

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

THE ORANGE COUNTY CLASSROOM
TEACHERS ASSOCIATION, INC.,

Charging Party,

Case No. CA-2018-050

v.

SCHOOL DISTRICT OF ORANGE
COUNTY, FLORIDA,

Respondent.

_____ /

HEARING OFFICER'S SUPPLEMENTAL RECOMMENDED ORDER

HANSON, Hearing Officer.

On April 4, 2021, the Commission remanded this case to me with directions to make supplemental findings of fact, analysis, and recommendations in accordance with its order.

ISSUES ON REMAND

1. Whether the Orange County Classroom Teachers Association, Inc.'s (OCCTA) unfair labor practice charges were timely filed?
2. Whether the School District refused to bargain collectively in violation of section 447.501(1)(a) and (c), Florida Statutes?¹

¹All statutory citations are to the 2020 edition of the Florida Statutes.

3. Whether the School District of Orange County, Florida (School District) unilaterally imposed evaluation procedures in violation of section 447.501(1)(a) and (c), Florida Statutes?

4. Whether either party is entitled to an award of attorney's fees and costs?

SUPPLEMENTAL FINDINGS OF FACT²

1. From as early as 1999, the parties' Collaborative Bargaining Leadership Team (CBLT) bargained over all aspects of teacher evaluations. The classroom and non-classroom teachers' pay were determined based upon performance. Representatives from OCCTA and the School District met to negotiate and establish the evaluations, the criteria to include in the assessments, and the score ranges to rate the teachers. (T. Day 1, 94-96.)

2. The parties had a sub-committee on assessments which regularly met during that period of time and created the system under which teachers were evaluated. (T. Day 1, 94-96.)

3. During the period of 1999 through 2006, evaluations in the School District affected teacher pay. The evaluations also impacted workload because the criteria that

²References to the record are made to facilitate review by the Commission, but are not necessarily the only record support for any finding of fact. OCCTA's exhibits will be designated "CP" with the appropriate exhibit number(s). The School District's exhibits will be designated "R" with the appropriate exhibit number(s). The hearing was held January 15 (Day 1), October 27 (Day 2), and October 28 (Day 3), 2020. References to the transcript are designated as "T" followed by the "Day" of the hearing and the appropriate page number(s).

the School District used to evaluate teachers directly increased the amount of work required of the teacher. (T. Day 1, 94-97.)

4. The Florida Department of Education adopted the Florida Educator Accomplished Practices (FEAP). See Fla. Admin. Code R. 6A-5.065. The rule states that the purpose of FEAP is to establish Florida's core standards for effective educators. The FEAPs have three "foundational principles," which are to be applied through six "Educator Accomplished Practices" that form the foundation of the state's teacher preparation programs, educator certification requirements, and school district instructional personnel systems. The FEAPs are general principles. They do not establish exactly how a teacher must follow an accomplished practice or how a teacher must demonstrate to an administrator that a FEAP was being followed. School districts are not required to incorporate the FEAPs verbatim in their evaluation procedures but only to embed them in the systems. See § 1012.34(3)(a)(2), Fla. Stat. ("For instructional personnel ... [e]valuation criteria used when annually observing classroom teachers ... must include *indicators based* upon each of the Florida Educator Accomplished Practices adopted by the State Board of Education." (emphasis added)).

5. In 2011, the Florida Legislature enacted a law (Senate Bill 736) that mandated teacher evaluations be tied to performance pay. After the law was enacted, the parties changed salary schedules and how teachers were evaluated. (T. Day 1, 20-21.) Private vendors offer a variety of teacher evaluation systems. The CBLT decided to utilize what is known as the "Marzano Model" to evaluate teachers. Before deciding upon the Marzano Model, the parties bargained over which system to use. They

agreed to use Marzano over two competing systems, Copeland and Danielson, which are used in other Florida counties.³ (T. Day 1, 56, 59.)

6. The Marzano Model is organized by using domains, elements, protocols, and scales.

7. There are four domains, which address: classroom strategies and behaviors; lesson planning and preparation; reflecting on teaching; and collegiality and professionalism. (T. Day 1, 127-28.) Teachers are evaluated based on the different elements within each domain. (T. Day 1, 125.) Teachers are scored in the first domain through informal or coaching evaluations. They are scored on the second, third, and fourth domains through a formal evaluation. (T. Day 1, 128.)

8. A domain is a body of knowledge defined by research that represents a particular aspect of teaching. Domains reflect the core responsibilities of teachers and are how teachers organize an evaluation model.⁴ (CP. Ex. 4; T. Day 2, 326.)

9. Domains contain elements, which are also known as instructional strategies. Elements are research-based best practices that teachers can employ to cause a desired effect or an outcome that students can demonstrate. (CP. Ex. 4; T. Day 2, 326-27.)

10. Every element has protocols, which are also called criteria. The protocol provides a focus statement, which includes the teacher actions and the desired student

³I find James Demchak a credible witness. He responded to questions from both parties in a straightforward, candid manner.

⁴I find Stephanie Wyka credible for this portion of her testimony.

outcomes. The protocols show the relationship between teacher actions and the outcome on students. (CP. Ex. 4; T. Day 2, 327-28.)

11. Protocols include a developmental scale, which describes a progression through levels of proficiency with the use of the strategy. Protocols also include example criteria, which are example “evidences” a teacher or student may demonstrate to show use of the instructional strategy. (CP. Ex. 4; T. Day 2, 327-28.)

12. On May 17, 2011, the members of the CBLT signed a “Letter of Support” indicating that they had agreed on a “New Evaluation Procedure for the Race to the Top Grant and The ‘Student Success Act’ (SB 736) signed into law on March 24, 2011.” The Letter of Support stated that “[t]he CBLT agrees to the concept and framework of the teacher evaluation model outlined in the proposal being submitted to the Florida Department of Education (FLDOE) [the Marzano Model]. The CBLT understands that it will *move forward with bargaining specific elements of the evaluation model* upon acceptance of the proposal by FLDOE.” (CP. Ex. 32, emphasis added.)

13. On June 1, 2011, the School District submitted its application for Race to the Top funds, which stated that the School District had selected the Marzano Model. The application also stated, in part:

A committee of stakeholders met throughout the 2010-11 school year to collaborate on a teacher evaluation design that will meet the requirements of both Race to the Top and Florida Statute 1012.34.

[...]

In November, 2010 a core group of 30 stakeholders: teachers, principals, Classroom Teachers Association representatives, and district personnel met to begin the process of redeveloping the teacher assessment tools and processes for Orange County Public Schools. The team researched successful models from across the

nation and spent many hours discussing the promise and concerns of each model. *In February the team began to develop their own evaluation instrument based upon best practices, and continued in that vein* until the State of Florida introduced the Marzano Evaluation.

[...]

Both the school district and the Classroom Teacher Association agree collective bargaining will be required regarding specific elements of the process, but there is agreement to move forward in good faith.

(CP. Ex. 33, emphasis added.)

14. The parties bargained over how much of the Marzano framework to implement. They agreed to implement only a few of the Marzano elements for the first year and then bargained over which ones to use. (T. Day 1, 58.) The parties bargained over how many “eggs in the basket” a teacher needed to result in an evaluated rating of effective or highly effective. Also, although the parties did not alter the definitions in the Marzano framework, they bargained over how to total the ratings to arrive at an overall evaluation.⁵ (T. Day 1, 62-64.)

15. The parties reached a tentative agreement (TA) on evaluations for the 2011-2012 school year. The TA stated that teachers would be placed in one of four categories for purposes of evaluation, depending mostly on their level of experience. The TA described the provisions and procedures for the informal and formal observations upon which the teachers would be evaluated and how teachers would be scored. The TA

⁵This supplemental finding of fact replaces finding of fact 9 in my initial recommended order.

charged the Evaluation Committee of the CBLT with recommending changes to the Evaluation Manual to the CBLT. (CP. Exs. 35, 40.)

16. The CBLT bargained and signed off on an Instructional Personnel Evaluation System Procedures Manual for 2011-2012. The document was both filed with the state and used as a procedures manual for teachers. (CP. Ex. 37) At page 4, the manual states “In accordance with [...] the Race to the Top Memorandum of Understanding, *Orange County Public Schools and Orange County Classroom Teachers Association have modified the state adopted model to create a teacher evaluation system* that combines student growth measures with the evaluation of the delivery of core effective practices.” At page 5, the manual states “The Instructional Personnel Evaluation System was cooperatively developed starting in November 2010 by appointees from the Orange County Classroom Teachers Association, Inc., and the School Board of Orange County, Florida.” (CP. Ex. 37, emphasis added.)

17. At page 15, the manual described the evaluation process for each category of teacher. On page 13, the manual established “Proficiency Scales,” which determined whether a teacher was rated highly effective, effective, developing or unsatisfactory. Appendix C, “Observation Forms,” established four domains by which teachers were to be evaluated. The parties spent a great many hours discussing the manual, going over the manual multiple times. (T. Day 1, 24-25.)

