

NATIONAL SCIENCE FOUNDATION
OFFICE OF INSPECTOR GENERAL
OFFICE OF INVESTIGATIONS

CLOSEOUT MEMORANDUM

TO: AIGI

File Number: I96110057

Date: 28 March 2002

Subject: Closeout Memo

Page 1 of 1

There was no closeout written at the time this case was closed. The following information was extracted from the file in conformance with standard closeout documents.

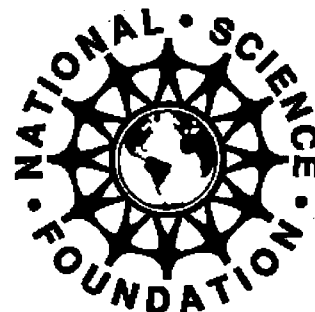
Our office was informed that the subject¹ was alleged to have committed other improper actions. The subject allegedly owned stock in a corporation,² an NSF SBIR grantee, and made award decisions on their proposals. Subsequent investigation, including an interview in which the subject admitted to owning the stock and not recusing himself from reviewing corporation proposals, in apparent violation of 18 U.S.C. § 208. He participated personally and substantially in the review process for three proposals from the Corporation. This participation also violated government-wide and NSF conflict-of-interest regulations. Our investigation also determined that the subject recommended his son as a panel reviewer, who reviewed a proposal from the corporation in which the subject later obtained a financial interest. The subject also failed to file a Form SF-450, Executive Branch Confidential Financial Disclosure Report, for 1995 with the Office of General Counsel.

Based on these determinations, an investigation report was forwarded to NSF's Deputy Director on July 30, 1997. On February 11, 1998, the Acting Deputy Assistant Director (ADAD) for the Directorate of Engineering reported to us that the subject was suspended from duty and pay for 14 days. It was also reported that the subject had resigned from the agency.

Accordingly this case is closed.

[REDACTED]

Name:	Prepared by:	Cleared by:		
	Agent:	Attorney:	Supervisor:	AIGI
Signature & date:				





Office of Inspector General Investigation Report

Case Number I96110057

30 July 1997

Background

This report concerns _____ in NSF's _____

_____ We investigated to determine whether _____ used his position to favor a company in which he owned stock. We concluded that _____ violated federal law, 18 U.S.C. § 208, by participating personally and substantially in decisions on three SBIR proposals submitted to NSF by _____, a company in which _____ had a financial interest. In addition, _____ violated sections of government-wide "Standards of Ethical Conduct for Employees of the Executive Branch", 5 C.F.R. part 2635, and NSF conflict regulations, 45 C.F.R. §§ 680-684 (collected in NSF Manual No. 15, "NSF Conflict-of-Interests Rules and Standards of Conduct"), by failing to take appropriate measures to recuse himself from working on these proposals.

Investigative Findings

_____ became an NSF _____ in June 1987 and has been in this position until the present.¹ Between June 1987 and December 1994, _____ acted on 8 _____ proposals (recommending 2 for award and 6 for declination) [see Attachment A]. In connection with his official duties, _____ also conducted a site visit of _____ facilities in the summer of 1993. _____ purchased 4,000 shares of _____ stock on December 27, 1994 [see Attachments B, C]. After acquiring this financial interest in _____, _____ acted on 3 more proposals.

We interviewed _____ on April 23 and 24, 1997. _____ admitted that after purchasing stock in December 1994, he acted on _____ proposals.

In both instances, _____ recommended in writing that NSF decline funding for the proposal [see Attachment D]. _____ stated in his affidavit:

I received Phase I reviews and recommended actions consistent with the reviews on several _____ proposals. I did this, for example, with _____, recommending on August 10, 1995 that the proposal be declined. I now realize that I should have recused myself from this proposal instead of acting on it. However, I did not confer any special treatment to _____ for any reason. I participated in the same manner in

¹

_____ is currently working under an NSF funded position at _____ Intergovernmental Personnel Act (IPA) agreement.

in which I recommended on January 24, 1995 that NSF
decline to purchase I proposal²

In January 1995, I also participated in the review process for a third proposal, by signing the Form 7 summarizing the review panel's findings. However, another NSF program manager made the formal recommendation not to fund the proposed project.

