STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
THE BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	*	
	*	
Petitioner	*	
v.	*	PSLRB Case No. N 2015-01
BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS, LOCAL 340	*	
	*	
Respondent	*	

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DECISION AND ORDER ON REQUEST
TO RESOLVE DISPUTE AS TO NEGOTIABILITY[1]

I. INTRODUCTION

On August 4, 2014, the Baltimore City Board of School Commissioners ("City Board") filed a "Request to Resolve a Dispute as to Negotiability" ("Form PSLRB-04"), with the Public School Labor Relations Board ("PSLRB"). Form PSLRB-04 reflects the authority granted to the PSLRB by Section 6-408(c)(5)(i) of the Education Article to decide disputes over the negotiability of bargaining topics:

> If a public school employer and an employee organization dispute whether a proposed topic for negotiation is a mandatory, permissive, or an illegal topic of bargaining, either party may submit a request for a decision in writing to the Board for final resolution of the dispute.

[1] The PSLRB issued its decision on August 29, 2014, with full opinion to follow. That full opinion is embodied herein.

Md. Code, Educ. Art. ("Educ. Art.") § 6-408(c)(5)(i) (2014 Repl. Vol.). *See also* COMAR 14.34.02.02 ("A party requesting a resolution of a dispute as to negotiability may request relief from the Public School Labor Relations Board by completing Form PSLRB-04 and filing it with the Executive Director of the Board.").

Section 6-408(c)(5)(v) of the Education Article states that "the [PSLRB] shall…[r]ender a decision determining whether the topic of negotiation is mandatory, permissive, or illegal," and "[i]ssue the written decision to the parties within 14 days after receiving the written briefs." Educ. Art. § 6-408(c)(5)(i). On August 4, 2014, the PSLRB requested the City Board and the Baltimore Teachers Union, American Federation of Teachers, Local 340, AFL-CIO ("BTU") to submit written briefs in support of their positions. The City Board and BTU submitted their briefs to the PSLRB on August 12 and 15, 2014, respectively.

II. FINDINGS OF FACT

The following facts are not in dispute. Pursuant to § 6-405 of the Education Article, BTU is the exclusive representative for a bargaining unit of approximately 5,778 certificated employees who work for the City Board. The City Board is a public school employer as defined in § 6-401(f) of the Education Article. The City Board and BTU are parties to a Collective Bargaining Agreement in effect from July 1, 2013 to June 30, 2016.

Under Maryland's Education Reform Act of 2010, codified at Education Article § 6-202, local school boards are required to establish performance evaluation criteria for

certificated teachers and principals mutually agreed on by the local school system and exclusive employee representative. Following passage of the Education Reform Act, the City Board[2] and BTU began efforts toward development of a teacher evaluation system. Efforts in this regard included conducting a no-stakes pilot evaluation in 2011-2012 for 300 teachers and field-testing an evaluation model for all teachers in 2013. Feedback and results from the 2013 field-test were used to "further hone the various evaluation components and to inform final negotiations between City Schools and the BTU." (Guide to City Schools' Teacher Effectiveness Evaluation: Understanding and Using the District's New Evaluation for Teachers, Fall 2013 [Fall Guide], at 2).

By letter dated July 30, 2013, the City Board and BTU notified Dr. Lillian Lowery, Ed.D., State Superintendent of Schools, Maryland State Department of Education (MSDE), that they had agreed upon a teacher support and evaluation system. The City Board's evaluation system, called the Teacher Effectiveness Evaluation, consisted of four components: classroom observation, professional responsibilities, student growth, and a school performance measure. The City Board and BTU agreed to weight the four components as follows: classroom observation (35%), professional responsibilities (15%), student growth measure (35%), and school performance measure (15%). MSDE approved the evaluation system, with certain qualifications.

[2] Materials submitted by both parties refer in numerous places to Baltimore City Public Schools (City Schools) as engaging with BTU on the matter of the evaluation system. For purposes of our analysis, there is no relevant legal distinction between the City Board and City Schools, and for sake of consistency, "City Board" is used herein, except where "City Schools" is used from quoted material or is otherwise indicated.

