

Conflict of Interest **State Engineer – Village Road**

Case No. 07-1

Facts:

Engineer A, a licensed professional engineer, is employed by the State Department of Transportation as a district engineer and also serves as chairman of the state engineering licensure board.

As district engineer, Engineer A supervises other state department of transportation engineers and has authority over the use of state and federal highway funds.

Engineer A owns a parcel of land in the state. Consideration is being given to new roads with links to the interstate highway passing through the state. Engineer A's property would benefit from the building of a new road that would connect a village where Engineer A's property is located. Currently, the village is serviced by a dirt road. During the design and construction of other roads, Engineer A approves a change order to build a road to the village where Engineer A's property is located. As part of the change order, several truckloads of road surfacing materials generated from the federal highway project were diverted to the village to surface the existing dirt road.

Question:

Was it ethical for Engineer A to approve the building of the additional road to the village where Engineer A's property is located?

References:

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| Section I.6. | - NSPE Code of Ethics: | <i>Engineers, in the fulfillment of their professional duties, shall conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.</i> |
| Section II.4. | - NSPE Code of Ethics: | <i>Engineers shall act for each employer or client as faithful agents or trustees.</i> |
| Section II.4.a. | - NSPE Code of Ethics: | <i>Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.</i> |
| Section III.1.e. | - NSPE Code of Ethics: | <i>Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.</i> |
| Section III.5. | - NSPE Code of Ethics: | <i>Engineers shall not be influenced in their professional duties by conflicting interests.</i> |

Discussion:

The issue of conflicts of interest is among one of the most examined issues in professional engineering ethics. In addition to the NSPE Code of Ethics language and earlier cases decided by the NSPE Board of Ethical Review, the specific facts and circumstances of the individual case are of critical importance in understanding the ethical dimensions of the matter.

Over the many years of reviewing ethical matters, the NSPE Board of Ethical Review has considered a variety of factual situations involving this most fundamental ethical issue. The Board has noted on numerous occasions that the ethical duty of the engineer in areas of conflicts of interest is to inform the client of those business connections or interests that may influence the judgment and quality of the engineering services. Those decisions have been consistent with the provisions of NSPE Code Section II.4.a. cited above.

While that provision of the Code has been interpreted many times over the years, it is, as are all code provisions, subject to constant examination and reinterpretation. For any code of ethics to have meaning, it must be a living, breathing document which responds to situations that evolve and develop. This Board has generally interpreted that code provision in a strict manner.

For example, in BER Case No. 69-13, the Board reviewed a situation where an engineer was an officer in an incorporated engineering consulting firm that was engaged primarily in civil engineering projects for clients. Early in the engineer's life, he had acquired a tract of land by inheritance, which was in an area being developed for residential and industrial use. The engineer's firm had been retained to study and recommend a water and sewer system in the general area of his land interest. The question faced by the Board under those facts was, "May the engineer ethically design a water and sewer system in the general area of his land interest?" The Board ruled that the engineer could not ethically design the system under those circumstances. The Board acknowledged that the question was a difficult one to resolve, pointing to the fact that there was no conflict of interest when the engineer entered his practice but that the conflict developed in the normal course of his practice when it became apparent that his study and recommendation could lead to the location of a water and sewer system that might cause a considerable appreciation in the value of his land depending upon the exact location of certain system elements in proximity to his land. The Board stated that while the engineer must make full disclosure of his personal interest to his client before proceeding with the project, such disclosure was not enough under the NSPE Code. Said the Board, "He can avoid such a conflict under these facts either by disposing of his land holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time." The Board concluded by saying: "This is a harsh result, but so long as men are in their motivations somewhat 'lower than angels,' it is a necessary conclusion to achieve compliance with both the letter and the spirit of the Code. The real test of ethical

conduct is not when compliance with the Code comports with the interests of those it is intended to govern, but when compliance is adverse to personal interests.”

We agree with much of what was stated in BER Case No. 69-13 considering the NSPE Code then in effect. In its reading of the Code, the Board took a strict view of the meaning of the Code provisions then in force, which stated: “8. The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client” and “8.(a) The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer.” It is clear from a reading of BER Case No. 69-13 that the Board focused its attention on the first clause of Section 8 stating that “the engineer will endeavor to avoid a conflict of interest with his employer or client.” Undoubtedly, the Board reasoned that this was the basic obligation of the engineer in this context and that any qualification of that obligation would dilute the essential meaning and intent of that obligation. Therefore, the Board did not choose to rely upon the remaining provisions contained in Sections 8 and 8(a) in reaching its decision. Instead, the Board determined that under the facts it would not be sufficient for the engineer to make full disclosure of his personal interest to the client in order to properly address the potential conflict-of-interest question.

