**ERNEST FUCHS**

**v. Docket No. 94-05-010**

**BROOKE COUNTY BOARD OF EDUCATION**

**D E C I S I O N**

Grievant Ernest Fuchs is employed by the Brooke County Board of Education (BCBE) as a bus operator. On or about January 10, 1994, he filed the following grievance at level four: (See footnote 1)

Grievant. . .is contracted to work a six hour per day schedule. School year 1993-94 Grievant was assigned a daily work schedule of approximately (5 1/2) five & one half hours per day.

Every fourth week Grievant's work schedule is increased by the addition of approximately 1 1/2 hours transporting students home who are involved in after school activities. On September 1, 2, 1993, Grievant worked 7 1/4 & 7:09 hours totaling 2:24 overage. [BCBE] has refused to pay the overage.

Grievant contends this is unfair and requests compensation for past and future overages.

Based on all matters of record, the following determina tions are made. Findings of Fact

1. BCBE has established a six hour work day for its bus operators. Credited work time includes twenty minutes for the operator to service his bus and another thirty minutes for lunch.

2. On August 27, 1993, BCBE held an inservice meeting for all school bus operators prior to the beginning of the new 1993- 94 school year.

3. Grievant, contracted along with his co-workers as a six hour per day, thirty hour per week driver, attended the inservice meeting on August 27, 1993. All but about four of BCBE's thirty-four bus operators were present.

4. At the inservice meeting, Transportation Director Raymond Lahita discussed the need for supplemental curricular runs or activity runs, i.e., trips generally made at either 11:00 a.m. or 5:00 p.m., and distinct from the "normal" morning runs which bring students to school and afternoon runs which take students home immediately after the end of the instruction al day. He proposed that each bus driver who actually worked less than six hours per day would, in order of seniority, choose a supplemental curricular run or activity run to perform one week out of every three or four weeks throughout the school year. Four drivers who worked six hours or more per day would not be considered for placement on the activity driving schedule because they already satisfied their daily

work time.

5. The procedure presented by Mr. Lahita was similar to the procedures proposed by BCBE for the 1991-92 and 1992-93school years for the allocation of activity runs.

6. Issues involving the activity runs have been the subject of three grievances in prior school years in which the grievants did not prevail: Fuchs, et al., v. Brooke County Bd. of Educ., Docket No. 92-05-047 (May 5, 1992), hereinafter Fuchs I; Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-462 (April 30, 1993), Fuchs II; and Stern/ Blackburn v. Brooke County Bd. of Educ., Docket No. 93-05-093 (Aug. 16, 1993). The grievants in Fuchs I failed to prove a claim that they were entitled to compensation at the "normal daily rates" with respect to the allocation of activity runs.

7. At the August 27, 1993, inservice meeting, fifteen bus operators whose work time was less than six hours and who would be affected by Mr. Lahita's proposal and given an activity run consented in writing to the procedure presented by Mr. Lahita. That is, they signed a paper under a handwritten notation, "I agree on accumulated time for Activity Run." BCBE Ex.2. However, Grievant and two other affected drivers opposed and signed a sheet that stated, "I do not agree on accumulated Activity Run time." BCBE Ex.3. The remaining fourteen bus drivers did not sign either document; however, these workers have not filed grievances or otherwise indicated their disap proval of the procedure.

8. Mr. Lahita essentially testified that, if the bus operators would not approve of the procedure by which activity runs are allocated to drivers whose daily driving schedules fall short of from fifteen to thirty minutes or more of work time,those particular workers would be obligated to remain on duty "and do something" each and every day to fulfill their contract time. T.36. He also testified that, while activity drivers are not paid for overage time during their activity driving week, "overtime" wages are authorized for drivers who fulfill their contract obligations and work over six hours a day. T.34-35.

9. Because Grievant's "regular" work hours for the 1993- 94 school year fell shy of the designated six hours per day work time, he was given an activity run.

10. During the 1993-94 school year, Grievant works five hours and thirty minutes per day during three weeks of each month. During these three weeks, Grievant falls short of his "contracted" time by a half hour each day or two and one-half hours each week, for a total of seven and one-half hours for the entire three-week period. Grievant completes his regular p.m. run at approximately 4:20 every day. During the fourth week of each month when he drives an activity run, he picks up students

at about 5:00 p.m. and finishes approximately forty-five minutes later. Counting Grievant's "down" time each afternoon after he finishes his p.m. run and before he begins his activity run, he works approximately seven hours per day and a total of five hours of "overage" time during that week. However, during each month's cycle of driving, Grievant is still short two and one- half hours on his "contract" time.

