND MATERIALS 615 (2011) [hereinafter MALIN, PUBLIC-SECTOR].
\textsuperscript{42} WILLIAM V. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 254 (2013).
\textsuperscript{43} Slater, \textit{supra} note 19, 396-400; \textit{Id.} at 296 n.140; As of 2013, these states have some form of interest arbitration: Alaska, California, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming) (However, the California Supreme Court has struck down the state’s statute for violating the home rule provision of California’s constitution. County of Riverside v. Superior Court, 66 P.3d 718 (Cal. 2003)).
\textsuperscript{44} GOULD IV, \textit{supra} note 37, at 251.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} Slater, \textit{supra} note 19, at 400.
\textsuperscript{47} \textit{Id.}; Arbitrator may be a private party voluntarily selected by both the union and the employer, or maybe appointed by a specific state agency under the authorizing statute. Hearings typically involve documentary evidence (such as employer’s financial records, and employment terms and compensation of other comparable employees). Some hearings may involve witness testimony but is infrequent.
general. One major benefit is that arbitration is generally more expeditious than litigation.\(^{48}\) It is also a relatively informal process where \textit{stare decisis}—the principle of binding legal precedent—is not applicable to arbitration proceedings.\(^{49}\) Though arbitrators often consider past arbitration decisions, similar case facts need not result in a similar decision and an arbitrator has discretion to consider the issue anew.\(^{50}\)

Another major argument advancing interest arbitration is that it is an effective substitute, at least for a period of time, for the right to strike.\(^{51}\) Some argue that the right to strike is needed to make collective bargaining work.\(^{52}\) Striking is undeniably an effective weapon in increasing employees’ bargaining potential and winning favorable bargained for terms. In public-sector labor disputes that prohibit the right to strike, interest arbitration is an effective substitute that provides a motivation for bargaining.\(^{53}\) Thus, interest arbitration enables parties in a labor dispute to retain the leverage to bargain effectively while eliminating the harmful effects of an actual strike.\(^{54}\) Even if unauthorized strikes have not ceased completely, it has reduced the inclination to strike because workers know that an impartial arbitrator will determine cases on merit.\(^{55}\)

\textbf{b. Major Criticisms}

A major criticism of interest arbitration focuses on the chilling effect it can have on collective bargaining, inducing parties to rely on arbitration rather than negotiations.\(^{56}\) Parties

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\begin{itemize}
    \item \(^{48}\) \textsc{Gould IV}, \textit{supra} note 37, at 259.
    \item \(^{49}\) \textit{Id.} at 258.
    \item \(^{50}\) \textit{Id.}
    \item \(^{51}\) \textit{Id.} at 259.
    \item \(^{53}\) \textit{Id.} at 156.
    \item \(^{54}\) \textit{Id.} at 179.
    \item \(^{55}\) \textsc{Gould IV}, \textit{supra} note 37, at 259.
    \item \(^{56}\) Malin, \textit{supra} note 11, at 150; \textsc{Gould IV}, \textit{supra} note 37, at 297.
\end{itemize}
who use interest arbitration are more likely to use it repeatedly for future impasses—creating a narcotic effect.\(^\text{57}\) Some also argue that interest arbitration encourages both parties to inflate their positions because they expect the arbitrator to issue awards that will be the midpoint of both party’s final offers.\(^\text{58}\) They may fear that making concessions would undermine their position with the arbitrator.\(^\text{59}\)

These criticisms have some support but remain largely inconclusive. Thomas Kochan, for example, found that in the first decade of public-sector bargaining, a higher percentage of cases reached impasse under arbitration than other dispute resolution procedures and that there was an overdependence on arbitration in a number of jurisdictions operating under both arbitration and other dispute resolution alternatives.\(^\text{60}\) Kochan’s findings also conclude that, in general, large areas “tend to rely heavily on whatever dispute resolution is available.”\(^\text{61}\) Several cities such as Buffalo, Rochester, and Syracuse, for example, rely heavily on interest arbitration to form collective bargaining agreements.\(^\text{62}\) Recent research, however, contradict these findings\(^\text{63}\) while some jurisdictions even show decreasing use of interest arbitration.\(^\text{64}\)

Some public employers argue that interest arbitration entrusts an arbitrator with public policy determinations supposed to be entrusted to politically accountable officials.\(^\text{65}\) By setting terms, working conditions, and wages of public employees, an arbitrator essentially performs a

\(^{57}\) Malin, \textit{supra} note 11, 150.

