



Withholding Permission from Departing Employee To Take Copies of Computer Files; Compensation as Means of Recognizing the Professional Contributions of Employees

Summary

The National Ethics Council (“Council” or “NEC”) dismissed a Complaint alleging violation of Rules 5.201 and 5.203 of the Institute’s 1997 Code of Ethics and Professional Conduct by an AIA Member in connection with the termination of an employee by the Member’s firm. The Complaint alleged that the Member and his firm had not paid the Complainant compensation she was due and that they had denied her request for copies of her work as a CAD manager.

All initials, names, dates, places, and gender references in this decision have been changed.

References

1997 Code of Ethics and Professional Conduct, Canon V, Obligations to Colleagues

Rule 5.201 Members shall recognize and respect the professional contributions of their employees, employers, professional colleagues, and business associates.

Rule 5.203 A Member shall not unreasonably withhold permission from a departing employee or partner to take copies of designs, drawings, data, reports, notes, or other materials relating to work performed by the employee or partner that are not confidential.

Commentary: A Member may impose reasonable conditions, such as the payment of copying costs, on the right of departing persons to take copies of their work.

Findings of Fact and Analysis

In accordance with Section 5.5 of the NEC’s Rules of Procedure, the Hearing Officer, with the concurrence of the Chair of the NEC, determined that the undisputed facts in the record do not establish that the Respondent violated Rule 5.201 or Rule 5.203 of the Institute’s 1997 Code of Ethics. Therefore, the Complaint has been dismissed. The grounds for the dismissal are more fully set forth below.

The Complaint alleges that the Complainant’s former employer (“Respondent’s Firm”) violated Rules 5.201 and 5.203 and Ethical Standard 5.1 of the Code of Ethics. The Ethical Standards in the Code of Ethics do not provide grounds for disciplinary action by the Institute. Therefore, the NEC may consider only the alleged violations of Rules 5.201 and 5.203.

The Respondent filed a Response to the Complaint, and a pre-hearing conference call was held. Participants in that call included the Complainant, the Respondent, a representative from the Human Resources office of the Respondent’s Firm, the Hearing Officer, and the AIA’s Associate General Counsel.

The undisputed facts of the case are as follows. The Complainant was employed as a CAD man-



ager by the Respondent's Firm from March 21 until May 5 of the following year, at which time her employment was terminated due to what was termed a "reduction in overhead staff." The Complainant's responsibilities included "supporting CAD, IT and Network support," in addition to "[i]nstalling & configuring systems including system cleanup." Upon termination from the firm, the Complainant received accrued paid time off and two weeks' severance pay.

The Complainant later requested, by e-mail, electronic files of her "work." from the Respondent's Firm. The Complaint also alleges that the Respondent should be held accountable in this case on the following grounds:

- The Complainant worked "extra hours" between Christmas and New Year's Day, but received neither overtime pay nor compensatory hours in return.
- The Respondent's Firm refused the Complainant's request for four weeks of severance pay.
- Bonuses were paid to all employees of the Respondent's Firm after the Complainant's departure, but no bonus was paid to her.

The Complaint also acknowledges that the Complainant was "an exempt employee."

We note for the record that, although the Respondent did not respond to the Complainant's requests directly, a copy of a letter submitted with the Complaint and statements made during the pre-hearing conference call indicated that a representative of the Human Resources office responded on behalf of the Respondent's Firm. The letter stated, in part:

- "I cannot comment on the current disposition of the bonus schedule as it has not been finalized as yet."
- "...as an employee classified as exempt you are not entitled to overtime pay. Further, the

... Practice ... does not pay overtime to exempt employees nor engage in the practice of comp time."

- "We have offered you our standard severance package of two weeks pay based on your years of service."

During the pre-hearing conference call in this case, both the Complainant and the Respondent elaborated on the information included in the Complaint and the Response. The Complainant informed the Hearing Officer that she had also filed a complaint against the Respondent's Firm with the State Labor Commissioner on the grounds that the firm had failed to pay overtime compensation for the "additional" hours worked between Christmas and New Year's Day. In a notice that was provided to the NEC by the Respondent, the Deputy Labor Commissioner indicated that he had completed his investigation of the complaint, no further action was contemplated, and he was closing the file. He further noted that the Complainant did not dispute the Respondent's assertion that she was a CAD manager with exempt status.

