

Conflict of Interest—Role on Public Utility Board

Case No. 13-1

Facts:

Engineer A is appointed officer and partner at a full-service design, engineering, and construction firm in his hometown. Engineer A is also appointed by the mayor to the board of directors of a local public utility—the state's largest. Coinciding with Engineer A's service on its board, the utility spends three years researching options for a new power-generation plant. Two years into project research, Engineer A resigns his professional position to form his own engineering-construction management company. However, Engineer A remains on the public utility board. The public utility's staff informs Engineer A and other board members of its decision to build a new power plant and asks for immediate incremental approval to advance financing. Engineer A votes to approve financing and the vote passes. After the vote, Engineer A resigns from the board, and about a month after his resignation, Engineer A submits a proposal to serve as the owner's representative for the utility on the project.

Question:

Was it ethical for Engineer A to submit a proposal to serve as the owner's representative for the utility on the project?

References:

- Section II.3.a - NSPE Code of Ethics: *Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*
- Section II.4.a - NSPE Code of Ethics: *Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgement or the quality of their services.*
- Section II.4.d. - NSPE Code of Ethics: *Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.*
- Section II.4.e. - NSPE Code of Ethics: *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.*
- Section III.4.a - NSPE Code of Ethics: *Engineers shall not, without the consent of all known parties, promote or arrange for new employment or practice in connection with a specific project for which the engineer has gained particular and specialized knowledge.*

Discussion:

As a general matter a conflict of interest is considered to occur when an individual or organization is involved in multiple interests, one of which could possibly corrupt the motivation for an act in another. The presence of a conflict of interest is independent from the execution of an impropriety. Therefore, a conflict of interest can be discovered and voluntarily defused before any corruption occurs.¹

A widely used definition of a “conflict of interest” is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest. Primary interest refers to the principal goals of the profession or activity, such as the protection of clients, public health and safety, etc., and the duties of public office. Secondary interest includes not only financial gain but also such motives as the desire for professional advancement and the wish to do favors for family and friends, but conflict of interest rules usually focus on financial relationships because they are relatively more objective, fungible, and quantifiable. The secondary interests are not treated as wrong in themselves, but become objectionable when they are believed to have greater weight than the primary interests. The conflict in a conflict of interest exists whether or not a particular individual is actually influenced by the secondary interest. It exists if the circumstances are reasonably believed (on the basis of past experience and objective evidence) to create a risk that decisions may be unduly influenced by secondary interests.²

Over the many years of its existence, the NSPE Board of Ethical Review has reviewed a variety of cases involving conflicts of interest. For example, in BER Case No. 95-6, Engineer A served as a member of the Board of Trustees of a college in a medium-sized city. The US Department of Housing and Urban Development had awarded the city money and the city had agreed to use the money to construct a new library at the college. Engineer A indicated that he would like to be considered to provide engineering services on the project. In deciding that it would be unethical for Engineer A to be considered in providing engineering services on this project, the Board noted that the facts indicated the city would be awarding the library contract using HUD funds. The Board noted that under the facts, it appeared that the college trustees and the city had a very close relationship. Although Engineer A would not be directly involved in the decision, Engineer A was far too close to the city and could influence its decision.

In BER Case No. 92-5, an engineer was serving on a community service corporation board that was responsible for obtaining money to construct a courthouse and office. The engineer was instrumental in getting the federal government to spend the money on the

¹ “Conflict of Interest”, Wikipedia, The Free Encyclopedia. Wikimedia Foundation, Incorporated. July 2013, http://en.wikipedia.org/wiki/Conflict_of_interest

² “Conflict of Interest”, Wikipedia, The Free Encyclopedia. Wikimedia Foundation, Incorporated. July 2013, http://en.wikipedia.org/wiki/Conflict_of_interest

project. His service corporation had no influence in determining who would design or build the project. The engineer wanted to be a sub-consultant to a larger design firm submitting proposals to the federal government agency responsible. Under these facts, the BER opinion found no violation of the ethical code.

A third example is in BER Case No. 85-2, where an engineer served on a board of directors of a private health care provider that contracted with the county hospital board to operate a health care facility. When engineering work was needed at the facility, the engineer offered to provide the services and received a contract from the private provider to perform the work. The decision to select the engineer was made by the private board of which Engineer A was a member. Since the engineer did participate in the decision, the Board concluded Engineer A acted unethically in agreeing to a contract under these circumstances.

Finally, in BER Case No. 04-3, Engineer A served as a member of the city council and also owned a construction contracting firm. Engineer A's company contracted for the remodeling of a residence. Engineer A contacted the city's planning department and was told that the remodeling would be in violation of a longstanding city zoning law since the parcel of land had been rezoned into a nonresidential category. Engineer A met with the associate city planner and following a contentious meeting, Engineer A contacted the city manager and urged the city manager to initiate a rezoning of the parcel. In deciding that Engineer A's conduct was unethical, the Board noted that Engineer A in his role as a city council member had direct authority over the city manager, who had direct authority over the planner. Thus, Engineer A appeared to be using his official position to influence a governmental decision in which Engineer A had a direct financial interest. Engineer A appeared to be wearing two hats simultaneously—that of a contractor with a financial interest in a residential project, and that of a city council member with an obligation to act in a manner that is consistent with the interests of the city, its laws, and regulations.

Turning to the facts in the present case, it is the Board's view that the key to understanding this case relates to the fundamental question raised earlier as to whether Engineer A's professional judgment and actions regarding his primary interest (i.e., serving as a director of the public utility) was unduly influenced by a secondary interest (being retained to serve as the owner's representative on the contract for the new power plant). It is the Board's view that Engineer A's actions in serving as a director of the public utility, voting to approve financing for the new power plant, and then resigning and submitting a proposal to serve as the owner's representative on the power plant project at a minimum creates the appearance of a conflict of interest and suggests more improper motives. Engineer A may have intended to resolve the conflict of interest by resigning from the board of the utility prior to submitting his proposal to provide engineering services for the project, as would be proper under Section II.4.e of the Code. However, at the time Engineer A formed his own company, he had particular and specialized knowledge (see Section III.4.a of the Code) as a board member of the utility that the utility would likely

engage in a project that would need engineering services which he could provide. The facts of the case do not indicate whether or not Engineer A had informed the board at the time of the vote that he had started his own engineering firm, as could have been required by Section II.4.a of the Code.

In any case, Engineer A's actions could potentially result in public suspicion that Engineer A had created a competitive advantage for himself due to the particular and specialized knowledge he had acquired of the project during his service to the utility. While arguably Engineer A's objectives as a director of the public utility who voted to approve financing for the new plant may have been completely pure, Engineer A's decision to resign from the board following the vote and thereafter submit a proposal to serve as the owner's representative for the utility on the project at the very least calls into question Engineer A's objectives and suggests possible impropriety on the part of Engineer A.

Conclusion:

It was not ethical for Engineer A to submit a proposal to serve as the owner's representative for the utility on the project.

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NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

Each opinion is intended as guidance to individual practicing engineers, students, and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole proprietorships, government agencies, and university engineering departments), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services, which must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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