

Job Qualifications—Disclosure of Material Fact

Case No. 20-01

Facts:

Engineer Intern A, an Engineer Intern in State Y with a BS in engineering, an MS in management, and five years of experience, was planning on relocating to State X and applied for a position advertised by XYZ Consultants. The qualifications listed in the advertisement included 4+ years' experience, with a PE in State X required or achieved within 90 days after date of hire. At his interview, Engineer Intern A explains he is not a licensed PE in State Y but indicates an intention to take the PE exam in the coming weeks. He also explains that he will be relocating to State X in several months and will be available for work. Engineer Intern A did not indicate in the interview his previous attempts to pass the PE exam, and XYZ Consultants did not ask. XYZ Consultants offered the position to Engineer Intern A with the expectation that Engineer Intern A was on the track to obtain a PE license. A month after starting work, Engineer Intern A indicated to his supervisor that the PE exam results had been released and that his third attempt to pass the PE exam had been unsuccessful. Engineer Intern A also explained that the State X licensing board required additional experience and new references following a third failure before sitting for the exam again.

Question:

Was it ethical for Engineer Intern A not to have mentioned at the interview his two previous failures at passing the PE exam if he was not asked that question by XYZ Consultants?

NSPE Code of Ethics References:

Section 1.5 - Engineers, in the fulfillment of their professional duties, shall avoid deceptive acts.

Section 1.6. - 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.

Section II.3.a. - 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.5.a. - Engineers shall not falsify their qualifications or permit misrepresentation of their or their associates' qualifications. They shall not misrepresent or exaggerate their responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers, or past accomplishments.

Section III.1.e. - Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.

Section III.3.a. - Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.

NSPE BER Case References: [19-1](#), [97-11](#), [03-6](#)

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Discussion:

The Board of Ethical Review (hereafter, the Board) has ruled on numerous occasions that the privileges, aspirations, and obligations of engineering work apply throughout all phases of an engineer's career, starting with engineering school, emerging through the intern phase, and continuing through practice. Thus, the ethics of an engineer's employment lie squarely within the Board's purview, and the Board has considered such matters in past cases.

In [BER Case 19-1](#), Engineer A failed to disclose a medical condition from fear of discrimination by the employer. The engineer did not lie, falsify statements, compromise the highest standards of honesty or integrity, or misrepresent his qualifications prior to his obtaining employment, but he stopped short of pointing out that he had autism, more specifically, Asperger's Syndrome. Engineer A was concerned that doing so might place his career in jeopardy, or at the least, limit his career options. Could this be considered an omission of facts, a duty to disclose, or a deception? The Board found that although Engineer A was free to disclose his autism, the NSPE Code of Ethics does not compel disclosure. In that case, the Board found that Engineer A had a personal right to privacy.

[BER Case 97-11](#) relates how, during the rendering of services to Client B on a manufacturing project, the state board of professional engineers contacted Engineer A regarding an ethics complaint filed against Engineer A by Client C. The complaint related to services provided on a project for Client C that were similar to the services being performed for Client B. Client C alleged that Engineer A lacked the competence to perform the services in question. Engineer A did not believe it was necessary to notify Client B of the pending complaint. Later, through another party, Client B learned of the ethics complaint filed against Engineer A and told Engineer A that he was upset by the allegations and that Engineer A should have brought the matter to Client B's attention.

In finding that it was ethical for Engineer A not to report to Client B the ethics complaint filed against Engineer A by Client C, the Board noted that while an engineer clearly has an ethical obligation to act as a faithful agent and trustee for the benefit of a client, avoid deceptive acts, be objective and truthful, avoid conflicts, etc., such obligations would not compel an engineer to automatically disclose that a complaint had been filed against the engineer with the state engineering licensure board. As the Board explained, a complaint is a mere allegation and does not amount to a finding of fact or a conclusion of law. "No engineer should be compelled to disclose potentially damaging allegations about his professional practice—allegations that could be false, baseless, and motivated by some malicious intent. Instead, Engineer A should weigh all factors and, depending upon the nature and seriousness of the charges, take prudent action, which might include providing Client B with appropriate background information."

However, the right to privacy (i.e., nondisclosure) must be balanced by an engineer's corresponding obligation to be "objective and truthful in professional reports, statements, or testimony" and to "avoid the use of statements containing a material misrepresentation of fact or omitting a material fact."

[BER Case 03-6](#) is just such a case. Here, Engineer F is a professional engineer and applies for a professional engineering position with an engineering firm. Previously, Engineer F was the owner of a fire sprinkler contracting firm, which was required to have a contractor's license. On the engineering firm employment application, a question asked whether the engineer "has ever been disciplined in the practice of professional engineering or had his license suspended or revoked?" Engineer F responded in the negative on the employment application. Later, the engineering firm learned that while Engineer F's engineering license was never revoked or suspended, Engineer F's contractor's license was revoked because he allowed an unlicensed individual who was unrelated to his contracting firm to use the contractor license number on another project.

In finding that Engineer F had an ethical obligation to report on the employment application the revocation of his contractor's license, the Board referred to [Case 97-11](#) but pointed out a critical distinction: Engineer F had his contractor's license revoked because of "actual demonstrated violation on Engineer F's part." This was not "a mere allegation, but instead an actual adjudication of wrongdoing."

In the present case, similar to [Case 19-11](#), the facts indicate Engineer Intern A did not lie, falsify statements, or misrepresent his qualifications prior to his hiring, but he stopped short of pointing out that he had failed the PE exam twice before. But as in [Case 97-11](#) and [Case 03-6](#), privacy considerations are not the whole story. The ethical question becomes whether Engineer Intern A's failure to disclose could be considered fully "objective and truthful" or "omitting a material fact."

The Board is of the view that the facts of this case are finely nuanced, but tip toward the situation identified in [Case 97-11](#). That is, it would have been *prudent* for Engineer Intern A to have been forthcoming about the past exam failures, but in this case, disclosure arguably was not ethically required. XYZ Consultants offered the position to Engineer Intern A knowing he had not yet passed the PE exam. In fact, of the three requirements for professional licensing (examination, education, and experience), Engineer Intern A's education and experience qualifications are quite acceptable. The facts do not suggest any deception on behalf of Engineer Intern A, but rather an appropriate, planned, confident path toward satisfying the job requirement, namely, PE licensure within 90 days of the date of hire. Most likely Engineer Intern A felt that passage of the PE exam on the third attempt was imminent.

However, failure to disclose does come with a downside. The "prudent" part of disclosure is revealed in Engineer Intern A's very shaky position with the firm, given failure to pass the PE exam and achieve licensure, as per the job requirement. Had Engineer Intern A disclosed two previous failures to pass the exam, there was some risk XYZ Consultants would not have offered employment in the first place. But if XYZ Consultants chose to offer employment with full knowledge of previous past exam failures, Engineer Intern A would likely be in a much stronger position, both professionally and relationally, with the employer at a time when the consequences of losing employment were significantly amplified.

Conclusion:

It was imprudent but not unethical for Engineer Intern A not to have mentioned at the interview his two previous failures to pass the PE exam, as the question was not asked by XYZ Consultants. More specifically, Engineer Intern A's failure to disclose the two previous exam failures seriously undermined his trust relationship with XYZ Consultants.

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