Moreover, during the pre-hearing conference call, the Complainant provided a clearer explanation of the nature of the "work" encompassed in her request to the firm and noted that it included customized menus to assist CAD users, an edited AutoCad program, as well as other work materials of a CAD manager. The Respondent indicated he was not a sophisticated CAD user and, in the absence of a clearer understanding of the nature of the materials, he was initially reluctant to release them because of concerns that they were confidential. However, as a result of the Complainant's clarification during the pre-hearing conference call, he agreed to provide copies of the electronic files to the Complainant. The Complainant responded that she had already replicated the material and no longer needed it. Instead, she requested compensation for the time that she had expended replicating the work. The Hearing Officer informed the Complainant and the Respondent that the



NEC had no authority to impose monetary damages if it should find a violation of the Code of Ethics. The Complainant indicated that she would consider filing a subsequent complaint with the State to seek monetary relief.

The Complaint alleges violations of Rules 5.201 and 5.203 of the 1997 Code of Ethics.

Rule 5.201

Rule 5.201 states:

Members shall recognize and respect the professional contributions of their employees, employers, professional colleagues, and business associates.

The Complainant alleges that the Respondent violated this Rule by failing to provide overtime pay or compensatory time for “extra hours” she worked between Christmas and New Year’s Day, refusing to provide her four weeks (rather than two weeks) severance pay, and declining to pay her a bonus.

Based upon review of the NEC’s past decisions pertaining to Rule 5.201, the Hearing Officer has determined that the above-referenced conduct is not the type of conduct previously found by the Council to violate this Rule. (*See NEC Decisions 87-6, 92-7, 94-5, 94-7, and 94-12.*) All previous ethics cases alleging a violation of this Rule have consistently involved a failure to recognize and respect the contributions of employees, employers, professional colleagues, or business associates by failing to credit them for work done in connection with a project. We have found no authority suggesting that Rule 5.201 has ever been invoked to impose discipline on an AIA Member for conduct of the type alleged in this Complaint.

Rule 5.203

Rule 5.203 states:

A Member shall not unreasonably withhold permission from a departing employee or partner to take copies of designs, drawings, data, reports, notes, or other materials relating to work performed by the employee or partner that are not confidential.

The Council has ruled in several cases involving alleged violations of this Rule. (*See NEC Decisions 88-7, 91-2, 93-13, 94-9, and 94-12.*) The Council has noted that these cases point to several factors that are critical to determining the result in a case of this type:

- First, did the requested material reflect work performed by the Complainant while employed by the Respondent’s firm?
- Second, was the Respondent’s refusal to provide access to the materials reasonable under the circumstances?
- Third, were the conditions, such as the payment of copying costs, imposed by the Member for the release of the materials reasonable?

Applying these factors to the facts here, we conclude that the Respondent’s refusal to provide the Complainant with copies of the materials was reasonable under the circumstances, and thus did not violate Rule 5.203. In the Complainant’s initial requests to the staff at the Respondent’s Firm for copies of her work on CD, the description of the “work” was very difficult to understand. For example, in e-mail messages to the Respondent, she described the work as a PowerPoint presentation, which she had presented at a CAD managers’ summit, and “digital files of lisps, scripts, PDFs, DOCs, BMPs, routines, mns, mnu etc and e-mails.” In addition, the Complainant requested a copy of “the customization [she] was involved in.” It



was only during the pre-hearing conference call in this case, when the Complainant explained the exact nature of the “work” (*i.e.*, “program routines” which facilitate computer work of staff such as “customized menus” for CAD programs) that the Respondent was able to determine that the material was work that the Complainant had actually created and, moreover, that it was not confidential. At that point, he offered to provide copies of the computer files if the Complainant would provide specific information identifying or describing them. The Complainant indicated that she had already replicated the work and requested compensation for the time she had spent (estimated at 60 hours) recreating the routines.

The fact that the work in question is electronic does not necessarily make it confidential nor does it preclude it from being covered by Rule 5.203. However, we believe that the Complainant’s descriptions of the work made it difficult for the Respondent to understand exactly what she was requesting. Therefore, the Respondent’s refusal to provide the Complainant with the copies was reasonable under the circumstances. Finally, as we previously noted, the NEC has no authority to order the Respondent to compensate the Complainant for reproducing the materials herself.

Conclusion

Since the Respondent has not violated Rules 5.201 or 5.203 of the Code of Ethics, the Complaint is dismissed.

National Ethics Council

Peter Piven, FAIA, Chair
Janet Donelson, FAIA, Hearing Officer

October 16, 2004