

Employment Agreement – Arrangements Between Firms

Case No. 07-7

Facts:

Engineer A is the owner of FGH Engineers, a medium-sized engineering firm with a civil, environmental, and structural division. Engineer B, the owner of IJK Engineers, an environmental and structural engineering firm, approaches Engineer A to discuss the possibility of Engineer B acquiring the civil engineering division of FGH Engineers. An agreement is ultimately reached and included in the agreement is a provision whereby, following the acquisition, Engineer B and IJK Engineers agree not to hire any of the employees of Engineer A and FGH Engineers in the future.

Questions:

1. Was it ethical for Engineer A to include in its agreement a provision whereby Engineer B and IJK Engineers agree not to hire any of the employees of Engineer A and FGH Engineers in the future?
2. Was it ethical for Engineer B to agree not to hire any of the employees of Engineer A and FGH Engineers in the future?

References:

- Section I.6. - NSPE Code of Ethics: *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.*
- Section III.3.b. - NSPE Code of Ethics: *Consistent with the foregoing, engineers may advertise for recruitment of personnel.*
- Section III.7. - NSPE Code of Ethics: *Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers. Engineers who believe others are guilty of unethical or illegal practice shall present such information to the proper authority for action.*

Discussion:

The rights, as well as the duties and responsibilities, involved in the selling of an engineering firm, or a portion of an engineering firm, raises important ethical issues. In this connection, ethical issues relating to one engineer moving from one firm to another was an issue that the NSPE Board of Ethical Review first considered many years ago. For example, in BER Case No. 63-1, Engineer A employed Designer X for approximately four and a half years, during which time Designer X progressed from a draftsman to a designer. The employer anticipated that through additional training and experience, Designer X would continue to progress. Engineer B, in the same

geographical area, contacted Designer X directly and, without notice to Engineer A, offered Designer X a job with Engineer B's firm. Designer X accepted the offer, and after giving Engineer A two weeks' notice, left to work for Engineer B. In deciding that Engineer B did not act unethically in hiring Designer X, though his conduct was discourteous to a fellow engineer, the Board noted that there was no violation of the NSPE Code of Ethics (at the time Canons, Rules) since there was no information or inference that the employee would be expected to disclose the business affairs or technical processes of his former employer to his new employer.

At the time, the Board also noted that while the "foreword" of the canons was not an applicable canon, in a pure sense, it set the tone of philosophy which should guide the professional engineer in all of his relationships. The foreword stated, in part, that "Honesty, justice and courtesy form a moral philosophy which, associated with mutual interest among men, constitutes the foundation of ethics." In this situation, said the Board in BER Case No. 63-1, the key word is "courtesy," which has a dictionary meaning of "courtly politeness, graceful, and considerate behavior toward others."

The Board noted that Engineer B's action did not comport with the concept of courtesy in that he was not considerate of Engineer A's interests. Said the Board, "While he had the undoubted legal right to bypass Engineer A in contacting Designer X with a job offer, by so doing he was discourteous to a fellow engineer even though not unethical under the canons, as written." The Board suggested that he had a duty of "courtesy" to discuss with Engineer A his interest in securing the services of the employee. Having taken this step, as a matter of courtesy, he would still be free to proceed with his offer to the employee, even over Engineer A's objections.

Importantly, the Board also noted that language in then NSPE Professional Policy 19 (a), "Freedom of Employment," recognized the right of an individual professional engineer to seek and accept other employment in accordance with the canons and rules. The same right, both legal and moral, undoubtedly applied to employees other than professional engineers. Hence, no criticism was intended toward Designer X, nor should there be any thought that adherence to ethical concepts or acts of courtesy between professionals means that there exists or should exist an "understanding" that an employee will not be hired from another professional without the consent of the present employer. Such arrangements would constitute an objectionable practice.

In this connection, it should be noted that to this day, NSPE Professional Policy No. 19, Employment Practices—Freedom of Employment, remains an important NSPE professional policy and while it has been modified over the years, the following provision, "NSPE opposes any agreements between employers that limit the individual engineer's employment opportunities," remains within the existing policy.

In BER Case No. 72-10, Engineer A left the employ of Engineer B and opened his own local consulting practice. He immediately contacted several of Engineer B's clients (those for whom Engineer B had periodically done work but who were not under contract at that time) in an effort to have them become his clients. He also offered two engineer employees of Engineer B a raise to come to work for him. One of the employees accepted the offer. In the ensuing months, Engineer A repeatedly approached the other employee and proposed a raise plus a cash bonus to induce the employee to make the change. In deciding that it was not unethical for Engineer A to seek to obtain the clients of Engineer B provided that such attempts did not involve projects for which Engineer B had been retained or was in the process of being retained, and it was not unethical for Engineer A to seek to obtain the services of employees of Engineer B by offering increased salaries or bonuses to make the change, the Board noted salaries are properly a function of the law of supply and demand and that under this "free market" concept, there does not appear to be any warrant to hold that the NSPE Code is meant to deny employed engineers the right to change employment on the basis of improved salary or other economic conditions, nor does it forbid one employer the right to make more attractive economic offers to other engineers in competing firms. The higher salary offer may be a snare and delusion to attract employees away from a competing firm, and those employees so attracted may find that their increased economic status is short-lived or their employment only temporary. But the Board noted that it must rely upon the good sense and judgment of the employees so invited to evaluate these factors, as well as to act ethically themselves in this situation. The Board concluded that in the absence of any facts to indicate the intent of Engineer A, it assumed that his purpose was only to staff his own operation, but it also recognized that his action might nevertheless harm the interests of Engineer B.

Turning to the facts in the present case, based upon the language in the NSPE Code of Ethics, earlier NSPE Board of Ethical Review Opinions, and NSPE Professional Policy 19, it is clear that the terms of the agreement between Engineer A and Engineer B were designed to limit the prospects of engineers employed in Engineer A's firm. The subject contract provision is clearly questionable since it seeks to advance the interests of Engineer A at the expense of the prospects of Engineer A's employees. We think it is reasonable to assume that in initially hiring employees, at least a part of Engineer A's recruitment approach would involve express or implicit appeals to prospective employees regarding opportunities to grow and gain experience for future opportunities elsewhere. This contract provision flies in the face of such an appeal. Engineer A was unethical for seeking inclusion of the provision in the agreement, and Engineer B was similarly unethical for agreeing to be a party to the terms of the agreement. Both benefited in some way from its terms, to the detriment of those engineers employed by FGH Engineers.

Conclusions:

1. It was unethical for Engineer A to include in its agreement a provision whereby Engineer B and IJK Engineers agree not to hire any of the employees of Engineer A and FGH Engineers in the indefinite future.
2. It was unethical for Engineer B to agree not to hire any of the employees of Engineer A and FGH Engineers in the indefinite future.

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