According to the Fall Guide, there are four effectiveness ratings based on the overall score from the four above components. These ratings are: highly effective, effective, developing, and ineffective. As also stated in the Fall Guide, the scoring rubric, or "cut scores," for the four ratings are as follows: highly effective (80 and above), effective (60-79), developing (45-59), and ineffective (below 45). (Fall Guide at 11). Varying numbers of Achievement Units (AUs) are assigned to the four ratings: highly effective (12 AUs), effective (9 AUs), developing (3 AUs), and ineffective (0 AUs). (Fall Guide at 12). Pursuant to the parties' Collective Bargaining Agreement, teachers move up one interval on the pay scale, called Career Pathways, by accumulating twelve AUs. Achievement Units are earned through the evaluation system described above and may also be earned outside the annual evaluation process, e.g., by completing eligible coursework.

Education Article § 6-202(c) was amended, effective June 1, 2014, in part by addition of the following language: "Any performance evaluation criteria developed under this subsection may not require student growth data based on State assessments to be used to make personnel decisions before the 2016-2017 school year." Educ. Art. § 6-202(c)(7). In response to the amendment to § 6-202(c), the student growth and school performance components were removed from the evaluation system. The remaining components were re-weighted as follows: classroom observations (85%) and professional responsibilities (15%).[3]

[3] The parties disagree over whether the 85%/15% split was determined unilaterally by the City Board (BTU's assertion) or by mutual agreement (the City Board's assertion).

On April 23, 2014, the City Board and BTU met and discussed the evaluation system. In its update presented on April 23, the City Board noted the reduction of the evaluation system to two components and how the remaining two components would be weighted, and proposed the following revised cut scores: highly effective (89 and above); effective (75 to 88); developing (55 to 74); and ineffective (54 and below). On April 29, 2014, the City Board presented another set of revised cut scores: highly effective (86 and above); effective (72 to 85); developing (55 to 71); and ineffective (54 and below). On May 28, 2014 and May 29, 2014, the City Board and BTU met and discussed again the evaluation system; the revised cut scores presented on May 29 were the same as those presented on April 29.

On June 4, 2014, an update on the evaluation system was posted on the City Schools' website. The update noted that the 2013-2014 teacher evaluation would be based on the two components of Classroom Observation and Professional Expectations, weighted 85% and 15% respectively. The update included the same effectiveness ratings and corresponding cut scores as presented on April 29 and May 29. On June 5, 2014, BTU wrote to the City Board Chair and Interim Chief Executive Officer objecting, *inter alia*, to the unilateral change in cut scores from those stated in the Fall Guide and demanding negotiations on the subject.

Also on June 5, BTU filed a class action grievance alleging that the City Board violated Article 9.1 of the Collective Bargaining Agreement, which requires that a copy of the Board's evaluation system be provided to each teacher at the beginning of each new school year. BTU also alleges that the change in cut scores is arbitrary and adversely

affects teachers' pay.[4] The relief sought by BTU is an award requiring use of the lower cut scores presented in the Fall Guide and negotiation of any subsequent changes. Arbitration of the grievance is scheduled for September 10, 2014.

Additional correspondence between the parties after June 5 included BTU's letter of July 29, 2014, demanding negotiation "as required by Education Article Section 6-20[2](c)(3)." On August 4, 2014, the City Board filed the instant Request to Resolve a Dispute as to Negotiability, asking that the cut scores for teachers, effective school year 2013-2014, be declared an illegal subject of bargaining.

III. POSITIONS OF THE PARTIES

The City Board asserts that it negotiated with BTU over the component and weighting aspects of the evaluation system but maintains that it did not negotiate the "evaluation rating and scoring rubric ('cut scores')." The City Board, quoting *Livers v. Board of Educ.*, 101 Md. App. 160 (1994), and citing Education Article § 6-408(c)(5)(vi)(2), contends that the subject of the cut scores "is an illegal subject of negotiation as it is an administrative function and the school system's interest outweighs the interest of the employee."[5] The City Board further contends that there is no requirement for the parties to reach agreement on cut scores.

