EMPLOYMENT - OFFER OF EMPLOYMENT BY VENDOR

Case No. 00-9

Facts:

Upon graduation from an ABET/EAC-accredited civil engineering program, Engineer A is employed by U&I Construction Co., which is owned and operated by Engineer B and Engineer C, both licensed professional engineers. Engineer A is soon delegated the responsibility of preparing bills of materials for designs to be constructed, with appropriate allowance for waste, and negotiating the material procurement with suppliers. Engineer A negotiates quantity, schedule, specifications, and price, then submits a recommendation to his highly experienced, non-degreed supervisor to arrange for appropriate company approval authority for the procurement contract if the financial commitment to a supplier on a project exceeds $250. After two years, Engineer A expresses concern to his supervisor that his job seems repetitive and lacks the variety of experiences and challenges that draw on the breadth of his education. Engineer A is informed that he is providing an essential service to the company with exceptional proficiency, for which he seems very well paid, and that he will be considered for opportunities should they become available -- if a replacement to cover his current activities can be found. Engineer A's financial authority is increased to $500 for any one supplier of the project.

Another year passes and Engineer A is still performing the same level of assignments. Engineer A wants to remain in the locality, but there are limited alternative employment opportunities in engineering available. Engineer A has developed a highly respected reputation for knowledge, fairness, and integrity among the suppliers of U&I Construction Co. Engineer D, an employee of ACE Supplies, a frequent supplier to U&I, has developed a familiarity with Engineer A. When ACE has an opening for a civil engineer, Engineer D lets Engineer A know about it. Engineer A interviews for the position and after an evaluation period, Engineer A learns that he will receive an offer of employment with ACE.

The offer letter states that ACE is "looking forward to having Engineer A on its team commencing on a mutually agreed upon date…that Engineer A is not an employee of ACE until Engineer A physically reports to work at ACE's facilities, executes patent and proprietary information agreements at that time, and that the employer's physician confirms that Engineer A has no pre-existing health condition that would prevent Engineer A from performing the requirements of the position." In a subsequent discussion with Engineer A, Engineer D mentions to Engineer A that the position was one that the ACE Vice President of Engineering has the prerogative of filling, but on occasion the ACE CEO has eliminated the position opening even with outstanding

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offers pending until business conditions improved or when a major customer had expressed displeasure with the hiring of one of its employees.

Engineer A submits his resignation with a customary two weeks notice to U&I. Engineer A's supervisor Engineer E, is disturbed by the resignation and expresses a desire that Engineer A stay with U&I, saying that if Engineer E could prevent his leaving he would. Engineer A insists that his decision is firm. Engineer A is not asked and does not believe it is in his interests to mention that he will be employed by ACE. Engineer E requests that Engineer A should bring all of his work assignments to a point of completion that will facilitate his making an orderly transfer to other U&I employees and to conclude as many assignments as possible before departing. For the next two weeks before leaving U&I, Engineer A continues to negotiate and prepare recommendations on bids including those that had been submitted by ACE.

Questions:

Question 1: Was it ethical for Engineer A not to volunteer to U&I the information that he would be employed by ACE within two weeks?

Question 2: Was it ethical for Engineer D to entice Engineer A to consider employment with ACE?

Question 3: Was it ethical for Engineer A to interview with a supplier of U&I without first advising U&I of his intent?

Question 4: Was it ethical for the ACE Vice President of Engineering to offer employment to Engineer A without first divulging the risk that the offer might be withdrawn by the ACE CEO?

Question 5: Would it have been ethical for U&I to have interfered in Engineer A's employment change had U&I become aware of the identity of the future employer and ACE's susceptibility to pressure from U&I?

Question 6: Would it have been ethical for ACE to have withheld an offer to Engineer A if ACE had become aware of U&I's displeasure?

Question 7: Was ACE's policy of withdrawing employment offers after they are made ethical?

References:

Section I.4. - *Code of Ethics:* *Act for each employer or client as faithful agents or trustees.*

Section I.5. - *Code of Ethics:* *Avoid deceptive acts.*

Section I.6. - *Code of Ethics:* *Conduct themselves honorably, responsibly, ethically and lawfully so as to enhance the honor, reputation and usefulness of the profession.*

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Section III.1.d.	-	*Code of Ethics:*	*Engineers shall not attempt to attract an engineer from another employer by false or misleading pretenses.*
Section III.4.a.	-	*Code of Ethics:*	*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.*
Section III.7.	-	*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:

