



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

February 6, 2017

Patrick A. Nowakowski
President
MTA Long Island Rail Road
93-02 Sutphin Blvd., 3rd Floor
Jamaica, N Y 11435

Re: Ethics Violations
MTA/OIG #2017-02

Dear Mr. Nowakowski:

The Office of the MTA Inspector General (OIG) has completed its investigation into allegations that Robert N. Fazio, (Fazio) Assistant Chief Program Officer–Infrastructure, Department of Program Management (DPM), MTA Long Island Rail Road (LIRR), had an improper relationship with management of Henningson Durham & Richardson, Inc. (HDR), a consulting firm that provided services on various projects to LIRR DPM. Our investigation substantiated that Mr. Fazio engaged in a number of unethical and prohibited acts. We recommend that LIRR impose discipline on Fazio, as it deems appropriate, up to and including termination. Based on our finding that Fazio’s conduct also appears to violate New York State Public Officers Law, we are referring this matter to the New York State Joint Commission on Public Ethics (JCOPE), in accordance with its jurisdiction, for such action as it may deem appropriate.

BACKGROUND

Robert Fazio was hired by LIRR in 2008 and entered his current position in 2010. His duties include supervising the work of third-party vendors and overseeing design consultants such as HDR, as well as supervision of subordinate DPM staff directly responsible for project management and oversight, in connection with bridges, signals and power projects.

Richard Semenick, (Semenick) a former LIRR employee was hired by LIRR in 1985. Semenick retired from LIRR in 2010 (approximately two years after Fazio’s hire) as Assistant Chief Engineer–Maintenance of Way. He subsequently became Rail Section Manager/Associate Vice President in HDR’s New York City office.

INVESTIGATION

Our investigation included a review of Fazio's LIRR email account, telephone records, and various contract-related documents relative to HDR, including contractor evaluations, as well as interviews of Fazio and others.

OIG investigators recognized a pattern of contact between Fazio and Semenick that reflected a personal relationship going beyond the expected arms-length dealings on behalf of their respective employers. A review of telephone records revealed that over a 14-month period between October 2014 through December 2015, there were more than 300 telephone calls placed between Fazio's two LIRR numbers and numbers associated with Semenick or HDR. These calls included approximately 90 calls in excess of a minute in duration placed by Fazio to numbers directly associated with Semenick, and more than 30 calls exceeding a minute from numbers associated with Semenick to Fazio's LIRR telephone numbers.

Moreover, review of IT records spanning from October 2013 through January 2016 revealed that Fazio also repeatedly communicated with Semenick via his LIRR email account. Most of their communications pertained to LIRR projects involving HDR on which no LIRR employee, not even Fazio's subordinates responsible for handling those projects, was copied. These emails included communications in which Fazio sought and received information or guidance from Semenick on technical matters or on how to respond to LIRR/MTA inquiries about HDR's projects.

When interviewed by OIG staff, Fazio stated he has known Semenick since the beginning of his LIRR employment and are presently friends. Fazio acknowledged that they were currently in frequent contact and that there could be instances in which he tried to reach Semenick by telephone as much as 12 or more times in a day, although Fazio claimed he actually spoke with Semenick once or twice a day at most. Fazio stated their communications included getting Semenick's advice about structures and other technical matters as well as how to deal with LIRR Engineering, and mutual "venting" about their work. Fazio initially stated that he tried to avoid discussing LIRR projects with Semenick, but eventually admitted they discussed HDR's LIRR projects as well.

Fazio admitted he attended several business meetings at HDR's Manhattan office as the sole LIRR representative, but had not gone alone to meetings at other vendors' offices. Fazio also stated that on one occasion in 2016 he attended a meeting at HDR's offices along with other LIRR staff, and while there met alone with Semenick behind closed doors to discuss a particular LIRR project. Fazio claimed the purpose of this meeting was for him to express to Semenick the need "to get the job done." Fazio admitted he did not document that meeting or other meetings with HDR that he attended alone. He claimed he briefed his staff after the meetings. When asked why a person at his level attended these meetings, Fazio claimed his staff was inexperienced in project management. When asked why he did not bring the staff responsible for

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the project to the meetings so that they might gain experience, Fazio stated he was not sure and claimed he wanted to get matters resolved between himself and the consultant [HDR].