[4] In addition to Article 9.1, BTU bases its grievance on Article 16.5, which provides in relevant part, "No teacher shall be disciplined, reduced in rank or compensation, suspended, or discharged without just cause."

[5] The City Board quotes the following from *Livers*, "If the school system's interests predominate, the matter is non-negotiable matter of educational policy within the local board's control." 101 Md. App. at 166. Section 6-408(c)(5)(vi)(2) provides, "To resolve disputes under this section, the Board shall develop a balancing test to determine whether the impact of the matter on the school system as a whole outweighs the direct impact on the teachers or employees."

According to the City Board, the evaluation system, quoting the Fall Guide, is designed to "attract, support and recognize effective teachers and, by extension, ensure a well-rounded and rich educational experience for every student." In a similar vein, the City Board contends that the "scoring rubric with the four (4) tiers of achievement allows for a greater differentiation of performance," which benefits lower-achieving teachers by identifying their need for additional supports and which benefits higher-achieving teachers ("and the school community as a whole") by allowing for compensation increases based on the AUs earned through the annual evaluation process. The City Board adds, however, that "[w]hile teacher compensation under the BTU contract is based on AUs, the evaluation is only one component of earning AUs."

In further support of its position that the cut scores constitute an illegal subject of bargaining, the City Board cites to Education Article § 4-205(c)(2)(ii), authorizing the county superintendent to resolve disputes involving the proper administration of the school system, to § 4-304(b)(1), which provides that the Chief Executive Officer is responsible for the overall administration of the Baltimore City Public School System, and to this Board's recent decision in *Board of Education of Frederick County v. Frederick County Teachers' Association*, PSLRB Case No. N 2014-12 (2014), describing an illegal subject of bargaining with respect to transfer decisions as one that would contemplate a diminishment of the superintendent's discretion.

Finally, the City Board maintains that under Education Article § 6-202(c) negotiations concerning the "evaluation tool" are not "substantive contract negotiations"

subject to § 6-408 and that "evaluations are appealable under COMAR 13A.07.04.04 and, thus, not arbitrable."

BTU contends that a balancing test, as articulated in *Livers*, is inapplicable. According to BTU, the balancing test is inapplicable where there is a "clear directive to subject a topic to collective bargaining." BTU maintains that Education Article, § 6-202(c)(3)(i), enacted as part of the Education Reform Act of 2010, contains such a clear directive by requiring the establishment of evaluation criteria "that are mutually agreed on by the local school system and the exclusive employee representative." BTU points to legislative history showing that the phrase, "after meeting and conferring," was replaced with the phrase "mutually agreed on." BTU contends, in light of this legislative history, that "there can be no question that BCBSC has a statutory duty to negotiate, 'mutually agree on,' the performance evaluation system."

Furthermore, BTU maintains that the matter of cut scores is included within the meaning of "performance evaluation criteria" as used in § 6-202(c), and the fact that cut scores were not included in the materials presented to MSDE on July 30, 2013 is irrelevant. BTU cites to COMAR 13A.07.09.04C(2), which requires performance evaluation criteria to result, at a minimum, in "an evaluation of effective, highly effective, or ineffective." According to BTU, agreement on the cut scores that delimit these categories is part and parcel of the entire "evaluation system" that must be mutually agreed upon.

Finally, BTU maintains that even if a balancing test should be applied in this case, the balance weighs in favor of mandating bargaining over the cut scores because of the

"major role" that the cut scores play in determining salaries, a mandatory subject of bargaining. According to BTU, unlike other school systems in which teachers' salaries increase with years of experience, teachers employed by the City Board remain at the equivalent of a given step until they earn twelve AUs, which are most easily earned through performance evaluations. The adoption of the cut scores at issue has resulted in a reduction in the number of teachers rated as highly effective or effective, which, in turn, has resulted in a reduction in the number of teachers who have received salary increases. BTU contends that this fiscal interest of the City Board's cannot outweigh the teachers' right to bargain over salaries.

IV. ANALYSIS

Two sections of the Education Article provide the framework for resolving the instant dispute as to negotiability.

