

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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BRAD KOZACZUK and the NEW HOLSTEIN EDUCATION ASSOCIATION, Complainants,

vs.

SCHOOL DISTRICT OF NEW HOLSTEIN, Respondent.

Case ID: 145.0005

Case Type: COMP\_MP

DECISION NO. 37954-A

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**Appearances:**

Rebecca Ferber Osborn, Staff Attorney, Wisconsin Education Association Council, 13805 W. Burleigh Road, Brookfield, Wisconsin, appearing on behalf of Brad Kozaczuk and the New Holstein Education Association.

Tony J. Renning, Attorney, Strang, Patteson, Renning, Lewis & Lacy, 2935 Universal Court, P.O. Box 3505, Oshkosh, Wisconsin, appearing on behalf of the School District of New Holstein.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

On January 8, 2019, Brad Kozaczuk and the New Holstein Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the School District of New Holstein had committed prohibited practices within the meaning of §§ 111.70(3)(a)1 and (3). Stats. I was assigned by the Commission to serve as hearing examiner.

A hearing was held on March 1, 2019, in New Holstein, Wisconsin. A stenographic transcript was received on March 18, 2019, and the parties thereafter filed written argument until May 10, 2019. On June 24, 2019, I was formally appointed as the Hearing Examiner.

Having considered the matter, I make and issue the following:

**FINDINGS OF FACT**

1. The School District of New Holstein is a municipal employer. Dan Nett is the District Administrator.

2. Brad Kozaczuk is employed by the District as a teacher and has served as the President of the New Holstein Education Association since June, 2018. The Association is the collective bargaining representative of teachers employed by the District.

3. On Thursday, November 15, 2018, at 9:48 a.m., Kozaczuk sent the following email to certain District employees using the District's email system:

Hello to all!,

Here is your soon to be daily annoyance from me, reminding you to vote YES for our NHEA union re-certification!

First some clerical errors to correct. In my haste to get you all the information I inadvertently used some materials created by the Racine Education Association. All the information should get you to the correct website and phone number, but I did get a few questions about the REA. So I fixed it. I hated leaving that mistake out there so the signage is all new with NHEA all over it! I even went ahead and put new voting cards in the HS and MS mailboxes. Don't worry ES, your stuff is coming today! Look for it in your mailboxes tomorrow!

Second, the question of who can vote came up. Basically if you are eligible to join the union you have to vote. Even if you are not a NHEA member your vote counts! More importantly, if you do not vote it counts as a "NO" vote and hurts us.

"What do we get by voting yes?" The short answer is a voice in our contract. While we do not have full bargaining power, we do still have a voice in our salary. **BUT ONLY IF WE RE-CERTIFY!** That's why your yes vote is so crucial. If we do not re-certify, we give complete power to Mr. Nett to do whatever he wants with our salary increase. By re-certifying we get a seat at the table to discuss salary distribution and any other topics we can slide into the meeting. It is an important conversation to have with administration.

**The deadline to vote is Tuesday, November 20 at noon. Please take 2 minutes, click the link below and vote YES to give yourself a voice.**

[www.aaaelections.org/WERC](http://www.aaaelections.org/WERC)

Thanks,

Brad

4. On November 16, 2018, Kozaczuk personally received the following letter from Nett suspending him for one day:

Dear Mr. Kozaczuk,

This letter represents the 1 day unpaid suspension (11/19/18) that you are being provided due to engaging in political and union activities during school time with school resources. Specifically, Mr. Kozaczuk created NHEA documents and sent out emails via school technology in support for the NHEA recertification election during school hours. The document sent to all staff also provided a false accusation that “If we do not recertify, we give complete power to Mr. Nett to do whatever he wants with our salary increase.” Mr. Kozaczuk approached Mr. Nett a few weeks ago to ask permission to distribute political and union materials. At that time, Mr. Nett explained the answer is no, specifically during school hours and with use of school resources and justified the decision by sharing with Mr. Kozaczuk current school board policy specific to the matter. Mr. Kozaczuk disregarded Mr. Nett’s directive. Board policy (3231) and administrative guidelines (AG 3231) describe that school resources and time are not appropriate pathways for distributing this information. Mr. Kozaczuk must focus on instruction during the contractual day.