18. The parties bargained over the criteria, components, and the impacts. The domains, elements, protocols, and scales are crucial, intertwined criteria and components of the evaluation. They cannot be separated from the evaluation and considered

independently, due to their fundamental and intertwined positions in the evaluations. (T. Day 1, 28-29; T. Day 2, 58, 332-34.)

19. The scales, which are part of the protocols, determine the score that a teacher receives, which determines the teacher's rating and ultimately the teacher's salary. The elements affect the workload because teachers engage in substantial preparation to prove to their observers that they are meeting the required elements. The protocols for each element inform the teacher about the expectations for a teacher's lessons. A requirement that a teacher provide evidence or data about the teacher's lesson impacts the teacher's workload. The more detail that a protocol requires, the more the teacher's workload will increase because the teacher must modify his or her individual lesson to provide what the protocol requires. (T. Day 2, 57-58, 332-34.)

20. Evaluations can affect the workload of even those teachers who receive ratings of effective or highly effective. Requirements that the teacher provide evidence to demonstrate to an administrator that the teacher is meeting a protocol increases the workload. (T. Day 2, 333-44)

21. The parties bargained an Instructional Personnel Evaluation System Procedures Manual for 2012-2013. Appendix B contains a Learning Map with four domains, with elements under each domain. (CP. Ex. 44.)

22. The parties continued to bargain over evaluations between 2012 and 2017. Due to the parties' agreement to use the Marzano Model and agreement to a procedures manual, they did not bargain for a few years over the model and its elements, protocols, and scales. (T. Day 2, 341-42, 377.) However, the parties addressed other evaluation issues. On September 7, 2012, the parties discussed the value-added model required by

the state, what percentage of a teacher's evaluation would be based upon student test data, and whether there was a waiver for the School District. (CP. Ex. 42.) In December 2012, they bargained over changes to Article X, regarding teacher evaluations, in the collective bargaining agreement. (CP. Ex. 43.) On February 8, 2013, they discussed the parameters of teacher appeals of evaluations. (CP. Ex. 45, p. 4.) On May 23, 2013, the parties agreed to further changes to Article X regarding teacher evaluations.

(CP. Ex. 46.)

23. In September 2013, the School District declared an impasse. The parties went to impasse over teacher evaluations and several other issues. OCCTA had made proposals on various matters regarding teacher evaluations. The impasse went to a Special Magistrate, who addressed the issues. (CP. Ex. 48; CP. Ex. 49, pp. 25-27.)

24. On September 28, 2016, the parties signed an agreement concerning Article X and the evaluations manual. The changes chiefly addressed the procedures for observing teachers and how ratings should be scored. (CP. Ex. 51.)

25. On October 17, 2016, the CBLT executed "Memorandum of Understanding #5 regarding "Student Learning Growth and Ratings Ranges to Calculate Final Summative Evaluation Score." The memorandum of understanding specified how ratings for teachers of highly effective, effective, needs improvement, and unsatisfactory would be demonstrated. (CP. Ex. 52.)

26. On March 15, 2017, the CBLT reached a TA on three proposals that placed an upper limit on duty days for certain teachers, the number of informal and formal observations for evaluations for each category of teacher, and the aggregation of scores to produce an overall student learning growth score of effective. (CP. Ex. 56.)

27. On May 3, 2017, Stephanie Wyka, Wendy Doromal, and School District Superintendent Barbara Jenkins attended a meeting of the Florida Association of District School Superintendents in Kissimmee, Florida. A presentation was given addressing part of the Marzano Focused Evaluation System, which is different from the Marzano Model that the School District selected in 2011. The Focused Marzano Model reduced the number of elements from the original Marzano Model and was intended to simplify the system and reduce work for teachers and administrators. (T. Day 1, 129-31; T. Day 2, 130; CP. Exs. 18-19.)

28. After the workshop, OCCTA and the School District had several meetings in which they discussed all aspects of the Marzano system, with the parties considering using the Focused Marzano Model, another school district's system, or a hybrid. At the meetings, the parties discussed what worked and did not work, and what needed to be changed because it created problems such as increasing teachers' workloads and creating unnecessary work for teachers. (T. Day 1, 131-35.)

29. On May 12, 2017, the CBLT met and signed a TA proposing a change to Article X, Evaluation, which addressed evaluation due dates. (CP. Ex. 1.)

30. On June 21, 2017, the School District and OCCTA engaged in a collective bargaining session. The minutes for the session provide:

This spring, Wendy Doromal, Stephanie Wyka, [and] Krista Russell attended a Florida Association of District School Superintendents meeting with Dr. Jenkins. LSI presented information about a new focused evaluation tool. In a subsequent follow up meeting with Dr. Jenkins, *we all determined that we would like to build a bridge for 2017-2018 towards a more condensed evaluation tool.*

(R. Ex. 5; CP. Ex. 3, emphasis added.)

31. On June 21, 2017, the parties signed a TA that had a learning map. The learning map consisted of the four domains and the elements within those domains. (R. Ex. 6; CP. Ex. 30, pp. 29-31, which contains the learning map for all four domains; T. Day 2, 343.) The lower left-hand corner of the TA states: “This condensed Learning Map will be used during the 2017-2018 school year, as [the School District] begins to transition to the Marzano Focused Teacher Evaluation Model. This streamlined, targeted resource serves as a way to bridge the 2014 Marzano Teacher Evaluation Model to the Focused Teacher Evaluation Model.” (R. Ex. 6.)

32. The TA stated that the learning map was a bridge and the parties would continue to bargain over the next phase. (R. Ex. 6; T. Day 1, 145-46, 199-200.)

33. On June 27, 2017, the CBLT met to discuss moving from a “conjunctive scoring model” to a “rounded average scoring model.” Also, according to the minutes:

CTA and the District have agreed to condense the Evaluation Learning Map for the 2017-2018 school year *in anticipation of restructuring the Learning Map for future years.*

The proposal discussed was to reduce the learning map from 60 elements to 45.[...] This proposal was made TA #17b. This can be seen on the Labor Relation website under Part 2.” (emphasis supplied)

(CP. Ex. 4, emphasis added.)

34. After the TA, the evaluation committee met several times to bargain over the evaluation system and streamlining elements. (T. Day 2, 47-48.) At one meeting of the evaluation committee, it discussed eliminating several elements and condensing elements. (T. Day 2, 343-44, 347, 366-67, 389-92; CP. Ex. 2.)

35. On July 12, 2017, the evaluation subcommittee held a meeting to discuss protocols, focus statements, desired effects, teacher evidence, and reduction of elements. (T. Day 1, 146-48; T. Day 2, 338-39; CP. Ex. 5.)

36. On July 18, 2017, the CBLT met for an “Evaluation Article Language Clean Up.” They discussed revising Article X concerning observations dates, additional observations, the sequence for scoring observations, referring in the contract to elements by name instead of number, and identifying the party to provide orientation for Deliberate Practice. They also agreed to incorporate in the Evaluation Manual the changes to the teachers’ learning map and contract language. (CP. Ex. 7.)

37. The CBLT met on September 28, 2017, to discuss measuring the student learning growth component of evaluations. (CP. Ex. 8.)

38. On November 17, 2017, the CBLT met. The minutes state that the “Evaluation Committee has agreed to work towards streamlining the Evaluation system. Our first meeting on this topic will be January 17, an all day meeting at CTA.” (CP. Ex. 9.)

39. On January 17, 2018, the evaluation committee met to discuss a Student Learning Growth proposal to amend Article X, Section F, and also discuss “Making Meaning of Evaluation – Collaborative Discussion Protocol.” (CP. Ex. 10.) The members reviewed a chart of the “observation process,” “streamlining elements,” and “deliberate practice” to discuss what was working and what was not working and possible solutions. (CP. Exs. 10, 12.) The discussion included the streamlining of elements and developmental scales. (T. Day 2, 350, 370, 382-83.)

40. The CBLT minutes for the January 17, 2018, meeting state “[t]he committee reported that they had good conversations on what is working or not working with the process. More work is needed before there is a recommendation from the committee to the bargaining teams.” The minutes also state OCCTA “relayed that their bargaining team wants to be involved in every aspect of evaluation system decisions.” (CP. Ex. 10.)

