

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael Berg,)	
)	
Appellee and)	Supreme Court No. 20170413
Cross-Appellant,)	
v.)	
)	Civil No. 08-2015-CV-00200
North Dakota State Board of)	
Registration for Professional)	
Engineers and Land Surveyors,)	
)	
Appellant and)	
Cross-Appellee.)	

An Appeal from a Judgment dated October 3, 2017 and two Orders dated February 6, 2017 and August 30, 2017 in regard thereto of the District Court, South Central Judicial District, Burleigh County, North Dakota, entered into an Administrative Appeal Proceeding

**REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE NORTH DAKOTA
STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND
LAND SURVEYORS**

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Dated: April 23, 2018.

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1. Berg's claim that he was found to have not violated the code of ethics is incorrect

[¶1] Berg¹ states that Apex and/or Berg were found to have not violated the "Code." The district court affirmed the Board's finding that Berg violated N.D.A.C. § 28-03.1-01-10. The "Code" referenced by Berg is the Code of Ethics of the National Society of Professional Engineers ("NSPE"). NSPE is a voluntary professional organization for engineers. It has its own Code of Ethics. There has never been a determination or opinion by NSPE that Berg's conduct would not have violated the NSPE Code of Ethics.

[¶2] But, the NSPE Code of Ethics, and interpretations thereof, are not controlling on the Board. The NSPE Code of Ethics is not referenced, or adopted, in the North Dakota Century Code, or Administrative Code. An opinion of the NSPE Board of Ethical Review ("BER") is just an advisory opinion expressing BER's opinion. Whether Berg did, or did not, engage in conduct that violated the NSPE Code of Ethics is not relevant.

[¶3] Further, NSPE is not "responsible" for creating the canons of ethics and rules of professional conduct for engineers. That responsibility rests with the Board under N.D.C.C. § 43-19.1-08(1). While the Board may have used the NSPE Code of Ethics as a beginning point, the Board's adopted Code of Ethics is adopted under the rulemaking power of the Board. The Code of Ethics adopted by the Board was adopted in January 1988, and has been amended three times, in April 1999, October 2004, and October, 2010. The versions of N.D.A.C. § 28-03.1-01-

¹ Capitalized terms in this Reply Brief have the same definition as in the Board's Appellant Brief.

10 can be found at <http://www.legis.nd.gov/agency-rules/administrative-rules-supplement>.

[¶4] Accordingly, the Code of Ethics has gone through public hearings and comment, and amendments; and then been approved by the North Dakota Attorney General and the North Dakota Administrative Rules Committee. It is the Code of Ethics that the Board is to apply. Any holding by the district court that if the Board did not follow the interpretations of BER, the Board erred as a matter of law, is without legal basis.

[¶5] But, when the website provided by Berg is reviewed, the referenced opinion of BER, and the discussion therein, has nothing to do with the conflict of interest provisions of N.D.A.C. § 28-03.1-01-10. The referenced BER opinion dealt with an engineer who had opened his own practice, waited an entire year before soliciting any work from his prior employer's clients, and there was then an inquiry if he could do so after waiting this year. The BER opinion dealt solely with the engineer's ability to compete, going forward, with his prior employer. It had nothing to do with an engineer working for months for an employer, without disclosing to the employer he was involved in planning a competing firm, while at the same time meeting with clients of the employer to discuss future business opportunities with the plan to solicit immediately, upon leaving employment, business from these same clients for the same and additional business; nor did it deal with an engineer making decisions as to allocation of resources to projects which he at least hoped his new firm could work on as a sub-contractor because the projects had not been completed when he left.

[¶6] The NSPE Code of Ethics, in Paragraph II. 4 thereof found at its website, has a similar provision regarding disclosure to employers or clients of known or potential conflicts of interest that could appear to influence their judgment or the quality of their services. But this provision was not relevant to the referenced BER opinion.

2. Berg's violation of N.D.A.C. § 28-03.1-01-10 was not simply because he started a firm competing with Ulteig.

[¶7] Berg's failure to recognize the distinction between (1) simply leaving Ulteig to start his own firm (with others) versus (2) being in a position, while he remained with Ulteig, where his decision to do so could influence or appear to influence his judgment or the quality of his services to Ulteig, is obvious in his arguments

[¶8] Berg argues that starting a new business to compete with Ulteig is central to the competition allowed under N.D.C.C. § 9-08-06. Subject to some exceptions, N.D.C.C. § 9-08-06 prohibits non-competition provisions in contracts. Ethical limitation on an engineer arise from an administrative rule, not a contract. N.D.C.C. § 9-08-06 has no applicability to a code of ethics provision governing the conduct of a professional. If N.D.C.C. § 9-08-06 were to be interpreted to restrict ethical provisions, all licensing and registration requirements by statute or rule would be void because they all can be deemed a "restraint" on the free exercise of a profession or trade.

[¶9] Biever, Drees & Nordell v. Coutts, 305 N.W.2d 33 (N.D. 1981) dealt with an injunction granted against an accountant in a civil lawsuit brought against him by his former employer, restraining him from performing any audit or other accounting or bookkeeping services of any kind for certain clients of his previous employer.

The Supreme Court affirmed the injunction. The Supreme Court relied on a provision, existing at that time, which had been adopted by the State Board of Public Accountancy as part of their code of professional ethics. The provision put restrictions on a public accountant seeking to replace services currently provided by another public accountant, subject to certain exceptions. If N.D.C.C. § 9-08-06 represented a restriction on the adoption of ethical provisions that might come into play with competitive acts of a professional, the injunction would never have been affirmed.

