



NATIONAL SOCIETY OF  
PROFESSIONAL ENGINEERS

## BOARD of ETHICAL REVIEW

CASE REVIEW

# Post-Public Employment - City Engineer Transitioning to Consultant

Case No. 23-3

June 17, 2024

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### Facts

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Engineer D, a licensed professional engineer, works as the City Engineer in a mid-sized municipality that has been experiencing rapid growth along with rapid infrastructure growth. Engineer D has been one of the City's main points of contact for AE firms and contractors in the area, both with respect to contract negotiation and award (consultant and construction) and senior-level review of major project issues that arise from time to time.

Engineer D announces plans to step down as the City Engineer and indicates that they accepted a

position at an unnamed engineering firm in the City. Of significance is that the City does not include "revolving door" provisions in employment contracts for its senior-level employees.

Shortly after Engineer D's announcement, Firm AE&R announces Engineer D as a newly hired associate. AE&R completed many projects for the City during Engineer D's tenure as City Engineer, and the firm plans to continue submitting proposals and performing consulting work for the City.

### Questions

1. Is it ethical for Engineer D to accept employment with AE&R?
2. Is it ethical for Engineer D to be immediately, directly involved with AE&R's projects with the City?

## NSPE Code of Ethics References

- I.4** Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.
- I.6** 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.
- II.4.a** 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.
- II.4.c** Engineers shall not solicit or accept financial or other valuable consideration, directly or indirectly, from outside agents in connection with the work for which they are responsible.
- II.4.e** Engineers shall not solicit or accept a contract from a governmental body on which a principal or officer of their organization serves as a member.
- II.5.b** Engineers shall not offer, give, solicit, or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.
- III.4.** Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.
- III.4.a** Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge.
- III.6.** Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.

## BER Cases: 58-1, 63-5, 74-2, 11-12, 14-8, 15-8

### Discussion

This case has to do with what are commonly called “revolving door” constraints governing the ethics of high-level government employees (federal, state, municipal) who leave public employment to enter the private sector. Such persons are – or can be – viewed as being in a position to unfairly profit from or otherwise trade upon the contacts, associations, influence, and special knowledge they acquired during their tenure as public servants. Practices of concern include but are not limited to involvement in the solicitation of continuing contracts, assuming the management and oversight for active projects, participating in the solicitation of new work for which the employee had been directly involved as a public-sector employee, and related professional matters.

We start the discussion by reviewing the first case the Board of Ethical Review published, [BER Case 58-1](#). In that case a foreign government agency invited proposals to complete a design and supervise construction of a hydroelectric project. The basic plans for the project were in place and were prepared by a team of engineers working for a US government agency. Several of those engineers negotiated with at least two AE firms with the intent of taking part in the design and supervision of the work. The engineers formed a corporation to be part of a joint venture to design the hydroelectric project. At about the time the various contract negotiations were wrapping up, the engineers resigned from their US government positions and entered into a contract with the foreign government to work on the hydroelectric project. The Board was asked, “Was it a violation of

the Canons of Ethics or the Rules of Professional Conduct for employees of the US Government, while still employed, to organize a new private company and negotiate a contract to take part in the design of a project for which they had prepared preliminary plans as employees of the Government?”

In BER Case 58-1, the Board began by noting “there can be no question of the basic right of an American citizen to resign from one position and accept another or initiate a business of his own.” The Board noted that they were not able to call witnesses to understand the exact circumstances of the case, but they pointed out, “It seems axiomatic that the personal and intimate knowledge of the project which the employees gained from their work on the preliminary design of the project and the acquaintance they made with the representatives of the owner of the project gave them many distinct advantages over any other firms who may have considered the offering of their services to the owner. The crucial question is, therefore, ‘Were these advantages used unfairly?’” Said the Board:

*...They (the advantages) might have been used and in any case the possibility of the existence of one or more of these facets raises a cloud of doubt as to the purity of the enterprise. It becomes a matter which might be considered under Section 19 of the Canons, which states: “The engineer will endeavor to protect the engineering profession collectively and individually from misrepresentation and misunderstanding.”*

The Board concluded, "The... [engineers] in question have violated the spirit of the Canons and Rules, although the evidence does not prove them to be in violation of specific paragraph (sic), as now worded." They went on to state, "it tends to bring dishonor to the profession of engineering if the [engineer] devotes his energies, while still employed, to promote his future practice or employment on the basis of having inside information which would lead to greater profits, if he can secure a position or enter into contract to work on further details of the identical project."