During investigation, Mr. Kozaczuk and his representative stated confusion that was created by delineating between the general election and the union election as part of the reason that Mr. Kozaczuk’s email was sent. Mr. Kozaczuk did apologize for “poor politics and choice of words,” specific to statements that he made.

In the future, please ensure that you follow expectations provided by the professional staff employee contract (3.04), handbook, school board policy, administrative guidelines, and administrative directives. You welcome to speak with me for clarification. Moving forward, if you do not follow the guidelines above, you will be reprimanded with a longer duration of unpaid suspension and/or a recommendation of termination of your contract to the Board of Education.

5. After receiving the suspension letter, Kozaczuk felt ill and with permission left school and went home. At 11:24 a.m., Kozaczuk sent the following email to the personal email addresses of certain District employees using his personal email account:

Hello to all!

Please remember that the New Holstein Education Association recertification election ends at NOON on Tuesday, November 20th.

I urge you to vote YES so that the NHEA has a guaranteed seat at the table to discuss wage increases with the District. Unlike the November 6th election, or any other democratic election you have ever participated in, the recertification election allows for non-votes to count as “NO.”

Since I do not have home emails for teachers, I urge you to talk to your colleagues and encourage them to vote. Here is the link to vote online:

[https://www.aaaelections.org/aaaelections/WERC/in\\_dex.asp](https://www.aaaelections.org/aaaelections/WERC/in_dex.asp) I've attached a document that explains the online voting process.

I am communicating with you through home email because Mr. Nett believes I made a mistake talking about the recertification vote using school email on Thursday, November 15th. I have been disciplined by Mr. Nett for that email. After the Thanksgiving holiday, I'll be scheduling a membership meeting to talk more about this issue.

BRAD

6. On November 26, 2018, Kozaczuk received the following letter from Nett suspending him for three days:

Dear Mr. Kozaczuk,

This letter confirms the three (3) day unpaid disciplinary suspension (11/27/18-11/29/18) that you are being issued due to engaging in communication with staff members that is divisive with the role of the Superintendent, and for publically (sic) sharing your discipline with staff members within hours of these same concerns being discussed by us (and you being issued a one (1) day unpaid disciplinary suspension (11/19/18 for engaging in almost the same type of conduct). In an electronic message to staff, after our discipline meeting on 11/16/18, you emailed staff a reminder about the recertification election. An appropriate platform was used for this communication and the majority of the communication was appropriate. However, again, you referenced myself and stated that you were reprimanded by the Superintendent. You shared that you were disciplined for “talking about the recertification vote using school email ...” which is not completely truthful. Your email was sent at 11:26 a.m. on 11/16/18, while you were out sick per

Mr. Olig. School staff shared your electronic-mail message with me, as they thought the last paragraph was inappropriate in nature.

As a reminder, you approached me a few weeks ago to ask permission to distribute political and union materials. At that time, I explained the answer it no, specifically during school hours and with use of school resources. I justified the decision by sharing with you current School Board policies specific to the matter. You disregarded my directive. Board policy (3231) and administrative guidelines (AG 3231) specifically provided that school resources and time are not appropriate pathways for distributing this type of information. As a result you were provided a one (1) day unpaid disciplinary suspension for the above stated behavior, and specifically, for falsely representing that “by not voting, we give Mr. Nett complete power to do whatever he wants with our salary increase ... .” You were specifically directed to stop engaging in similar communications moving forward.

In the future, please ensure that you follow expectations provided by the professional staff employee contract, handbook, school board policy, administrative guidelines, and administrative directives. You are welcome to speak with me for clarification. Again, you are specifically directed to stop engaging in conduct that is divisive and undermines authority of the Superintendent. Moving forward, if you do not follow the guidelines above, you will be disciplined further, including the potential of a recommendation of termination of your contract to the Board of Education.

Please refer to District policy should you have further concerns as to your right to appeal this decision (3340), professional expectations, or next steps.

Based on the above and foregoing Findings of Fact, I make and issue the following:

### **CONCLUSIONS OF LAW**

1. Section 111.70(2), Stats., gives Kozaczuk the right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.
2. Kozaczuk’s actions set forth in Findings of Fact 3 and 5 were lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection and were protected by § 111.70(3)(a)1, Stats.
3. Nett’s actions set forth in Findings of Fact 4 and 6 had a reasonable tendency to interfere with the right of Kozaczuk and other District employees to engage in lawful, concerted

activities for the purpose of collective bargaining or other mutual aid or protection and therefore violated § 111.70(3)(a)1, Stats.

