



Barry I. Kluger
Inspector General

Office of the Inspector General

Metropolitan Transportation Authority
Two Penn Plaza, 5th Floor
New York, New York 10121
212-878-0000

December 27, 2018

Andrew Byford
President
MTA New York City Transit
2 Broadway, 30th floor
New York, New York 10004

**Re: Dual Employment by Transit
Elevator Maintenance Supervisor
MTA/OIG #2018-60**

Dear Mr. Byford:

The Office of the Metropolitan Transportation Authority (MTA) Inspector General (OIG) has completed its investigation into an allegation that Gerard J. Appierto (Appierto), Elevator Maintenance Supervisor II, New York City Transit (NYC Transit) Training, engaged in unauthorized dual employment with private elevator companies. We substantiated the allegation. We recommend that NYC Transit impose discipline on Appierto as it deems appropriate, up to and including termination.

INVESTIGATION

Appierto was hired by NYC Transit on April 3, 1995 as a Mechanic. He was promoted in 2012 to Maintenance Supervisor I and supervised a crew of approximately ten Maintainers for Maintenance of Way Operations/Elevators and Escalators. He has been in his current position of Maintenance Supervisor (Elevator) II since October 23, 2017, and his responsibilities include conducting training for NYCT Human Resources. While his former maintainer positions were considered safety-sensitive, his current trainer position at Human Resources is not considered safety-sensitive.

OIG staff learned that Appierto has maintained outside employment with multiple private companies during his 23 years with NYC Transit, and only applied for dual employment approval for the very first time in 2009. That 2009 application was approved by NYC Transit. However, thereafter, Appierto did not apply for any dual employment approval again until the years 2012, 2015 and 2017. Although Appierto was approved for dual employment in 2012 and 2015, Appierto was denied dual employment approval in 2017. NYC Transit denied Appierto's application in 2017 based on a determination that his outside employment would have interfered with his ability to satisfy the 16 hours of rest requirement for his safety-sensitive position. Appierto applied for dual employment again in 2018, after he transferred to NYC Transit Training, and that application was approved in April 2018.

OIG staff reviewed Appierto's employment records from companies for which Appierto worked, including:

[REDACTED]
(dual employment approval received in 2009);

[REDACTED]
(dual employment approval received in 2012);

[REDACTED]
(dual employment approval received in 2015, denied in 2017);

[REDACTED]
(dual employment approval received in 2018);

[REDACTED]
(dual employment approval never requested).

OIG staff also reviewed records of the Joint Employment Office of the Elevator Industry, located at 35-40 36th Street, 2nd floor, Long Island City, New York, which provided job referrals to Appierto for outside employment.

OIG learned that [REDACTED] had employed Appierto as an elevator inspector from approximately September 2008 to June 2010. Although [REDACTED] was not able to provide Appierto's Internal Revenue Service form W-2s or attendance records due to the passage of time and a loss of records, we determined that Appierto had been employed by [REDACTED] without NYC Transit approval from 2008 until he received approval in 2009 to work at [REDACTED].

OIG learned that [REDACTED] had employed Appierto as a maintenance supervisor from 2015 to 2016, and [REDACTED] records showed his approximate earnings as \$6,880 and \$28,190 for the years 2015 and 2016, respectively. [REDACTED] had employed Appierto as a maintenance supervisor from 2017 to 2018 and earned \$43,360 in 2017, as well as regular weekly gross pay during 2018 of \$1,170. Although neither [REDACTED] nor [REDACTED] records for 2015, 2016, and 2017 were sufficiently detailed to ascertain whether Appierto's outside employment directly conflicted with his NYC Transit work hours or affected his hours of rest requirement, Appierto did not receive any new dual employment approval during those years despite NYC Transit policy requiring Appierto to

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reapply for approval any time his work schedule or assignments changed, inside or outside of NYC Transit. ██████'s 2018 records indicated that Appierto's work hours at ██████ were 4:00 p.m. to 8:00 p.m. Monday, Tuesday, Friday and provided telephone support on Saturdays until 9:00 p.m., and 8:00 a.m. to 3:00 p.m. on Sundays.

When Appierto transferred in October 2017 to Human Resources to conduct training, he was no longer in a safety-sensitive position, but he nonetheless had been working at ██████ despite NYC Transit's 2017 denial of Dual Employment, prior to receiving his April 2018 approval for Dual Employment to work at VMR.