Improper Disclosure of Confidential LIRR Information

Our review of emails revealed that Fazio provided confidential LIRR information to Semenick. On July 2 and 14, 2014, Fazio was copied by a LIRR attorney on an email message string that contained a discussion of a legal question about a waiver for a project. The subject line in the last two of these messages included the term "Privileged and confidential." Fazio nonetheless forwarded the message chain outside the LIRR to Semenick, asking "What do you think?"

When questioned, Fazio stated he forwarded the email because Semenick had previously dealt with obtaining waivers and Fazio wanted to get the right answer as soon as possible. Fazio claimed he had not noticed the "privileged and confidential" designation.

In a different matter, on January 30, 2015, Fazio received an email from a LIRR project manager, with the Subject line of "FWD: Cost Proposal for HDR," who requested that Fazio find out what information HDR owed to MTA Audit Services. Fazio immediately forwarded this entire message to Semenick and stated, "Rich Can you assist me on this. This may hold up award." When he forwarded this message to Semenick, Fazio also included a longer internal email chain, including the below cost estimate details contained in a January 14th message from the project manager to an LIRR Procurement and Logistics (P&L) contract administrator:

Based on my cursory review, the HDR cost proposal (Total \$597, 319.60 including weekends and the 6-month option) is within the LIRR estimate/task budget (\$668,000).
Let's negotiate!

Fazio thereby provided Semenick with the LIRR's internal estimate during the sensitive pre-award stage of the task order. Fazio stated to OIG staff that if he had realized the email chain contained "the number" he would not have sent it, which establishes his awareness at the time that such information is confidential. Fazio denied intentionally providing this confidential information to HDR.

Our review of email also revealed that in several instances where Fazio's supervisor, MTA Audit Services or P&L raised questions about HDR, Fazio not only forwarded their queries verbatim to Semenick, but also sought Semenick's guidance or input in formulating responses, and/or later shared his own responses with Semenick.

For example, on January 23, 2015, LIRR Chief Program Officer Richard Oakley emailed Steven Schneider, Senior Project Manager of the Wreck Lead Bridge project: "Reviewing HDR's ACE report, I notice that although their DBE has completed 49% of their work, payments to date are \$0. Given the focus on such issues by the MTA, I need from HDR an explanation." Schneider forwarded this message to Fazio and asked, "No payment was issued to DBE contract[or]"

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because no payment was issued to HDR. Can I call Rich to explain and close this issue.” Fazio responded by instructing Schneider to call Rich Semenick and request an explanation. However, two minutes later, Fazio forwarded all of the messages to Semenick, thereby alerting him that Schneider would be calling to seek an explanation. Moreover, in apparent disregard of Schneider’s proposed explanation, about half an hour later Fazio explicitly asked Semenick via email:

Rich
Any recommendations on how to respond to rich [sic].
Possibly subcontractors not invoicing? Anything else.

Similarly, six days later when Oakley wrote to Schneider “I already signed the ACE Report. However why so long to pay 8/11/14 invoice?” Schneider asked Fazio whether he could tell Oakley “We were waiting on acceptable deliverables to justify the payment.” Four minutes later Fazio forwarded those emails to Semenick and asked, “Rich Can you give me some words.”