4. Nett's actions set forth in Findings of Fact 4 and 6 were motivated at least in part by his hostility to Kozaczuk's exercise of his right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection and therefore violated § 111.70(3)(a)3. Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following:

**ORDER**

1. To remedy the violations of §§ 111.70(3)(a)1 and 3, Stats., the School District of New Holstein, its officers, and agents, shall immediately take the following actions that will effectuate the purposes and policies of the Municipal Employment Relations Act:

A. Cease and desist from interfering in any manner with the right of District employees to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

B. Cease and desist from taking any action that discourages membership in the New Holstein Education Association.

C. Take the following affirmative actions:

i. Immediately rescind the suspensions received by Brad Kozaczuk and make him whole.

ii. Send a copy of this decision to all District employees who are represented for the purposes of collective bargaining by the New Holstein Education Association and to all members of the New Holstein Board of Education.

iii. Within twenty (20) days of the date of this Order, advise me, Brad Kozaczuk, and the New Holstein Education Association in writing of the actions taken to comply with this Order.

Dated at Madison, Wisconsin, this 5th day of July, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Examiner

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER**

Complainants correctly allege the suspensions received by Brad Kozaczuk from District Administrator Nett constitute prohibited practices within the meaning of §§ 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act.

Section 111.70(2), Stats., provides in pertinent part that municipal employees such as Kozaczuk have the right to “form, join, or assist labor organizations” and the right to engage in “lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Both statutory rights are protected both by (1) § 111.70(3)(a)1, Stats., which makes it a prohibited practice for a municipal employer such as the School District of New Holstein “[t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).” The right to “form, join, or assist labor organizations” is also protected by § 111.70(3)(a)3, Stats., which makes it a prohibited practice for a municipal employer such as the District to “[t]o encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment.”

**Alleged Violations of § 111.70(3)(a)1, Stats.**

Analysis of whether the one-day suspension violated § 111.70(3)(a)1, Stats., focuses on whether Kozaczuk’s November 15 email was a protected exercise of § 111.70(2) rights and, if so, whether the suspension had a reasonable tendency to interfere with the exercise of those rights. *WERC v. Evansville*, 69 Wis.2d 140 (1975). The District concedes that, if the November 15 email had not included the sentence, “If we do not re-certify, we give complete power to Mr. Nett to do whatever he wants with our salary increase,” Kozaczuk would have been exercising lawful concerted (and thus “protected”) § 111.70(2) rights, and the suspension would have violated § 111.70(3)(a)1, Stats.<sup>1</sup> The District contends that by use of that phrase, Kozaczuk was sharing false and disruptive information and therefore lost statutory protection.

The Commission has held there are circumstances where an employer’s “operational needs” or “business needs” excuse and permit actions that otherwise have a reasonable tendency to interfere with employee’s lawful concerted activity. *Racine Education Association*, Dec. No. 29074-C (WERC, 7/98); *University Hospitals and Clinics Authority*, Dec. No. 30202-C (WERC, 4/04); *State of Wisconsin*, Dec. No. 30340-B (WERC, 7/04). However, the employer’s action cannot exceed what is needed to protect its legitimate interests. *Id.*

Here, the District contends Kozaczuk was inaccurate as to the extent of Nett’s power because the School Board has the ultimate authority to determine the course of collective bargaining. In addition, Nett believed Kozaczuk was acting contrary to instructions Nett

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<sup>1</sup> While the suspension letter asserts the suspension is for “engaging in political and union activities during school time and with school resources,” Nett agreed during the March 1, 2019 hearing that:

... had the communication been limited to, here’s the election, here’s how you can vote, and he did it on school time, prep time, no violation of school policy, and no discipline ...

incorrectly thought he had conveyed earlier to Kozaczuk about allowable communications. However, the record reflects that Kozaczuk had a good faith and accurate belief that his actions, in the context of a recertification election, did not fall within the scope of Nett's directives regarding the distribution of what Nett himself referred to as "political flyers," in the context of a gubernatorial election. Kozaczuk was also a novice in terms of the collective bargaining process and was obviously open to a clarification of his remark to be distributed to employees. In light of all of these considerations, it is clear that a one-day suspension far exceeded the scope of the action needed to meet any District "operational need." Instead of a suspension, the District could have met any legitimate interest by unilaterally advising employees of its views on how information regarding recertification could be communicated and what was inaccurate in Kozaczuk's communication or by pursuing a joint clarification with the Association. Therefore, it is concluded that the November 15 email was "protected" lawful, concerted activity, and the November 15 one-day suspension constituted a prohibited practice within the meaning of § 111.70(3)(a)1, Stats.<sup>2</sup>