41. The School District files its “Instructional Evaluation System” with the Florida Department of Education. The document filed in 2015-2016 noted that “[t]he Teacher Evaluation Committee from Orange County Public Schools recommended the use of the Marzano model with minor adaptation and a phased in implementation that resulted in full use of the framework to date.” (CP. Ex. 28, p. 8.) It also stated that “both the school district and the Classroom Teacher Association agreed that collective bargaining was required for decision-making around the implementation of the model, but reached consensus for using it.” (CP. Ex. 28, p. 7.) The 2017-2018 Instructional Personnel Evaluation System Procedures Manual states: “The Instructional Personnel Evaluation System is cooperatively developed by the Orange County Classroom Teachers Association, Inc. and the School Board of Orange County.” (R. Ex. 3, p. 3.) The Instructional Evaluation System for 2017-2018 states:

For the 2017-2018 school year, the district collaborated with the Orange County Classroom Teachers Association to streamline the evaluation process. This input was used to support the development of a streamlined framework that reduced the total number of elements from sixty to forty-five.[...] The district and Orange County Classroom Teachers Association collaborated to implement an updated scoring model, focused on average scores.

(CP. Ex. 75, p. 7.)

42. As of May 2018, OCCTA and the School District had not met for several months. OCCTA wanted to resume further discussion on evaluations. (T. Day 1, 162; T. Day 2, 49; 387-88.) At a meeting on May 18, OCCTA proposed an evaluation system based upon the Polk County system, which OCCTA believed was in conformance with the FEAPs. OCCTA's proposal kept some of the structure of Marzano and also used Florida Educator Accomplished Practices guidelines and best practice indicators for protocols. (CP. Ex. 13.) The School District's minutes indicate the School District told OCCTA that it could not negotiate the model but only the impacts of the model. (R. Ex. 29.)

43. On May 23, 2018, OCCTA and the School District had an evaluation committee meeting during which the School District presented more information about its new instructional framework for the 2018-2019 school year. (CP. Ex. 16.) The School District was informing OCCTA of the new system. OCCTA asked who created the system. The School District provided OCCTA with a list of names and stated it had a management right to impose the system, which would take effect for the upcoming school year. OCCTA disagreed with the School District's claim that it had a management right to implement whatever system it chose.⁶ (CP. Ex. 16; T. Day 1, 164-65; T. Day 2, 50, 114-15, 180, 244-45.)

⁶I find Wendy Doromal and Maribel Rigsby credible witnesses. They responded to questions from both parties in a straightforward, candid manner. I find Stephanie Wyka credible for this portion of her testimony.

44. At the May 23, 2018, meeting, OCCTA noted that the School District's document (CP. Ex. 16) differed from the Focused Marzano system.⁷ (CP. Ex. 17.) The School District's document contained additional elements called "Planning for the Achievement of All Students Using Data" and "Applying Literacy and Communication Strategies." (T. Day 1, 165.)

45. On May 24, 2018, the School District sent an Orange County Public Schools "News You Can Use," to teachers titled "New Teacher Evaluation System Coming in 2018-2019." The article stated:

"The district has developed a new and condensed teacher evaluation model for 2018-2019, as allowed by state statute, which further reduces the number of elements in the evaluation from 45 to 24 of the most important elements. This simpler model was developed after discussions with the Classroom Teachers Association (CTA) and from other feedback. Such dialogue is always appreciated."

(CP. Ex. 14.)

46. During this period, OCCTA and the School District had a dispute over the School District's implementation of an initiative called "DPLC" (District Professional Learning Communities). DPLC was a method by which the School District sought to instruct students in literacy strategies and close reading techniques. On March 16, 2018, the Union sent the School District a cease and desist letter complaining that the implementation of DPLC added to teacher workload and required teachers to work beyond the 7.5 hour duty day established by the collective bargaining agreement. On

⁷Because the School District's May 23, 2018, evaluation plan is different from the Focused Marzano Model, I will refer to the School District's plan as the "May 23, 2018" evaluation plan or evaluation system.

May 9, 2018, the Union filed a grievance over DPLC. On July 30, 2018, the parties entered into a settlement agreement. On November 18, 2018, OCCTA filed an unfair labor practice charge contending that the School District unlawfully repudiated the settlement agreement. The Commission issued a final order sustaining OCCTA's charge, which was affirmed on appeal.⁸ See *Orange County Classroom Teachers Association, Inc. v. School District of Orange County, Florida*, 46 FPER ¶ 58 (2019). (CP. Ex. 61.)

47. The School District's proposal at the May 23, 2018, meeting contained an element that was not in the Marzano Models, "Applying Literacy and Communication Strategies," which OCCTA concluded was a means to compel teachers to participate in a DPLC initiative that was significantly increasing workload. School administrators were requiring teachers to show they had attended DPLC meetings. When the teachers were observed, administrators required them to show that they were employing elements of DPLC strategies, which included making "anchor charts" and annotating texts. These observations impacted the teacher evaluations. (T. Day 1, 169-74; CP. Ex. 79.)

48. The School District's May 23, 2018, proposal with the new element of "Applying Literacy and Communication Strategies" could continue the workload problems created by the DPLC initiative by unilaterally moving them into the School District's May 23 evaluation plan. For their evaluations, teachers would have to spend time demonstrating to administrators that they complied with the element. (T. Day 2, 52) In OCCTA's News and Updates, dated May 29, 2018, OCCTA told its members that "the

⁸Pursuant to OCCTA's request, I took administrative notice of the Commission's decisions in *Orange County Classroom Teachers Association, Inc., v. School District of Orange County, Florida*, 46 FPER ¶ 58 (2019), and *Orange County Classroom Teachers Association, Inc. v. School District of Orange County, Florida*, 43 FPER ¶ 323 (2017).

District added another element, 'Applying Literacy and Communication Strategies,' which includes close reading techniques and other strategies that are promoted by the district in their DPLCs." (R. Ex. 31.)

49. The School District's proposal at the May 23, 2018, meeting contained an element that was not in the Marzano Models, which was "Planning for the Achievement of All Students Using Data." (T. Day 1, 176; T. Day 2, 51) In OCCTA's News and Updates, dated May 29, 2018, it stated that "[a]lmost every element now has a data connection. This will surely put even more demands on teachers who are already overwhelmed with the burdensome workload and do not have enough planning time to complete mandated tasks within the 7.5 hour workday." (R. Ex. 31.)

50. On May 25, 2018, OCCTA sent a demand to impact bargain to the School District noting that at the May 23 meeting, the School District handed the OCCTA committee members an evaluation model that the School District intended to impose and that the School District stated it would not bargain the May 23, 2018, evaluation model, framework, and scales. In the demand to impact bargain letter, OCCTA complained about the School District making unilateral changes regarding developmental scales, planning protocols, professional responsibilities, and conditions of learning. OCCTA stated that the School District's changes would have an immediate and substantial impact on pay, workload, and training. (CP. Ex. 24.)

51. In the demand to impact bargain letter, OCCTA stated that the School District's evaluation model added an element, "Planning for the Achievement of All Students Using Data," which requires teachers to devote many more hours to provide evidence of analyzing and using data to drive instructional decisions including data

collection, data comparison and data documentation in planning lessons and unit lessons. (CP. Ex. 24.)

52. In the letter, OCCTA stated that under the new element “Using Formative Assessments to Track Progress,” teachers would be tasked with providing evidences for the creation of formative and summative assessments, analyzing and using continuous data. The letter also stated that the School District added another new element, “Applying Literacy and Communication Strategies,” that would require more time in planning lessons and assessments, and in creating student activities to implement this strategy. (CP. Ex. 24.)

53. In the letter, OCCTA stated that the new system required teachers “to provide evidence of implementing lessons, unit plans, and assessments aligned to grade level standards using learning targets embedded in a performance scale.” (CP. Ex. 24.)

54. OCCTA stated in the letter that the new element “Maintaining Expertise in Content and Pedagogy” required additional work in providing “reflective evidence of the implementation of developed expertise in content and classroom instructional strategies.” (CP. Ex. 24.)

55. In the letter, OCCTA stated that the new procedures were not well tailored to evaluate non-classroom teachers such as social workers, psychologists, and speech language pathologists, yet would affect whether these bargaining unit members would be rated effective or highly effective. (CP. Ex. 24.)

56. In the letter, OCCTA objected to initiating the system in the fall without adequate time to train teachers, which could result in lower evaluations, affecting their pay under the School District’s merit pay system. (CP. Ex. 24.)

57. The School District did not respond to OCCTA's demand to impact bargain. The School District did not contact OCCTA and ask for its viewpoints or input into the evaluation system. Instead, the School District continued to move forward with implementing portions of the evaluation system.⁹ The School District began training principals and observers in the new evaluation system. In addition, the School District ceased bargaining with OCCTA over evaluation procedures. (T. Day 1, 166, 176, 178-79, 296-98.)

58. On May 29, 2018, OCCTA filed a grievance in which it alleged violations of Article I, Recognition, and Article XXI, Management Rights. At the time the charge was filed, the parties were awaiting arbitration.¹⁰ (CP. Ex. 25.)

