Report on a Case by the Board of Ethical Review

Case No. 87-3

Conflict of Interest—Engineer Retained By County to Inspect Project Developed By Client

Facts:
Greenhill County employs individuals to perform building inspections in the county. Dissatisfied with the services provided by in-house inspectors and, as part of an effort to "contract out" certain county functions, the county decided to retain a private consulting engineering firm to perform building inspections. Greenhill County selects and retains Engineer A's firm. One of Engineer A's responsibilities is to inspect a building project developed by Enterprise, Inc., a company for which she has regularly performed services in the past. Although she did not provide any services in connection with the building project in question, Engineer A and Enterprise, Inc., anticipate that they will continue to work together in the future. In contract negotiations with the county, Engineer A discloses this relationship with Enterprise, Inc., and it becomes a matter of public record.

Question:
Would it be unethical for Engineer A to perform building inspection services for the county in connection with the project developed by Enterprise, Inc.?

References:
Code of Ethics - Section II.4. - "Engineers shall act in professional matters for each employer or client as faithful agents or trustees."

Section II.4.a. - "Engineers shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstances which could influence or appear to influence their judgment or the quality of their services."

Discussion:
Conflict of interest is one of the most frequent and least easily resolvable issues faced by the BER.

Case 76-3 involved an engineer who had been under a retainer with a county for general advisory services and long performed extensive engineering services for it. While still on the retainer, the engineer was retained by a developer with the approval of county officials. The developer filed a petition with the county board to rezone a substantial area of the county for commercial purposes. The county Department of Public Works filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water-sewer facilities. The developer called the engineer as an expert witness at the hearing and he testified in support of the rezoning petition.

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In ruling that it was unethical for the engineer to appear for the development company while serving as an engineering consultant to the county, the Board noted that he was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the zoning board; he was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers. The BER noted that the engineer was not required to agree with the county engineering staff or its reports, or even to support their position at the hearing. If the engineer chose to oppose that position on behalf of an adverse party he could ethically do so by first resigning from his role as adviser to the county.

More recently, in Case 85-6, the state, considering the construction of a highway spur, retained an engineer to perform certain feasibility studies relating to it. After learning that the spur would go through an area adjacent to the community in which he resided, the engineer informed the state that the new spur might affect his residential property, fully disclosing the potential conflict with the state. The state did not object to the engineer's performing the work; he proceeded with his feasibility study and ultimately recommended that the highway spur be constructed, which was done.

In deciding that is was not unethical for the engineer to perform the feasibility study despite the fact that his land may be affected thereby, the Board noted that Section II.4.a. of the Code does not require the engineer to "avoid" any and all situations that may or may not raise the specter of a conflict of interest. We noted that such an interpretation of the Code would leave engineers with neither any real understanding of the ethical issue nor any guidance as to how to deal with the problem.

Turning to the facts of the instant case, unlike Case 76-3, we are not confronted with a situation where an engineer is being retained as a paid "advocate" for a particular position or point of view on a pending matter in direct conflict with the engineering opinions of her county client. Nor are we faced with a situation where the timing of the retainer raises a question of propriety. Rather, Engineer A is being asked to perform basic inspection services in connection with a building with which she has never previously been involved, but which was developed by a former and possibly future client.

While we note that Engineer A clearly has a professional obligation under Sections II.4. and II.4.a. of the Code to disclose her relationship with Enterprise, Inc., to the Greenhill County, we do not believe it would be necessary for her to decline to perform the inspection services. To prohibit Engineer A from providing building inspection services would be an unrealistic intrusion into her practice and would inhibit the county from utilizing a flexible method of delivering services consistent with the public health and safety.

Conclusion:
It would not be unethical for Engineer A to perform building-inspection services for the county in connection with the project developed by Enterprise, Inc.

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