Section 6-202 of the Education Article provides in relevant part:

> (2) (i) Subject to subparagraph (iii) of this paragraph, the State Board shall adopt regulations that establish general standards for performance evaluations for certificated teachers and principals that include observations, clear standards, rigor, and claims and evidence of observed instruction.
>
> (ii) The regulations adopted under subparagraph (i) of this paragraph shall include default model performance evaluation criteria.
>
> (iii) Before the proposal of the regulations required under this paragraph, the State Board shall solicit information and recommendations from each local school system and convene a meeting wherein this information and these recommendations are discussed and considered.
>
> (3) Subject to paragraph (6) of this subsection:

(i) A county board shall establish performance evaluation criteria for certificated teachers and principals in the local school system based on the general standards adopted under paragraph (2) of this subsection that are mutually agreed on by the local school system and the exclusive employee representative.

(ii) Nothing in this paragraph shall be construed to require mutual agreement under subparagraph (i) of this paragraph to be governed by Subtitles 4 and 5 of this title.

…

(6) If a local school system and the exclusive employee representative fail to mutually agree under paragraph (3) of this subsection, the default model performance evaluation criteria adopted by the State Board under paragraph (2)(ii) of this subsection shall take effect in the local jurisdiction 6 months following the final adoption of the regulations.

Educ. Art. § 6-202(c)(2)-(3) and (6).

Section 6-408(c) of the Education Article provides in relevant part:

(c) Representatives to negotiate. --

(1) On request a public school employer or at least two of its designated representatives shall meet and negotiate with at least two representatives of the employee organization that is designated as the exclusive negotiating agent for the public school employees in a unit of the county on all matters that relate to salaries, wages, hours, and other working conditions, including procedures regarding employee transfers and assignments.

(2) Except as provided in paragraph (3) of this subsection, a public school employer or at least two of its designated representatives may negotiate with at least two representatives of the employee organization that is designated as the exclusive negotiating agent for the public school employees in a unit of the county on other matters that are mutually agreed to by the employer and the employee organization.

(3) A public school employer may not negotiate the school calendar, the maximum number of students assigned to a class, or any matter that is precluded by applicable statutory law.

> (4) A matter that is not subject to negotiation under paragraph (2) of this subsection because it has not been mutually agreed to by the employer and the employee organization may not be raised in any action taken to resolve an impasse under subsection (e) of this section.

Educ. Art. § 6-408(c)(1)-(4).

There are two questions that must be answered in resolving the instant dispute as to negotiability: 1) whether the evaluation criteria that are to be mutually agreed on by the local school system and exclusive representative, pursuant to § 6-202(c)(3)(i), constitute a subject of mandatory, permissive, or illegal bargaining; and 2) whether the cut scores are part of these evaluation criteria. The Board concludes that the evaluation criteria constitute a permissive subject of bargaining. The Board also concludes that the cut scores are part of the evaluation criteria so as to render the cut scores a permissive subject of bargaining. Because the instant dispute is resolved on statutory grounds, application of the balancing test to determine negotiability, briefly discussed by the parties, is unnecessary.

A. The Evaluation Criteria Constitute a Permissive Subject of Bargaining.

A careful reading of the applicable statutes, supported by certain items of legislative history, requires the conclusion that the evaluation criteria constitute a permissive subject of bargaining.

To begin, the subject of evaluation criteria is not a mandatory subject of collective bargaining under § 6-408(c)(1). This conclusion is compelled by § 6-202(c)(3)(ii), which states, "Nothing in this paragraph shall be construed to require mutual agreement under subparagraph (i) of this paragraph to be governed by Subtitles 4 and 5 of this title."