BER Case 58-1 included a dissent:

The guiding principle behind the phrasing of the "Rules" is that the words mean exactly what they say—that there is no concealed, hidden, or obscure "intent." In my opinion the "Conclusion" of the report should be, "The Board believes that the [engineers] in question have not violated the Canons or Rules as they currently exist." This could be followed by a "Recommendation" that the Ethical Practices Committee be instructed to consider the desirability of adding another Rule... to make unethical a situation similar to the one considered, as well as for a situation where the employees were other than Government.

Since that first case, the Board has considered multiple situations where a professional engineer in private practice or an engineering firm also serves as a city, town, or county engineer. While such cases are more directly concerned with dual employment, the situations are pertinent relative to many ethical considerations of transitional employment. Three cases are illustrative.

In [BER Case 63-5](#), a small community retained a professional engineer, Engineer B, on a part-time basis to serve as city engineer. Engineer B was engaged in full-time private practice and treated his part-time service to the community as a public

service. In addition to general advisory services to the city, Engineer B was selected by the city council for the preparation of plans and specifications for a city project. In such cases, Engineer B was compensated on a normal professional fee basis over and above his monthly retainer. The Board ruled that it is ethical for a professional engineer retained by a community on a part-time basis as a city engineer to prepare plans and specifications for a project for the same community, but in so acting the engineer must be scrupulously careful that his advice is not influenced by his secondary interest as the engineer likely to be retained for the design of the project. The Board noted that "it is axiomatic that a professional person may not take action or make decisions which would divide his loyalties or interests from those of his employer or client." Among the issues the Board considered in BER Case No. 63-5 was the practical question of the engineer passing on the adequacy of his own plans in his capacity as city engineer. The Board noted that there is no requirement in the NSPE Code that an engineer's plans for a client must be reviewed by an engineer employed or retained by the client. The Board noted that the client had the right of review by its own engineer, but it may waive its right, as it did in BER Case 63-5, and under those circumstances, the engineer was acting in a dual capacity but not a divided one.

In [BER Case 74-2](#), the Board considered a case involving a state law that required that every municipality have a municipal engineer whose duties and compensation were to be fixed by a municipal ordinance. But many of the smaller communities in the state did not have and could not afford full-time municipal engineers or supporting staff personnel for a full-time office. In such instances the smaller communities retained the services of a consulting firm in private practice and appointed a principal of the firm as the



municipal engineer. Such a municipal engineer was paid either on a cost-plus basis or a flat monthly retainer—usually a relatively low amount. The municipal engineer’s firm was thereafter usually retained for engineering services for capital improvement projects needed by the municipality. In deciding that it was ethical for the engineer – who was not a municipal employee, but whose compensation was paid on a retainer or fee basis -- to serve as municipal engineer and participate in a consulting firm providing engineering services to the same municipality under the stated conditions, the Board determined that the public interest was best served by providing the small municipalities with the most competent engineering services which they can acquire. It was assumed by the Board that the state law was intended to achieve this end.

