

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE:

B-162578

DATE:

JUN 19 1975

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MATTER OF:

**A. Ernest Fitzgerald - Backpay entitlement upon
reinstatement after unjustified separation action -
Department of the Air Force**

DIGEST:

Where there is no substantial increase in volume of nonofficial part-time teaching, lecturing and writing of former employee during the interim period between separation and restoration from an adverse action, interim earnings from such activity need not be deducted from backpay under 5 U.S.C. § 5596.

The Department of the Air Force requests further advice as to the computation of the deduction from backpay due Mr. A. Ernest Fitzgerald as set forth in 53 Comp. Gen. 824 (1974) and 54 Comp. Gen. 288 (1974). As pointed out in the decision of October 18, 1974, the decision of May 6, 1974, involved the entitlement of Mr. Fitzgerald to backpay under 5 U.S.C. § 5596 (1970) incident to his reinstatement in his former position on the basis of a timely appeal resulting in a finding by appropriate authority that he had undergone on unjustified or unwarranted personnel action resulting in the withdrawal of his pay. Questions concerning Mr. Fitzgerald's backpay have been settled with the exception of \$38,250.23 which he reported as having been earned from lecturing and writing during the period of separation.

The digest of the decision of May 6, 1974, in pertinent part stated that where income was generated from part-time teaching, lecturing, and writing activities prior to an unjustified separation action only the added increment from such activities during the interim period between separation and reinstatement need be deducted from backpay. The determination as to the amount of such added increment may be based upon a comparison of the amount of outside work performed on an hourly basis or frequency of occurrence, or upon income received prior to separation with that of the interim period.

The decision in pertinent part continued as follows:

"Since Mr. Fitzgerald engaged in lecturing and writing prior to his separation as well as thereafter during the interim prior to his restoration, the amount received for lecturing during the period of his separation need not be deducted from his backpay

to the extent that he is able to establish the volume of such lecturing and writing activities prior to his separation. This may be done on an earnings basis, on an hourly basis, or on the basis of the number of lectures given and articles written during a representative period prior to his separation. If it is shown that his activities in these fields did not increase substantially during his period of separation no deduction from backpay is required. If, on the other hand, he engaged in substantially more lecturing and writing activities after his separation, deduction should be made in an amount commensurate with the increase in such activity. Thus, if he gave twice as many lectures during the interim period half of his earnings from that source should be deducted. If Mr. Fitzgerald chooses to base the comparison on money earned, deduction should be made for the amount earned after separation which is in excess of his earnings prior to his separation."

The digest of the decision of October 18, 1974, reads as follows:

"Where volume of nonofficial part-time teaching, lecturing and writing of Federal employee prior to separation may be equal to such activity during interim between separation and restoration which would eliminate need that interim earnings be deducted from backpay under 5 U.S.C. 5596, affidavit by employee based on limited records and recollection as to his belief of such activity is not sufficient to establish volume when agency requested detailed listing showing date, place, and duration of each lecture and date and citation of each article. Agency is entitled to specificity requested."

Mr. Fitzgerald in his affidavit, with incorporated exhibits, dated April 11, 1975, has provided the agency a listing of his lectures and teaching appearances during calendar years 1968-73, and his major articles during calendar years 1968-74. Mr. Fitzgerald indicates that in reconstructing these activities, he has used all available personal records, leave records provided by the Air Force, and good faith approximations for those years during which there was no contemporaneous reason to keep detailed records.

The agency seeks further advice as set forth below:

"In addition to the submission of April 11, 1975, the discussion which follows makes reference to the memorandum from Mr. Fitzgerald dated January 15, 1974, and his affidavit of August 23, 1974, copies of which were enclosed with our letters to you of January 18, 1974 and September 12, 1974, respectively, and which are also herewith transmitted together with your decisions to facilitate reference.

"1. Lectures and Teaching. As confirmed in your decision of October 18, 1974, the instructions to Mr. Fitzgerald included a request for a detailed listing showing the date, place and duration of each lecture. In asking where an activity had taken place, the intent was to identify not merely the city and state, but also the name and address of the group, school or other sponsoring organization. As can be seen, the April 11, 1975 exhibits are essentially silent in the latter regard. The employee has not included such information except with the memorandum of January 15, 1974, whose attachments illustrate two of the specific contexts where he appeared in 1969. Otherwise, only the geographical area has been shown.