11. Grievant was aware on August 27, 1993 that he would be scheduled to drive some type of supplemental curricular run or activity run one week out of four. He testified that during theAugust 27, 1993 inservice meeting, he had an "inkling" that he would not receive additional compensation for overage during the week he worked more than six hours per day driving the activity run. He agreed that he was somewhat aware that drivers had not been paid overage during prior school years. T.17,19.

12. On September 10, 1993, Grievant knew for certain that he would not be paid for overage during the 1993-94 year, because he received his first paycheck and no extra compensation for his overage driving days on September 1 and 2, 1993.

13. Grievant requested a level one conference with his immediate supervisor on September 30, 1993, exactly fourteen "working" days after he received his paycheck.

The first issue which must be addressed is BCBE's argument that Grievant's claim is time barred. W.Va. Code §18-29-4(a)(1) provides that

Before a grievance is filed and within 15 days follow ing the occurrence of the event upon which the griev ance is based, or within 15 days of the date on which the event became known to the grievant or within 15 days of the most recent occurrence of the continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a confer ence with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

According to BCBE, the "grievable event" in this case occurred during the August 1993 inservice meeting because Grievant knew at that time he would be assigned an activity run and not be paid for overage. According to Grievant, the issue in this case is whether or not he is entitled to "overage" wages when he works over six hours each day during the week he has theactivity run.

Contrary to BCBE's assertion, Grievant could not be certain that he would not be receiving overage pay until he received his paycheck. While Mr. Lahita testified that overage had not been paid for several school years, he stated that the issue was not discussed at the inservice meeting in

August 1993. When Grievant learned he had not been paid overage, he timely initi ated a grievance within the fifteen days of allowable time.

BCBE alternatively argues that the legal issues in this case have already been addressed in Fuchs I, Fuchs II, and Stern/Blackburn. BCBE invokes the doctrines of stare decisis and res judicata.

With respect to the actual activity run work assignment, Grievant does not dispute that, as a result of the decision in Fuchs I and later affirmed by the Circuit Court of Brooke County on November 12, 1992 (Civil Action No. 92-P-72), BCBE may assign him an activity run one week out of four, and that the assign ment properly becomes a portion of his six-hour workday. He further claims the subject of overage compensation was not addressed in Stern/Blackburn because BCBE raised a timeliness issue in that case, and the grievants failed to justify why they had not timely filed their grievance.

In support of her contention that Grievant is entitled to compensation for overage time, Grievant's union representative argued at the level two hearing as follows:

[W.Va. Code §§18A-4-8 and 18A-4-8a] that stipulates employment time and monthly minimum salary do protect an employee's right for pay beyond the stipulated 6- hour contract time. In the Brooke County case, it isa 6-hour workday, which [Grievant] has documented that he goes beyond that 6 hours at a certain point when he is asked to do that activity run. It is for that time that [Grievant] is requesting compensation for those times documented on the grievance and future overages.

T.40. In her level four fact/law proposals, Grievant's repre sentative asserts that Grievant opposed "Mr. Lahita's request to accumulate time. . .." Grievant's Proposed Findings of Fact, ¶9. She goes on to argue, "[W.Va. Code §18A-4-8a] protects the rights of service personnel regarding pay beyond their normal working day." Grievant's Proposed Conclusions of Law, ¶3.

The subject of res judicata was recently addressed in Woodall v. W.Va. Dept. of Trans., Docket No. 93-DOH-393 (Feb. 2, 1994). It was noted in Woodall, at 4, n. 6 (cites omitted), that "res judicata may be applied by an administrative agency to prevent the 'relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.'" The question of whether the doctrine of res judicata should apply in this case requires a close reading of Fuchs I.

The grievants in Fuchs I sought job postings, separate contracts and additional compensation at the "normal daily rates" with respect to the allocation of activity runs in a past school year. While those activity runs are essentially the same activity runs at issue here, and Grievant is again seeking

extra compensation for driving an activity run, the precise issue of "overage" compensation was not raised in Fuchs I (See footnote 2) (or addressedin Stern/Blackburn). (See footnote 3) Therefore, it is determined that a new issue has been raised in this action which has not been previ ously litigated. Accordingly, res judicata does not apply.

Stare decisis would require the undersigned to abide by formerly decided cases. Again, the issue of overage driving and compensation was not previously decided. Fuchs I simply established that BCBE could require its bus operators to perform some curricular driving in addition to morning and afternoon runs in order to fill out the drivers' six-hour work day without payment of additional compensation. (See footnote 4)

Thus the question of "overage" must be addressed. It is clear that Grievant is entitled to some relief on this issue. Code §18A-4-8 contains the following prohibition: "No service employee, without his agreement, shall be required to report for work more than five days per week and no part of any working day may be accumulated by the employer for future work assignments, unless the employee agrees thereto." Grievant did not agree to accumulate time for future work assignments. Therefore, BCBE cannot force Grievant to accumulate time.