\(^{58}\) \textit{Id}.

\(^{59}\) \textit{Id}.

\(^{60}\) \textit{Id}.

\(^{61}\) Thomas Kochan, \textit{Dynamics of Dispute Resolution in the Public Sector, in Public Sector Bargaining} 175 (1979) [hereinafter Kochan].

\(^{62}\) Malin, \textit{supra} note 11, at 150 n.30.


\(^{64}\) Malin, \textit{supra} note 11, at 150.

legislative function as opposed to traditional grievance arbitration, where an arbitrator merely interprets and applies an existing contract. Although most states and recent trends uphold interest arbitration, a minority of states do hold interest arbitration unconstitutional under state constitutions because it delegates legislative authority to a private third party. Most of these states have non-delegation doctrines in their state constitution, and interest arbitration is held as unconstitutional because it delegates legislative public policy making to unaccountable private parties.

Another line of argument advanced by some public employers is that interest arbitration leads to inflated wages that ultimately harm their budgets. A recent study seems to contradict this assertion, at least for police officers and firefighters, and conclude that neither the presence nor the use of arbitration has resulted in an increase of wages beyond that negotiated by police officers and firefighters in other states without arbitration.

Martin Malin suggests there are three major public policy concerns regarding interest arbitration. First, interest arbitration shields union leaders and public officials from being accountable for unpopular and unfavorable decisions they would have to make in collective bargaining disputes. They can attribute unpopular and unfavorable decisions to the arbitrators.

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66 Id.
68 Malloy, supra note 59, at 146. For early state high courts striking down binding interest arbitration statutory framework, see Salt Lake City v. Int’l Ass’n of Firefighters, Locals 1645, 593, 1654, & 2064, 563 P.2d 786 (Utah 1977); City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35 (S.D. 1975).
69 Malloy, supra note 59, at 247.
70 Id. at 245-256.
71 Kochan, Long Haul, supra note 57, at 583.
72 Malin, supra note 11, at 150.
instead of making these decisions themselves in the collective bargaining process.\(^73\) This may also provide an explanation for why it is repeatedly used by certain labor sectors.\(^74\)

Second, interest arbitration prevents innovation in collective bargaining agreements. In crafting awards, arbitrators tend to rely on comparing with similarly situated employees, and past agreements.\(^75\) Because of this, it is rare for arbitrators to craft groundbreaking bargaining agreements, and often simply reflect small deviations from the status quo.\(^76\) Third and lastly, interest arbitration merely shifts conflict resolution from the formation of collective bargaining disputes to the contract administration.\(^77\) For example in Ontario, Robert Hebdon and Robert Stern compared public sector bargaining units that adopted interest arbitration and ones that had the right to strike.\(^78\) They found that grievance arbitration was used more often in units that used interest arbitration as the alternative to striking.\(^79\)

c. Give It a Name: Models

1. All That Heaven Will Allow: Conventional

Generally, there are two models of interest arbitration. The first is conventional interest arbitration.\(^80\) Under this model, an arbitrator may decide to accept one party’s final offer over the other party, or may decide to craft a new result balancing both parties’ offer.\(^81\) This model is heavily criticized because it supposedly discourages bargaining in good faith, and intensifies the “chilling effect” on collective bargaining.\(^82\) Parties may be unwilling to enter serious

\(^{73}\) Id.
\(^{74}\) Id.
\(^{75}\) Id. at 155.
\(^{76}\) Id. at 155-56.
\(^{77}\) Id. at 165.
\(^{78}\) Id.
\(^{79}\) Id. at 156 n.53.
\(^{80}\) Id. at 147; FOA, supra note 9, at 387.
\(^{81}\) Malin, supra note 11, at 147.
\(^{82}\) FOA, supra note 9, at 387.
negotiations if they believe they will receive a better outcome in arbitration.\textsuperscript{83} Parties may also perceive that conventional arbitration will result in a compromise award between the two parties’ position and may exaggerate their positions, and be unwilling to make compromises with the fear that it will lead to a reduction in obtaining a favorable award.\textsuperscript{84}