59. During this period, the School District sent a "News You Can Use" to the teachers, titled "Important Update for Teachers." In the article, the School District acknowledges that the School District and OCCTA met nine times to "discuss the evaluation process in the Evaluation Committee: 5/16/17; 5/26/17; 7/12/17; 7/18/17; 7/24/17; 1/17/18; 2/21/18; 2/22/18; and 5/23/18. During these meetings, input was gathered from [OCCTA] on all aspects of the evaluation model, including streamlining elements, the evaluation process, and student learning growth calculations." The article

⁹OCCTA sent another demand to impact bargain letter to the School District on January 22, 2020. The School District responded on January 27, 2020, stating that it is open to considering any offers the Union makes, but claimed that the evaluations, protocols, criteria, and scales of the evaluation system are management rights. These events are outside the scope of OCCTA's charge, as they occurred approximately thirteen months after the charge was filed.

¹⁰The parties do not argue that the election of remedies in section 447.401, Florida Statutes, applies. Thus, I will not address this issue further.

further stated that these meetings were not collective bargaining and, pursuant to Florida law, the School District had selected a different evaluation model. (CP. Ex. 22.)

60. On July 24, 2018, the parties ratified a collective bargaining agreement that incorporated a procedures manual that included the learning map from the June 2017 TA. (R. Ex. 2.) OCCTA submitted the contract for ratification because the parties needed to periodically ratify a collective bargaining agreement in order for salary increases to occur. (T. Day 1, 211.) The TA stated that the learning map was a bridge and the parties would continue to bargain over the next phase as the School District “begins to transition” to the Focused Marzano model. (R. Ex. 6; T. Day 1, 145-46, 199-200.)

61. Article II A. 3. of the collective bargaining agreement provides that “Issues may be raised for consideration through an appropriate process at any time during the length of this ratified agreement.” (R. Exs. 1-2.)

62. In the School District’s response to OCCTA’s grievance, the School District wrote: “Therefore establishing what criterion a teacher’s proficiency is measured is a management right. Thus, the School Board was entitled to unilaterally implement the criteria for an ‘outstanding’ rating and it did not commit an unfair labor practice when it did so.” The School District also stated “[f]inally, since the District has committed to not implement the Focused Teacher Evaluation Model in 2018-2019, there is no unilateral change to the Evaluation System. CTA’s grievance is moot.” (CP. Ex. 26.)

63. In the fall of 2018, teacher Maribel Rigsby attended a power point presentation when she became recertified as a trainer. The materials provided at the presentation, which were given to her to use, show that the School District was moving forward

with implementing the Focused Marzano Model in 2019-2020. (T. Day 2, 59; CP. Ex. 77.)

64. An observation result for Wendy Kearns, a teacher, showed her as “Developing” and “Needs Attention” in the area of participating in District and School Initiatives. On the observation, the principal commented that “[!]esson plan reflection is evidence that you are aware of the district’s and school’s initiatives (Marzano instructional framework and close reading) and that you are participating in them in accordance with your talents and availability.” (T. Day 2, 55-56; CP. Ex. 64.)

65. The School District was continuing to implement portions of its May 23, 2018, evaluation plan, such as data production and literacy strategies, that went beyond the June 21, 2017, TA, and significantly increased teacher workload. (T. Day 2, 21-22, 33-36, 52-57, 62-75, 333-39, 352-53.)

66. The School District continued to require teachers to comply with “close reading” and “test-dependent questions,” which are parts of the element called “Applying Literacy and Communication Strategies” from the School District’s May 23, 2018, evaluation plan. (T. Day 2, 337-38; CP. Ex. 83.)

67. Teachers were told to comply with the School District’s May 23, 2018, initiative, such as literacy strategies or close reading, in order to receive a good evaluation. (T. Day 1, 267, 273-75.)

68. As a follow up to a preplanning meeting, Administrator Amanda Ellis sent an email to her teachers about the School District’s guidelines and implementation of the literacy element in Domain 4 of Focused Marzano. (T. Day 2, 53-54; CP. Ex. 14.)

69. Administrators sent teachers emails directing them to complete their Domain 4 observations and how to prepare “evidences” that they had complied with the focus areas of close reading and text dependent questions. (T. Day 2, 54.)

70. The principal of Hunters Creek Elementary directed her faculty to comply with close reading strategies. (T. Day 2, 54-55.)

71. Observations for some teachers pointed out that they were not fully meeting the School District’s initiatives, which were portions of its May 23, 2018, evaluation plan. (T. Day 2, 55-56.) Principal Robert Strenth sent a reminder to teachers that the data requirements were increasing, which was an element in the new system. (T. Day 2, 337.)

72. During this period, the School District compelled teachers to attend data meetings that required them to compile reports, organize data, and produce data.¹¹ Preparing for a data meeting can take several hours per week. The School District has increasingly demanded that teachers produce evidence and data at regular meetings. After the meetings, teachers have the added work of incorporating various requirements into their lessons and curriculum. The added responsibilities place pressure on daily planning time, which forces teachers to take an increasing amount of work home. (T. Day 1, 252-55, 265, 274-75, 278-81, 304-09.)

73. For several years, the School District has required teachers to provide data. However, recently the data components have greatly increased teacher workload. In

¹¹I find Andrea Bowles, Albert Davies, Matthew Hazel, Karen Salter, and Michelle Vanderley credible witnesses. They responded to questions in a straightforward, candid manner.

some situations, the requirements for data collection have quadrupled. (T. Day 1, 267, 307-08.)

74. Attending data meetings is an element of Domain 4, which considers how well the teacher works with other people and supports others. If teachers did not attend data meetings and meet these requirements, their evaluations would be affected. Data collection also impacted other parts of the evaluations. Although the data requirements have not prevented teachers from being rated as effective or highly effective on their evaluations, they must work much harder to receive those ratings. (T. Day 1, 255-58, 273, 280, 308-09.)

75. There are numerous observations and evaluations for 2018 and 2019 that show the School District did not rely on portions of its May 23, 2018, evaluation plan.

76. On December 13, 2018, Leigh Ann Blackmore, Director of Labor Relations for the School District, wrote Doromal to inform her that the School District would not implement the Marzano Focused Teacher Evaluation Model “at this time.” Blackmore asked Doromal to withdraw OCCTA’s unfair labor practice charge. (CP. Ex. 59.)

77. When the School District told OCCTA that it has a management right to impose evaluation systems, the School District repeatedly cited *Gilchrist Employees/United v. School District of Gilchrist County*, 30 FPER ¶ 71 (2004).

SUPPLEMENTAL ANALYSIS

Whether There Was an Effective Demand for Impact Bargaining and a Refusal to Bargain?

I will start with the refusal to bargain charge. OCCTA did not mention the May 18, 2018, meeting in its charge. Also, OCCTA did not amend its charge to include the events

of May 18, 2018. The Commission only has jurisdiction to resolve charges that have been determined to be sufficient pursuant to the statutory sufficiency process or are alleged in a properly filed and granted motion to amend. The Commission does not consider allegations that were not specifically pled in a charge or the subject of a motion to amend, regardless of whether such allegations were litigated or resolved. *Jacksonville Consolidated Lodge 5-30, Fraternal Order of Police v. City of Jacksonville*, 44 FPER ¶ 129 (2017); *Teamsters Local Union 769 v. City of Fort Pierce*, 36 FPER ¶ 72 (2010), *aff'd per curiam*, 51 So. 3d 1158 (Fla. 1st DCA 2011); *LIUNA, Local 101 v. Alachua County*, 22 FPER ¶ 27018 (1995). Thus, any actions by the School District during the May 18, 2018, meeting which could arguably constitute a refusal to bargain are outside the scope of the charge.

In my recommended order, I considered the events of the May 18, 2018, meeting due to the School District's argument that the refusal to bargain charge was untimely. Although I initially recommended that the refusal to bargain charge was untimely, a further examination of case law demonstrates that the timeliness of a refusal to bargain charge is determined under a different standard than a unilateral change charge. In *City of Winter Park v. Laborers' International Union of North America, AFL-CIO, Local Union No. 517*, 409 So. 2d 45 (Fla. 5th DCA 1981), the district court held that each refusal to bargain is a separate unfair labor practice that starts a six-month period. See also *Communications Workers of America, AFL-CIO, CLC; Florida Police Benevolent Association, Inc.; International Association of Firefighters, Local 2157, Gainesville Professional Firefighters, Inc.; and Gator Lodge 67, Inc., Fraternal Order of Police v. City of Gainesville*, 36 FPER ¶ 56 (2010) ("[T]he Commission has held that the statute of

limitations begins to run anew with each refusal to bargain.”). In light of this standard, I turn to the demand to impact bargain letter that OCCTA sent to the School District on May 25, 2018, which was pled in OCCTA’s unfair labor charge.