When questioned as to why he handled Oakley’s inquiries in this manner, Fazio stated he was trying to get answers for Oakley and trying to help Schneider who does not always get the answer for Oakley. When asked why he did not copy anyone at LIRR on these messages, Fazio claimed that was an error and admitted he should have copied the project manager or director. When confronted as to why he directed his subordinate to call Semenick but immediately alerted Semenick and also asked Semenick for a recommended response, Fazio stated he did not know why he did that; that he just wanted to get a response, to get the right answer, from Semenick that afternoon. Contrary to his explanations, we believe Fazio’s actions, especially suggesting “subcontractors not invoicing,” to be more consistent with attempts to help portray HDR’s conduct in the best possible light.

Conversely, when a staff member alerted Fazio to a problem with HDR, Fazio handled the matter differently. In March 2015, Fazio inquired of one of his project managers as to the status of finalizing a credit for HDR on the Long Beach substation project. The manager replied:

HDR has put us in a difficult position with the change order and invoices. We have had to do a tremendous amount of research and documentation along with [E]stimating and [P]rocurement . . . HDR has not done anything since last meeting . . .

Additionally, when Fazio responded by asking if HDR owed LIRR information, the manager further reported, “They have not responded since the last meeting to our requests.” Fazio, who often sent internal LIRR emails to Semenick, nonetheless told OIG staff that he did not forward these messages about HDR’s non-responsiveness to Semenick, because he believed the matter was resolved.

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Conflicts of Interest

We learned that Semenick helped Fazio prepare a resume that Fazio planned to submit in an application for the position of LIRR Chief Program Officer. On April 10, 2014, Fazio attended a negotiation with HDR officials (not including Semenick) for the Wreck Lead Bridge project (Contract # 6052A-03-05). Later that day, Fazio emailed to Semenick from a personal account a draft resume that stated "Rich, Attached is my resume as discussed. Please review for comments ... Please return the revisions to this email . . ." Three days later, Semenick did so and commented, in part, "Bob, I took some liberties with your resume and cover letter . . . Read it over carefully to make sure you agree with my edits." Fazio told OIG staff that this exchange was simply a friend asking a friend for a favor. He denied doing anything to reciprocate for this assistance or for the other advice that Semenick gave him.

At the time Semenick edited Fazio's resume and cover letter, HDR was also the consultant for the Preliminary Design of Long Beach Substation, a project within Fazio's purview. Within a month of the email exchange, on May 8, 2014, Fazio signed as a second reviewer, an All-Agency Contractor Evaluation system (ACE) interim evaluation of HDR. All categories were rated as Satisfactory. However, later that year, a member of P&L in an email to Fazio expressed concern about that particular ACE report:

HDR has performed unsatisfactory with regards to Schedule Adherence. All contractual submissions were late causing the end date to slip by six months. There are questions as to their budget adherence to complete the work and their submittals and deliverables needed to be revised several times before LIRR acceptance. Your final ACE report should consider these deficiencies when evaluating HDR.

Fazio told OIG staff that all of the information in the email was correct, yet subsequent ACE evaluations of HDR, in which Fazio is not on record as reviewer, still rated HDR's Schedule Adherence as satisfactory. Fazio stated that while he did not influence the ACE evaluation he nonetheless told P&L that he concurred with the satisfactory rating. He opined that P&L did not understand the engineering issues and that while the schedule did slip, much of the delay was attributable to LIRR itself.

Fazio denied that any of his actions were intended to favor HDR or Semenick in any way and asserted that he treats all contractors the same.

In a subsequent incident, on November 9, 2015, Fazio sent an email to an individual named Louis D'Onofrio that stated:

Louie

Rich Semenick would like your resume. He will be bidding on substation projects and would like to use your resume. Let me know. Also trying to get Joe Murdelo back.

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Although he received no response from D'Onofrio, Fazio followed up on November 13, 2015 with, in part, the following:

Louie

Saw rich [sic] Semenick tonight. He was wondering if you were going to call him. Also he is liking for over people [sic]. I was thinking about tom [sic] Spatz. Anyone else you think may be interested in moving. Can I get tom Spatz phone number [sic]

Fazio told OIG staff Semenick had called and asked if Fazio knew anyone and that Fazio then reached out to D'Onofrio, an old friend, who Fazio claimed had asked if Fazio knew of any job opportunities. Contrary to this claim however, D'Onofrio's email response to Fazio was: "I've been hesitant to call Rich because I don't see myself working more hours than I am now."