2. All or Nothing at All: Final Offer

The second model is called the final offer, or last best offer, arbitration.\textsuperscript{85} Under this model, an arbitrator is required to select one of the two parties’ final offer.\textsuperscript{86} An increasing number of jurisdictions\textsuperscript{87} have started using this model because it is designed to force both sides to negotiate a settlement on their own—thus avoiding a major fear that interest arbitration will inhibit the collective bargaining process.\textsuperscript{88} Final offer arbitration has also been used in salary disputes in baseball\textsuperscript{89}, and has been suggested as a possible procedure to be used in the Taft-Hartley and Railway Labor Act emergency disputes.\textsuperscript{90}

Final offer arbitration generally comes in two flavors. The first type is issue-by-issue arbitration, where an arbitrator may select only the final offer of one of the parties but may select different final offers for different issues in dispute.\textsuperscript{91} An arbitrator’s discretion comes into play when there are multiple issues in dispute.\textsuperscript{92} The second type is final offer package, where an arbitrator chooses one party’s final offer in its entirety—regardless of how many issues are in

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Malin, \textit{supra} note 11 at 147; \textsc{Gould} IV, \textit{supra} note 37, 254; FOA, \textit{supra} note 9, at 384.
\textsuperscript{86} Malin, \textit{supra} note 11, at 147; \textsc{Gould} IV, \textit{supra} note 37, at 254.
\textsuperscript{87} \textsc{Gould} IV, \textit{supra} note 37, at 254 n.7 (Twenty-four states use final offer package for at least some public sector workers; Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming).
\textsuperscript{88} Id. at 255.
\textsuperscript{89} FOA, \textit{supra} note 9, at 385 (Major League Baseball uses final offer arbitration to set salaries for veteran players).
\textsuperscript{90} \textsc{Gould} IV, \textit{supra} note 37, at 255.
\textsuperscript{91} Malin, \textit{supra} note 11, at 147.
\textsuperscript{92} FOA, \textit{supra} note 9, at 394.
dispute. An arbitrator’s discretion is narrowly limited to choosing one side over the other, which drastically increases the risk for either party entering into arbitration.

Final offer interest arbitration provides strong incentives to settle and enter into negotiated agreements in many ways. It acts as a “psychological, economic, and political incentive” for parties to settle on their own because of the high risk of going into interest arbitration—especially for final offer package arbitration. Each party is faced with the possible outcome that an arbitrator accepts the other party’s full final offer on either issue by issue or on the whole, without any compromise between the two offers. Because of the high risks of this type of interest arbitration, it has often been referred to as “the hydrogen bomb poised above the bargaining table whose very terror should assure its non-use.”

Final offer interest arbitration also encourages good faith bargaining by giving the parties a motivation to present reasonable and defensible offers—those that can be defended by the factors an arbitrator uses to make his or her decision. To avoid antagonizing an arbitrator, parties are likely to refrain from indulging in flights of fancy when proposing settlement terms. This is especially true because an arbitrator in this model cannot craft a compromise decision when he or she decides, so an arbitrator would be less willing to choose unreasonable offers. Further, final offer arbitration also encourages negotiated settlement because each party’s final offer may communicate concealed information that previously may not have been released. Each party

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93 Id. at 395.
94 Id. at 295.
95 Id. at 388.
96 Id.
97 Id. at 387.
98 Id. at 388.
99 Id. at 388.
100 Id. at 388-389.
may continue learning about the other in the final offer stages and can continue to find ways to settle.\(^\text{101}\)

Although there is a lack of recent studies on final offer arbitration in the public sector, studies in the 1970s showed that final offer arbitration encouraged more parties to reach negotiated agreements and avoided strikes. For example, early in Wisconsin’s final offer arbitration program, arbitrators resolved only 9 out of 173 successful negotiations.\(^\text{102}\) In another example from the 1980s, New Jersey saw two-thirds of arbitration cases resulted in voluntary settlement. In the other third in which an arbitrator decided disputes, half were either formal or informal consent awards.\(^\text{103}\)

### 3. Worlds Apart: Bargaining vs. Adjudicatory Model

Malin suggests that interest arbitration models can be viewed on a continuum between two opposite ends—either it is a part of the parties’ collective bargaining process or it is a method for adjudicating disputes over terms and conditions of employment.\(^\text{104}\) He argues that the more an interest arbitration model is situated as part of the collective bargaining process, it mitigates the disadvantages and drawbacks of interest arbitration.\(^\text{105}\) But the more it is situated as an adjudicative model, the more it exacerbates its disadvantages.\(^\text{106}\)