Against the dictate of § 6-202(c)(3)(ii), BTU's position that § 6-202(c)(3)(i) contains a "clear directive to subject" the topic of the performance evaluation system to mandatory collective bargaining cannot be sustained. Simply put, this Board does not have authority to require collective bargaining under Subtitle 4 over a subject that the General Assembly has said is not required to be governed by Subtitle 4.[6]

Moreover, the conclusion that the evaluation criteria constitute a mandatory subject of collective bargaining is inconsistent with § 6-202(c)(6), which provides that when the local school system and the exclusive representative fail to mutually agree upon evaluation criteria, the State Board's model evaluation criteria "shall" take effect. This clear legislative mandate leaves no room for mandating the impasse proceedings of mediation and binding arbitration set forth at § 6-408(e)(8)-(14), inasmuch as doing so could result in evaluation criteria that are neither mutually agreed on pursuant to § 6-202(c)(3)(i) nor the State's default criteria. Avoiding such an anomalous result is consistent with the rules of statutory construction. *Abrams v. Lamone*, 398 Md. 146, 187 (2007) ("Results that are unreasonable, illogical or inconsistent with common sense should be avoided and an interpretation should be given which will not lead to absurd or anomalous results").

While the language of § 6-202(c)(3)(ii) and § 6-202(c)(6) precludes classifying the evaluation criteria as a mandatory subject of collective bargaining, the language of § 6-

[6] BTU does not address § 6-202(c)(3)(ii) but rather relies on legislative history to support its position that the subject is mandatory. In light of the unambiguous declaration in § 6-202(c)(3)(ii) that the subject is not mandatory, BTU's legislative history argument to the contrary cannot prevail and, therefore, we need not delve into it.

202(c)(3)(i), that the evaluation criteria are to be "mutually agreed on," read together with § 6-408(c)(2), militates against the conclusion that the evaluation criteria constitute an illegal subject of bargaining. Section 6-408(c)(2) uses the phrase "mutually agreed to" to define the scope of permissive subjects of bargaining. [7] The symmetry in key language used in the two subsections suggests the General Assembly's intention to link them. Moreover, while § 6-202(c)(3)(ii) provides that mutual agreement on the evaluation criteria is not required to be governed by Subtitle 4, it does not expressly prohibit mutual agreement on this subject from being governed by Subtitle 4. It would have been rather easy for the General Assembly to have written § 6-202(c)(3)(ii) so as to prohibit collective bargaining in even permissive form – "mutual agreement under subparagraph (i) of this paragraph shall not be governed by Subtitles 4 and 5 of this title" would have been an obvious choice in this regard. Significance must be given to the fact that the General Assembly chose not to take such a clear path to removing the evaluation criteria from the realm of collective bargaining.

Moreover, recognizing the evaluation criteria as a permissive subject of bargaining does not lead to the anomalous result identified above. When parties mutually agree to negotiate a matter pursuant to § 6-408(c)(2), negotiations over such matters would include use of the impasse proceedings set out in § 6-408(e). *See*, *supra*, § 6-408(c)(4). In

[7] In *Wethersfield Bd. of Education v. Connecticut State Bd. of Labor Relations*, 519 A.2d 41 (Conn. 1986), an analogous statute provided for "mutual agreement" over teacher evaluation guidelines between the local board and the exclusive representative, with default to state board guidelines in the absence of mutual agreement. Focusing on the difference in meaning between "negotiation" and "mutual agreement," as those terms were used in the statute in question and Connecticut's public school collective bargaining laws, the Court held that the local board was permitted but not required to negotiate the subject of teacher evaluations.

the case of evaluation criteria, if the parties mutually agree to negotiate pursuant to § 6-408(c)(2) and these negotiations result in an impasse, their mutual agreement would extend to use of both the mediation and arbitration phases of impasse proceedings. This interpretation has the additional virtue of giving the fullest effect possible to both § 6-202(c)(3)(i) and § 6-408(c)(2). *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183 (2006) ("when two statutes appear to apply to the same situation, this Court will attempt to give effect to both statutes to the extent that they are reconcilable") (citations omitted).