When asked which substation projects Semenick was referring to, Fazio stated that while Semenick might have had LIRR in mind, HDR could also be bidding for another MTA agency or a New Jersey Transit project.

When asked if there was a potential conflict of interest in helping HDR find staff for projects that might fall within his purview, Fazio responded that he would not be part of the selection committee and that DPM would only have one vote in the selection. Fazio also stated that in the past other vendors have also asked him for names of available persons for their projects.

Gift from Prohibited Source

Fazio also admitted he and Semenick socialized outside of work including such occasions as when Semenick visited Fazio's home to view recent renovations; the two men attended a Broadway play together with their wives; and the two men attended a Major League Baseball game at Citi Field in 2016. Fazio stated Semenick gave Fazio a ticket for "good seats" on the third base line, and that Semenick had obtained their tickets from a friend for free. Fazio admitted he did not pay for his ticket but stated he received nothing else of value from Semenick, and claimed that in their other mutual social activities each party paid his own expenses.

Nepotism

Our review of Fazio's email messages also disclosed that on May 17, 2013, Fazio sent an email to Ellen Isaacs, Assistant Auditor General, MTA Audit Services, with a Subject line including "... Job Posting – Auditor No. 76821 position." Fazio wrote:

I was talking to Mat [Matthew Rudick, Senior Auditor III, MTA Audit Services] regarding the auditing position that is open in internal audit. Please see attached resume [sic].

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My daughter submitted her resume for the Auditing position No. 76821. She just recently graduated with an MBA concentrating in accounting. Her interest[s] are in auditing and has had some auditing experience with KPMG.

I am hoping that you received her resume and she could be considered fro [sic] the position.

Thank you.

Bob

Fazio's full name, LIRR job title and telephone numbers appeared below the message. Kimberly Fazio's resume was attached to the email.

When questioned, Fazio stated that he sent the email to Isaacs to see if his daughter Kimberly could be considered for the job, and further admitted he was trying to get Isaacs to consider his daughter for the position. Fazio nonetheless claimed that he was not trying to influence the decision.

Additionally, according to LIRR Controller Michael Reilly, in early 2014 Fazio came to Reilly's office and handed him Kimberly Fazio's resume, commenting to the effect that in case Reilly was looking for people his daughter had a degree in accounting and just graduated. Reilly, who is the hiring official for the Controller's Office, advised Fazio that his daughter should check for openings and apply online.¹ Kimberly Fazio applied for a job and was interviewed. Reilly told OIG staff that following Kimberly's interview, Fazio inquired of Reilly as to how his daughter made out in the interview. Reilly stated that Fazio's inquiry was made in person following an unrelated business meeting that Fazio and Reilly attended.

Fazio admitted that he inquired of Reilly about his daughter's hiring status. Fazio stated Reilly informed him that his daughter did not do well in the interview. Fazio later stated he was not sure if she had interviewed or taken a test or both. Fazio claimed he believed that Reilly had called him, based upon his daughter's last name. Fazio also claimed he did not communicate with anyone at LIRR about his daughter's application prior to her interview or test.

MTA All-Agency Code of Ethics

The MTA All-Agency Code of Ethics, Section 2.01, Gift Prohibition-Zero Tolerance provides, in part, that:

Employees are prohibited from soliciting or receiving gifts, directly or indirectly, from any Prohibited Source.

¹ Kimberly Fazio applied via the normal process, passed a pre-screening exam, was interviewed for Accounting Analyst in April 2014, but ultimately not selected.