Due to the School District’s insistence at the May 23 meeting that it had a management right to unilaterally change the evaluation system, OCCTA President Doromal sent the School District a demand to impact bargain letter on May 25, 2018, to preserve its rights. In the demand letter, OCCTA did not agree with the School District that it had a management right to impose the unilateral change. (CP. Ex. 24; T. Day 1 166, 217-20, 222.) OCCTA alleged that the School District had refused to bargain the new evaluation model, framework, and scales. The School District did not respond to the demand to impact bargain. The School District did not contact OCCTA and ask for its viewpoints or input into the evaluation system. Rather than bargain or respond directly to OCCTA’s letter, the School District proceeded to move forward with implementing portions of its new evaluation system.

OCCTA sent the demand to impact bargain letter to the School District within six months of filing the charge on November 20, 2018. See § 447.503(6)(b), Fla. Stat. The School District failed to respond to the demand to impact bargain. I conclude that the refusal to bargain charge was timely filed and will now examine that charge.

To establish a prima facie violation of an employer’s duty to engage in impact bargaining, OCCTA is required not only to allege that it requested and was refused an opportunity to impact bargain, but also that it identified negotiable effects upon terms and conditions of employment resulting from implementation of the employer’s underlying

decision. See *Laborers' International Union of North America, Local 678, AFL-CIO v. Greater Orlando Aviation Authority*, 28 FPER ¶ 33256 (2002); see also *School District of Indian River County v. Florida Public Employees Relations Commission*, 64 So. 3d 723, 728 (Fla. 1st DCA 2011); *Hillsborough Classroom Teachers Association v. School Board of Hillsborough County*, 7 FPER ¶ 12411 (1981), *recon. denied*, 8 FPER ¶ 13074 (1982), *aff'd*, 423 So. 2d 969 (Fla. 1st DCA 1983). In order to establish negotiable impact, an employee organization must show direct and substantial effects upon existing wages, hours, and terms and conditions of employment caused by and foreseeably resulting from the implementation of the change at issue. The burden of showing that a negotiable impact has occurred is on the charging party. See *Jacksonville Supervisors Association, Inc. v. City of Jacksonville*, 25 FPER ¶ 30289 (1999) (GCSD).

Here, in the demand to impact bargain letter, OCCTA stated that the School District's unilateral changes regarding developmental scales, planning protocols, professional responsibilities, and conditions of learning would have an immediate and substantial impact on pay, workload, and training. In the letter, OCCTA identified elements of the evaluation model ("Planning for the Achievement of All Students Using Data" and "Using Formative Assessments to Track Progress") that would require teachers to devote many more hours to provide evidence of analyzing and using data to drive instructional decisions including data collection, data comparison, and data documentation in planning lessons and unit lessons, as well as providing evidences for the creation of formative and summative assessments. OCCTA's letter also stated that the School District added another new element, "Applying Literacy and Communication Strategies," that would require more time to plan lessons and assessments, and to create

student activities to implement this strategy. OCCTA stated that the new evaluation system would substantially increase the hours teachers would have to work each week to create and analyze the new data, and these added requirements could directly impact their pay because the results of the evaluations determined their placement among the four rating levels and their salaries. Further, OCCTA noted that the new procedures were not well tailored to evaluate non-classroom teachers such as social workers, psychologists, and speech language pathologists, yet would affect whether these bargaining unit members would be rated effective or highly effective. In addition, OCCTA objected to initiating the system in the upcoming fall without adequate time to train teachers, which could result in lower evaluations, affecting their pay under the School District's merit pay system. Thus, OCCTA presented areas of concern raised by the new evaluation system, identified direct and substantial impacts on the bargaining unit members that would affect existing workload and pay, and suggested negotiable options for the parties to discuss (for example, needing more time to train teachers about the new evaluation system). When a public employer exercises an allegedly management right that has substantial effects upon the wages, hours, or terms and conditions of employment, it must engage in impact bargaining if the certified bargaining agent so requests. *See School District of Indian River County v. Florida Public Employees Relations Commission*, 64 So. 3d 723, 728 (Fla. 1st DCA 2011); *Jacksonville Supervisors Association v. City of Jacksonville*, 25 FPER ¶ 30289, 579 (1999) (GCSD). I conclude that OCCTA has shown direct and substantial effects upon existing wages, hours, and terms and conditions of employment caused by and foreseeably resulting from implementation of the change at issue.

OCCTA's May 25, 2018, letter was a proper demand to impact bargain. The School District failed to respond. In this proceeding, the School District argues that it did not proceed to implement its evaluation plan. However, the evidence shows that the School District began training principals and observers in the new evaluation system. In the fall of 2018, Rigsby was provided with training materials showing that the School District was moving forward with implementing the Focused Marzano in 2019-2020. Also, the School District was continuing to implement portions of its May 23, 2018, evaluation plan, such as data production and literacy strategies, that went beyond the June 21, 2017, TA and significantly increased teacher workload. The School District continued to require teachers to comply with "close reading" and "test-dependent questions," which are parts of the element called "Applying Literacy and Communication Strategies" from the School District's May 23, 2018, evaluation plan. Teachers were told to comply with the School District's initiative, such as close reading and the literacy element in Domain 4 of Focused Marzano, in order to receive a positive evaluation. Observations for some teachers pointed out that they were not fully meeting the School District's initiatives that were portions of its May 23, 2018, evaluation system. During this period, the School District compelled teachers to attend data meetings that required them to compile reports, organize data, and produce data. Although the School District had required teachers to provide data for the past few years, the School District increased the demand on teachers to produce evidence and data at regular meetings, which corresponded with the School District's May 23, 2018, evaluation plan. In addition, the School District ceased bargaining with OCCTA over evaluation procedures.

The School District introduced numerous observations and evaluations for 2018 and 2019 into evidence in an attempt to show that it did not proceed to implement its plan. The School District argues that it did not rely on portions of its May 23, 2018, evaluation plan when evaluating those teachers. However, these evaluations are not adequate to outweigh the evidence presented by OCCTA that the School District refused to bargain and that it moved forward with implementing portions of the May 23, 2018, evaluation plan. By the time the School District was providing bargaining unit members with observations and evaluations, OCCTA had filed a grievance and this unfair labor charge. The School District was well-aware that any use of its May 23, 2018, evaluation plan in observations or evaluations would be detrimental to its position. More significantly, the evidence provided by OCCTA, including the testimonies that I have found credible, show that the School District continued to implement its evaluation system after the May 25, 2018, demand letter. It is important to note that many teachers performed the work required by the School District's May 23, 2018, evaluation system in their efforts to receive positive evaluations. At the time, they were told that they had to comply with the School District's May 23, 2018, evaluation plan. I acknowledge that these particular subsequent evaluations do not refer to the requirements of the May 23, 2018, evaluation plan. However, the absence of such references does not demonstrate that teachers were nonetheless directed, several months earlier, to comply with the plan. Thus, the May 23, 2018, evaluation plan impacted the terms and conditions of employment, even if it was not mentioned in the final evaluations.

Based on the above, I conclude that by failing to respond to the demand to impact bargain and continuing to move ahead with implementing portions of the May 23, 2018,

evaluation plan, the School District violated section 447.501(1)(c) by its refusal to bargain.

Management Right versus Mandatory Subject of Bargaining

I now turn to OCCTA's charge that the School District unlawfully imposed a unilateral change. As a preliminary issue, I conclude that this charge is timely. On May 18, 2018, the School District rejected OCCTA's proposal to amend the evaluation procedures utilized by the School District. On May 23, 2018, the School District began presenting information to OCCTA about the new evaluation system for the 2018-2019 school year. At the meeting, OCCTA strongly disagreed with the School District's claim that it had a management right to implement whatever system it chose. In light of the School District's position, which was an abrupt change after twenty years of collective bargaining over teacher evaluations, OCCTA sent the demand to impact bargain letter on May 25. The School District did not reply to the letter. However, after sending the letter, OCCTA began hearing from its members that the School District was proceeding to implement portions of the May 23, 2018, teacher evaluation system, even though the School District claimed it was not implementing the system. Thus, it is difficult to state a definitive date when the School District allegedly began implementing the May 23, 2018, evaluation system, but the evidence demonstrates that the School District began the implementation after the demand letter was sent. OCCTA sent the demand to impact bargain letter to the School District on May 25, 2018, which is within six months of filing the charge on November 20, 2018. See § 447.503(6)(b), Fla. Stat. Thus, I conclude that the unilateral change charge was timely filed and will now consider the charge.

The School District argues that it did not proceed to implement its May 23, 2018, evaluation plan and, therefore, it did not impose a unilateral change. As already discussed, the evidence demonstrates that the School District proceeded to implement the May 23, 2018, evaluation system. The School District also argues that even if it did impose the May 23, 2018, evaluation plan, it had a management right to impose the plan. See § 447.209, Fla. Stat. If the School District had a management right to impose the change, then there is not an unlawful unilateral change. See *Hillsborough Classroom Teachers Association v. School Board of Hillsborough County*, 7 FPER ¶ 12411 (1981), *recon. denied*, 8 FPER ¶ 13074 (1982), *aff'd*, 423 So. 2d 969, 970 (Fla. 1st DCA 1982). However, if the evaluations are a mandatory subject of bargaining, there could be a unilateral change violation. The instant case presents an issue of first impression for the Commission, which is whether teacher evaluation systems are a management right or a mandatory subject of bargaining. I start this examination by considering the parties' extensive bargaining history regarding teacher evaluations.

