



Barry L. Kluger
Inspector General

Office of the Inspector General
Metropolitan Transportation Authority
Two Penn Plaza, 5th Floor
New York, New York 10121
212-878-0000

July 5, 2016

Joseph Giulietti
President
MTA Metro-North Railroad
420 Lexington Avenue
New York, NY 10017-3739

**Re: Violation Dual Employment Policy
and Theft of Time
MTA/OIG #2016-12**

Dear Mr. Giulietti:

The Metropolitan Transportation Authority (MTA) Office of the Inspector General (OIG) has completed its investigation of allegations that Ryan J. Cunningham (Cunningham), Sheet Metal Worker, Maintenance of Equipment, MTA Metro-North Railroad (MNR) engaged in unauthorized dual employment and abused the Family and Medical Leave Act (FMLA). Our investigation substantiated both allegations in that Cunningham improperly used FMLA and other leave to engage in unauthorized outside employment. In addition, Cunningham violated the provisions of the MTA All-Agency Code of Ethics by not providing complete and truthful cooperation during our investigation. Based on our findings, we recommend that MNR impose discipline on Cunningham, as it deems appropriate, up to and including termination,

INVESTIGATION

Cunningham has been a MNR employee since May 2000. He initially applied for and received approval in May 2012 for intermittent FMLA leave for a reported back condition. This approval has been renewed annually up to and including November 4, 2016. According to MTA Business Service Center (BSC) and MNR records, Cunningham did not apply for or receive permission for outside employment.

Cunningham's regular work hours have varied during his employment, but for the period in question, between July 2012 and October 2014, he worked a regular Monday through Friday shift from 8 a.m. to 4 p.m. During this period however, based on our review of his time and payroll records, Cunningham took virtually every Friday off. As reflected in the records, Cunningham used various leave categories each Friday, including regular leave, sick leave, personal days and FMLA leave. In total, Cunningham took off 114 consecutive Fridays over the course of two years and three months.

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The investigation found that for the time period of at least July 2012 to October 2014, during which Cunningham took virtually every Friday off from his MNR employment, he worked at Croton Automotive Services, Inc., d/b/a Nappy Auto Collision – Auto Repair, at 87 Brook Street, Croton-on-Hudson, New York (Nappy).

OIG conducted surveillances of Nappy on two Fridays in December of 2014. On both occasions, Cunningham was observed and photographed working at Nappy. Based on a sworn statement from the President of Nappy, for the period of July 2012 through at least October 2014, Cunningham was scheduled to work, and did in fact work, on virtually every Friday and was paid for his work.

When interviewed by OIG, Cunningham at first denied, but ultimately admitted working at times at Nappy. Throughout the interview, Cunningham was evasive and untruthful about his employment status at Nappy and his use of various leave categories, particularly on Fridays. At one point he claimed a relative owned the establishment and he was not paid, yet later in the interview he claimed a friend owned Nappy and that was why he spent so much time there and that he was not paid. Cunningham eventually admitted that he received some payment for this work stating that sometimes an individual whom he only identified as “Bill” gave him a few dollars, and added that other times he was not paid. Towards the end of the interview, he would only respond “I don’t know” or “I don’t recall.”

POLICY

MTA All-Agency Code of Ethics section 4.07, Other Employment and Outside Activities states in pertinent part, the following:

Employees are prohibited from outside employment . . . that interferes or is in conflict with the proper and effective discharge of the individual’s official duties and responsibilities Employees may engage in outside employment /activity provided that . . . such employment /activity does not interfere with their ability to devote appropriate time and attention to their employment with their MTA Agency; . . . such employment/activity does not violate the specific guidelines for other employment set by their MTA Agency; . . . and . . . they obtain the required approvals as set forth in the specific procedures for approval of other employment set by their MTA Agency.