There is a limited exception that:

Employees may accept Gifts from employees of a Prohibited Source if these Gifts are reflective of a personal relationship independent of the relationship between the Prohibited Source and the MTA.

The MTA Vendor Code of Ethics, Sections 4.01 and 4.02, contains parallel provisions to Section 2.01.

The MTA All-Agency Code of Ethics, Section 2.04, Reporting Gift or Gift Offers provides, in pertinent part, that:

An Employee to whom a Gift is offered or given in Violation of Section 2.01 above shall promptly report such offer or Gift to the applicable Agency Ethics Officer

The MTA All-Agency Code of Ethics, Section 4.01, Conflicts of Interest/Recusal provides, in pertinent part, that:

Employees shall not have any interest, personal, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is or may be in conflict with the proper discharge of his or her duties.

Employees must notify their Agency Ethics Officer or Ethics Committee directly regarding any possible Conflict of Interest.

Employees must not only avoid Conflicts of Interest with the MTA but also even the appearance of a conflict.

The MTA All-Agency Code of Ethics, Section 4.02, Public Trust states, in pertinent part:

- (a) Employees shall not engage in a course of conduct that will raise suspicion among the public that they are likely to be engaged in acts that are in violation of the public trust. Employees shall avoid even the appearance that they can be improperly (1) influenced in the performance of their official duties or (2) induced to violate the public trust or impair their independence of judgment in the exercise of their official duties.

Example: An employee's undisclosed social relationship with a Prohibited Source might create an impression of impropriety if the Employee were in a position to act favorably toward the Prohibited Source in an MTA Agency matter.

- (b) Employees shall not by their conduct give reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of their official duties, or that they are affected by the kinship, rank, position, or influence of any party or person.

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The MTA All-Agency Code of Ethics, Section 4.03, Confidential Information, states that:

Employees shall not disclose Confidential Information without the permission of the General Counsel of the MTA Agency at which such individual is employed for any purpose, or use such information to further their personal interests.

The MTA All-Agency Code of Ethics, Section 8.01, Nepotism, in the version in effect at the time of Fazio's May 2013 email to Isaacs, provided, in pertinent part:

... Employees are prohibited from participating in any hiring or employment decision relating to a family member. . . There will be no preferential treatment for family members of current Employees . . .

Long Island Rail Road Corporate Policies & Procedures

LIRR Corporate Policy and Procedure #EMPL-004, Avoidance of Nepotism, amplifies the requirements and procedures contained in the above Section 8.01 of the MTA All-Agency Code of Ethics. While EMPL-004 makes specific reference to job opportunities at LIRR, Section V(A)(1) puts all LIRR employees on notice of the principle that

[E]mployees may not participate in any employment decision or any other personnel action concerning a Relative . . . Specifically, employees are prohibited from, but not limited to . . . influencing or attempting to influence, either directly or indirectly, the recruitment and selection process of a Relative . . .

MTA All-Agency Policy Directive

MTA All Agency Policy Directive #11-051, Anti-Nepotism Employment Procedures, section IV(A)(1), effective September 30, 2013 and in force at the time of Fazio's conversations with Reilly, specifically warns MTA employees, in pertinent part, that:

The prohibition includes, without limitation, an employee submitting or referring to an MTA agency, or providing to an employee of the MTA agency involved in the hiring/promotional process, a family member's application, resume or other expression of interest with respect to a vacant position, or asking an agency employee involved in the hiring/promotional process about the status of a family member's application.

FINDINGS

1. Fazio disseminated confidential information outside the LIRR namely, (1) an internal cost estimate during the pre-award stage of a procurement, and (2) communications clearly identified by an agency attorney as privileged and confidential, without permission to do so, in violation of MTA All-Agency Code of Ethics, Section 4.03.

