

**Conflict of Interest – Former Government Official –
Independent Contractor for Firm**

Case No. 15-1

Facts:

Engineer P is a top official in the State X highway department. He would like to leave his position to become an executive with an architecture/engineering firm. Engineer P requests permission from the state to accept the new position. State X refuses to grant permission, noting that, in accepting the position, Engineer P would be in violation of the state law that requires top state highway officials to wait a year after leaving the State X highway department before accepting positions with firms with which the department does business. Engineer P leaves the State X highway department and joins the architecture/engineering firm not as an “employee” but as an “independent contractor.”

Question:

Was it ethical for Engineer P to leave the State X highway department and join the architecture/engineering firm not as an “employee” but as an “independent contractor”?

NSPE Code of Ethics References:

Section I.5 – Engineers, in the fulfillment of their professional duties shall avoid deceptive acts.

Section II.4. – Engineers shall act for each employer or client as faithful agents or trustees.

Section 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 for which the engineer has gained particular and specialized knowledge.

BER Case References: 06-10; 14-1; 14-8

Discussion:

The issue of conflicts of interest is an ethical one that has been examined numerous times by the NSPE Board of Ethical Review. In many instances, conflicts of interest are complex. In others, they are relatively simple and straightforward.

Among the conflict of interest cases considered by the NSPE Board of Ethical Review are BER Cases 06-10, 14-1, and 14-8. In BER Case 06-10, Engineer A, a quality assurance manager at Company C, learned that the purchasing manager for the company had contracted with a new supplier of precision plastic components. It turned out that the production manager at the new supplier was the quality assurance manager’s spouse—a fact unknown to everyone at Company C. The quality assurance manager did not create this situation, and there was no effort to put pressure on any party in connection with the dealings between the parties. The Board of Ethical Review, in deciding that Engineer A

should provide full disclosure that he was the spouse of a vendor's key employee to appropriate managers within his company, and that he would be required to recuse himself from specific dealings with the vendor, noted that it could easily foresee circumstances in which, as quality assurance manager, Engineer A would be in a position to evaluate the quality of the vendor's product. Should any questions arise concerning the product, Engineer A might find himself in a personally conflicted situation—between the interests of his employer and the interests of his spouse and her employer.

More recently, in BER Case 14-1, Engineer A was an assistant director of public works in Somecity. As part of his job, Engineer A was involved in selecting and hiring engineering consultants for projects in the city involving local, state, and federal funds. Engineer A also worked part-time as an independent consulting engineer and had teamed with Engineer B on federal- and state-funded projects in another city in the same state. In deciding it was unethical for Engineer A to work with Engineer B as a consultant on federal- and state-funded projects under these circumstances, the Board noted that it could easily foresee, at the very least, the potential appearance of a conflict of interest in Engineer A's roles as assistant director of public works and as an engineer who teamed with Engineer B on projects in the same state. Although the outside consulting work in question may involve projects in another city, Engineer A may be exposing himself and the engineering profession to public criticism, particularly if the work in question is the same or similar to the work Engineer A is performing in his role as an assistant director of public works. Moreover, the Board noted that Engineer A's impartiality and judgment could be called into question, particularly in the event that conflicts or disputes arise in connection with his private work. The Board concluded that it would be unethical for Engineer A to work with Engineer B as a consultant on federal- and state-funded projects because doing so could create the appearance of a conflict of interest. The Board decided that before Engineer A undertook any work as an independent consultant, he must advise and secure the permission of the appropriate authorities in Somecity; and because the work in question involved local, state, and federal resources, Engineer A must also make absolutely certain that his actions were consistent and in conformance with applicable local, state, and federal procurement laws and conflict of interest provisions as well as with state engineering licensure laws and regulations.

In BER Case 14-8, Engineer A worked for a private engineering company in the field of water rights. The firm was hired by a client to complete a water-rights analysis, in which Engineer A participated. Engineer A, along with one other employee at the firm, signed and sealed the final document. These types of analyses quantify water and provide terms and conditions for future use that must be approved by the local courts. Typically, the court process can take years to complete and, in short, it includes the following steps: (1) application (proposal); (2) engineering to support application; (3) objections from the public/other water users; (4) rebuttal to objector's comments; (5) mediation or trial. Engineer A worked on the project through step 2 and resigned from the firm to work for the State, which was an objector in this specific analysis (the State is typically an objector

in most cases). Engineer A believes that he can and should support the work he performed and that was included in the stamped report, but he was concerned about the remaining steps in the court process. In his current employment, he has been isolated from the State's case in the matter, and his current position does not include opposing this or other cases.

The Board of Ethical Review decided that Engineer A had an ongoing duty to honor his obligations both to his former employer and the private client. According to the Board, Engineer A should have been assigned other duties by the State and remain isolated from its 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.

Turning to the facts in the present case, the Board of Ethical Review believes the earlier BER Cases are instructive. Clearly, at a minimum, a potential conflict of interest exists between Engineer P's obligations to his former employer—the state highway department—and the party with which Engineer P is now contracting, the architecture/engineering firm. While disclosure has been made, in the Board's opinion based on the facts, disclosure alone is not sufficient for Engineer P to meet the ethical requirement. 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.

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

Conclusion:

It is unethical for Engineer P to join the architecture/engineering firm as an “independent contractor” instead of as an “executive employee” as an apparent way of circumventing state law.

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