The upshot of all of this statutory analysis is that neither § 6-202(c)(3)(ii) nor § 6-202(c)(6) constitute "applicable statutory law" under § 6-408(c)(3) precluding negotiation over the evaluation criteria.[8] In accordance with § 6-202(c)(3)(i) and § 6-408(c)(2), such negotiation is permissive.[9]

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[8] The City Board does not provide an analysis of any of the pertinent subsections of § 6-202(c). It refers to § 4-205(c)(2)(ii), which provides in relevant part that each "county superintendent shall decide all controversies and disputes that involve:…(ii) The proper administration of the county public school system." To the same end, the City Board refers to § 4-304(b)(1), which provides that the Chief Executive Officer of the City Schools shall be "responsible for the overall administration" of the school system." Because these general statutes do not specifically address the evaluation criteria and how they are to be established, and also because they were enacted before § 6-202(c), they do not control the analysis. *See Lumbermen's Mut. Casualty Co. v. Insurance Comm'r*, 302 Md. 248, 268 (1985) ("where one statutory provision specifically addresses a matter, and another more general statutory provision also may arguably cover the same matter, the specific statutory provision is held to be applicable and the general provision is deemed inapplicable"); *Department of Motor Vehicles v. Greyhound Corp.*, 247 Md. 662, 667 (1967) (later statute governs to the extent of conflict). Finally, the City Board's single-line argument that "evaluations are appealable under COMAR 13A.07.04.04 and, thus, not arbitrable" is a non-starter. COMAR 13A.07.04.04 is not "applicable *statutory* law" under § 6-408(c)(3).

[9] In *Washington County Board of Education v. Washington County Teachers Association*, MSBE Op. No. 11-05 (2011), the Maryland State Board of Education (MSBE) concluded in an advisory opinion that "the substantive performance evaluation criteria that may be mutually agreed to under the Education Reform Act are not legal topics for collective bargaining." *Id*. at 4. The MSBE rendered this opinion only after determining that the PSLRB did not have jurisdiction because "the matters giving rise to this Petition for Declaratory Ruling arose prior to July 1, 2010, which is the effective date of the Act" by which the

The dissent misreads § 6-202(c)(3)(ii) by taking language calibrated to do no more than remove the evaluation criteria from the scope of mandatory collective bargaining and extending it to create a complete prohibition on collective bargaining over the subject. This interpretation does not comport with the rules of statutory construction. *See Walker v. Dep't of Hous. & Cmty. Dev.*, 422 Md. 80, 97 n. 10 (2011) ("we neither add nor delete language so as to reflect an intent not evidenced in the plain language of the statute; nor [do we] construe the statute with forced or subtle interpretations that limit or extend its application"). Furthermore, the dissent misunderstands our decision in asserting that it creates an "untenable disconnect" between § 6-202(c)(3)(i) and § 6-408(c)(2). According to the dissent, permitting negotiations over the evaluation criteria pursuant to § 6-408(c)(2) is inconsistent with § 6-202(c)(3)(i), which, again according to the dissent, "mandates that the parties have collaborative discussion on evaluations." The first conclusion we reached is that § 6-202(c)(3)(i) does not mandate collective bargaining over the evaluation criteria and that conclusion is not inconsistent with the ultimate conclusion that collective bargaining over such is permissive. Also, we disagree with the dissent's claim that this "matter amounts solely to an interpretation of § 6-202…." By statutory mandate, the PSLRB has exclusive authority to "decide any controversy or dispute arising under Title 6, Subtitle 4 or Subtitle 5 of this article," which includes the instant dispute as to negotiability. Educ. Art. § 2-205(e)(4)(i). In order to decide this dispute, pursuant to statutory mandate, it has been necessary for the PSLRB to

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PSLRB was created. Nothing in MSBE's analysis of § 6-202(c)(3)(ii), to which less than one full page was devoted, persuades us that the subject of evaluation criteria is illegal as opposed to permissive.

interpret pertinent sections of both § 6-408 and § 6-202. Finally, *Washington County Board of Education v. Washington County Teachers Association*, MSBE Op. No. 11-05 (2011), which the dissent cites, is addressed in footnote 9.

There is support for our statutory analysis in the legislative history of the 2014 amendment resulting in the addition of § 6-202(c)(7) (precluding certain use of student growth data before the 2016-2017 school year). A hearing was held on the House version of the 2014 amendment, H.B. 1167, on March 6, 2014. On this date, the City Board informed the Ways and Means Committee of the following:

> The Baltimore City Board of School Commissioners has entered into a contract with The Baltimore Teacher's Union to allow the use of student growth in performance evaluations. The contract was ratified this year.

