



Barry L. Kluger  
Inspector General

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

March 11, 2019

Andrew Byford  
President  
MTA New York City Transit  
2 Broadway, 30<sup>th</sup> Floor  
New York, New York 10004

**Re: Dual Employment, Time and  
Resource Abuse by Computer  
Specialist  
MTA/OIG #2019-07**

Dear Mr. Byford:

The Office of the MTA Inspector General (OIG) has completed its investigation into allegations that Mikhail Bershchanskiy (Bershchanskiy), Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA) Computer Specialist 4, engaged in time and resource abuse by operating a personal business during his work hours. We substantiated the allegations and also determined that Bershchanskiy violated the provisions of his dual employment authorization. We recommend that the agency impose discipline on Bershchanskiy, up to and including termination. We further determined that Bershchanskiy's conduct also appears to violate provisions of New York State Public Officers Law. Based on our findings, we are forwarding 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.

### **INVESTIGATION**

Bershchanskiy was hired by MaBSTOA in July 2000 and became a Computer Specialist 4 in 2008. He has been a team leader responsible for the supervision of approximately 5 employees, providing computer application support for the commodity management system of the Department of Materiel since April 2016. He is a non-represented employee assigned to work at MTA Headquarters located at 2 Broadway, New York, New York, although his position is carried on MaBSTOA's payroll. His work schedule is Monday through Friday, 9:00 a.m. to 5:00 p.m., with Saturday and Sundays off. Bershchanskiy is required to file an annual financial disclosure form with JCOPE.

OIG staff reviewed Bershchanskiy's work station telephone records, time and attendance records, and electronic workstation records. Our investigation also included a review of a 2013 matter in which the OIG substantiated that Bershchanskiy had engaged in unauthorized dual

Andrew Byford  
Re: MTA/OIG #2019-07  
March 11, 2019  
Page 2

employment with a company he owned and operated called M&L Services (M&L). (See MTA/OIG #2013-04)

During the investigation of the 2013 matter, Bershchanskiy admitted that he did not request approval for outside employment because he thought it would be denied. At that time Bershchanskiy claimed that he worked for M&L approximately 10-20 hours a week on his personal time and that he had been compensated approximately \$40,000 in 2012 for that work. The agency did not impose discipline on Bershchanskiy for that misconduct and resolved the matter by requiring Bershchanskiy to belatedly request approval for his outside employment and, thereafter, approved that request in December 2013. However, that approval for Bershchanskiy's outside activity plainly stated:

Please be advised that activities associated with your outside employment are not permitted to interfere with your NYCT working hours. Moreover, no NYCT resources or NYCT material may be used in connection with your outside activity; this applies to, but is not limited to, computers, email, telephones . . . support staff assistance.

Further, JCOPE issued a December 12, 2013 approval for Bershchanskiy's outside activity that plainly stated:

Please be advised that actions associated with your outside activity are not permitted during State work hours and should not interfere with your work responsibilities. No state resources of any type may be used to accomplish your outside activity. This applies to telephones . . . computers or support staff assistance.

Bershchanskiy has continued his work with M&L since he received the above-described authorizations in 2013.

OIG staff analyzed calls made to and from Bershchanskiy's work telephone during the time period from October 1, 2015 to September 27, 2016. The review established that Bershchanskiy improperly used agency resources and work time for M&L business. In fact, OIG staff found that more than 500 calls were made to a number linked to one of M&L's clients, Apollo Electrical Contractor (Apollo). OIG staff also found that during this same time period Bershchanskiy made more than 70 calls to a number linked to M&L's client All Brooklyn Towing for which Bershchanskiy administered and designed a website which he still hosted as of 2016. OIG staff found additional M&L-related material on Bershchanskiy's workstation computer, although some of the items were dated as of 2009.