OIG also learned that ██████ had employed Appierto from 1993 to 1997, and then again from 1998 to 1999. Although ██████ records were incomplete, they indicated that Appierto had approximately 13 vacation days remaining at the time of his 1997 termination, and ten (10) vacation days remaining at his 1998 termination date. However, Appierto had begun work at NYC Transit since 1995, and had not applied for approval for any of his employment at ██████.¹

OIG further learned that ██████ had employed Appierto as a maintenance supervisor from 2010 to 2015. Although ██████ records were also incomplete, and some of Appierto's ██████ employment may have occurred during periods when Appierto had approval for outside employment, ██████'s records indicate that in 2015 Appierto was paid at a rate of \$42.63 per hour, earned a total of \$48,778.15 and that he worked many 8-hour days. ██████ records were complete enough to indicate that Appierto had worked at ██████ without NYC Transit approval at least from 2010 until he received approval in 2012.

Interview of Appierto

OIG interviewed Appierto on September 24, 2018. When asked about his employment with the above private companies, Appierto admitted that he has worked for all of those companies. When specifically asked about his dates of employment, Appierto said that he did not recall the dates at which he worked at any of the companies. Appierto also said that he did not keep copies of his dual employment applications or any of NYC Transit's responses. He stated repeatedly that he had a poor recollection of dates and amounts of money earned.

Appierto claimed that he "always" requested dual employment approval, and kept requesting approval if he received no response, but added that he was sometimes told orally that "it was okay" or that NYC Transit would not give any responses to his request. When asked why he would keep requesting approval unless he realized that he did not yet have approval, Appierto gave no answer. When asked about his current dual employment at ██████, Appierto said that he

¹ OIG also learned that a now closed company, ██████ had employed Appierto from 1985 to 1992, and 1999 to 2008. Appierto admitted that he had worked at ██████ but said he did not recall the dates of his employment. Appierto did not receive dual employment approval to return to work at ██████ from 1999 to 2008, after he joined NYC Transit in 1995.

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had worked at his current [REDACTED] employment for about a year, and produced an approved request for dual employment dated May 4, 2018. When confronted with the fact that his 2018 approval occurred only after he had already begun working at [REDACTED] in 2017, Appierto made no response.

When asked about his current hours at [REDACTED], Appierto claimed that he only worked Fridays and Saturdays from 4:00 p.m. to 8:00 p.m. Contrary to Appierto's assertion, [REDACTED] records indicated that Appierto was available on Monday, Tuesday and Sunday, and additionally available to provide telephone support until 9 p.m. on Fridays and Saturdays. Notably, if Appierto was only working ten total hours on Fridays and Saturdays each week, and [REDACTED] was paying him \$1,170 per week, Appierto was being paid \$117 per hour by [REDACTED] in 2018 (in contrast to \$43 per hour that [REDACTED] paid Appierto in 2015.)

When asked about his disapproved dual employment request in 2017, Appierto curiously claimed at the time in 2017 he intentionally wanted NYC Transit to disapprove the request because he wanted an excuse to avoid the outside work. Appierto claimed that his divorce and child support payments were onerous and therefore he was forced to work the outside employment, so he had wanted an excuse not to work.

POLICIES

MTA All-Agency Code of Ethics

MTA All-Agency Code of Ethics, Section 4.07, Other Employment and Outside Activities (in effect during the first eleven months of 2015) states, in pertinent part:

Employees are prohibited from outside employment, business, professional, or other outside activity that interferes or is in conflict with the proper and effective discharge of the individual's official duties or responsibilities . . .

Employees may engage in outside employment/activity provided that (1) such employment/activity does not interfere with their ability to devote appropriate time and attention to their employment with their MTA Agency; (2) such employment/activity does not violate the specific guidelines for other employment set by their MTA agency;... and (4) they obtain the required approvals as set forth in the specific procedures for approval of other employment set by their MTA Agency . . . [emphasis added]

NYC Transit Rules & Regulations

NYC Transit Rules and Regulations, Rule 4(g) states, in pertinent part:

All employees must obtain Authority approval before engaging in any occupation, business or profession, including self-employment, outside the Authority. A

request for approval must include written notification to their Division Heads specifying the proposed activities, the name, address and telephone number of the place of proposed employment, the date upon which they plan to commence additional employment, the days of the week and the hours during which they will be employed and the duties they will perform. Any change in any of this information, once the additional employment has commenced, must be provided in the same manner of notification. *[emphasis added]*

NYC Transit Policy Instruction Manual

NYC Transit's Policy/Instruction No. 4.23.2 states, in pertinent part:

IV. GUIDELINES

A. For all employees:

1. The dual employment shall not interfere with the proper and effective discharge of the employee's duties with the Authority or otherwise render the employee unfit for duty.
2. The dual employment shall not create a conflict of interest or an appearance of a conflict in the performance of the employee's employment with the Authority.
3. A current employee may not commence a secondary job until his/her dual employment request has been approved in writing. *[emphasis added]*