(Written Statement of City Board, March 6, 2014, H.B. 1167 Teachers and Principals – Performance Evaluation Criteria – Use of Student Growth Data). On this basis, the City Board requested "an amendment that would…allow the use of student growth in performance evaluations" where such was already mutually agreed to. (*Id.*).

The Fiscal and Policy Notes subsequently issued by both chambers noted that, "The Baltimore City Public School System reached a new three-year agreement with the Baltimore Teachers Union that was ratified on February 18, 2014, that uses student growth data based on State assessments for personnel decisions."[10] The Senate Floor Report of March 10, 2014 proposed the addition of Section 2 below, explaining that it

[10] *See* Fiscal and Policy Note Revised, S.B. 676, Teachers and Principals - Performance Evaluation Criteria - Use of Student Growth Data (March 25, 2014) at 2; Fiscal and Policy Note Revised, H.B. 1167, Teachers and Principals - Performance Evaluation Criteria - Use of Student Growth Data (March 25, 2014) at 2

"was added to the bill at the request of the Baltimore City Public School System (BCPSS), in light of the agreement BCPSS has signed with the Baltimore Teachers Union in this regard." (Floor Report, S.B. 676, March 10, 2014, at 2). Accordingly, Chapter 544 of the 2014 Laws of Maryland, contains the following:

> SECTION 2. AND BE IT FURTHER ENACTED, That § 6–202(c)(7) of the Education Article of the Annotated Code of Maryland, as enacted by Section 1 of this Act, does not apply to a local school system and an exclusive employee representative that mutually agree to use student growth data based on State assessments to make personnel decisions in accordance with an agreement executed on or after January 1, 2014, and before March 1, 2014.

In sum, the legislative history of the 2014 amendment supports the conclusion that the General Assembly did not intend to prohibit collective bargaining over the evaluation criteria and that such is a permissive subject of bargaining.[11]

B. The Cut Scores Are Part of the Evaluation Criteria.

The next question that must be addressed is whether the cut scores are part of the evaluation criteria. The parties disagree about the answer to this question. The City Board maintains that only the evaluation components and their corresponding weights (i.e., the 85%/15% split), not the cut scores, are encompassed within the evaluation criteria that must be established pursuant to § 6-202(c). To the contrary, based upon its premise that the evaluation system in its entirety is a mandatory subject of bargaining, BTU maintains that the cut scores are an integral part of the evaluation system and thus a mandatory subject of collective bargaining.

[11] In light of this legislative history, it is not clear why the parties perceived a statutory need to remove the student growth component from their agreement regarding evaluation criteria.

The topic of cut scores is not addressed in § 6-202(c). Regulations adopted under the authority of § 6-202(c), however, provide guidance on the issue. COMAR 13A.07.09.04 sets out the "General Standards" and "Performance Evaluation Criteria" that must be included in an "evaluation system for teachers and principals developed by an LEA [local education agency] in mutual agreement with the exclusive employee representative." "In order to ensure Statewide rigor in LEA evaluation systems:…(b) An evaluation of a teacher or principal shall provide, at a minimum, for an overall rating of highly effective, effective, or ineffective." COMAR 13A.07.09.04B(5)(b). Similarly, the "Performance Evaluation Criteria" must "[y]ield, at a minimum, an evaluation of effective, highly effective, or ineffective;…." COMAR 13A.07.09.04C(2). Thus, the subject of mutual agreement is the "evaluation system," inclusive of evaluation criteria that yield the ratings of highly effective, effective, and ineffective. But these ratings do not come into existence without cut scores that delineate them. Thus, the State Board of Education has determined, not unreasonably, that the subject of mutual agreement under § 6-202(c)(3)(i) includes cut scores.