Accordingly, Grievant is entitled to be relieved of the activity run in question since that particular run takes him an hour over his contracted work day for approximately five daysout of twenty without his consent. However, if Grievant is relieved of the run, he would then be a half-hour shy of his contracted work day every day of the twenty-day monthly period. Given that situation, BCBE is permitted to assign Grievant additional bus-operator-related duties each and every working day to fill out Grievant's six-hour daily schedule. (See footnote 5)

All that remains is Grievant's request for "compensation for past and future overages." The authority to pay compensa tion for overage work is not found in Code §18A-4-8a, the statute upon which Grievant erroneously relied. That statute discusses the rates of pay for "extra-duty" assignments, defined in Code §18A-4-8b as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips," but contains absolutely no information about payment of wages for "overage" work. Obviously, the activity runs at issue herein are not "irregular" jobs and cannot be construed as extra-duty work. See Fuchs II.

In fact, there is no statutory mandate to compel the payment of overage compensation under any

circumstances. The worker either does or does not agree to accumulate time. With respect to "future" overages, Grievant is entitled to be relieved of the offending activity run and nothing else; BCBE cannot be ordered to keep Grievant on the run and to pay himextra wages. The issue of "past" overages is somewhat different. However, in the final analysis, Grievant must prove each and every element of his grievance and establish a legal basis for the relief he requests.

Grievant failed to present any legal theory in support of an award of compensation for past overages. As noted above, Code §18A-4-8b offered no guidance on the subject of the proper wages for "overage," and none could be found in other relevant statutes. It is also noted that Grievant willingly selected an activity run without inquiring as to whether or not he would be paid for overage, even though he suspected he would not be paid. Because Grievant exercised his option to refuse overage but nevertheless still selected a run of his own choosing, it cannot now be found that he is necessarily entitled to any compensation for past overage.

In addition to the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. The event upon which this grievance is based is BCBE's practice not to pay some form of additional compensation with respect to the allocation of activity runs and "overage" time. Grievant timely initiated his grievance when he learned he had not received said compensation.

2. This grievance raises a new issue not raised or addressed in previous cases; therefore, the doctrine of res judicata does not apply. See Woodall v. W.Va. Dept. of Trans., Docket No. 93-DOH-393 (Feb. 2, 1994), and cases cited therein.
For the same reason, stare decisis does not apply.

3. No part of any working day may be accumulated by the employer for future work assignments, unless the employee agrees thereto. W.Va. Code §18A-4-8.

4. Grievant did not agree to the accumulation of time for future work assignments per W.Va. Code §18A-4-8.

5. Grievant failed to establish that he was entitled to "compensation for past. . .overages," under any theory of law.

Accordingly, the grievance is **GRANTED**, to the extent that BCBE is Ordered to relieve Grievant of the activity run in question unless Grievant agrees to accumulate time for future work assignments; all other relief is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Brooke County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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**NEDRA KOVAL**

**Administrative Law Judge**

**Date: April 29, 1994**

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*Footnote: 1 Grievant's union representative, at the time she filed the level four appeal, requested in writing that mediation be scheduled in an attempt to settle the dispute. However, BCBE declined the offer. Thereafter, the parties agreed that a decision could be based upon the record and supplemented by written fact/law proposals. The record consists of the November 2, 1993 level one decision, the transcript/exhibits of the December 20, 1993 level two hearing and the December 21, 1993 level two decision. A brief was submitted by BCBE on April 6, and by Grievant on April 20, 1994.*

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*Footnote: 2 The issue in Fuchs II had nothing to do with either the propriety of the activity run assignments or overage compensation. In fact, in Fuchs II, Grievant protested because hehad been removed from the bus operators' activity schedule.*

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*Footnote: 3 The grievants in Stern/Blackburn alleged violations of Federal wage and hour laws and that the allocation of the activity runs was illegal and violative of Code §18A-4-8.*

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*Footnote: 4 Fuchs I was appealed to the Brooke County Circuit Court and later affirmed on November 12, 1992 (Civil Action No. 92-P-72).*

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*Footnote: 5 It may be that an activity run is available which takes less than the average forty-five minutes to complete. Certainly, Grievant should not be permitted to choose an activity run to his liking if he also refuses to accumulate time.*