While the reasoning of the Board in BER Case No. 69-13 is extremely important in understanding the ethical dimensions of the instant case, the decision becomes less significant in view of the fact that the Code provisions under which the decision was rendered have been crucially altered. (See NSPE Code Sections II.4. and II.4.a., the successor provisions to Section 8.) As one can readily see, the phrase “engineer will endeavor to avoid a conflict of interest with his employer or client” is no longer contained in the applicable code provision. Clearly, the reason for that omission is not out of a lack of desire within the engineering profession to maintain an ethical proscription relating to conflicts of interest. Truly, ethical dilemmas relating to conflicts of interest are some of the most significant issues facing the engineering profession today. Nevertheless, the provision in the Code relating to conflicts of interest was amended and those changes impact upon the manner in which this Board regards BER Case No. 69-13, as well as the manner in which the Board interprets the Code. It is evident that had NSPE Code Sections II.4. and II.4.a. been in effect at the time the Board decided BER Case No. 69-13, the Board may well have reached a different result. While it is not our role to speculate upon the intent of this significant change in the Code since BER Case No. 69-13 was rendered, we do think that some expression by this Board in that regard would assist readers in understanding the basis for the change. In no sense should this change be interpreted in any way to suggest a retreat by this Board or the Code from a deep concern for dilemmas relating to conflicts of interest. Rather, it is our view that the modifications in the Code reflect recognition of the fact that conflicts of interest emerge in a multitude of degrees and circumstances and that a blanket,

unqualified expression prohibiting engineers from all activities that raise the shadow of a conflict of interest is not a workable approach. It is often a question of degree as to what does and does not constitute a significant conflict of interest. Obvious and significant conflicts of interest are easily identifiable and should always be avoided. These difficult, multifaceted situations require discussion and consideration as they are complex and sometimes irresolvable. A code of ethics should address and provide guidance for these kinds of conflicts of interest. We believe the new NSPE Code provisions sought to establish the ethical obligation to engage in dialogue with a client or employer on the difficult questions relating to conflicts of interest. We think that it was for this reason that the NSPE Code provisions were altered.

Thereafter in BER Case No. 85-6, the Board considered a case involving Engineer A who was retained by the state to perform certain feasibility studies relating to a possible highway spur. The state was considering the possibility of constructing the highway spur through an area that is adjacent to a residential community in which Engineer A's residence was located. After learning of the proposed location for the spur, Engineer A disclosed to the state the fact that his residential property may be affected by the new spur and fully disclosed the potential conflict with the state. The state did not object to Engineer A's performing the work. Engineer A proceeded with his feasibility study and ultimately recommended that the spur be constructed. The highway spur was eventually constructed. In ruling that Engineer A's actions were not unethical, the Board noted that the ethical obligations contained in NSPE Code Section II.4.a. did not require the engineer to "avoid" any and all situations. That may or may not raise the specter of a conflict of interest. Said the Board, "Such an interpretation of the Code would leave engineers with neither any real understanding of the ethical issues nor any guidance as to how to deal with the problem." The basic purpose of a code of ethics is to provide the engineering profession with a better awareness and understanding of ethical issues that impact upon the public. Only through interacting with the public and clients will engineers be able to comprehend the true dimensions of ethical issues. The Board noted that this also holds true in the area of conflicts of interest. The Board also noted that it assumed that under the facts of this case, the state agency involved has a fully qualified staff which will ultimately review the recommendation of the engineer. Therefore, the Board concluded that Engineer A's discussion with the client prior to performing the services and disclosing the possible conflict of interest came within the ethical guidelines of the Code and was a proper course to take in dealing with the conflict. The Board was not willing to state as it did in BER Case No. 69-13 that the engineer can only avoid such a conflict either by "disposing of his land and holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time."

Turning to the facts in the present case, the Board must distinguish this case from both BER Case Nos. 69-13 and 85-6. In both of those cases, the engineers in question were in private practice and disclosure appears to have been an action that might at least

begin to address some of the ethical and professional practice issues involved in those matters. However in the present case, Engineer A is an influential, high-level employee within a state department of transportation with highway funding responsibilities as part of his duties. In addition, Engineer A serves as the chairman of the state engineering licensure board with authority over the ethical and competent practice of engineering within the state—in accordance with the state licensure laws and rules of professional conduct. With those factors in mind, it is difficult for this Board to fathom how Engineer A could have failed to appreciate or understand both the actual and apparent conflict of interest that his conduct raised.

As this Board has pointed out in the past, at a minimum, disclosure is the first course of action involving conflict of interest. Other courses available would include recusal from the matter (with a substitute engineer making the judgment in question), or in extreme circumstances, resignation, if the conflict of interest is of such a nature that the continued participation by the engineer substantially jeopardizes the interests of the client or employer. Undoubtedly, both federal and state regulations as well as DOT personnel policies also contain prohibitions that address Engineer A's actions in this matter.

Conclusion:

It was unethical for Engineer A to approve the building of the additional road to the village where Engineer A's property is located.

Board of Ethical Review:

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