2. Fazio's involvement in and supervision of matters affecting the interests of HDR while maintaining a personal relationship with Semenick without notifying or consulting with the LIRR Ethics Officer or seeking recusal violated MTA All-Agency Code of Ethics, Section 4.01.
3. Fazio had a potential conflict of interest in that he attempted to help Semenick recruit staff for HDR who Fazio knew might have been included in proposals that Fazio's department would evaluate, in violation of MTA All-Agency Code of Ethics Section 4.01.
4. Fazio repeatedly conducted business with HDR via in-person, email and telephone communications that were not transparent to, and in some instances circumvented, subordinate staff responsible for project management, which reasonably created the impression that Fazio was seeking to aid the interests of Semenick and/or HDR or may have engaged in acts in violation of the public trust, in violation of MTA All-Agency Code of Ethics, Section 4.02.
5. Fazio accepted a gift namely, a Major League Baseball game ticket, from Semenick, a representative of a Prohibited Source with whom he dealt in his official capacity, in violation of MTA All-Agency Code of Ethics, Section 2.01.

While Fazio had a personal and business relationship with Semenick, the personal relationship exception to the Zero Tolerance gift rule is inapplicable under these facts. Semenick's employer, HDR had a history of being, and at the time of the gift was, a vendor performing work specifically within Fazio's purview. Moreover, according to Fazio's statements in their other mutual social activities each party paid his own expenses. If true, there is no history of reciprocity of gift giving. The gift flow between the parties therefore ran only in one direction, from the Prohibited Source to Fazio. Additionally, the overwhelming majority of the period of their friendship, the last six of eight years, falls during Semenick's time at HDR, not LIRR. Accordingly, we find the gift in question was *not* reflective of a personal relationship independent of their business relationship.

6. Fazio failed to promptly report the offer and acceptance of the baseball ticket gift, in violation of MTA All-Agency Code of Ethics, Section 2.04.
7. Fazio improperly engaged in prohibited communications with Reilly to influence his daughter Kimberly Fazio's job search within the MTA, in violation of MTA All-Agency Code of Ethics, Section 8.01, All-Agency Policy Directive #11-051, and LIRR Corporate Policy and Procedure #EMPL-004.

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8. Fazio improperly engaged in prohibited communication with Isaacs to influence his daughter Kimberly Fazio's job search within the MTA, in violation of MTA All-Agency Code of Ethics, Section 8.01.

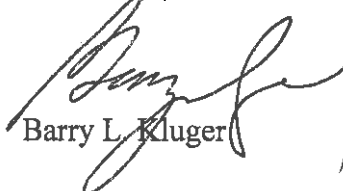
RECOMMENDATIONS

1. LIRR should impose discipline on Fazio, as it deems appropriate, up to and including termination.
2. Fazio should be recused from all matters involving HDR and the LIRR should document the terms and conditions of such recusal.
3. LIRR should take appropriate corrective action concerning the violation of the MTA Vendor Code of Ethics by HDR's representative, Semenick. This may include convening a special vendor responsibility hearing to determine HDR's status as a responsible vendor committed to adherence to the Zero Tolerance gift provisions of the MTA Vendor Code of Ethics. Any such action should include obtaining assurance from HDR that it now has an effective compliance mechanism to vet and approve any potential gifts to be offered to MTA employees under the personal relationship exception of the Vendor Code, or that it has instructed its staff that all gifts to MTA employees are prohibited irrespective of personal relationships.

Finally, based on our determination that Fazio's conduct appears to violate New York State Public Officers Law, we are referring this matter to JCOPE, in accordance with its jurisdiction, for such action as it may deem appropriate.

As always, we appreciate your continued courtesy and cooperation. Please advise me within 30 days of any actions you take pursuant to this letter. If you need additional information please feel free to contact me at (212) 878-0007 or Deputy Inspector General Demetri M. Jones at (212) 878-0279.

Very truly yours,



Barry L. Kluger

cc: Lamond Kears, Chief Compliance Officer, MTA
Stephen Papandon, Ethics Officer, LIRR