

NATIONAL SCIENCE FOUNDATION
 OFFICE OF INSPECTOR GENERAL
 OFFICE OF INVESTIGATIONS

CLOSEOUT MEMORANDUM

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| TO: AIGI | File Number: I95010001 | Date: 16 May 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.

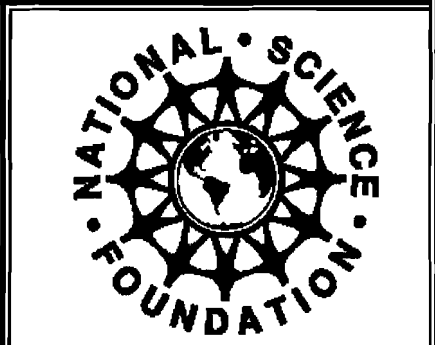
Our office conducted an investigation and concluded that the subject¹ conducted no research with the funds his company received under a Small Business Innovation Research (SBIR) Phase II grant from NSF. The subject was convicted of three counts of wire fraud and three counts of false statements based on three forms he submitted to NSF seeking advances of grant funds. On the basis of this conviction, NSF debarred the subject.

On appeal the subject's conviction was reversed. To receive the advance payments under the grant, the subject had submitted a standard form usable for requests for advances or reimbursements, and each time he signed a statement certifying that the data on the form was correct and that expenditures of grant funds complied with the grant conditions. The appellate court determined that the certification about expenditures applied only when the form was used to obtain reimbursement, which required filling in a box concerning grant expenditures to date. Thus, in the court's view, because he used the form only for advances, the subject made no certification as to what had actually been spent or how it had been spent.

Following the decision of the court of appeals, NSF notified the subject that his debarment was terminated. This case is closed.

¹ [REDACTED]

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





1 of 1 DOCUMENT

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM L. HODGE,
Defendant-Appellant.**

No. 97-10245

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*150 F.3d 1148; 1998 U.S. App. LEXIS 18172; 98 Cal. Daily Op. Service 6180; 98 Daily
Journal DAR 8562*

**July 17, 1998, Argued, Submitted, San Francisco, California
August 6, 1998, Filed**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of California. D.C. No. CR-95-40202-SBA. Sandra B. Armstrong, District Judge, Presiding.

DISPOSITION: REVERSED.

COUNSEL: Mark D. Flanagan, Wilson Sonsini Goodrich & Rosati, Palo Alto, California, for the defendant-appellant.

Albert S. Glenn, Charles B. Burch, Assistant United States Attorneys, Oakland, California, for the plaintiff-appellee.

JUDGES: Before: Stephen Reinhardt, John T. Noonan, and David R. Thompson, Circuit Judges. Opinion by Judge Noonan; Concurrence by Judge Reinhardt.

OPINION BY: JOHN T. NOONAN

OPINION

[*1149] OPINION

NOONAN, Circuit Judge:

William L. Hodge appeals his conviction of wire fraud in violation of *18 U.S.C. § 1343* and of false statements in violation of *18 U.S.C. § 1001* by filing certain certifications to the National Science Foundation (NSF) as an NSF grantee.

FACTS

Hodge is an atomic physicist with over seventeen years experience in atomic physics, laser physics, plasma physics, and electro-optical instrument design. He has designed soft x-ray instrumentation at John Hopkins University, has taken part in plasma spectroscopy [**2] experiments at Massachusetts Institute of Technology (MIT) and at the Princeton Plasma Physics Laboratory, and has been a consultant at Sandia National Laboratory on x-ray lasers. He is the author of over forty scientific articles in these fields. He was the owner and president of High Energy Laser Associates (HELTA) in Oakland, California, founded in 1987. On December 21, 1989, HELTA submitted a grant proposal to the NSF under NSF's Small Business Innovation Research program. HELTA proposed to develop "a neodymium-like soft x-ray laser." The principal investigator was listed as Hodge himself. Spectroscopic experiments were to be performed at the Janus laser facility, Lawrence Livermore National Laboratory, Livermore, California and at MIT. Peter Hagelstein of the Electrical Engineering and Computer Science Department at MIT was to be consultant and subcontractor; Hagelstein's group at MIT was constructing a slab amplifier that would be used in the project. Michael Finkenthal of Johns Hopkins University and Hebrew University was to consult in the area of spectroscopic line identification. The grant request was for \$ 287,275 for the project, which was to be completed in two years.