Andrew Byford  
Re: MTA/OIG #2019-07  
March 11, 2019  
Page 3

### *Bershchanskiy's Interview*

During his interview with OIG staff in December 2016, Bershchanskiy stated that he owned and operated M&L, also known as "esoftcoder.com", from his home. He stated the business was created in approximately 2008 to provide computer consulting services, including designing and building websites. Bershchanskiy initially denied conducting personal business during his work hours. He claimed that he conducted M&L business only after work hours and that he only worked approximately 1 to 2 hours a week, including weekends. OIG staff confronted Bershchanskiy about the more than 500 calls made to Apollo from his work phone and he claimed that the calls were personal as he was friends with Apollo's owners. However, he admitted he occasionally received M&L-related calls during work hours and claimed he kept the calls very brief. According to Bershchanskiy, M&L grossed between approximately \$18,000 and \$25,000 in 2016.

Bershchanskiy stated that although he had twelve clients previously, only four were currently clients: Caribe Funeral Home, Caribbean Hall, Apollo, and Primary Allergy Solutions. Bershchanskiy also indicated that, he owned several websites in addition to the esoftcoder.com domain and all were associated with his clients' businesses. A review of esoftcoder.com's website indicated that the business was started in 2000. It should be noted that Bershchanskiy's 2013 unauthorized dual employment matter involved the same M&L business.

## **LAWS AND POLICIES**

### *New York State Public Officers Law*

Public Officers Law § 74(3)(d) (Code of Ethics - Standards) states, in pertinent part:

No officer or employee of [any public benefit corporation or public authority]... should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.

*MTA All-Agency Code of Ethics*

MTA All-Agency Code of Ethics, Section 4.07, Other Employment and Outside Activities, 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; (3) they do not use any MTA Agency resources (e.g., time, equipment, telephone, etc.) in connection with such employment; and (4) they obtain the required approvals as set forth in the specific procedures for approval of other employment set by their MTA Agency.

MTA All-Agency Code of Ethics, Section 8.04 Prohibition Against the Use of MTA Property, states, in pertinent part:

MTA's names, logos, supplies, equipment, computer resources, personnel, and other resources may not be utilized for non-governmental purposes, including for personal purposes or for outside activities of any kind except as may be specifically authorized herein:

- c) MTA telephones may not be used for non-governmental long distance calls, except for toll free calls, collect calls, and calls billed to a personal telephone number. MTA telephones may be used for incidental and necessary personal local calls that are of limited number and duration and do not conflict with the proper exercise of the duties of the Employee.
- d) MTA computer resources may be used for incidental and necessary personal purposes, such as sending personal electronic mail messages, provided that such use is in a limited amount and duration and does not conflict with the proper exercise of the duties of the Employee.

*MTA All-Agency Policy Directive*

Policy Number 11-033, Computer and Social Media Usage, states, in pertinent part:

III. DEFINITIONS

Computer Resources: items purchased or leased with MTA Agency funds, or under custody or control of the MTA, including but not limited to, devices such as PCs, printing devices, telecommunication devices, mobile devices, ... owned by, contracted for, or under the custody or control of any MTA Agency at any location. In addition, Computer resources include all data and information and data storage devices, and the MTA Agency-wide network, including email and the Internet and network infrastructure – Information and Physical.

Computer User: any user of Computer Resources, including employees, temporary employees, directors, officers, interns, consultants, contractors, vendors and guests.

IV. RESPONSIBILITIES

A. General Guidelines

2. Occasional and incidental personal use must be consistent with the requirements and guidelines of this policy directive. Such uses are permitted only with the restrictions outlined below:
  - a. Must be subordinate and subject to the business needs of MTA Agency and not interfere with the conduct of MTA Agency business;
  - b. Must not interfere or disrupt in any way other Computer Users, Computer Resources or other MTA Agency services or equipment;
  - c. Must be occasional and only account for an incidental amount of a Computer User's time;
  - e. Must not be used in violation of any of the Prohibited Uses described in Section IV.B.2 of this Policy Directive; and
  - f. Computer Users engaging in excessive personal use are subject to disciplinary or other action as determined by the MTA Agency.