B. *For employees in FTA safety-sensitive titles, in addition to the guidelines set forth in subsection A above:*

1. The proposed outside employment may not result in total, combined work time that prevents the employee from having eight consecutive non-working hours in the 16-hour period before reporting to work for the Authority. *[emphasis added]*
2. Employees who previously received approval for dual employment must seek new approval within five (5) days of notification of an assignment change, either in their NYC Transit employment or their outside employment, that results in changes in work days, shift changes, work location changes, and/or work assignments. *[emphasis added]*

When such changes occur, the employees must seek new approval of their Division/Department Head by completing a new Dual

Employment/Outside Activity form Requests that are not submitted timely will result in the previous approval being null and void. *[emphasis added]*

VI. ADMINISTRATION AND RESPONSIBILITIES

B. Employee:

1. All current employees must obtain the Authority's approval in writing, on the prescribed application form, before engaging in any occupation, business or profession, including self-employment, outside the Authority. *[emphasis original]*
3. Employees in FTA safety-sensitive titles who previously received approval for dual employment must seek new approval within five (5) days of notification of an assignment change, either in their NYC Transit employment or their outside employment, that results in changes in work days, shift changes, work location changes, and/or work assignments. Requests that are not submitted timely will result in the previous approval being null and void. *[emphasis added]*
6. Violation of these procedures may subject an employee to discipline, up to and including termination of employment, and/or may expose an employee to civil or criminal penalties. *[emphasis added]*

NYC Transit's Ethics Policy Instruction No. 5.6.4, §3.07 (issued May 11, 1999) states, in pertinent part:

Dual Employment. The Authority requires that employees devote appropriate time and attention to their employment with the Authority. Employees are prohibited from employment, [b]usiness, professional or other outside activity which interferes or is in conflict with the proper and effective discharge of the individual's official duties or responsibilities. Employees may engage in other employment in certain limited circumstances, subject to approval.

Appierto repeatedly failed to obtain NYC Transit's prior approval for his dual employment before engaging in his dual employment, despite his demonstrated familiarity with the dual employment application process. While our investigation was not able to determine the exact dates and times and specific interference with Appierto's NYC Transit duties, it is clear that Appierto, while working in a safety-sensitive position subject to hours of service restrictions and acting as a supervisor, repeatedly worked multiple outside jobs without NYC Transit approval.

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Furthermore, Appierto's failure to seek proper dual employment approval impeded NYC Transit's ability to properly supervise Appierto, and to identify and prevent potential conflicts of interest.

FINDINGS

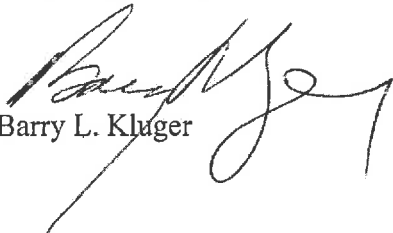
1. Appierto failed to obtain dual employment approval prior to engaging in work with VMR for the years 2017 through 2018, in violation of MTA All-Agency Code of Ethics, Section 4.07, NYC Transit Rule 4(g) and Policy/Instruction Number 4.23.2.
2. Appierto failed to obtain dual employment approval prior to engaging in work with Nouveau for the years 2010 through 2011, in violation of MTA All-Agency Code of Ethics, Section 4.07, NYC Transit Rule 4(g) and Policy/Instruction Number 4.23.2.
3. Appierto failed to obtain dual employment approval prior to engaging in work with [REDACTED] for the year 2008, in violation of MTA All-Agency Code of Ethics, Section 4.07, NYC Transit Rule 4(g) and Policy/Instruction Number 4.23.2.
4. Appierto failed to obtain dual employment approval prior to engaging in work with [REDACTED] for the years 1995 through 1998, in violation of MTA All-Agency Code of Ethics, Section 4.07, NYC Transit Rule 4(g) and Policy/Instruction Number 4.23.2.

RECOMMENDATION

NYC Transit should impose discipline on Appierto as it deems appropriate, up to and including termination.

We appreciate your continued courtesy and cooperation. Please advise us of your agency response to our recommendation within thirty days of receipt of this letter. Should you have any questions, or need additional information, please contact me at (212) 878-0007 or Deputy Inspector General Demetri M. Jones at (212) 878-0279.

Very truly yours,


Barry L. Kluger

cc: Kim Moore-Ward
Vice President, Labor Relations