On [**3] August 31, 1990 the NSF awarded a grant of \$ 250,994, which included an "MIT subcontract budget dated August 27, 1990," to HELTA for the proposed project. This grant, the relevant one here, was a sequel to an earlier proposal by HELTA for Phase I of the

same project, which had been funded by the NSF in December 1988 and successfully completed by Hodge in November 1989. The new award was effective September 1, 1990 and expired February 28, 1993. The first installment of the grant, \$ 66,338, was applied for by Hodge on August 31, 1990. To obtain it, he executed a NSF form headed [*1150] "Request for Advance Or Reimbursement." He checked both the Advance and Reimbursement boxes. Under the subheading, "Computation Of Amount Of Reimbursements/Advances Requested," there was a column containing as its first item "Total program outlays to date." No sum was entered here. Item "i" was "Federal share now requested." \$ 66,338 was entered. A separate heading read "Alternate Computation For Advances Only." Nothing was filled in here. The next heading was "Certification." Under it in print the following appeared: "I certify that to the best of my knowledge and belief the data above are correct [**4] and that all outlays were made in accordance with the grant conditions or other agreement and that payment is due and has not been previously requested." Opposite this statement was a place for the "certifying official" to sign. Hodge signed.

On November 27, 1990, Hodge signed an identical form, checking both Advance and Reimbursement boxes and requesting \$ 39,503. On February 21, 1991, he did the same, checking only the Advance box and requesting \$ 20,000. On April 5, 1991, he did the same, checking the Advance box and asking for \$ 75,700. Again on September 12, 1991, on January 21, 1992, and on March 12, 1992, he checked only "Advance", requesting, respectively, \$ 35,000, \$ 14,000, and \$ 453.

To carry out his project Hodge needed access to the laser at Lawrence Livermore. He had had such access for Phase I, and access had been tentatively approved for Phase II. For reasons that can only be guessed from the record, the Lawrence Livermore committee that scheduled access did not grant it to him although Hodge persistently sought access from August 1990 until February 1991. By mid-1991, again for reasons not in the record, Hodge's badge, permitting him to be at the Janus facility, [**5] was revoked. He continued to discuss his project with Dr. Michael Finkenthal between September 1990 and February 1992. In August 1991, Hodge indicated to Finkenthal that he was moving his project to MIT; however, he did not do so. According to Finkenthal, there was "something wrong" with Hodge. Hodge was under stress related to his marriage. At one point Finkenthal found himself being driven by Hodge in the opposite direction from the conference they were trying to attend. Hodge made no report to the NSF on what he had done.

PROCEEDINGS

On November 16, 1995, Hodge was indicted on six charges of wire fraud in violation of *18 U.S.C. § 1343* and six charges of false statements to a government agency in violation of *18 U.S.C. § 1001*. The wire fraud charges alleged that Hodge had devised a scheme to defraud the NSF and carried it out by false statements to the NSF that the grant funds provided to HELA "were being used solely in accordance with the grant conditions"; the wire transfers were those made by the NSF in payment of the grant beginning with the payment of December 3, 1990. The false statement charges were that, beginning with [**6] the certificate of November 27, 1990, Hodge had falsely certified that "all outlays were made in accordance with the grant conditions or other agreement."

The jury acquitted Hodge on the counts charging false statements made on November 27, 1990, February 21, 1991 and April 5, 1991 and on the related wire fraud counts. The jury convicted him of wire fraud and false statements on the basis of the certificates of September 12, 1991, January 21, 1992, and March 12, 1992.

Hodge appeals.

ANALYSIS

Each certification which is the center of this case cannot be read in isolation from the single page document, "Request For Advance Or Reimbursement," of which the certification is a subordinate part. As the title of the document indicates, the form is a request for either an advance or a reimbursement. On each of the documents resulting in a conviction Hodge checked the box titled "Advance." The term "outlays", of which the certification speaks, refers to "Total program outlays to date," item "a" under "Computation Of Amount Of Reimbursements/Advances Requested." On none of the forms [*1151] signed by Hodge was any amount entered under "Total program outlays to date." Hodge made no [**7] representation to the NSF as to what these outlays had been. Hodge did not ask reimbursement for any outlays made. In the documents resulting in convictions, Hodge sought only advances.

That Hodge sadly failed to carry out the research he proposed is evident. That Hodge had a moral obligation not to take the grant money and a moral obligation to return what he took does not need demonstration. That the government could have sued Hodge civilly for unjust enrichment is undisputable. That Hodge presented a case where the government could show how tough the government can be with a nonperforming grantee is clear. What is not evident is Hodge's crime or crimes.

The first certificate executed by Hodge, the day before the grant became effective, was not charged by the government as a false statement or as giving rise to wire

fraud. This request was for \$ 66,338 as reimbursement and advance. All outlays were certified as made in accordance with the grant although no program outlays were recorded. The "Alternative Computation For Advances Only" was not filled out. It is apparent from this first certification that the form required by the NSF was simply a convenient way for a grantee to pull [**8] down portions of the grant on schedule. Perfunctory compliance with the form's specifications was the rule. Nothing was significant except the amount asked for. Only this amount and the Advance/Reimbursement boxes were filled in by the grantee. The request form as written and as used was not intended as a report by the grantee to the government of what the grantee had actually done or expended.

All the subsequent requests were like the first. No outlays of funds were reported. No certification was made as to what had actually been spent on the project. The forms used in the counts of conviction were clearly labelled as requests for advances. No representation was made that reimbursement was sought for any outlay made.