Metro-North Railroad Policies & Procedures, Dual Employment & Outside Activities, Number: 21-029 (Rev. September 4, 2015) provides in pertinent part that:

[t]his Policy is to ensure that MNR employees, both agreement and non-agreement, do not compromise the safety, integrity or reliability of MNR’s operations by engaging in outside employment or outside activities that conflict with, or have the potential to conflict with, their responsibilities as employees. In furtherance of these objectives,

employees wishing to engage in any outside employment must first obtain MNR authorization to do so in accordance with the procedures set forth in section VI of this Policy. In addition, any employee who wishes to engage in an outside activity that could create a conflict of interest or the appearance of a conflict of interest or otherwise have an impact on his/her MNR job-related responsibilities must also obtain approval in accordance with the procedures set forth in section VI of this Policy.

As noted, Cunningham never obtained approval to engage in outside employment for the entire period in question and was therefore in violation of both the MTA All-Agency Code of Ethics and MNR's Operating Procedure.

Moreover, Cunningham's misconduct is exacerbated by the fact that he misused the Family and Medical Leave Act of 1993 (FMLA) leave in order to work at outside employment. Although he claimed to MNR on numerous occasions that he was unable to work on the Fridays in question because of back trouble, and he was permitted to do so because he had obtained FMLA intermittent leave, he nevertheless worked at Nappy on those very days.

Metro-North Railroad Policies and Procedures Family & Medical Leave, Number: 21-022 (Rev. July 1, 2005) summarizes federal FMLA provisions stating that:

In compliance with the federal Family and Medical Leave Act ("FMLA"), Metro-North Railroad will provide employees up to twelve weeks of unpaid leave in any twelve-month period for any of the following reasons:

- the birth of a child or placement of a child with the employee for adoption or foster care;
- to care for an immediate family member (child, spouse or parent) with a serious health condition; or
- the employee is unable to work because of his or her own serious health condition.

The term "serious health condition" means a condition that involves inpatient care or continuing treatment by a health care provider which includes a period of incapacity under certain circumstances.

Employees are not permitted to use FMLA leave or MNR sick leave to work at outside employment. MNR Operating Procedure, Dual Employment & Outside Activities, Number: 21-029, sect. V. 7 states that "Employees who use sick time, short term or long term disability leave or leave granted pursuant to the [FMLA] to engage in outside employment or activities will be subject to disciplinary action, up to and including dismissal." (Emphasis added.)

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As evidenced by the results of OIG surveillance of Cunningham working at Nappy, clearly he was able to perform various physically demanding work, and falsely represented to MNR that he was unable to work due to his medical condition, thereby abusing sick leave and FMLA leave and MNR procedure.

MTA All-Agency Code of Ethics Policy section 1.07 states that “[e]mployees must cooperate fully and honestly with audits and investigations conducted by the MTA Inspector General, Joint Commission on Public Ethics, Auditor General, Chief Compliance Officer, Agency Ethics Officer, or other governmental agencies. . . .”

Cunningham’s evasive conduct and lies during his OIG interview constitute failure to cooperate and be truthful in his interview with OIG and is a violation of section 1.07.

FINDINGS

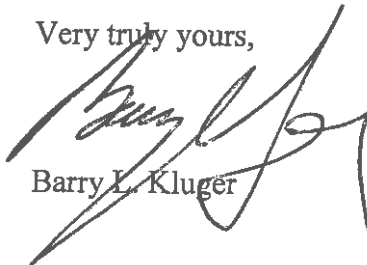
1. Cunningham violated MTA All-Agency Code of Ethics section 4.07 and MNR Operating Procedure Number 21-029 by engaging in outside employment without the required approvals.
2. Cunningham violated MNR Operating Procedure, Dual Employment & Outside Activities, Number: 21-029, sect. V. 7 by using FMLA and other leave for the purpose of working at unauthorized outside employment.
3. Cunningham violated MTA All-Agency Code of Ethics section 1.07 by being evasive and untruthful during his OIG interview.

RECOMMENDATION

Based on our findings, we recommend that MNR impose discipline on Cunningham as it deems appropriate, up to and including termination.

As always, we appreciate your continued courtesy and cooperation. Should you have any additional questions, or need additional information, please feel free to contact me at (212) 878-0007 or Demetri M. Jones, Deputy Inspector General at (212) 878-0279.

Very truly yours,



Barry L. Kluger

Cc: Cathy Rinaldi