More recently, [BER Case 11-12](#) considered the situation of Engineer A, who served as the part-time town engineer for Smithtown and also had a consulting engineering practice. With Engineer A's advice and concurrence, Smithtown selected Engineer B to provide design services for a local road project. Following the selection and after Engineer B began to perform preliminary design services, Engineer A, in his role as town engineer, reviewed Engineer B's preliminary work and became convinced Engineer B's performance on the contract did not meet the standards as outlined in Engineer B's contract. Following the termination of Engineer B under the terms and conditions of his contract with the town, Engineer A offered, and Smithtown agreed, that Engineer A's firm should perform the design work for the local road project for Smithtown. In determining it would not be ethical for Engineer A to offer and agree to perform the work for Smithtown, the Board observed that serious ethical constraints would preclude the selection of Engineer A by the

town to perform the road design work. Because Engineer A was an officer or principal of his engineering firm, according to NSPE Code of Ethics Section II.4.e, Engineer A was not eligible to provide engineering services to Smithtown for the local road project. This conclusion is based upon the language of Code Section II.4.e and is irrespective of whether the town's procurement laws were scrupulously followed. The Board further opined that the disclosure of any further circumstances would not be sufficient to avoid a conflict of interest or the appearance of a conflict of interest.

Conflicts of interest feature prominently in transitional employment situations. [BER Case 14-8](#) for example – which is in many ways the converse of the situation Engineer D faces in the present case – describes how Engineer A worked for a private company and stamped a water rights analysis for a client, and that analysis was working its way through the court system. During the legal review, Engineer A resigned from their firm and went to work for the State – the State being an objector to the analysis Engineer A prepared. The Board was asked to weigh in on Engineer A's ethical obligations. The case discussion noted Engineer A's ongoing duty both to their former employer and the private client. Engineer A could not have disclosed, participated in or represented the State's interest in connection with this proceeding unless Engineer A first obtained the permission/consent of Engineer A's former private firm employer and also the client. The BER discussion and conclusion recommended:

Engineer A should be assigned other duties by the State, remain isolated from the State's water rights case involving Engineer A's former employer and its client—and the State should recognize and respect Engineer A's ethical obligations in this matter. Any involvement by Engineer A in the State's case could potentially compromise the

interests of all parties—the former employer, the private client, and the State—as Engineer A's dual role and his professional opinion/judgment—as an employee of the private firm and now as a State employee—could be called into question—by one of the parties, the public, or the media.

As a final example, [BER Case 15-8](#) offers direct guidance on the ethics of transitional employment. Engineer P is a “top” official in State X highway department who would like to leave and become an executive in an architecture/engineering (AE) firm. Engineer P requested permission from the State X highway department to accept the new position; however, the State X highway department refused to grant permission, noting that, in accepting the position, Engineer P would be in violation of the state law that requires top State X highway officials to wait a year after leaving the highway department before accepting positions with firms with which the department does business. In response, Engineer P left the State X highway department and joined the AE firm not as an “employee” but as an “independent contractor.” The board was asked if it was ethical for Engineer P to leave the State X highway department and join the AE firm in this way.

The BER pointed out a potential conflict of interest existed between Engineer P's obligations to his former employer—the State X highway department—and the party with which Engineer P was now contracting, the AE firm. They also noted that while disclosure of a desired new employment relationship had been made, disclosure alone was not sufficient. The BER stated, “the agreement for a one-year hiatus after leaving government service before accepting related employment is not supported by disguising the employment as ‘independent contracting’.” The BER concluded:

The fact that Engineer P proceeded to join the architecture/engineering firm as an “independent contractor” instead of as an “executive employee” was an apparent way of circumventing state law. The Board of Ethical Review believes that Engineer P's actions were unethical.

We now turn to the present case, the situation of Engineer D who resigned the position as City Engineer in a mid-sized municipality, and shortly thereafter accepted the position of “associate” at Firm AE&R, a consultant with whom Engineer D would have regularly interacted during tenure with the City. The facts of the case specifically note Engineer A's employment contract with the City did not include a revolving door prohibition such as Engineer P faced in BER Case 15-8. Thus, on the face of the matter, it would seem there is no legal barrier to Engineer A accepting employment with Firm AE&R. BER Case 58-1 and other cases since then support the engineer's right of employment. But that does not mean such employment would exempt Engineer A from the ethical requirements and obligations of the NSPE Code of Ethics.

