



Unreasonable Refusal by Employer to Give Departing Employee Access to Material Relating to the Employee's Work while with the Firm.

Summary

The Council found a violation of R. 5.203, unreasonable refusal by an employer to give a departing employee access to materials relating to the employee's work while with the firm. The penalty imposed is Admonition. Admonition is a private reprimand, a record of which is placed in the architect's AIA membership file.

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

Reference

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

Rule 5.203 A Member shall not unreasonably withhold permission from departing employees to take copies of designs, drawings, data, reports, notes, or other materials relating to work performed by the employees in the Member's service which are not confidential.

Commentary: *A Member may impose reasonable conditions, such as the payment of copying costs, on the right of departing employees to take copies of work performed while in the Member's service.*

Facts

Architect A's employment was terminated. At the termination interview Architect B, the employer, agreed that he would allow the employee access to items he might need to update his portfolio. Four days later the employee gave the employer a list of material that he wanted to copy. He requested that the material be made available within three weeks. No materials were made available to the employee within that time period.

There had been no discussion on the date of termination about what items would be made available. The employer had expected only to provide copies of mylars from certain projects on which the employee had worked. The employee had requested that rendering boards and drawings of certain designs and elevations which he had prepared or for which he had contributed design ideas be made available so that he could photograph them after business hours.

The employer failed to return telephone messages left by the employee inquiring when the requested material would be available. The employee continued his efforts through telephone messages and letters to obtain access to the materials requested. Finally, the parties spoke by telephone long enough for the employer to tell the employee that the materials he had requested would not be made available, and that he would receive an explanatory letter. The employee received a letter stating that the rendering boards requested represented "at best only rendering ability done in conjunction with other staff members...", that the lack of that material would not hamper his job search, and that a longer letter would be sent in one week. That letter was sent, and for the first



time the employer raised the issue of the confidentiality of the material requested by the employee. The employer refused to give possession of the requested materials to the employee, but offered to have pictures taken by a photographer chosen by the employer at the employee's expense. The prices listed in the letter were, in the words of the employer, quotes from "the most expensive photographer in town." The employee never disputed the employer's right to retain control of the boards in question, but did dispute the alleged confidential nature of the material. Of the eight project boards requested, only two of the projects were in a confidential posture. All others were under contract and/or construction, or had been featured in newspaper articles. Because of financial difficulties resulting from his unemployment, the employee attempted to negotiate photography by another, less expensive photographer, or by himself or a friend at the employer's office outside of working hours. The employer refused all alternatives proposed by the employee.

The employee also requested copies of his time sheets. The employer initially agreed to provide them, and then refused citing their confidentiality. The employee alleged that the confidentiality of time sheets was a new "policy" in the office. He said he needed the time sheets to update his NCARB file without being dependent on his former employer to provide a satisfactory rating. While he wanted to have his time sheets for his own records, he said he would accept a summary of amounts of time spent in various phases of practice. The employer explained that time sheets, while initially filled out by employees, were subsequently reviewed by him. In that review process, he sometimes made adjustments in time or costs for a variety of reasons, including the desire to give a client a discount on services. He did not want his notations, nor the fact that he may or may not be giving certain clients a discount on services, to become public knowledge. The employer acknowledged that the employee's work as an architect was satisfactory.

Discussion

In Decision No. 88-07, the Council narrowly interpreted the definition of "departing employee" to exclude an employee who had waited for eighteen months after his departure from the firm to request copies of certain material. It is clear in this case that the employee was a departing employee when the parties first discussed the possibility, if not the logistics, for providing materials to update his portfolio. Any subsequent discussions about obtaining items to update his portfolio continued in close time proximity to his employment termination.

The materials which the employee had requested from the employer fall within the list of items described in R. 5.203. A photograph of a rendering board or elevation board is a "copy" of those items. In fact, photography may be the only way to reproduce some of the items listed in the Rule. The Commentary to the Rule states that Members may impose reasonable conditions on the methods by which departing employees may obtain copies of certain material. The employer's desire to preserve the confidentiality of designs and projects not already publicized is reasonable. His desire to maintain the confidentiality of his notations on employee time sheets is reasonable. The employer should, if an employee has performed his or her professional duties satisfactorily, "facilitate ... professional development" as discussed in E.S. 5.1, by providing information about time expended in different project phases and a satisfactory rating to NCARB. Neither the desire to limit competition in an already competitive market, nor personality conflicts not related to the departing employee's professional abilities, should jeopardize that employee's ability to update NCARB file status.

The employer's actions in this case hardly seem calculated to aid the departing employee in any sort of expeditious manner. However, his offer to make boards available for photographing at the expense of the employee but under the employer's control is reasonable. It appeared that the parties



might resolve this matter between themselves shortly after the hearing. The employer stated that there were any number of "houses in town" capable of doing the necessary photography, and that he had accounts at most of them. He offered to provide the names of three potential photographers, and to let the work be charged to his account, with the employee then paying him. While this was a reasonable proposal, employers need to be sensitive to the abilities of someone who has been unemployed for a number of months to meet that requirement. There may be situations in which permitting the employee to do his own photography, with appropriate protection for the employer's material, would also be a reasonable solution.

The request from the employee for a choice of more than the two photographers named by the employer, especially in light of the employer's expansive statement about having accounts at nearly every house in town, was not unreasonable. While the employee's requests sometimes sounded like ultimata, the employer seized every opportunity to conclude that he was making unreasonable demands, which obviated any need for the employer to retrieve the necessary boards. These actions, when combined with his frank statements during the hearing that he was not anxious to have another competitor in the market, lead to the conclusion that he was simply "stonewalling" the employee. This "stonewalling" complies neither with the letter nor the spirit of the Rule in question.

The employer's concerns that the employee might use photographs of certain boards to misrepresent his contributions to the projects depicted is not a valid reason for refusing access to them, or for refusing to honor agreements made with the employee. If the employee misrepresents his contributions to certain projects, his actions may warrant a separate ethical complaint by the employer.

This case exemplifies the failure of a more experienced architect to help teach a less experienced architect the meaning of ethics and

professional conduct in action. It is clear that an attempt to comply with the spirit of Canon V in respecting the rights of a colleague, never crossed the employer's mind. He was quite frank in his assertions that he did not want another competitor. He did everything in his power to take actions that he calculated would require the minimum effort on his part to comply with any applicable Rule of Conduct. He miscalculated—a miscalculation which cost him not only the respect of a former employee and fellow architect—but earned him an Admonition for violating the AIA Code of Ethics and Professional Conduct.

Conclusion

For his unreasonable refusal to give a departing employee access to material relating to the employee's work with the firm, we find that the employer violated R. 5.203 of the AIA Code of Ethics and Professional Conduct, and impose the penalty of Admonition. A letter of Admonition from the Secretary of the Institute, along with a report on this case, will be placed in the employer's AIA membership file.

A. Notley Alford, FAIA, Chairman
Glenn Allen Buff, FAIA
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As provided in the Rules of Procedure of the National Judicial Council, the Hearing Officer, Robert V. M. Harrison, FAIA, did not participate in the decision of this case.

October 30, 1992