Although I was unable to explain why he acted on the proposals after purchasing stock, he believed he had taken sufficient action to address the conflict of interests. He said:

After obtaining the stock, I advised the program managers at NSF of my stock purchase and resulting conflict of interests as to proposals. I also notified [the head of the office] of this situation. I did not submit a written recusal form, but I believed the matter had been addressed through my oral notification of these individuals.

However, I acknowledged that he did not consult the cognizant conflict-of-interests officer for his directorate about his stock purchase as required by 45 C.F.R. § 681.21(a) and he did not formally (i.e. in writing) recuse himself from working on proposals. Furthermore, although NSF has required annual attendance at conflicts briefings since 1992,³ I acknowledged that:

During my tenure at NSF, I have only attended one NSF Conflict of Interests and Ethics Briefing. This briefing was in June 1987. . . . I have been sent several e-mail announcements regarding . . . briefings. Though I did not attend these briefings, I am familiar with the rules listed in the publication, "Standards of Ethical Conduct for Employees of the Executive Branch, August 1992," but I do not have a copy of this publication. I am aware that if I have a financial interest in an organization, I am prohibited from participating substantially and personally in an official capacity in any particular matter in which, to my knowledge, I have a financial interest

² All quotations from I are contained in his affidavit (see Attachment B).

³ See NSF O/D 92-12 (March 10, 1992): "All program officers and all officials at or above a comparable level should participate in at least one conflicts briefing session in each calendar year. . . . These briefings are a requirement for all program staff."

said that prior to, or shortly after, his purchase of [redacted] stock he visited NSF's Office of General Counsel (OGC) and requested advice on whether he needed to recuse himself once he made the purchase:

In approximately late 1994 or early 1995, I spoke to [NSF's Designated Agency Ethics Officer (DAEO)] regarding my anticipated purchase of [redacted] stock. . . . I was told by [the DAEO] that I would probably have to recuse myself if I did purchase [redacted] stock, but was given no documents describing [the DAEO's] opinion. The only document [the DAEO] gave me was a sample recusal form. I have never filled out or submitted one of these forms and have not had any more contact with [the DAEO] since that meeting.

In addition to the above participation in [redacted] proposals, [redacted] recommended that his son, [redacted] be used as a reviewer for proposals sent to NSF regarding bioengineering. [See Attachment F] Subsequently, [redacted] was placed on the review panel for [redacted] proposal [redacted], which was declined. However, prior to the proposal's declination but approximately one month after he had purchased the [redacted] stock, [redacted] signed the NSF Form 7 listing his son's review. [redacted] said:

I suggested my son . . . as a potential panel reviewer, but did not make the final election decision or contact him to ask him to come. My son is a physical chemist, and I believed that he was qualified to review proposals in the biomedical area. In addition, I believed that by gaining experience as a reviewer, my son would learn to write better proposals for himself in the future. My son served on the panel, and reviewed [redacted] proposal [redacted] and on January 25, 1995, I signed the Form 7 summarizing the panel's ratings of the [redacted] proposal. I realize now that I should have recused myself from the process for this proposal, instead of participating as I did.

We also determined that [redacted] did not, as required, file a SF-450 form, "Executive Branch Confidential Financial Disclosure Report" for 1995 with OGC. [redacted] submitted a SF-450 form on October 30, 1996, which listed the 4,000 shares of [redacted] stock [see Attachment E]. [redacted] explained that he did not receive a SF-450 form in 1995 because he was on an IPA assignment to [redacted] and, when he filed the SF-450 form covering 1996, he was not informed by OGC that he had not filed the SF-450 form covering 1995. [See Attachment F]

Analysis of Violations

Federal law, 18 U.S.C. § 208, prohibits individuals from:

... participat[ing] personally and substantially as a Government officer or employee, through decision, approval, **disapproval**, recommendation, the rendering of advice, or otherwise, in [any] ... matter ... in which, to his knowledge, he ... has a financial interest [Emphasis Added.]⁴

, acting as an NSF Program Manager ("Government officer or employee"), recommended that the two proposals, ... not be funded by submitting the appropriate written documentation to NSF ("through ... disapproval ... in a ... matter") and participated in the panel review of ... proposal 'through the rendering of advice or otherwise'), all while knowing that he owned 4,000 shares of ... stock ("[to his] ... knowledge ... he ... has a financial interest ..."). His participation in each proposal violated 18 U.S.C. § 208.