The School District and OCCTA have negotiated over teacher evaluations since 1999 until 2018. From as early as 1999, the parties' CBLT bargained over all aspects of teacher evaluations. The classroom and non-classroom teachers' pay were determined based upon performance. Representatives from OCCTA and the School District met to negotiate and establish the teacher evaluations, the criteria to include in the assessments, and the score ranges to rate the teachers.

During the period of 1999 through 2006, evaluations in the School District affected teacher pay. The evaluations also impacted workload because the criteria that the

School District used to evaluate teachers directly affected the amount of work required of the teachers.

In 2011, after the Florida Legislature enacted Senate Bill 736 that mandated teacher evaluations be tied to performance pay, the parties changed salary schedules and how teachers were evaluated. The CBLT decided to utilize what is known as the Marzano Model to evaluate teachers. Before deciding upon the Marzano Model, the parties bargained over which system to use. They agreed to use this Marzano Model over two competing systems, Copeland and Danielson.

In May 2011, the CBLT signed a "Letter of Support" indicating that they had agreed on a "New Evaluation Procedure for the Race to the Top Grant and The 'Student Success Act' (SB 736) signed into law on March 24, 2011." The Letter of Support stated that "[t]he CBLT understands that it will *move forward with bargaining specific elements of the evaluation model* upon acceptance of the proposal by FLDOE." (CP. Ex. 33, emphasis added.) In June 2011, the School District stated in its application for Race to the Top funds that a team of School District representatives and OCCTA representatives met throughout the 2010-11 school year to collaborate on a teacher evaluation design. "The team researched successful models from across the nation and spent many hours discussing the promise and concerns of each model. *In February the team began to develop their own evaluation instrument based upon best practices, and continued in that vein* until the State of Florida introduced the Marzano Evaluation." (CP. Ex. 33, emphasis added.) In the application, the School District also stated "*[b]oth the school district and the Classroom Teacher Association agree collective bargaining will be required regarding*

specific elements of the process, but there is agreement to move forward in good faith.” (CP. Ex. 33, emphasis added.) The parties bargained over how much of the Marzano Model to implement. They agreed to implement only a few of the Marzano elements for the first year and then bargained over which ones to use.

The CBLT bargained and signed off on an Instructional Personnel Evaluation System Procedures Manual for 2011-2012. The document was both filed with the state and used as a procedures manual for teachers. The manual described the evaluation process for each category of teacher. Also, the manual established Proficiency Scales, which determined whether a teacher was rated highly effective, effective, developing or unsatisfactory. Further, the manual established four domains by which teachers were to be evaluated. The parties spent numerous hours discussing the manual, going over the manual multiple times. The parties bargained over the criteria, components, and impacts. The domains, elements, protocols, and scales are crucial, intertwined criteria and components of the evaluation system.

The parties continued to meet and negotiate over evaluations between 2012 and 2018. In 2018, the School District sent a “News You Can Use” article to the teachers stating that it met nine times with OCCTA to “discuss the evaluation process in the Evaluation Committee: 5/16/17; 5/26/17; 7/12/17; 7/18/17; 7/24/17; 1/17/18; 2/21/18; 2/22/18; and 5/23/18. During these meetings, input was gathered from [OCCTA] on all aspects of the evaluation model, including streamlining elements, the evaluation process, and student learning growth calculations.” These meetings resulted in TAs and agreed-upon changes that were set forth in the Instructional Evaluation Systems filed with the

Florida Department of Education, as well as changes to the Instructional Personnel Evaluation System Procedures Manual.

The fact that the School District continued to bargain with OCCTA over teacher evaluations for the past twenty years has created a reasonable expectation that the evaluations would continue to be a subject of bargaining. Doromal testified that she thought that OCCTA and the School District were bargaining collectively over all aspects of the evaluation system, not that OCCTA was merely being asked to provide input. OCCTA's representatives would not have wasted so much of their own time had they known they were merely providing input. (T. Day 1, 167.) In addition, as a result of these meetings the parties signed TAs and memorandums of understanding, and incorporated language into various agreements regarding evaluations. The TA that the parties signed on June 21, 2017, which had a learning map consisting of the four domains and the elements within those domains, is one such example. The parties had agreed to use that learning map during the 2017-2018 school year as a bridge in working towards other models. (R. Ex. 6.) Thus, I disagree with the School District's claim that none of these meetings, discussions, and negotiations were part of the parties' collective bargaining. Also, the extensive bargaining history suggests that the School District recognized that the evaluation system directly and substantially impacted the teachers' workloads, wages, hours, and terms and conditions of employment.

During a CBLT meeting on May 18, 2018, the School District told OCCTA that it "cannot negotiate the [evaluation] model, but [the School District] can negotiate the impacts of the model." The School District stated it had management rights regarding the

evaluations and attempted to support its position by discussing section 1012.34, Florida Statutes, and a Commission case, *Gilchrist Employees/United v. School District of Gilchrist County*, 30 FPER ¶ 71 (2004). That case does not have any precedential value. In *Gilchrist*, the hearing officer issued a recommended order, which the Commission remanded. The Commission did not adopt the hearing officer's recommendations. Although the hearing officer issued a supplemental order, the charging party filed a motion to withdraw which the Commission granted. *Gilchrist Employees/United v. School District of Gilchrist County*, Order No. CA-2003-024 (PERC 2004). The Commission did not issue a final order addressing the merits of this case. Further, the relevance of that case is questionable because the hearing officer considered a statutory provision that no longer exists. Thus, the School District is not supported by *Gilchrist*. I turn now to the statutes and relevant case law.

The Florida statutory scheme for determining the scope of bargaining does not provide a list of non-negotiable subjects. Rather, section 447.309(1), Florida Statutes, requires negotiations over wages, hours, and terms and conditions of employment.¹² The Commission defines those subjects on a case-by-case basis. Section 447.209, Florida Statutes, provides the Commission broad policy considerations to consider when called

¹²The phrase "terms and conditions of employment" has been broadly construed. See *Jacksonville Consolidated Lodge 5-30, Fraternal Order of Police v. City of Jacksonville*, 44 FPER ¶ 129 (2017); *City of Tallahassee v. PERC*, 393 So. 2d 1147 (Fla. 1st DCA 1981), *aff'd*, 410 So. 2d 487 (Fla. 1982); *United Faculty of Palm Beach Junior College v. Palm Beach Junior College Board of Trustees*, 7 FPER ¶ 12300 (1981), *aff'd*, 425 So. 2d 133, 139 (Fla. 1st DCA 1982), *aff'd in relevant part*, 475 So. 2d 1221 (Fla. 1985); *Duval Teachers United v. Duval County School Board*, 3 FPER 96 (1977), *aff'd*, 353 So. 2d 1244 (Fla. 1st DCA 1978).

upon to make a determination regarding what constitutes a non-negotiable subject. This necessarily vests the Commission with discretion to define mandatory subjects of bargaining. See *Amalgamated Transit Union, Local 1593 v. Hillsborough Area Regional Transit Authority*, 24 FPER ¶ 29247 (1998), *aff'd*, 742 So. 2d 380 (Fla. 1st DCA 1999), *rev. denied*, 760 So. 2d 945 (Fla. 2000).

The Florida Constitution prohibits public employees from striking. To balance that prohibition, public employees have a constitutional right to bargain collectively. See Art. I, § 6, Fla. Const.¹³ This right sets Florida apart from many other jurisdictions. In *FOP v. Miami Lodge 20 v. City of Miami*, 609 So. 2d 31 at 34 (Fla. 1992), the Florida Supreme Court enunciated a balancing test to be implemented to determine whether the employees' right to collectively bargain, or management's right to exercise control and discretion, should predominate. Thus, I must weigh these competing interests to determine whether imposing teacher evaluation systems is a mandatory subject of bargaining or whether it is a non-negotiable management prerogative. After careful consideration, I conclude, based upon the reasons discussed below and the specific facts of this case, that the teacher evaluation system imposed by the School District is a mandatory subject of bargaining. To determine otherwise would have the effect of significantly preventing the bargaining unit members in the School District of Orange County

¹³Article I, Section 6, Florida Constitution provides:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

from negotiating over matters that directly and substantially impact their workloads, wages, hours, and terms and conditions of employment.

The School District argues that it has a management right to impose its evaluation model, citing section 447.209, Florida Statutes, and section 1012.34, Florida Statutes. The School District states that it decided to impose its evaluation system because it sought to establish procedures for evaluating personnel in a manner that increased student academic performance by improving instructional services. The School District informed OCCTA that it would not negotiate the model, which includes the evaluation system, framework, elements, protocols, and scales. The School District's arguments rely on the intertwined and comprehensive nature of the May 23, 2018, evaluation system. For that very reason, I conclude that the evaluation system is a mandatory subject of bargaining. The facts demonstrate that the May 23, 2018, evaluation system directly and substantially impacts the teachers' workloads, hours, terms and conditions of employment.

