Report on a Case by the Board of Ethical Review

Case No. 75-15

Attempt to Restrain Employment of Engineer–Employees

Facts:
John Doe, P.E., chief engineer of a city agency responsible for a large public works program, for which the agency regularly utilizes the services of private engineering firms, sends a letter to all firms which are or have been retained by the agency, stating in pertinent part:

"The program in which this agency is now engaged requires the services of every employee, especially the more capable and devoted. Our consultant firms, too, need such people, and some have approached our employees with enticing offers of jobs. I understand their needs for capable engineers, and their offers are compliments to the engineers involved and this agency.

"However, it is obvious that the rationale of retaining consultants is to augment our capability. This premise must be continually defended . . . including the city's approval of each consultant's contract.

"The tendering of employment offers or even entering into discussions with our engineering employees has a disturbing and unsettling effect on morale and is entirely inconsistent with the purposes of retaining consultants. I would, therefore, view with disfavor any such discussions with my engineering employees."

/s/ John Doe, P.E.
Chief Engineer

Question:
Is Doe's letter a violation of the Code of Ethics?

References:
Code of Ethics – Section 2(a) – "He will regard his duty to the public welfare as paramount."

Section 12 – "The Engineer will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice or employment of another engineer, nor will he indiscriminately criticize another engineer's work. If he believes that another engineer is guilty of unethical or illegal practice, he shall present such information to the proper authority for action."

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Section 15 – "The Engineer will cooperate in extending the effectiveness of the profession by interchanging information and experience with other engineers and students, and will endeavor to provide opportunity for the professional development and advancement of engineers under his supervision."

Discussion:
This is an unusual case, even though we have had occasion to pass a number of times on various applications of §12 of the code, particularly in cases involving the "pirating" of engineers employed by one company or firm by another company or firm (Cases 63-1 and 69-3), and in connection with a restrictive employment agreement (Case 72-5). In this instance the employer is seeking to restrain those with whom he has actual or contemplated contractual arrangements for professional services from inducing the engineers of the agency to leave that employment in favor of employment by the consulting firms who are serving or may expect to serve the city.

Turning first to §15, we believe its mandate ". . . to provide opportunity for the professional development and advancement of engineers under his supervision," does not apply to the facts before us. In context of the full §15, the quoted extract is logically meant to apply to advancement within the organization in which the engineer serves by means of promotion, assignment of higher responsibilities and the opportunity for more significant services, all when warranted.

More directly pertinent is the requirement of §12 that the engineer (whether employer or employee) may not injure the "... prospects, practice or employment of another engineer. . ." That injunction, however, is conditioned by the preceding words, "maliciously or falsely, directly or indirectly. . ." There is no doubt that Doe's letter will have the effect of injuring the "prospects" or "employment" of engineers in the agency. Consulting firms receiving the letter could only conclude that if they contacted engineers in the agency to discuss or offer employment with their firm they would run the serious risk of being discriminated against for future work from that agency. We must assume that the consulting firms would logically follow the guidance found in King Henry IV; "The better part of valour is discretion," and would refrain from any future contact with engineers in the agency with regard to employment by their firms.

The remaining question, however, is whether the "chilling" effect of the letter is within the term, "maliciously or falsely;" certainly it is "directly." Looking to the purpose of the full §12, we are constrained to avoid a narrow and legalistic interpretation of "maliciously or falsely," and conclude that those words are not a necessary element to find that §12 applies when the purpose of the action by Doe is clearly to prevent, hinder or otherwise put obstacles in the path of the engineer-employees of the agency for other employment opportunities. Doe's action is a restrictive employment practice similar to that which occurred within certain industries under which employers agreed not to hire the engineers of each other without the consent of the current employer. This practice is condemned in NSPE Professional Policy No. 19-B:

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"PP No. 19-B-Employment Practices-Freedom of Employment

"An individual professional engineer has the right to seek and accept other employment in his field, provided the seeking and acceptance of such other employment is consistent with the Code of Ethics as it pertains to relations with clients and employers. NSPE opposes any agreements between employers which limit the individual engineer's employment opportunities.

"The National Society of Professional Engineers further declares that for every right there is a corresponding responsibility, and a professional engineer employee should assume his responsibility of loyalty to his employer and should normally notify his employer of his desire and reason for a change of employment prior to seeking such other employment, provided there are reasonable grounds to believe that the employer will not thereafter discriminate against or otherwise jeopardize the current status of the employee as a result of such notification."

We are not unsympathetic with the problem of the agency in meeting its responsibilities for the successful execution of its program, and with the concomitant requirement that to accomplish that mission it must have a staff of competent, experienced and dedicated engineers. We would place some emphasis on the second paragraph of Policy 19-B, with the hope that the agency might properly expect the assistance of the engineering profession in the community generally, and the consultant firms it engages particularly, to help it secure the necessary authority and funds to make employment in the agency attractive to its engineers.

We are also mindful that there is a serious question on the other side of this case to the extent that Doe's letter alleges that some consultants had approached the engineer-employees of the agency with offers of employment. Certainly Doe has a valid interest in protecting his "practice" of engineering as administrator of a large public works program and the requirement that to continue his "practice" on a professionally sound basis he must maintain an adequate supporting engineering staff. Those consultants who make a direct approach to the engineers of the agency staff are engaged in what is usually called "pirating." We are not prepared in this case to say absolutely that a prospective employer of engineers may never make a direct first contact with engineers employed elsewhere, with or without the prior permission of the employer of the engineer. But we are prepared to note that consultants performing services for the agency should be sensitive to the problems of that agency and recognize that it is in their own best interests and the interest of the public that their "pirating" of agency engineers will or could injure the "practice" of Doe. This also could lead to a conflict with the philosophy behind §2(a) that the consulting engineers' duty to the public is "paramount" and that to the extent that they are insensitive to the agency needs and the cumulative impact of "pirating" of engineers by them a major public works program may be put in jeopardy.

But in the final analysis, we must conclude that on balance it is an offense to the code for an engineer-employer to limit employment opportunities for his engineers by pressuring

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the consulting firms to avoid discussion of or offer of employment to the engineers of the agency.

Conclusion:*
Doe's letter is a violation of the Code of Ethics.

***Note**–This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

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