COMAR 13A.07.09.05, which describes the substance of the "Model State Performance Evaluation Criteria," does not address cut scores or the corresponding ratings (highly effective, etc.). None of the materials presented by the parties describe the cut scores that would be implemented by default in the event that the local school system and exclusive representative fail to mutually agree on them. However, the Maryland Teacher and Principal Evaluation Guidebook (Revised September 2012), produced by the MSDE, indicates that cut scores will be included as part of the State evaluation model.

The Guidebook states, "MSDE is designing a calculation engine that will support use of the State model for the Educator Effectiveness Rating System (EERS), as well as LEA [Local Education Agency] models that follow similar principles." (Guidebook at 65). Each LEA will have the option of using the State model and "EERS calculating engine." (*Id.*). Significantly, according to the Guidebook, to implement the EERS, "MSDE will provide the following system components:…Final ratings based on cut scores defined for the model." (Guidebook at 69).[12]

Finally, the City Board's presentation of its evaluation model to MSDE did not include cut scores *per se*, although it did include a rating scale (1 to 4) for professional responsibility competencies, which scale is used in arriving at a cut score. And in approving the evaluation model, MSDE did so with the understanding that the City Board "[w]ill calculate a rating for each teacher including the SLO to inform the system on their eventual evaluation model and to report out as needed to MSDE."

As previously indicated, BTU maintains that the cut scores are integrally related to the evaluation criteria, forming a single evaluation system. The Board essentially agrees. Similar to the dictionary definition provided by BTU, The New Oxford American Dictionary 405 (2001) defines criterion as "a principle or standard by which something may be judged or decided." It is difficult to conceive of a judgment on teacher effectiveness, under the mandated evaluation system, being made without cut scores; thus the criteria as a standard of judgment, by definition, includes the cut scores. In sum,

[12] We take judicial notice of the Guidebook as a statement of MSDE's intention regarding the use of cut scores in its model evaluation system, a matter "capable of certain verification" by recourse to the MSDE website. *Faya v. Almaraz*, 329 Md. 435, 444 (1993). Our conclusion regarding the cut scores is supported by the Guidebook but does not depend on it.

nothing in the ordinary meaning of the term "criteria" or in the materials discussed above indicates that the General Assembly intended to create a legal distinction between the evaluation criteria and the cut scores applied to those criteria such that collective bargaining over the former is permitted but that collective bargaining over the latter is either required or prohibited.

V. CONCLUSIONS OF LAW

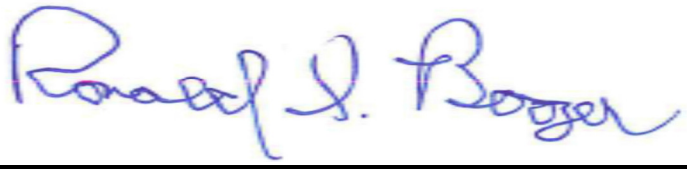
For the reasons set forth above, the Board concludes that the evaluation criteria that are to be mutually agreed on by the local school system and exclusive representative, pursuant to § 6-202(c)(3)(i), constitute a permissive subject of bargaining and that the cut scores are integrally related to these evaluation criteria so as to render the cut scores for teachers, effective school year 2013-2014, a permissive subject of bargaining.

ORDER

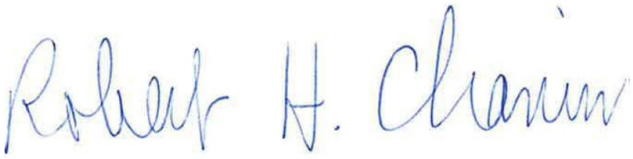
Having considered the City Board's request to resolve a dispute as to negotiability and the parties' briefs in support of their positions, it is hereby ORDERED that the dispute as to negotiability, in PSLRB Case No. N 2015-01, is resolved in accordance with the Decision of the PSLRB set forth above.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Seymour Strongin, Chairman



Ronald S. Boozer, Member



Robert H. Chanin, Member

Charles I. Ecker, Member

Annapolis, MD

September 2, 2014

APPEAL RIGHTS

Any party aggrieved by this action of the PSLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act – Contested Cases), and Maryland Rules 7-201 *et seq*. (Judicial Review of Administrative Agency Decisions).