The May 23, 2018, evaluation system is organized by using domains, elements, protocols, and scales. Domains set forth the core responsibilities of teachers and direct how teachers organize an evaluation model. Within the domains are elements, which are instructional strategies. The elements require teachers to employ certain practices to cause a desired outcome that students can demonstrate. Every element has protocols, or criteria, that state the desired teacher actions and student outcomes. The protocols show the relationship between teacher actions and the outcome on students. The scales, which are part of the protocols, determine the score that a teacher receives, which, in turn, determines the teacher's rating and ultimately the teacher's salary. The

evaluation system and its requirements permeate teachers' daily workloads and terms and conditions of employment and directly impacts their salaries.

The May 23, 2018, evaluation system not only measures the teachers' success in meeting certain requirements, it provides measurements in the numerous steps each teacher must take in order to meet those requirements. There are multiple layers of requirements that the teachers must meet, which are built layer upon layer, for each of the four domains down through the elements, protocols, and scales. The School District's May 23, 2018, evaluation system requires teachers to comply with four domains: directed classroom strategies and behaviors; methods of lesson planning and preparation; reflecting on teaching; and desired demonstrations of collegiality and professionalism. The multitude of factors impact their work day, with almost every action or inaction resulting in some form of measurement. The myriad issues teachers must comply with under the May 23, 2018, evaluation system include: meeting the different measurements that calculate teacher effectiveness; demonstrating that they complied with each element; demonstrating the desired teaching techniques; providing evidence of implementing lessons, unit plans, and assessments aligned to grade level standards using learning targets embedded in a performance scale; meeting the criteria dictated in assessments; demonstrating a progression through levels of proficiency with the use of the required strategy; preparing evidences that they have complied with the focus areas; demonstrating that the teacher is having a positive impact on students, which includes measuring and showing student progress; employing the required data collection techniques; properly reporting data information; participating in weekly meetings to report on the data; attending and participating in other meetings to demonstrate collegiality;

undergoing informal and formal observations upon which the teachers would be evaluated; preparing for preplanning meetings; and throughout all of these considerations they must be actively collecting sufficient “eggs in the basket” to result in a rating of effective or highly effective. The May 23, 2018, evaluation system is a complex labyrinth of intertwined requirements, factors, and measuring methods which, as the School District admits, cannot be separated from the overall evaluation system for collective bargaining purposes.

The May 23, 2018, evaluation system has increased the teachers’ workloads. The facts show that teachers were expending considerable time preparing lessons to meet the new requirements and gathering evidence to show to their superiors that they met the requirements. Teachers also spent considerable time collecting data, compiling data, and preparing for data meetings, which were part of the requirements of the evaluation plan. Teachers were working numerous extra hours per week to meet the requirements of the May 23, 2018, evaluation system, including taking additional work home. In some situations, the workload had quadrupled. The teachers had to bear the increased workload because the evaluation system, which imposed these multiple layers of requirements, directly impacted their salaries.

The School District argues that it has a management right to establish evaluation criteria to set standards of service. The School District states that it imposed the evaluation model because it sought to establish procedures for evaluating personnel in a manner that increased student academic performance by improving instructional services. The School District does not explain why the parties could not continue to

engage in collective bargaining, as they had for almost twenty years, to accomplish the School District's policy goals. In addition, the School District's comprehensive, multiple-layered, intertwined May 23, 2018, evaluation system, which constantly measures each teacher's action or non-action, is distinguishable from other public employers' more measured and less dominating decisions that were determined to be management rights. *See Jacksonville Consolidated Lodge 5-30, Fraternal Order of Police v. City of Jacksonville*, 44 FPER ¶ 129 (2017) (the Commission found that the county sheriff had a management right to require law enforcement personnel to wear body cameras); *Amalgamated Transit Union, Local 1593 v. Hillsborough Area Regional Transit Authority*, 24 FPER ¶ 29247 (1998), *aff'd*, 742 So. 2d 380 (Fla. 1st DCA 1999), *rev. denied*, 760 So. 2d 945 (Fla. 2000) (holding that public employer's management rights allow it to unilaterally subcontract its services); *Hillsborough Classroom Teachers Association, Inc. v. School Board of Hillsborough County*, 423 So. 2d 969 (Fla. 1st DCA 1982), *aff'g* 8 FPER ¶ 13074 (1982) (holding that class size is a management right because it falls within the standards of service under section 447.209).

Further, other jurisdictions have found evaluations to be mandatory subjects of bargaining. *See City of Dubuque v. Iowa Pub. Emp. Relations Board*, 444 N.W.2d 495 (Iowa 1989) (the Iowa Supreme Court affirmed decision of public employment relations board which concluded that evaluation procedure, including the criteria and procedures, was mandatory subject of bargaining); *Board of School Trustees of Gary Community School Corporation v. Indiana Education Employment Relations Board*, 543 N.E.2d 662, 663 (Ind. 5th DCA 1989) (the court held that the school corporation committed an unfair

labor practice by unilaterally implementing a teacher evaluation procedure); *Central Michigan University Faculty Association v. Central Michigan University*, 273 N.W. 2d 21 (1978) (the Indiana Supreme Court held that evaluation procedures unilaterally imposed by university were mandatory subjects of collective bargaining). The National Labor Relations Board has held that evaluation data applicable to particular jobs or wage compensation is a mandatory subject of bargaining. See, e.g., *Columbia University and Local 1199, Drug, Hospital, And Health Care Employees, Union RWDSU, AFL-CIO*, 298 NLRB 941 (1990); *Washington Hospital Center and Service Employees International Union, Local 722, AFL-CIO*, 270 NLRB 396 (1984). Here, the School District's comprehensive, multiple-layered, intertwined evaluation system goes beyond an employer's decision to engage in a management right and set standards of service. By imposing this wide-ranging system of requirements and measurements, the School District is effectively preventing bargaining unit members from negotiating over matters that directly and substantially impact their workloads, wages, hours, and terms and conditions of employment.

The School District also asserts that it has a management right to impose the evaluation system because section 1012.34(1)(a), Florida Statutes, directs the district school superintendent to establish evaluation procedures. However, section 1012.34(1)(a), Florida Statutes, does not explicitly prohibit collective bargaining in the development of, or decision to impose, an evaluation system. In fact, the statute cannot prohibit such bargaining. See *City of Tallahassee v. Public Employees Relations Commission*, 410 So. 2d 487 (Fla. 1981) (the Florida Supreme Court held that statutory prohibition on collective bargaining was unconstitutional in that it violated right to work

article of Florida Constitution and abridged the constitutional right of employees to bargain collectively). Further, section 1012.34(1)(a), Florida Statutes, must be read in an attempt to harmonize and reconcile it with section 447.201, Florida Statutes.¹⁴ The policy of section 447.201, in part, is to “provide statutory implementation of s. 6, Art. I, of the State Constitution, with respect to public employees [and ...] to promote harmonious and cooperative relationships between government and its employees, both collectively and individually [and require ...] local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees.” The School District has failed to demonstrate that section 1012.34(1)(a), Florida Statutes, provides it with authority to avoid complying with Article I, Section 6, of the Florida Constitution and section 447.201, Florida Statutes, and impose its comprehensive, multiple layered, intertwined evaluation system.

After considering all of the above, and applying the balancing test to the instant facts (*Miami Lodge 20*, 609 So. 2d 31), I conclude that the School District has failed to demonstrate why its desire to exercise control and discretion over the employees by its May 23, 2018, evaluation system should predominate over the employees’ right to collectively bargain. In fact, the School District presents scant evidence or argument that

¹⁴Section 447.201, Florida Statutes, provides, in part:

The public policy of this state, and the purpose of this part, is to provide statutory implementation of s. 6, Art. I, of the State Constitution, with respect to public employees; to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.

there was a policy decision, need, or purpose to support its decision to abruptly cease bargaining with OCCTA over evaluations and impose its own evaluation system. In light of the facts, I conclude that the evaluation system presented in this case is a mandatory subject of bargaining because the intertwined and comprehensive nature of the May 23, 2018, evaluation system directly and substantially impacts the teachers' workloads, wages, hours, and terms and conditions of employment. Thus, I further conclude that by unilaterally imposing the May 23, 2018, evaluation system, the School District violated section 447.501(1)(a) and (c), Florida Statutes, by imposing a unilateral change.

Waiver

The School District argues that the TA signed by the parties on June 21, 2017, the accompanying changes to the 2017-2018 Evaluation Manual, and similar language placed in the 2018-2019 Evaluation Manual, constitute a waiver by OCCTA. Based on these documents, the School District asserts that OCCTA agreed to usage of the Focused Marzano Model and, therefore, the instant case must be dismissed.