Among some of the most challenging conflicts faced by professional engineers relates to situations involving changes or transitions in employment. Frequently, engineers who change employers are privy to information and involved in circumstances that raise ethical questions. A good illustration of this is the very recent BER Case No. 99-6. In that case Engineer A, a member of NSPE, was employed by the FGH Construction Company and worked closely with Engineer B who was an employee of LMN Supplies. LMN Supplies sold construction materials and supplies. Part of Engineer A's responsibilities were to negotiate and approve bids by LMN Supplies that were submitted by Engineer B. LMN Supplies offered, and Engineer A accepted, an employment position with LMN Supplies. Engineer A submitted his resignation and gave two weeks' notice to FGH Construction Company and was not asked and did not mention that he would be employed by LMN Supplies. For the next two weeks before leaving FGH Construction Company, Engineer A continued to negotiate and approve bids submitted by LMN Supplies. In deciding that it was not ethical for Engineer A to fail to mention to FGH Construction Company that he would be employed by its vendor, LMN Supplies, the Board noted that Engineer A's actions would most probably raise some doubt in the minds of the supervisors and, perhaps, owners of FGH Construction about whether Engineer A's continued negotiation and approval of bids submitted by LMN Supplies were somehow tainted and could have resulted in inflated costs to FGH Construction or other unearned competitive advantages for the benefit of Engineer A's new employer, LMN Supplies. The BER also noted that by failing to disclose the material conflict that exists concerning his new employment with LMN Supplies, Engineer A may have unwittingly planted "seeds of doubt" with FGH Construction and potentially damaged the goodwill that might have existed between FGH Construction and LMN Supplies. Based upon the facts as presented, FGH Construction might wrongly conclude that LMN Supplies somehow persuaded Engineer A not to disclose his new position with LMN Supplies during the two-week period in order to gain some advantages. The Board concluded, stating that Engineer A's failure to fully disclose his new position with LMN Supplies and to continue to negotiate and approve LMN Supplies' bids to his current employer, was not in accordance with the spirit or the intent of the NSPE Code.

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An earlier BER case with a somewhat different perspective on this issue was BER Case No. 83-1. In that case, Engineer A worked as an employee for Engineer B. On November 15, 1982, Engineer B notified Engineer A that Engineer B was going to terminate Engineer A because of lack of work. Engineer A thereupon notified clients of Engineer B that Engineer A was planning to start another engineering firm and would appreciate being considered for future work. Meanwhile, Engineer A continued to work for Engineer B for several additional months after the November termination notice. During that period, Engineer B distributed a previously printed brochure listing Engineer A as one of Engineer B's key employees, and continued to use the previously printed brochure with Engineer A's name in it well after Engineer B did, in fact, terminate Engineer A. In ruling that Engineer B's actions were improper, the Board noted that an engineer is expected to act, at all times in professional matters for the client, as a faithful agent and trustee (See NSPE Code Section I.4.). That requires the engineer to recognize both a duty of loyalty and good faith. An essential aspect of those is the duty to disclose. Certainly it is not possible for an engineer to meet those obligations to the employer if the engineer is engaging in such promotional activity to the employer's detriment. The Board believes the salient points contained in BER Case Nos. 83-1 and 99-6 are instructive in the context of the present case.

Regarding Question 1, the Board is of the view that Engineer A had an obligation to inform his employer regarding the name and circumstances of his new position. Since Engineer A's new position was with a client of his present employer, there may be situations and circumstances that U&I Construction would need to take into account.

Regarding Question 2, the Board does not believe an engineer employed by a supplier of a client is unethical for seeking to recruit an employee of the client. We believe freedom of employment is the question at issue.

As for Questions 6 and 7, the Board believes that the engineering employment market is a dynamic one in which individuals make a variety of choices, determinations, and decisions concerning employment offers and acceptance. In the absence of any formal agreement, it is generally understood that the "employment at will" principle applies and no employee or employer is bound to another. Both employer and employee gain the advantages of this principle and also suffer from its shortcomings. In this context, companies and individuals will ultimately make certain decisions based at least partly upon self interest, budgetary considerations, salary expectations, employment benefits, corporate mission, and other factors. In this connection, the Board does not believe the issues raised by questions 6 and 7 involve ethical concerns and the Board therefore declines to address them. At the same time, it should be noted that as a general matter, the Board believes that as a good business practice, the offer of employment letter should have contained a full disclosure statement indicating that the offer of employment to Engineer A by ACE could be withdrawn at any time for any reason by ACE. Questions 6 and 7 relate to facts that are management decisions determined by

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ACE, which is not an engineering firm. Had it been an engineering firm involving the conduct of an individual engineer, the determination would have been different.

With respect to Question 3, as a practical matter, although it does happen under certain circumstances, it is generally not typical for an individual to inform his employer in advance of an interview for another position with another company. An employee may occasionally inform their employer in order to convey dissatisfaction with the employee's current position or in situations where the employee feels a special obligation to the employer due to length of service, loyalty, or other factors.

Regarding Question 5, the Board believes it would not be ethical for U&I to have interfered in Engineer A's employment change. The engineers of U&I were ethically bound by the Code of Ethics to avoid such conduct.

Regarding Question 4 of whether it was ethical for the ACE Vice President of Engineering to offer employment to Engineer A without first informing Engineer A that the ACE CEO could withdraw the offer, the Board believes it was improper. Clearly when sensitive questions of employment are concerned, those engineers in positions of authority to make decisions in this area must be mindful of the impact such decisions will have on clients as well as the individuals directly involved. The Board believes potential employers have an obligation to make all material facts that could impact a decision to proceed with employment known to the individual involved.

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Conclusions:

Question 1: It was not ethical for Engineer A not to volunteer the information that he would be employed by ACE within two weeks to U&I upon resignation.

Question 2: This did not involve an ethics issue.

Question 3: It was not unethical for Engineer A to interview with a supplier of U&I without first advising U&I of his intent.

Question 4: It was not ethical for the ACE Vice President of Engineering to offer employment to Engineer A without disclosing all material facts, i.e., the potential actions of the ACE CEO.

Question 5: It would not be ethical for U&I engineers to interfere with Engineer A's employment opportunity with ACE.

Question 6: This did not involve an ethics issue.

Question 7: This did not involve an ethics issue.

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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, university engineering departments, etc.), 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 services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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