Under the bargaining model, interest arbitration is a substitute for the right to strike. The strike is an alternative that is disfavored and to be feared. A key characteristic of this model is that decisions are unpredictable, so that both parties will be motivated to settle their difference and reach a compromise to avoid interest arbitration altogether.\(^\text{107}\) An arbitrator also assists in

\(^{101}\) Id.
\(^{102}\) Id. at 391-392.
\(^{103}\) Id.
\(^{104}\) Malin, supra note 11, at 147.
\(^{105}\) Malin, supra note 11, at 169.
\(^{106}\) Id.
\(^{107}\) Id. at 157.
mediating between the parties to resolve their impasse, only turning to arbitration as the final and last step if all else fails. Malin further argues that agreements are reached in right-to-strike jurisdictions because of the threat and unpredictability of what would happen in strikes. For interest arbitration to be an adequate substitute for the right to strike and a threat for the parties to avoid, it must also be unpredictable.

Under the adjudication model, the arbitrator’s decisions are limited to a specific criterion and thus more predictable. Statutes that follow this mold often specify factors that they apply in making their decisions, and the weight given to each factor. Some statues also prohibit an arbitrator from engaging in any form of mediation, while others do allow an arbitrator to mediate. Malin argues that while predictability in litigation increases the likelihood of settlement, predictability in the interest arbitration decision-making process discourages settlement. This is because if parties can predict the outcome of an arbitrator’s award, then there is no reason for the parties to enter into collective bargaining agreements and be held accountable for hard and unfavorable contract terms.

IV. The CCSD-CCEA Disputes and Nevada’s Public Sector Bargaining Laws

a. The CCSD-CCEA Disputes

During the boom years, the Clark County School District and its teacher’s union, had a predominantly harmonious relationship. CCSD had plenty of money to build new schools, hire thousands of teachers, and give its teachers wage increases and good benefits.

“Disagreements were resolved quickly, sometimes with a simple phone call,” said John

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108 Id.
109 Id. at 166.
110 Id. at 158.
111 Id. at 159.
112 Id. at 166.
Vellardita in 2012, then the union’s executive director and chief negotiator. “There were always disagreements,” echoed Eddie Goldman, CCSD’s chief negotiator, “[b]ut there was a give and take.”  

The economic recession forced a drastic change in CCSD and the union’s relationship. Declining revenues caused CCSD to make tough decisions, slash budgets, and seek union concessions. At one point, CCSD faced over $400 million in deficit. Though there are other unions that represent employees within CCSD—administrators, police, and support staff—its relationship and negotiations with the teacher’s union has been the most publicly and privately contentious.

Interest arbitration has increasingly become the method for resolving CCSD-union disputes, instead of negotiated settlements. Before 2011, the last time CCSD and the teacher’s union went into arbitration was 2001. And before 2012, the last time CCSD declared a bargaining impasse was over 20 years prior. But since 2011, CCSD and the teacher’s union have increasingly relied on interest arbitration to resolve bargaining impasses—in 2011,

114 Id.
115 Id.
116 Id.
117 Id.
118 Id.
2012, 2015 and, most recently, in 2017. The disputed terms range from wage increases, the number of furlough days, teachers’ health benefits and other such issues.

b. Nevada’s Public-Sector Bargaining Laws

Nevada’s public-sector labor laws—like all other states’—is exclusively created by state law because federal law does not consider states as employers. Nevada’s laws do not have any collective bargaining provisions that apply to employees of the State of Nevada because the terms of employment for these types of employees are either specified by legislation or by administrative policy. Nevada does, however, have public-sector collective bargaining statutes that apply to local government and their employees.

In 1977, the Nevada legislature enacted S.B. 440 which established procedures for resolving labor disputes between local governments and firefighters. The statute incorporated “final offer” binding interest arbitration. In 1985, this type of interest arbitration procedure was extended to police officers, and in 1991, a substantively similar interest arbitration procedure was adopted for teachers. NRS 288.215 and 288.217 outlines Nevada’s “final offer” interest arbitration procedure. It requires firefighters, police, and teachers who have reached an impasse

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124 Id.
126 LEGISLATIVE COUNSEL BUREAU (Background Paper 93-1), HISTORY OF MAJOR COLLECTIVE BARGAINING LAWS IN NEVADA 7, https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP93-01.pdf (It should be noted, however, that the Board of Regents for the University of Nevada System in 1990 adopted a policy authorizing collective bargaining for professional staff. In 1993, the faculty of Truckee Meadows Community College became the first group to organize a bargaining unit under these provisions.)
127 Id. at 5.
128 Id. at 6.
in collective bargaining to submit a single written statement containing each of the parties’ final offer for each issue that is being disputed. Nevada’s statute requires that an arbitrator may only accept one party’s statements in its entirety—called the “package” approach.\(^\text{129}\)