also violated NSF and government-wide conflicts regulations. The first of these violations concerns the Federal government-wide "Standards of Ethical Conduct for Employees of the Executive Branch", specifically 5 C.F.R. § 2635.402(a) which reiterates the definition of 18 U.S.C. § 208. What is noteworthy about this is that ... stated in his affidavit that he read this document and understood the rules set forth in it [See Attachment B]. ... also violated NSF's conflict-of-interests regulation, 45 C.F.R. § 683.20(a), which states:

You must not be personally involved as a Federal employee in handling any proposal, award, or other matter in which you ... a business partner, or an organization of which you are or may become a part has a financial interest. BE CAREFUL: Violation of this rule may also result in a violation of a criminal statute.

When ... failed to notify any NSF conflicts officials about his ... stock ownership and yet made the two recommendations to decline funding for the two proposals, he violated 45 C.F.R. § 681.21. This regulation states:

If you would normally handle a proposal or other application, but possess with respect to it a potentially biasing affiliation or relationship ... , you must bring the matter to the attention of a conflicts official in your directorate or staff office. ... Ownership of the institution's securities or other evidences of debt [is] automatically disqualifying.

⁴ Violators are subject to imprisonment for up to five years and a civil fine of up to \$50,000 per violation.

45 C.F.R. § 681.22(a) further explains the above regulation by stating:

If you have an interest, affiliation, or relationship that § 681.21 designates "automatically disqualifying", you should disqualify yourself from handling the affected proposal or application. You must not participate in handling it *under any circumstances* [emphasis in original].

In addition, by recommending his son as a reviewer for NSF proposals, [redacted] may have violated 5 C.F.R. § 2635.702, which states that "An employee shall not use his public office for . . . the private gain of . . . relatives" [redacted] acknowledged that he recommended his son as a reviewer in part to give his son experience with the review process, so that his son would learn to write better proposals on his own.

[redacted] son traveled from Albany NY to the Washington DC area to attend the panel review at NSF, which, at the very least, gives the appearance that [redacted] gave his son the opportunity to visit his father at government expense.

By failing to file a SF-450 form for the time period covering 1995, [redacted] violated 45 C.F.R. § 683.10(b). This regulation states:

If you . . . serve as either a program officer, directorate administrative officer, a grants and contracts officer, an auditor, or a lawyer, you must file confidential Statements of Employment and Financial Interests.

This is further explained in 45 C.F.R. § 683.12(a), which states that if

you are one of those who must file Statements of Employment and Financial Interests, you must file an initial Statement within 30 days after you are first appointed to a covered position either by promotion or as a new NSF employee. You must thereafter file a Statement each year by July 31.

Generally, if an employee fails to file a SF-450, OGC notifies the employee by e-mail to do so. However, although [redacted] failed to file his 1995 SF-450, there are no records to indicate that OGC attempted to contact him after the 1995 SF-450 submission deadline in order to obtain his SF-450.

[redacted] actions also created appearance issues. Specifically, it could appear to a reasonable person that by purchasing stock in a company that had submitted proposals to the NSF, [redacted] was using the proprietary information contained in the proposals to make personal investment decisions, in violation of

45 C.F.R. § 683.34(a) (as summarized in NSF Manual 15, p. 60). This regulation states:

If your Government job gives you access to information not generally available to the public, you must not use that information for your private benefit

However, during our interview, [redacted] denied that he used any proprietary information he may have had access to through his NSF position to assist in making his personal investment decisions. As he stated:

[Prior to the purchase of [redacted] stock] I was advised . . . by . . . a friend in the business community, of a rumor that . . . the President of [redacted] . . . might be planning to sell [redacted] stock. I did not obtain this information through my position at NSF, and my discussion with [my friend in the business community] did not take place during the course of my NSF duties. I did not base my decision to purchase [redacted] stock on the 1993 site visit My decision to purchase the stock was based on my previous associations with [redacted] and its founder], and my belief that [redacted] is a sound company.

