BER Case 94-11

APPROVED
May 9, 1995

Preamble	-	Code of Ethics
Section II.4.	-	Code of Ethics
Section II.4.a.	-	Code of Ethics
Section II.4.d.	-	Code of Ethics
Section III.3.	-	Code of Ethics
Section III.5.	-	Code of Ethics

CONFLICT OF INTEREST
DISCLOSURE & PARTICIPATION AS GOVERNMENT OFFICIAL ON WORK RELATED TO FORMER FIRM

FACTS:

Engineer A is a principal in a consulting engineering firm. He is appointed by the governor of a state to serve as secretary of commerce and resigns from the engineering firm. While Engineer A was a principal in the engineering firm, the firm had performed work for a major developer that is planning to build a major project in the state. As secretary of commerce, the governor has asked Engineer A to spearhead the state's campaign to bring the major development project to the state. The project has been the subject of controversy due to its potential environmental impact and the effect it could have on historic areas of the state.

Although Engineer A resigned from the engineering firm, he maintained a $250,000 retirement fund administered by the engineering firm, which includes an insubstantial amount of stock in the consulting firm. The firm has recently indicated that it might be interested in pursuing additional engineering work for the developer that would be part of the major development project. Engineer A has also indicated to members of the media that upon the conclusion of his services as secretary of commerce, there is a genuine possibility that he would return to his consulting engineering firm. Engineer A has fully disclosed all pertinent information to the state.

QUESTIONS:

1. Was it ethical for Engineer A to maintain a retirement fund administered by his former engineering firm while serving as secretary of commerce under the facts described?

2. Was it ethical for Engineer A, as secretary of commerce, to participate in consideration of issues relating to the major development project?

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REFERENCES:

Preamble - Engineering is an important and learned profession. The members of the profession recognize that their work has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness and equity, and must be dedicated to the protection of the public health, safety and welfare. In the practice of their profession, engineers must perform under a standard of professional behavior which requires adherence to the highest principles of ethical conduct on behalf of the public, clients, employers and the profession.

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 judgement or the quality of their services.

Section II.4.d. - Engineers in public service as members, advisors or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to professional services solicited or provided by them or their organizations in private or public engineering practice.

Section III.3. - Engineers shall avoid all conduct or practice which is likely to discredit the profession or deceive the public.

Section III.5. - Engineers shall not be influenced in their professional duties by conflicting interests.

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DISCUSSION:

Over the years, the Board has considered a number of cases relating to the conflict of interests that could arise in connection with the activities in which the engineer may be involved and the impact that such activities could appear to have on the personal economic interests of the engineer. As the Board has noted on numerous occasions, the basic ethical duty of the engineer in areas of conflict of interest is to inform the client of those business connections or interests that may influence the judgment and quality of the engineering services. Those decisions have been consistent with the provisions of Section II.4.a. of the NSPE Code of Ethics.

As we noted in BER Case 85-6, while that provision of the Code has been interpreted many times over the years, it is, as are all Code provisions, subject to constant examination and reinterpretation. For any code of ethics to have meaning, it must be a living, breathing document which responds to situations that evolve and develop.

This Board has generally interpreted that code provisions relating to conflicts of interest in a strict manner. In BER Case 69-13, the Board reviewed a situation where an engineer was an officer in an incorporated engineering consulting firm that was engaged primarily in civil engineering projects for clients. Early in the engineer's life, he had acquired a tract of land by inheritance, which was in an area being developed for residential and industrial use. The engineer's firm had been retained to study and recommend a water and sewer system in the general area of his land interest. The question faced by the Board under those facts was, "May the engineer ethically design a water and sewer system in the general area of his land interest?"

The Board ruled that the engineer could not ethically design the system under those circumstances. The Board acknowledged that the question was a difficult one to resolve, pointing to the fact that there was no conflict of interest when the engineer entered his practice but that the conflict developed in the normal course of his practice when it became apparent that his study and recommendation could lead to the location of a water and sewer system that might cause a considerable appreciation in the value of his land depending upon the exact location of certain system elements in proximity to his land. The Board stated that while the engineer must make full disclosure of his personal interest to his client before proceeding with the project, such disclosure was not enough under the Code.

Said the Board, "He can avoid such a conflict under these facts either by disposing of his land holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time." The Board concluded by saying: "This is a harsh result, but so long as men are in their motivations somewhat 'lower than angels', it is a necessary conclusion to achieve compliance with both the letter and the spirit of the Code of Ethics. The real test of ethical conduct is not when compliance with the Code comports with the interests of those it is intended to govern,
but when compliance is adverse to personal interests."

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We agree with much of what was stated in BER Case 69-13 considering the Code then in effect. In its reading of the Code of Ethics, the Board took a strict view of the meaning of the Code provisions then in force, which stated: "8. The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client." "8.(a) The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer."