[¶10] Paustian is an example of an engineer who left Ulteig to join Apex without violating N.D.A.C. § 28-03.1-01-10; Berg is not. Ulteig also claimed Paustian had violated N.D.A.C. § 28-03.1-01-10, and this was an issue addressed at the Board hearing. But, Paustian, after he was approached to join Apex, was not involved in business development meetings with clients of Ulteig and was not making decisions on the allocation of resources to projects Apex hoped to obtain as a sub-contractor because the projects were not completed. Accordingly, the Board made a factual finding that there was no need for Paustian to disclose the potential conflict and found no violation by Paustian of N.D.A.C. § 28-03.1-01-10.

[¶11] Further, Berg's attempt to compare his conduct with that of Kevin Nelson lacks any basis. Kevin Nelson was a Ulteig employee as well as a Board member at the time Ulteig filed its charges against Berg. Nelson immediately recused himself from any involvement. In 2013, three years after Berg left Ulteig, Nelson took another job. Apex deposed Nelson in Ulteig/Apex's civil lawsuit, and Berg's separate Appendix includes portions of the transcript. Nelson received an offer of

employment from Larson Engineering, which he immediately rejected as he planned on staying with Ulteig. (Berg App. p. 498). After that, while Nelson was not at work, but was out of town at a seminary studying to become an ordained minister, Larson Engineering called him again because the person heading their Bismarck office had just resigned and they made Nelson a new offer for a different position. He decided to take it, and as soon as he returned to Bismarck from the seminary he submitted his resignation to Ulteig. He performed no further services of any kind for Ulteig after Larson Engineering's second contact. In no way was this conduct similar to what Berg did three years earlier.

3. N.D.A.C. § 28-03.1-01-10 is not limited to potential conflicts of interest with just clients.

[¶12] Berg attempts to avoid his violation of N.D.A.C. § 28-03.1-01-10 found by the Board, and affirmed by the district court, by arguing that the conflicts of interest that needed to be disclosed were only those with a client, and not conflicts of interest with an employer. Essentially, he wants to add the words "to the client" to the end of the first sentence of this provision to change the requirements of the provision. He references other professions, such as attorneys, where the duty of disclosure only exists as to the client.

[¶13] N.D.A.C. § 28-03.1-01-10 specifically requires disclosures to employers of known or potential conflicts of interest that could influence an engineer's judgment or quality of services. Services provided to an employer, as opposed to a client, are not excluded. Unlike attorneys, for the engineer to continue there can be no objection by the employer. Berg's attempt to exclude the need to disclose known

or potential conflicts to an employer, if those conflicts could influence an engineer's judgment or the quality of services to the employer, is without merit.

[¶14] This disclosure requirement is consistent with N.D.A.C. § 28-03.1-01-03, another engineer Code of Ethics provision. This provision provides, in part, that a professional engineer is to act "as a faithful agent or trustee of each client or employer" (emphasis added). The requirement of disclosure to an employer of known or potential conflicts of interest that could influence or appear to influence an engineer's judgment or quality of their services has been a part of all prior versions of N.D.A.C. § 28-03.1-01-10 and is a part of the NSPE Code of Ethics raised by Berg.

[¶15] Further, Berg's claim that his failure to disclose known or potential conflicts did not affect clients is a self-serving statement. The implication is that the failure to disclose the plans of Berg and Apex to clients was somehow to the benefit of clients. The reality is that there could not be disclosure to clients without the risk to Berg and Apex that those clients would disclose to Ulteig the conflicts Berg should have himself disclosed. For those clients who had Ulteig complete unfinished work (which was every Ulteig client except the City of Jamestown) it is likely that the client would have wanted to know, prior to November 2, 2010, that the engineers working on their project would not be completing the project; and it is likely that had they known this earlier they would have wanted Ulteig to assign additional engineers to the project, prior to November 2, 2010, to reduce continuity problems. Berg's failure to disclose, done for his own benefit, created potential problems for his Ulteig clients.

4. The Jeffries case has no relevance.

[¶16] Berg cites the district court case of Jeffries v. North Dakota State Board of Registration for Professional Engineers and Land Surveyors, Burleigh County Case No. 08-2014-CV-00494 as supporting Berg's position that he is entitled to attorney fees, if he were the prevailing party, incurred in connection with the Administrative Hearing and the investigation of the charges filed by Ulteig. Jeffries is not on point with Berg's situation even if Berg becomes the prevailing party.

[¶17] In Jeffries, the charging party was the Board, through its Executive Director; and the Board, for legal procedural reasons, was the "losing party" with regard to all the charges heard at the administrative hearing. Neither of those situations apply to Berg. When the district court awarded Jeffries approximately 40% of his hourly attorney fees, the Board decided to not appeal the decision.

CONCLUSION

[¶18] Word limitations do not allow the Board to address in this Reply Brief any of Berg's arguments as to his violation of N.D.A.C. § 28-03.1-01-12(6). However, for the reasons discussed in the Board's principal brief, the Board's finding as to this violation should be affirmed.

[¶19] The Board's finding of a violation by Berg of N.D.A.C § 28-03.1-01-10, which was affirmed by the district court, should also be affirmed. The violation did not arise because Berg started a competing firm, it arose because in connection therewith he failed to disclose the known or potential conflicts of interest that could influence the quality of his services to Ulteig. Accordingly, in no circumstances is Berg the prevailing party as defined by N.D.C.C. § 43-19.1-25 (2003 version) even

if it is found to apply to the administrative appeal, all proceedings of which occurred after the statute had been amended in 2015.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶20] This Brief contains 1998 words, excluding the part of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with N.D.R.App.P. 29(d) and the typeface requirements of N.D.R.App.P. 32 and the type style requirements of the rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Arial, 12 point font.

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Ellen Loraas
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Subscribed and sworn to before me, today, April 23rd, 2018.

Brittany Boots
NOTARY PUBLIC
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