B. General Details

2. Prohibited Uses

Computer Users are not permitted to use Computer Resources to:

- a. Violate any laws and regulations;
- b. Conduct any form of activity that would violate MTA Policies or Procedures, including but not limited to:
  - i. the use of Computer resources to engage in outside employment/activities or engage in private marketing or private advertising of products or services

NYC Transit Rules & Regulations

NYC Transit Rules and Regulations state, in pertinent part:

- 4(g) 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.
- 11(e) Employees must give their full and undivided attention to the proper performance of their duties; they must not neglect or shirk any duty. The use of cellular phones, ... pagers, ear plugs, earphones or any other ... devices which may distract or impair an employee's attention is forbidden, except where authorized....
- 11(g) Employees shall not operate or utilize any Authority vehicle, equipment or property without authorization.
- 13(b)1 Employees shall not convert, borrow, or take System property for personal use.... All NYCT property is for official use only

- 13(i) *[from November 2003]* No employee shall engage in the unauthorized use of the Authority's internet or e-mail system. ... the use of the NYCT internet system is permitted only for NYCT business purposes. ... Any employee who is found to be using the internet system for personal or inappropriate use may lose access to the system and appropriate disciplinary action will be taken up to and including dismissal from service and other civil and/or criminal actions depending upon the nature of the violation.

*[revised in January 2016 to]* When an employee is given access to the Authority's Computer resources, it is their responsibility to assume appropriate use.

- 19(a) Telephones of the System, Authority-issued cellular phone/radios and telephones in offices of the System are solely for the business of the System. **THEY MUST NOT BE USED FOR PERSONAL CALLS.**  
*(emphasis original)*

*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.
5. The proposed outside employment:
  - a) may not make use of Authority time, resources, facilities or equipment.

## VI. ADMINISTRATION AND RESPONSIBILITIES

### B. Employee:

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.

NYC Transit's Ethics Policy Instruction No. 5.6.4, §3.07 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.

OIG found numerous instances in which Bershchanskiy improperly used agency work time and resources, including telephones and computers assigned to Bershchanskiy, to conduct his private business. Although Bershchanskiy was approved for dual employment in 2013, he was specifically prohibited from using agency work time and resources for that outside activity.

## FINDINGS

1. Bershchanskiy used agency work time to conduct his private business, in violation of Public Officers Law § 74(3)(d), MTA All-Agency Code of Ethics, Sections 4.07 and 8.04, MTA All-Agency Policy Directive 11-033, NYC Transit Rules and Regulations 4(g), 11(e), and NYC Transit Policy/Instruction Numbers 4.23.2 and 5.6.4.
2. Bershchanskiy used his agency-issued telephone and computer to conduct his private business, in violation of Public Officers Law § 74(3)(d), MTA All-Agency Code of Ethics, Sections 4.07 and 8.04, MTA All-Agency Policy Directive 11-033, NYC Transit Rules and Regulations 4(g), 11(e), 11(g), 13(b)1, 13(i), and NYC Transit Policy/Instruction Numbers 4.23.2.

Andrew Byford  
Re: MTA/OIG #2019-07  
March 11, 2019  
Page 9

### RECOMMENDATION

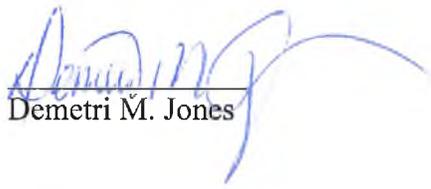
We recommend that MaBSTOA impose discipline on Bershchanskiy, up to and including termination.

As always, we appreciate your continued courtesy and cooperation. 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

By:

  
Demetri M. Jones

cc: Kim Moore-Ward  
Vice President, Labor Relations

Paige Graves  
General Counsel and Ethics Officer

Anita Miller  
Chief Employee Relations and Administrative Officer