Contractual waiver occurs when the parties by express contractual provision confer on the employer the power of unilateral decision. *See, e.g., Orange County Police Benevolent Association v. City of Orlando*, 4 FPER ¶ 4225 (1978). Waiver is an affirmative defense; the burden of proving waiver by a preponderance of the evidence is on the School District. *See, e.g., Hillsborough County Police Benevolent Association, Inc. v. City of New Port Richey*, 12 FPER ¶ 17040 at 61 (1985), *rev'd on other grounds*, 505 So. 2d 1096 (Fla. 2d DCA 1987). In *United Faculty of Florida v. University of Central Florida Board of Trustees*, 36 FPER ¶ 60 (2010), the Commission reiterated that:

The Commission has long held that a contractual waiver must be clear and unmistakable to be effective. This test has been approved by the Florida Supreme Court in *Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College*, 475 So. 2d 1221, 1224 (Fla. 1985), *aff'g in relevant part*, 425 So. 2d 133 (Fla. 1st DCA 1983), *aff'g* 7 FPER ¶ 12300 (1981). The Court held that, since a waiver of bargaining rights implicates constitutional rights as well as statutory rights, it cannot be accomplished without clear and specific waiver language. 475 So. 2d at 1225-1227. Hence, the Commission has held that a clear and unmistakable waiver of bargaining rights is only demonstrated by contractual language which unambiguously confers upon an employer the power to unilaterally change terms and conditions of employment. *Local 2226, IAFF v. City of St. Petersburg Beach*, 10 FPER ¶ 15211 (1984). A waiver of this type must be stated with such precision that simply by reading the pertinent provision employees will be reasonably alerted that the employer has the power to change the terms and conditions of employment. *Florida Public Employees Council 79, AFSCME v. State of Florida*, 10 FPER ¶ 15208 at 417 (1984), *aff'd*, 472 So. 2d 1184 (Fla. 1st DCA 1985).

Here, the language that the School District relies on is the TA that the parties agreed upon on June 21, 2017, which states:

This condensed Learning Map will be used during the 2017-2018 school year, as [the School District] begins to transition to the Marzano Focused Teacher Evaluation Model. This streamlined, targeted resource serves as a way to bridge the 2014 Marzano Teacher Evaluation Model to the Focused Teacher Evaluation Model.

(R. Ex. 6.) The language in the 2017-2018 Evaluation Manual states:

This condensed Learning Map will be used during the 2017-2018 school year as OCPS begins to transition to the Marzano Focused Teacher Evaluation Model. This streamlined, targeted resource serves as a way to bridge the 2014 Marzano Teacher Evaluation Model to the Focused Teacher Evaluation Model.

(R. Ex. 3.) There is similar language in the 2018-2019 Evaluation Manual. (R. Ex. 4.)

The plain meaning of these provisions shows that the parties agreed to use their own

learning map. Further, the provisions state that the learning map would serve as a bridge as the parties worked towards a transition to the Focused Marzano Model. The plain language does not state that the parties have agreed to use the Focused Marzano Model, only that they have agreed to use their learning map as a bridge. The language does not prevent the parties from further negotiations and changes, as they consider and develop the future evaluation system. I conclude that these provisions do not clearly and unmistakably demonstrate that OCCTA waived its right to bargain over the adoption of any model other than the Focused Marzano Model. Further, as OCCTA has demonstrated, the May 23, 2018, evaluation system imposed by the School District is different from the Focused Marzano Model.¹⁵ For these reasons, the School District has failed to meet its burden of proving waiver by a preponderance of the evidence.

Attorney's Fees and Costs

Both parties have requested an award of attorney's fees and costs. Section 447.503(6)(c), Florida Statutes, allows the Commission to award reasonable attorney's fees and costs of litigation to a prevailing party when it determines such an award to be appropriate. *See also Leon County Police Benevolent Association, Inc. v. City of Tallahassee*, 8 FPER ¶ 13400 (1982), *aff'd*, 445 So. 2d 604 (Fla. 1st DCA 1984). The School District is not entitled to attorney's fees and costs because it did not prevail.

With regard to the refusal to bargain charge, OCCTA is eligible for an award of attorney's fees and costs because it is the prevailing party on that issue. A prevailing

¹⁵As found in the above Findings of Fact, the School District's May 23, 2018, evaluation plan differed from the Focused Marzano system by adding additional elements, such as "Planning for the Achievement of All Students Using Data" and "Applying Literacy and Communication Strategies."

charging party is entitled to attorney's fees and costs when the respondent knew or should have known that its conduct was unlawful. See *DeMarois v. Military Park Fire Control Tax District No. 4*, 7 FPER ¶ 12065 (1981), *aff'd*, 411 So. 2d 944 (Fla. 4th DCA 1982). Here, the School District knew or should have known that it could not lawfully refuse to bargain, when OCCTA made the proper demand to bargain. Accordingly, I recommend that the Commission award attorney's fees and costs to OCCTA for litigating this issue.

With regard to the unilateral change charge, the issue of whether teacher evaluation systems are a management right or a mandatory subject of bargaining is a question of first impression for the Commission. Thus, it was reasonable for the School District not to know that it was acting unlawfully regarding this novel issue. Therefore, an award of attorney's fees and costs of litigation as to this unique issue is not appropriate. *E.g., Jacksonville Consolidated Lodge 5-30, Fraternal Order of Police v. City of Jacksonville*, 44 FPER ¶ 129 (2017) (the Commission did not award attorney's fees due to the issue being a case of first impression); *Jacksonville Supervisors Association v. City of Jacksonville*, 26 FPER ¶ 31140 at 257 (2000) (in a case of first impression a respondent cannot be said to have knowledge that it was acting unlawfully and thus will not be assessed fees and costs); *City of Tallahassee v. Leon County Police Benevolent Association, Inc.*, 9 FPER ¶ 14069 (1993) (the Commission declined to award fees to prevailing respondent where the issue was a "novel, if somewhat simple, issue for the Commission and the charge was not utterly frivolous or filed in bad faith");

Jacksonville Association of Fire Fighters, IAFF Local 122 v. City of Jacksonville, 15 FPER ¶ 20327 (1989) (the city could not or should not have known that its conduct was unlawful regarding an issue in which the Commission had not previously provided direction).

SUPPLEMENTAL CONCLUSIONS OF LAW

1. OCCTA's refusal to bargain charge and unilateral change charge were timely filed.
2. The School District violated section 447.501(1)(a) and (c), Florida Statutes, by refusing to bargain collectively.
3. The School District violated section 447.501(1)(a) and (c), Florida Statutes, by unilaterally imposing the evaluation system present in this case.
4. OCCTA is entitled to an award of reasonable attorney's fees and costs for litigating the refusal to bargain charge.
5. OCCTA is not entitled to an award of reasonable attorney's fees and costs for litigating the unilateral change charge.
6. The School District is not entitled to an award of attorney's fees and costs of litigation.

SUPPLEMENTAL RECOMMENDATION

In order to effectuate the purposes of Chapter 447, Part II, I recommend that the Commission adopt the findings of fact and conclusions of law set forth above, and enter an order requiring the School District to:

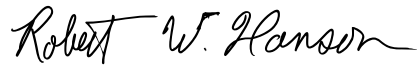
1. Cease and desist from:
 - (a) Refusing to bargain with the Union over its evaluation system, which includes the evaluation system, the elements, protocols and scales;
 - (b) Unilaterally imposing any portion of the May 23, 2018, teacher evaluation system; and
 - (c) In any like or related manner, interfering with, restraining, or coercing public employees in the exercise of any right guaranteed them under Chapter 447, Part II, Florida Statutes (2020).

2. Take the following affirmative action:
 - (a) Upon request, meet with the representatives of the Union for the purposes of collective bargaining concerning the teacher evaluation system and any other mandatory terms of collective bargaining;
 - (b) Rescind any portions of the May 23, 2018, evaluation system that it imposed;
 - (c) Pay to the Union its reasonable attorney's fees and costs of litigation for the refusal to bargain charge; and
 - (d) Post a Notice to Employees, which will be issued by the Commission.¹⁶

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within **fifteen** days from the date of this order. See Fla. Admin. Code R. 28-106.217.

¹⁶The School District can satisfy this requirement by emailing the Notice of Employees to bargaining unit members or by posting the Notice to Employees on its website. See *School District of Orange County v. Orange County Classroom Teachers Association*, 146 So. 3d 1203 (Fla. 5th DCA 2014) (questioning the practicality of requiring the actual posting of notices given the advancements in modern technology).

ISSUED and SUBMITTED to the Public Employees Relations Commission and
SERVED on all parties this 27th day of May, 2021.



ROBERT W. HANSON
Hearing Officer

RWH/bjk

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