NRS 288.217 specifically governs interest arbitration procedures between the school districts and employee organizations. It sets forth the process for parties to follow if an agreement is not reached after at least eight sessions of negotiations.\(^\text{130}\) After the selection of an arbitrator and convening a hearing, the written statement containing each of the parties’ final offer for each disputed issue is submitted.\(^\text{131}\) Following the submission of the final offers, the arbitrator issues a decision based on criteria set forth in NRS 288.200.\(^\text{132}\) The party’s final offer that is picked by the arbitrator becomes the binding contract retroactive to the date of the expiration of the last contract, if that date has passed.\(^\text{133}\)

NRS 288.200, Section 7 (a) and (b), sets the criteria for which interest arbitration awards are based upon. This procedure requires an arbitrator to act as a fact finder first and hold hearings to gather information concerning the dispute.\(^\text{134}\) The arbitrator must determine whether the District has the financial ability to pay for the union’s demands.\(^\text{135}\) If the District has the financial ability to grant monetary benefits, the arbitrator must further consider:

\[\ldots\text{comparison of other government employees, both in and out of the state, and use normal criteria for interest disputes regarding the terms and provisions to be included in the agreement in assessing the reasonableness of the position of each party as to each issue in dispute.}\ldots\]\(^\text{136}\)

\(^{129}\) *Id.* at 6.


\(^{131}\) *Id.*

\(^{132}\) *Id.*

\(^{133}\) *Id.*

\(^{134}\) *Id.*


\(^{136}\) *Id.*
Finally, the arbitrator must also consider the District’s ability to pay for the life of the contract being administered.\textsuperscript{137}

NRS 288.217 also leaves the door open for parties to further engage in negotiations after an arbitrator has held hearings but before parties have submitted their final offers.\textsuperscript{138} The arbitrator may recommend that parties enter negotiations before the submission of their final offers, and after the fact-finding process has begun. The arbitrator may adjourn the hearing for a period of three weeks for the District and the union to negotiate.\textsuperscript{139}

When final offers are submitted, an arbitrator must render a decision within 10 days based on the criteria set forth in NRS 288.200.\textsuperscript{140} The arbitrator decision must also include a report:

(a) Giving the arbitrator's reason for accepting the final offer that is the basis of the arbitrator's award; and
(b) Specifying the arbitrator's estimate of the total cost of the award.\textsuperscript{141}

\section*{V. Evaluating Nevada’s Model for the CCSD Disputes and Proposals for Reform}

\textbf{a. Strengths of Nevada’s Model}

Nevada’s flavor of final offer arbitration—final offer package—enhances the goals of promoting a negotiated settlement by maximizing the risks for both parties. Under this process, an arbitrator must choose one party’s final offer on all the issues presented. This eliminates much of an arbitrator’s discretion in choosing different party’s final offers for different issues—such as in issue by issue final offer—or creating a new agreement altogether—such as in conventional interest arbitration.\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{NEV. REV. STAT. ANN.} § 288.217 (2015).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{FOA, supra note 9, at 395.}
\end{enumerate}
\end{footnotesize}
Since an arbitrator will not have the discretion to choose between different final offers for different issues, or create a customized agreement, a party going into interest arbitration risks losing out on all its’ position entirely.\textsuperscript{143} The very high and costly risks faced by both parties maximize each party’s incentive to reach a negotiated settlement, even on at least some issues before they enter arbitration.\textsuperscript{144}

Nevada’s interest arbitration process for teachers also leave the door open for negotiations before the submission of the parties’ final offer.\textsuperscript{145} This can further help promote settlement because new information may be learned during the hearings, or determinations may be made that may forecast the arbitrator’s likely decision. The arbitrator’s fact-finding hearings—where a determination of a school district’s financial ability as well as other factors is made—can also help decrease the number of disputed issues. Parties could use the fact-finding results to craft new proposals in negotiations and further narrow their differences.