What are some of these ethical requirements and obligations? Among the most obvious are Code Sections II.4.c and III.6 which prohibit engineers from advancing their professional careers by any improper or questionable method. Likewise, Code Section II.5.b would prohibit the principals of Firm AE&R from inducing Engineer A to join the firm as a way of influencing the awarding of city contracts for improper reasons not related to Engineer A's qualifications and experience. The facts of the case are silent on these matters, and the Board takes this to mean no violation occurred.

Some might assert that because Engineer A's employment contract with the City did not include a revolving door prohibition, nothing more needs to be said. But the BER does not hold this

perspective. BER Case 58-1 speaks of the “purity of the enterprise”, of avoiding “dishonor to the profession,” and how engineers must consider not only the letter but the spirit of the ethics code. Consistent with Fundamental Canon 1.6, such values form the context of an engineer’s professional relationships and apply in this case.

Though revolving door prohibitions are not specifically in effect, the spirit of such provisions can guide multiple aspects of Engineer D’s employment activities. For example, the BER believes Engineer D’s prior responsibilities with the City for projects currently under contract by D’s new employer would raise concerns about objectivity and fairness if Firm AE&R directly placed Engineer D in responsible charge of those projects as a consultant. In this situation, disclosure by Engineer D and acceptance by the City may cure the matter. Alternatively, Engineer D can follow the recommendations in BER Case 14-8 and remain isolated from former projects until those contracts lapse.

Confidentiality is another ethical obligation that continues after one severs employment (Code Section III.4). Engineer D should not use or disclose confidential information acquired during the course of or by reason of duties or employment with the City. That is, Engineer D should not be allowed to breach confidentiality for personal gain.

Third, as a public official who transitions to private practice, Engineer D should not unfairly profit from or otherwise trade upon the contacts, associations, and special knowledge she acquired during tenure as a public servant. In particular this would apply to direct procurement activities. But does this mean Engineer D is automatically precluded from using D’s professional knowledge and expertise to serve the City in a consulting role? The Board sees room for accommodation.

Past BER cases affirm that full disclosure by the engineer (i.e., Engineer D) coupled with careful and thoughtful acceptance by the client (i.e., the City) can be sufficient to cure “known or potential conflicts of interest that could influence or appear to influence the engineer’s judgment or the quality of their services” (II.4.a). In evaluating disclosed information, important factors include avoiding divided interests by the engineer, advancing the best interests of the client, and complying with procurement requirements. While approval through disclosure is not automatic, ample precedent has shown that within many contexts the parties directly involved are in the best position to serve the public interest by providing the most competent engineering services available.

What about marginal situations, or conditions where a known or potential conflict would be prohibitive or too complex to set aside? Here, as was done in BER Case 15-8, an embargo or “cooling off” period, often one-year duration, can ameliorate such concerns. That is, as appropriate and prudent, Engineer D could voluntarily abstain from participation in procurement matters before the City, or before any other agency for which the City is or was the approving authority, for an agreed period of say, one year after she leaves the public job.

These transitional employment practices, in the spirit of NSPE Code of Ethics, are intended to help Engineer D engage only in conduct that is honorable, responsible, ethical, and lawful so as to enhance the honor, reputation, and usefulness of the engineering profession.



## Conclusions

1. Inasmuch as no “revolving door” contractual (i.e., legal) prohibition exists to private employment, it would be ethical for Engineer D to accept employment with firm AE&R. This finding is consistent with a long history of NSPE cases; engineers are free to move and work where they would like.
2. As to whether it would be ethical for Engineer D to be immediately, directly involved with AE&R's projects with the City, the answer is mixed as multiple considerations and details will affect the outcome. For example, participation in ongoing projects for which Engineer D has particular specialized knowledge may be ethical with disclosure and consent. Likewise, situations such as negotiating change orders (potential conflict of interest) might also be cured by disclosure and consent. However, for complex situations (e.g., perception of influence relative to solicitation of a contract) or prohibitive situations (e.g., divulging confidential information) a voluntary embargo by Engineer D for a specified period of time may be efficacious. In positive ways, such practices facilitate conduct which is honorable, responsible, ethical and lawful so as to enhance the honor, reputation and usefulness of the engineering profession.

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