The three-day suspension imposed by Nett as a result of Kozaczuk's November 16 email from his home also constituted a prohibited practice within the meaning of § 111.70(3)(a)1, Stats. The suspension letter asserts that Kozaczuk's communication was "divisive," "not completely truthful," and wrong for "publically (sic) sharing your discipline with staff members." Kozaczuk's email was not divisive. Rather, Kozaczuk was exercising a "mutual aid or protection" right to communicate with fellow employees about a disciplinary matter and potentially warn them about the consequences of certain modes of communication. Instead of being "divisive," the tone of the email is best read as being conciliatory as there is no mention of Nett's role in the collective bargaining process. Thus, while he had no obligation to do so, Kozaczuk's email reflects an effort to reduce rather than inflame tensions with Nett. As to the issue of "not completely truthful," Kozaczuk's less than precise reference to Nett's stated basis for the November 16 suspension again hardly warrants the excessive response of discipline. It was true for the one-day suspension, a non-disciplinary response would have met any legitimate District need. Instead, the record makes it apparent that Nett was actually acting out of anger over what he perceived to be a challenge to the "authority of the Superintendent" and his mistaken belief that Kozaczuk and the Association had agreed there would be no further communications pending efforts to come up with a joint communication regarding the November 15 email.

### **Alleged Violations of § 111.70(3)(a)3, Stats.**

The two suspensions also violated § 111.70(3)(a)3, Stats. if:

1. Kozaczuk was engaged in lawful concerted activity within the meaning of § 111.70(2), Stats., and protected by § 111.70(3)(a)1, Stats.
2. Nett was aware of that activity.
3. Nett was hostile to that activity.

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<sup>2</sup> The District asserts the suspension did not have a reasonable tendency to interfere with Kozaczuk's exercise of § 111.70(2) rights because Kozaczuk proceeded to communicate again with employees that same day. The fact that Kozaczuk was not cowed into silence does not negate the reasonable tendency of the suspension to chill his (and others) exercise of such rights. By way of example, Kozaczuk credibly testified that he is now much more hesitant to be assertive in his interactions with Nett and that coworkers are more hesitant to interact with him.



4. Nett acted in whole or in part out of hostility toward Kozaczuk's protected activity.

*Employment Relations Department v. WERC*, 122 Wis.2d 132 (1985).

As discussed in the context of the § 111.70(3)(a)1, Stats. analysis earlier herein, Kozaczuk was engaged in statutorily protected, lawful concerted activity and Nett was clearly aware of that activity.

As to the matter of hostility, the evidence clearly demonstrates that Nett was hostile to any employee action he perceived cast him in an unfavorable light or in his own words "undermines authority of the Superintendent." However, the exercise of § 111.70(2), Stats. rights inevitably and legitimately clashes with Nett's interest in counteracting anything that challenges his authority.

In the spring of 2018, Nett evidenced hostility after several District employees engaged in lawful concerted activity for the purpose of "mutual aid or protection" by raising concerns at a School Board meeting about workload decisions made by District administration. Nett responded negatively to the employees' actions. The strongest evidence of his hostility is provided by the suspensions themselves which are an excessive reaction to Kozaczuk's imprecision regarding Nett's collective bargaining role and the stated basis for the November 16 discipline, as well as to Nett's mistaken belief that Kozaczuk's November 15 email conflicted with a prior directive and that the November 16 email conflicted with an agreement reached with Kozaczuk and the Association.

As to the issue of Nett's motivation, the record does not provide any persuasive alternative to illegal hostility as being at least a partial basis for his actions. Nett's hostility led him to take actions that far exceeded anything legitimately needed to meet any bona-fide actual or perceived District "operational needs."

To remedy the prohibited practices, I have ordered the District to cease its illegal actions. I have also order the District to take certain affirmative remedial action that will hopefully make it clear that the rights of its employees under the Municipal Employment Relations Act must be respected.

Dated at Madison, Wisconsin, this 5th day of July, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Examiner