It is clear from a reading of BER Case 69-13 that the Board focused its attention on the first clause of Section 8 stating that "The engineer will endeavor to avoid a conflict of interest with his employer or client." Undoubtedly, the Board reasoned that this was the basic obligation of the engineer in this context, and that any qualification of that obligation would dilute the essential meaning and intent of that obligation. Therefore, the Board did not choose to rely upon the remaining provisions contained in Sections 8 and 8(a) in reaching its decision. Instead, the Board determined that under the facts it would not be sufficient for the engineer to make full disclosure of his personal interest to the client in order to properly address the potential conflict-of-interest question.

Later in BER Case 85-6, an engineer was retained by the state to perform certain feasibility studies relating to a possible highway spur. The state was considering the possibility of constructing the highway spur through an area that was adjacent to a residential community in which the engineer's residence was located. After learning of the proposed location for the spur, the engineer disclosed to the state the fact that his residential property may be affected by the new spur and fully disclosed the potential conflict with the state. The state did not object to the engineer performing the work. The engineer proceeded with his feasibility study and ultimately recommended that the spur be constructed. The highway spur was constructed.

In analyzing the case, the Board noted that since the earlier decision of BER Case 69-13, the Code of Ethics had been altered and the phrase "engineer will endeavor to avoid a conflict of interest with his employer or client" was no longer contained in the applicable Code provision. The Board went on to note that the reason for that deletion was certainly not out of a lack of desire within the engineering profession for an ethical proscription relating to conflicts of interest. Truly, ethical dilemmas relating to conflicts of interest are some of the most significant issues facing the engineering profession. Nevertheless, the provision in the Code relating to conflicts of interest was amended and those changes impact upon the manner in which the Board regards BER Case 69-13 as well as the manner in which the Board interprets the Code. It is evident that had Sections II.4. and II.4.a. been in effect at the time the Board decided BER Case 69-13, the Board may well have reached a different result.

As we noted in BER Case 85-6, it is not our role to speculate upon the intent of this significant change in the NSPE Code of Ethics since BER Case 69-13 was rendered, however, we do think that some expression by this Board in that regard would assist readers in understanding the

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basis for the change. In no sense should this change be interpreted in any way to suggest a retreat by this Board or the Code of Ethics from a deep concern for dilemmas
relating to conflicts of interest. Rather, it is our view that the modifications in the Code reflect recognition of the fact that conflicts of interest emerge in a multitude of degrees and circumstances and that a blanket, unqualified expression prohibiting engineers to avoid all activities that raise the shadow of a conflict of interest is not a workable approach.

It is often a question of degree as to what does and does not constitute a significant conflict of interest. Obvious and significant conflicts of interest are easily identifiable and should always be avoided. These difficult, multifaceted situations require discussion and consideration as they are complex and sometimes irreconcilable. A code should address and provide guidance for these kinds of conflicts of interest. We believe the new Code provisions sought to establish the ethical obligation to engage in dialogue with a client or employer on the difficult questions relating to conflicts of interest. We think that it was for this reason that the Code provisions were altered.

Turning to the facts of the instant case, we decline to adopt the reasoning of the Board in BER Case 85-6 and are of the view that the ethical obligations contained in Section II.4.a. do not require the engineer to "avoid" any and all situations that may or may not raise the specter of a conflict of interest. Such an interpretation of the Code leaves engineers with a real understanding of the ethical issues and clear guidance as to how to deal with the problem. The basic purpose of a code of ethics is to provide the engineering profession with a better awareness and understanding of ethical issues that impact upon the public. Only through interacting with the public and clients will engineers be able to comprehend the true dimensions of ethical issues.

Unlike BER Case 85-6, we are of the view that the engineer's disclosure of the facts and circumstance of his relationship with his engineering firm constituted a disclosure of the possible conflict of interest but did not come within the ethical guidelines of the Code and was not a proper course to take in dealing with the or appearance of conflict. We are willing to
state as we did in BER Case 69-13 that the engineer can only avoid such a conflict either by "disposing of his land and holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time," in this case a minimum amount of stock in his former employer's firm. Such an approach could not constitute an unfair and unreasonable financial hardship to the engineer and would not go beyond the requirements of the Code of Ethics.

Finally, we believe that Engineer A's relationship to the developer as a principal in the consulting firm should require that he as secretary of commerce remove himself from consideration of issues relating to the development project because of the many issues specifically and directly relate to the professional services provided by his former engineering firm. His role as secretary of commerce presumably involves a broad range of commercial, business and related issues involving the financial well-being of the state and Engineer A's judgment and knowledge to the issues that are presented to him. He presumably would be influenced by his ongoing relationship with the firm.

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Finally, the Board feels it is important to point out that the mere disclosure of a potential conflict of interest to a client or employer does not in and of itself eliminate the conflict of interest issue (contrast Code of Ethics Section II.4.a. with Section III.5.). A greater level of ethical commitment is required of engineers.

CONCLUSIONS:

1. It was unethical for Engineer A to maintain a retirement fund administered by his former engineering firm while serving as secretary of commerce under the facts described.

2. It was ethical for Engineer A, as secretary of commerce, to participate in consideration of issues relating to the major development project, except where such consideration specifically and directly relate to the professional services provided by his former engineering firm.

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