

Dismissed U.S. Aide Upheld On Right to an Open Hearing

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The U.S. Court of Appeals yesterday upheld the right of A. Ernest Fitzgerald to receive an open hearing before the Civil Service Commission to determine whether he was fired as a civilian Air Force official for testimony he gave before a congressional committee concerning the C-5A transport.

In a decision that could have wide application, a unanimous three-judge court ruled that Fitzgerald has a statutory right to a hearing and that if he wants the hearing to be open to the press and public, it must be open.

The Civil Service Commission had contended that Fitzgerald was fired on Jan. 5, 1970, as a result of a reduction in force and therefore Fitzgerald had no right to a hearing although the commission consented to give him one.

Fitzgerald, who held a \$13,874-a-year job as deputy for management systems in the Air Force Secretary's office, first came to public attention when he testified before a Joint Senate-House Economic subcommittee in November, 1968, that the cost of the C-5A was expected to run about \$2 billion over the original estimate of \$3.4 billion. Fitzgerald was subsequently shifted to studying minor programs before being fired in 1970.

At the time he was fired, Fitzgerald was told his job and a secretary's were being abolished as part of a cost reduction program.

He appealed the firing to the Civil Service Commission, which said he had no right to a hearing but granted him one anyway. Fitzgerald waived his right to a closed hearing, but the commission refused to open the proceeding to the public and press. The U.S. District Court upheld Fitzgerald in June, 1971, and the Court of Appeals yesterday affirmed the lower court order for an open hearing.

Even though a separation from government employment may be described by an agency as a reduction in force, the court said, Congress has charged the Civil Service

Commission to hear appeals where "non-frivolous allegations" are made that the discharge is legal.

"It is our opinion that Fitzgerald has a statutory right to the hearing which the Commission says it 'gratuitously gave him,'" Senior U.S. District Court Judge Burnita Shelton Matthews wrote for the panel, which included Chief Circuit Court Judge David L. Bazelon and Circuit Court Judge Edward A. Tamm.

The court also rejected the government's contention that the hearing did not have to be open. The Supreme Court has consistently distinguished the due process requirements of quasi-judicial administrative proceeding from those that are merely investigative and fact-finding, the court said.

Fitzgerald's hearing is quasi-judicial, the court ruled. "We

are satisfied that due process requires that the Fitzgerald hearing be open to the press and public," the court said.

The government had argued that keeping the hearing closed to the press and the public was for the protection of the individual involved. "The government did not explain to the satisfaction of the District Court why a regulation which is for the sole benefit of the employee cannot be waived by him," the court said. "There is no evidence that the presence of the public and press will in any way impede the Fitzgerald hearing, disrupt the otherwise 'calm atmosphere' nor impose additional burdens upon the Commission which it cannot handle."

A spokesman for the Justice Department said that no decision has been made about whether to appeal the case to the Supreme Court.