Nevada also allows an arbitrator to recommend both parties enter negotiations after fact-finding has begun and allows a mediator to assist. The arbitrator can adjourn the arbitration process for three weeks to allow parties time to negotiate. The benefit of having a mediator in the negotiation process enhances the possibility of negotiated talks, especially after both parties have tried to negotiate on their own without resolution. This happened in a CCSD-teacher’s union impasse dispute concerning contract negotiations early last year.\textsuperscript{146} An arbitrator ordered both

\textsuperscript{143} Id.
\textsuperscript{144} Id. at 394-395.
\textsuperscript{146} See Valley, supra note 4 or 116 (The union has requested a roughly $80 million package that includes 3 percent step pay increases as well as additional premium contributions to teachers’ health care. The school district sent a memo to licensed professionals earlier this month explaining why it has called for a pay freeze for the 2017-2019 academic year. The fate of teachers’ health care, however, may be the thorniest issue of the labor dispute. The school district has proposed moving teachers from the beleaguered Teachers Health Trust to fully-insured UnitedHealthcare plans similar to the ones provided for support staff and school police. But union officials insist the Teachers Health Trust — the nonprofit organization that oversees health care for roughly 18,000 Clark County
parties to the negotiating table with an assistance of a mediator. But the negotiations failed, and arbitration continued.\textsuperscript{147}

b. Recommended Changes

Despite some built-in strengths, Nevada’s interest arbitration procedures for the Clark County School District and its teacher’s union needs improvement. Nevada’s interest arbitration statute for teachers was adopted in 1991, prior to the economic recession that hit in 2007. The lesser frequency, or at least prolonged absence, of CCSD bargaining impasses going into arbitration prior to the recession (the last one being in 2001) likely show that Nevada’s final offer package arbitration did its job—acting as a deterrent for bargaining impasses and promoting a negotiated settlement.

But the alarming frequency of CCSD-teacher’s union bargaining impasses that have gone to interest arbitration in the recent years shows the need to amend, revise or, perhaps, even eliminate interest arbitration altogether.\textsuperscript{148} Clearly, it is not accomplishing its goal of promoting negotiated settlements between the Clark County School District and its teacher’s union. This adds credibility to some of the major criticisms surrounding interest arbitration—it chills collective bargaining, parties rely on it more once they start using it, and it is used by both union leaders and public officials as a political shelter for unpopular decisions they would have to make on their own.

\textsuperscript{147} Id.

\textsuperscript{148} Several jurisdictions have already sought to repeal or modify interest arbitration laws because of shifting attitudes toward public-sector unionism. GOULD IV, supra note 37, at 296 n.142 (“In California, the cities of Vallejo and Palo Alto are among those that have abolished interest arbitration for police and firefighters. A 2011 Michigan law amended that state’s arbitration procedure for police and fire unions to require arbitrators to consider a municipality’s ability to pay ahead of other relevant factors. In Ohio, the controversial S.B. 5 would have eliminated binding arbitration for public-sector workers, but the law was repealed by voters in a November 2011 referendum.”).
Several changes can be adopted to increase the effectiveness of Nevada’s interest arbitration procedure for CCSD and its teacher’s union. These changes can deter bargaining impasses and promote negotiated settlements between CCSD and its teacher’s union, as well as other employee unions within CCSD. These proposed changes also increase the bargaining features of Nevada’s interest arbitration model—and, as Malin argues, mitigate the criticisms and disadvantages of interest arbitration. The recommendations are; (1) open negotiation process after final offer, (2) adopt tri-partite panel of arbitrators, and (3) get rid of the requirement to produce a written report for the arbitrators’ basis for decision-making.

The first recommended change is to allow the negotiation process to continue even after final offers have been submitted. Nevada’s model allows negotiation to continue before parties submit their final offers. But Nevada’s process does not leave the door open for negotiations to take place after the submission of parties’ final offer. Leaving the door open for negotiations after parties submit their respective final offers gives the parties an opportunity to further learn about each other’s preferences and create new proposals based on the information learned. This can further strengthen the likelihood of a negotiated settlement.

The value of open negotiations after final offers have been submitted can be seen in baseball arbitration, where final offer interest arbitration often works smoothly and efficiently in bringing about negotiated settlements. Since MLB teams submit their final offers approximately one month before arbitration proceedings even begin, they are more likely to reach the middle ground in negotiations. Having time to negotiate after final offers have been submitted promotes the “battle of reasonable offers,” where parties can use the most reasonable

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150 Id. at n.74.
151 Id. at 105.
offers each side has submitted to further narrow down differences and adjust their own offers to find a settlement.\textsuperscript{152} This also helps counter the criticism that interest arbitration chills the collective bargaining process and causes parties to rely on an arbitrator to form collective bargaining agreements.