Grantees dealing with the government must turn square corners. But the government must turn square corners when it employs the heavy engine of the criminal law. The government here has failed to prove that any reasonable person could find that the three certificates

Hodge was convicted of falsely signing made any false statement to the NSF.

REVERSED.

CONCUR BY: STEPHEN REINHARDT

CONCUR

REINHARDT, Circuit Judge, concurring separately.

I concur fully [**9] in Judge Noonan's opinion for the court. This case simply represents an instance of an over-zealous prosecution and the misuse of the criminal laws where at most a civil remedy would have been appropriate. I write this separate concurrence, however, to point out another problem that is not limited to this case alone. The defendant who, it turns out, did not commit a criminal offense after all, completed service of his period of incarceration before his appeal was heard. It is a sentence he should never have served. The injury he suffered cannot ever be undone - by our reversal of his improper conviction, or otherwise.

Procedures exist under which, in many instances, incarceration can be delayed until after an appeal is decided. That process also does not always work properly. It is initially up to defense counsel, and then to the judicial system, to see that it does, within the limits that Congress has permitted. Unfortunately, for the defendant, that did not happen here.

NATIONAL SCIENCE FOUNDATION
4201 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22230



OFFICE OF THE
GENERAL COUNSEL

September 14, 1998

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Dr. William L. Hodge
72 Portsmouth Road
Piedmont, California 94610

Dear Dr. Hodge:

It has recently come to our attention that the U.S. Court of Appeals for the Ninth Circuit overturned your criminal conviction for fraud in connection with a National Science Foundation (NSF) Small Business Innovation Research grant. Since this conviction was the basis for the National Science Foundation's October 27, 1997 debarment against you, NSF is terminating that debarment as of today's date.

Although the criminal conviction has been overturned, NSF is currently considering whether you should now be debarred based upon the fact that you knowingly failed to use the NSF monies for their intended purposes. Before we take any further action, we wish to provide you the opportunity to present any evidence that demonstrates your present responsibility to receive Federal funds. Information that would be of interest to NSF includes any steps that you would agree to take to ensure that if you receive any Federal research funding in the future, you will use the funds for their intended purpose and advise the funding agency promptly of any difficulties that affect the progress of your work. Any information you wish to provide should reach us no later than 20 days from your receipt of this letter. Please respond directly to [REDACTED], Assistant General Counsel, at the above address, or contact her at 703-306-1060 if you have any questions about this matter.

Sincerely,

A handwritten signature in cursive script that reads 'Lawrence Rudolph'.

Lawrence Rudolph
General Counsel

NATIONAL SCIENCE FOUNDATION
4201 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22230



OFFICE OF THE
DEPUTY DIRECTOR

October 27, 1997

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Cornell Corrections Incorporated
205 MacArthur Boulevard
Oakland, California 94610
Attention: William L. Hodge #00693-111

Re: Debarment

Dear Dr. Hodge:

On July 17, 1997, the National Science Foundation (NSF) sent you a Notice of Suspension and Proposed Debarment in which NSF proposed to debar you from directly or indirectly obtaining the benefits of Federal research grants for a period of three years. The Notice set forth in detail the circumstances giving rise to your debarment. NSF's debarment action is based on your criminal conviction of three counts of making false statements and three counts of wire fraud in connection with an NSF Small Business Innovative Research Phase II grant to High Energy Laser Associates.

You received the Notice of Suspension and Proposed Debarment on July 21, 1997, and we received your response to the Notice on August 21, 1997. In your letter, you contend that NSF should not debar you because: (1) you are appealing your conviction, (2) you were unable to complete your work under the grant because of reasons outside of your control; and (3) you would like to submit future research proposals.

Your conviction establishes by a preponderance of evidence cause for debarment pursuant to 45 CFR §§620.314(c) and 620.305. Your first and second arguments were raised during the jury trial which resulted in your conviction. This debarment proceeding is not the proper forum to collaterally challenge your criminal conviction. If your appeal is successful, please notify NSF so that we can ascertain whether it warrants changing our determination.

Your response neither demonstrates that you are presently responsible nor establishes mitigating factors sufficient to warrant your continued participation in federally funded research. Accordingly, this serves as notice pursuant to 45 CFR §620.314 that you are debarred until July 17, 2000.

The debarment shall be effective throughout the Executive Branch of the Federal Government. You will be excluded from receiving Federal financial and non-financial assistance and benefits under nonprocurement programs and activities unless an agency head or an authorized designee makes a determination to grant an exception in accordance with 45 CFR §620.215. Nonprocurement transactions include grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. In addition, you will also be prohibited from receiving any Federal contracts or approved subcontracts under the Federal Acquisition Regulations (FAR) at 48 CFR Subpart 9.4 for the period of this debarment. 45 CFR Section 620.110(c).

If you have any questions regarding the foregoing, you may contact Lawrence Rudolph, General Counsel, at (703) 306-1060.

Sincerely,



Joseph Bordogna
Acting Deputy Director