Even if [redacted] did not use proprietary information gained from the use of his NSF position, it may have been inappropriate for [redacted] to purchase the stock in the first place. [redacted] purchase may create an appearance of impropriety in violation of 5 C.F.R. § 2635.101(b)(14). This regulation states:

Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

We are concerned that this is a significant potential problem for [redacted] officers in general because—uniquely among NSF program officers—they deal exclusively with large numbers of proposals from and awards to for-profit entrepreneurial businesses. Because NSF [redacted] managers have access to pertinent, and often proprietary, information (from such sources as proposals, indirect cost rate analysis, site visits, etc.) regarding [redacted] recipients' operations that is not available to those who are not NSF program managers, we believe that NSF should have a policy which sets forth a whether and in what circumstances it is appropriate for [redacted] managers to invest in [redacted] applicants and awardees.

Recommendations

Because [redacted] engaged in conduct prohibited by federal statute, we referred this matter to the Department of Justice as required by law.⁵ The Department determined that NSF should resolve the matter on an administrative basis, and declined prosecution. Accordingly, we are referring this matter to NSF management so that appropriate corrective action can be taken by the Foundation.⁶

Based on the evidence gathered during this investigation, we recommend that NSF take appropriate administrative action against [redacted] for the actions described in this report. In addition, in order to avoid similar instances, we recommend that NSF's Division of Design, Manufacture, & Industrial Innovation (DMII) and OGC assess whether and in what circumstances it is appropriate, consistent with conflicts of interests rules, for [redacted] managers to invest in [redacted] applicants and awardees. Following this assessment, we recommend that DMII and OGC disseminate a formal written policy addressing this issue.

At the time we began this investigation, we ascertained that under the controlling precedent in the United States Court of Appeals for the Fourth Circuit,⁷ where NSF is located, [redacted] actions did not constitute "insider trading" in violation of federal securities laws and regulations.⁸ We noted that, with its recent decision in *United States v. O'Hagan*,⁹ the Supreme Court expanded the scope of the prohibitions on insider trading such that they now apply to NSF employees.¹⁰ However, because [redacted] actions pre-date *O'Hagan*, we did not refer this matter to the Department of Justice for violations of securities laws and regulations.

⁵ 5 U.S.C. app. § 4(d).

⁶ Under federal ethics regulations, "It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases." 5 C.F.R. § 2635.106(b). In addition, "A violation of [federal or] agency regulations may be cause for appropriate corrective disciplinary action Such action may be in addition to any action or penalty prescribed by law." 5 C.F.R. § 2635.106(a).

⁷ *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995).

⁸ 15 U.S.C. §§ 78j(b), 78ff and 17 C.F.R. § 240.10b-5.

⁹ No. 86-842 (June 25, 1997).

¹⁰ "Is a person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information, guilty of violating § 10(b) and Rule 10b-5? . . . Our answer . . . is yes" *Id.*

Attachments

- A. Timeline of Relevant Events
- B. Affidavit of
- C. Documents Showing Purchase of Stock
- D. NSF Proposal Documentation Showing involvement in Decisions
After His Purchase of Stock
- E. SF-450 Forms Signed and Submitted by to NSF
- F. July 2, 1997 Response by NSF OIG's draft of Investigation Report

Attachment A: Timeline of Relevant Events

<u>Date</u>	<u>Event</u>
1985-1986	is a paid consultant of _____ hired to be the _____ representative in Washington D.C.
June 1987	NSF as a Program Manager, _____
December 1992	recommends declination for _____ proposal
October 1993	recommends declination for _____ proposal
November 1993	recommends Phase I award for _____ proposal
December 1993	recommends Phase I award for _____ proposal
January 1994	recommends declination for _____ proposals
March 1994	recommends that NSF decline funding for _____ proposal
September 1994	ommends final payment for _____
September 1994	submits SF 450 to NSF OGC, listing no financial interests in _____
November 1994	recommends final payment for _____
December 1994	speaks with NSF OGC regarding recusal from projects he may have a financial interest in, is given a recusal form
December 1994	purchases 4,000 shares of _____
January 1995	ommends declination for _____ proposal
January 1995	signs Form 7 containing his son's review results for _____

August 1995

recommends declination for proposal

August 1995

begins IPA assignment to

December 1996

submits SF-450 to NSF OGC listing ocks