The second recommended change is for Nevada to adopt a tri-partite arbitration panel instead of having one arbitrator decide issues in dispute. In a three-person board, there is usually a representative of each party present in addition to a neutral arbitrator.\textsuperscript{153} When the three-person panel enter into sessions, the neutral party tries to bring about a settlement reflecting the available data, either deciding by a majority or unanimous basis. Through this process, the neutral acts as a mediator especially when the two party’s positions are far apart, and both are hesitant to negotiate with each other.\textsuperscript{154}

Though Nevada’s model allows an arbitrator to recommend parties go into mediation, it does not allow for the arbitrator to participate in the mediation process directly. This feature of Nevada’s model casts the arbitrator in a more adjudicative role and limits his participation in being able to promote negotiations between both parties. In a tri-partite panel, as opposed to a third-party adjudicatory arbitrator, the neutral arbitrator will have better leverage to try and get parties to narrow down their differences and compromise because the neutral arbitrator will be making the decision on which side to favor when negotiations fail.\textsuperscript{155} Thomas Kochan noted that, in tripartite arbitration panels, the parties limit the potential risk of getting a “bad” or

\textsuperscript{152} Id.
\textsuperscript{153} \textsc{thomas carbonateau} et al., \textsc{handbook on labor arbitration} 24 (2007).
\textsuperscript{154} Id. at 24.
“unworkable” award by having their representatives participate directly in the arbitration decision-making process.\textsuperscript{156}

Finally, the last recommended change is to remove the requirement for a written report of the arbitrators’ decision\textsuperscript{157}. Admittedly, this is a more controversial proposal but one whose advantages may outweigh its disadvantages—especially when combined with the tri-partite panel arbitration. Getting rid of the requirement to have a written report for an arbitrator’s decision-making furthers the mediation mindset by allowing the neutral arbitrator to encourage compromises between the party-appointed arbitrators—thus continuing the bargaining process.\textsuperscript{158}

Nevada’s interest arbitration procedure requires that an arbitrator adhere to a criterion in issuing awards.\textsuperscript{159} It requires that an arbitrator first determine the financial ability of the school district to grant monetary benefits, consider the compensation of other government employees, use a “normal criteria” to determine the terms and provisions to be included in the agreement, and consider if either party had bargained in bad faith.\textsuperscript{160} Nevada law further requires that an arbitrator submit details in his report the facts upon which the arbitrator based his or her decisions on.\textsuperscript{161}

The requirement of a written report makes the arbitrator the author and thereby the owner of the award. Getting rid of this requirement in a tri-partite arbitrator panel will allow the neutral arbitrator to encourage the other arbitrators to compromise and set terms that both parties can live with. The statute’s criteria can still exist and can be used during fact-finding to settle disputed

\textsuperscript{156} Kochan, \textit{Long Haul}, \textit{supra} note 57, at 583.
\textsuperscript{157} See, e.g., Franckiewicz, \textit{supra} note 148, at 150.
\textsuperscript{158} \textit{Id.}; See Tulis, \textit{supra} note 142, at 120-126 (discussion of statutory standards adopted by states and emphasis or de-emphasizing certain criteria).
\textsuperscript{159} \textsc{NEV. REV. STAT. ANN.} § 288.200 (2015).
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
issues and encourage reasonable positions, but the product of the arbitration decision is a compromise between the two parties. This proposed change also promotes a more bargaining process, rather than an adjudicative one.

Getting rid of the written requirement will likely be very controversial because it seemingly gives the arbitrator’s unfettered discretion and eliminates political accountability. But in a tri-partite arbitration panel, each side is represented by a party-appointed arbitrator and would be directly answerable to their respective side. This process would also cut against the argument that CCSD and union officials are using the arbitration process as a political shelter for passing on to the arbitrator decisions they must otherwise make since each side is well represented and still participates in the decision-making process.

c. Replacing Interest Arbitration

Some argue that Nevada’s interest arbitration process for CCSD-teacher’s union disputes should be done away altogether—because it is more trouble than it is worth. Obviously, proponents of interest arbitration would also disagree and advocate for its strengths. But there might be other reasons to consider removing the interest arbitration process altogether. If the primary goal for Nevada’s final offer package arbitration is to increase the risks and pressure of the arbitration proceedings, so parties are encouraged to settle their disputes on their own, then another alternative could better accomplish this goal. Nevada should consider replacing the interest arbitration process for teachers with the right to strike.