"The reason for seeking this degree of specificity was primarily to establish the comparability of activities before and after separation. Geographical area, without more, would seem of limited value in such a comparison. Judging from the reconstruction the employee has been able to accomplish, the requested details would appear to be reasonably available, either from tax records if compensation was received or by means of good faith approximations. Obtaining these data would have the additional advantage of clarifying the nature of the activities in question and the employee's role. For example, to quote a characterization from the affidavit of August 23, 1974, does 'participation in educational seminars' come within the scope of your decision of May 6, 1974?

"In the absence of reported interpretations involving comparisons on other than an earnings basis, your views would be appreciated with respect to the sufficiency of this aspect of the April 11, 1975 submission. We would also appreciate further guidance regarding the tests to be applied in determining whether a particular activity qualifies as lecturing or teaching.

"2. Major Articles. An ambiguity has arisen as to whether the comparison under this heading involves the number of articles prepared or the number of articles published. On the former theory, Mr. Fitzgerald would be credited with an average of one article per year during the two years prior to separation, while on the latter theory, his output for this period would be reduced to an average of one half an article per year. There is also a variance in the listing for the period of separation, which was previously reported in the August 23, 1974 affidavit as six major articles, or one and a half per year, but has been revised in the April 11, 1975 exhibit to five major articles, or one and a quarter per year. Depending on the assumptions, the resulting ratios could range from a low of 1:3 (average rates of one half versus one and a half) to a high of 4:5 (average rates of one versus one and a quarter). In your opinion, can the correct ratio be established from the information at hand? If so, what is that ratio? If not, what additional information is required?

"We would have no objection to your dealing directly with Mr. Fitzgerald to resolve this matter and advising us of the proper amount to which he is entitled. If this is not feasible, we will be guided by the criteria set forth in your prior decisions and your response to this letter in evaluating and determining the amount to which he is entitled. A copy of this letter has been provided to Mr. Fitzgerald."

Mr. John Bodner, Jr., Mr. Fitzgerald's attorney, by letter of May 20, 1975, has advised us with respect to the agency discussion set forth above as follows:

"I reviewed with A. Ernest Fitzgerald the nature of the lecturing and teaching appearances listed in Exhibits A through F of his affidavit dated April 11, 1975. In all of the appearances listed, Mr. Fitzgerald performed a lecturing and/or teaching function. On none of the occasions listed was he either a student or passive participant. These appearances were before diverse groups including public service groups (i.e., Rotary, Kiwanis and the like), chambers of commerce, church groups, colleges and universities, business groups, foundations, and educational seminars. Typically, where Mr. Fitzgerald participated in a seminar, he would deliver a talk, then lead a discussion period, and on some occasions make a viewgraph presentation. His role combined lecturing and teaching.

"In sum, the activities of Mr. Fitzgerald at the appearances listed for the years 1968 through 1973 involved comparable lecturing and teaching activities before a wide range of associations and groups.

"Regarding the major articles written by Mr. Fitzgerald, the reason why his affidavit of August 23, 1974 referred to six articles whereas the exhibit to his affidavit of April 11, 1975 referred to five major articles is that on review of the articles Mr. Fitzgerald determined that one of the articles originally listed was in fact a reproduction of a speech that he had delivered. Since he did not prepare and write this talk for publication, it was decided that it should not be included as a writing effort comparable to his other articles listed."

We believe the material in Mr. Fitzgerald's affidavit of April 11, 1975, as amplified by the statement of Mr. Bodner, sufficiently establishes the comparability of the lecturing and teaching activity before and after separation. With respect to "Major Articles", we note all but one of the items listed in exhibit G to Mr. Fitzgerald's affidavit of April 11, 1975, were published. The one listed for September 20, 1968, which was not published was privately distributed. In the

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circumstances of this case we believe that article may be credited in the listing. Additionally we see no objection to Mr. Fitzgerald's determination not to count the publication of an article as such, since in fact it had previously been delivered as a speech. The resulting writing ratio of 4:5 does not indicate a substantial increase in writing activity during the period of separation.

Accordingly, we find that since Mr. Fitzgerald's lecturing and writing activities did not substantially increase during the period of his separation, no deduction need be made from his backpay for the amount he received for such activities during that period.

R.F. KELLER

Deputy Comptroller General
of the United States