Nevada should consider allowing teachers the right to strike. Some scholars conclude that public-sector strikes are not “sufficiently detrimental to the interests of the public to justify the

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162 See Joecks, supra note, 13.
current presumption against their legality.” But even for most observers who agree strikes should be prohibited for essential workers, there is little consensus and a great deal of controversy whether this prohibition should extend to public education workers.

While others have called the type of interest arbitration that Nevada adopts as the “hydrogen bomb” of public sector bargaining, I would argue that the right to strike has more power to deter impasse than arbitration. It would maximize the risk and pressure for both parties to find a negotiated settlement. Some have even argued that the collective bargaining process rarely works without the power to strike because unless an employer is faced with the real threat of inconvenience or injury, there is no incentive for them to compromise or negotiate seriously about wages, hours, and working conditions. The power to strike would no doubt present maximum incentives for CCSD and its union to reach negotiated settlements—CCSD would not want its teachers to strike and halt public education, while teachers would face the extreme pressure of not having salaries and potentially losing their jobs altogether.

Another good argument made in allowing strikes is that it already happens frequently and it creates an urgency for state officials and union leaders to come to the bargaining table. Hardly a month passes without strikes, or some form of economic pressure, in the public sector in some state. Allowing teachers the right to strike, even on a limited basis, would bring the law into the light of reality. This past few months alone have seen teachers across the country going on

164 GOULD IV, supra note 37, at 343.
166 GOULD IV, supra note 37, at 343.
167 Id. at 345.
168 Id (Although most states prohibit public employees from striking either by common law or statute, some jurisdictions—Hawaii, Pennsylvania, Vermont, Alaska, and Minnesota—have allowed a limited right to strike.).
strike.\textsuperscript{169} And in those jurisdictions, both state leaders and union leaders scramble to find immediate solutions to their disputes.\textsuperscript{170} It may not be ideal, but the right to strike is undeniably a powerful incentive for all parties to focus on negotiations and problem-solving.

But the size and scope of CCSD’s jurisdiction would certainly cause a serious disruption of an essential service to the community if strikes occur, especially if prolonged. It is debatable whether the public interest would outweigh CCSD teachers’ right to strike—a standard some courts have used to determine whether public workers should be able to strike\textsuperscript{171} Most would probably agree that a few days of strikes would not imperil public health and security, but it could if the strike would go on longer. After all, CCSD is the largest employer in the state and the fifth largest school district in the United States.\textsuperscript{172}

VI. Conclusion

Nevada’s final offer package interest arbitration process for CCSD and its teacher’s union is outdated. Interest arbitration, particularly final offer package, is meant to deter bargaining impasses and maximize the promotion of negotiated collective bargaining agreements, but only utilizing the binding arbitration process itself as the last resort. Its frequent use by CCSD and its teacher’s union in recent years shows that reforms are needed to better promote its primary intended goal. With minor reforms, Nevada can deter more bargaining impasses and promote negotiated settlements by; (1) opening the negotiation process after final offers have been submitted, (2) adopting a tri-partite panel of arbitrators, and (3) getting rid of the requirement to


\textsuperscript{170} Id.

\textsuperscript{171} Id. at 343 (citing County Sanitation of Los Angeles v. SEIU, 38 Cal. 3d 564, 586) (articulating a standard for when public employee strikes should not be permitted).

\textsuperscript{172} See Clark County School District, supra note 1.
produce a written report for an arbitration panel’s decision. In the alternative, Nevada should also consider replacing the interest arbitration process for teachers with the right to strike.

But there is currently a lack of focus on reforming the interest arbitration process in Nevada. The 2016 elections saw Democrats re-take control of both houses of Nevada’s legislature. The focus of labor reform forces since has been to scale back collective bargaining limits that the previously Republican-controlled legislature enacted.173 Interest arbitration reform seems to be a low priority on this labor reform list. But with CCSD and its teacher’s union increasingly and frequently making headlines for bargaining disputes, it may be sooner rather than later that the legislature turns its focus on Nevada’s outdated interest arbitration process. In the immortal words of Bruce Springsteen, “one day we’ll look back at this and it will all seem funny.”

173 See generally Garcia, supra note 5 (public employees include teachers, firefighters, and police officers).