

Office of Administrative Law Judges

WASHINGTON, D.C.

SECURITIES AND EXCHANGE COMMISSION WASHINGTON, DC

Respondent

and

Case No. WA-CA-90560

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Samuel M. Forstein, Esquire Charles C. Davis, Jr., Esquire Richard M. Humes, Esquire On Brief For the Respondent
Jefferson D. Friday, Esquire Meryl I. Levy, Esquire On Brief For the Charging Party Beth Ilana Landes, Esquire For the General Counsel
Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.⁽¹⁾, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Mr. Charles Tillman Snead, III, on, or about, June 11, 1999, was re-assigned from the Division of Enforcement to the Office of Information Technology because he had engaged in Union organizing activity.

This case was initiated by a charge filed on June 24, 1999 (G.C. Exh. 1(a)); the Complaint and Notice of Hearing issued August 30, 1999 (G.C. Exh. 1(b)), and the hearing was set for November 8, 1999, pursuant to which a hearing was duly held on November 8 and 9, 1999, in Washington, D.C., before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument on Respondent's Motion To Dismiss. At the conclusion of the hearing, December 10, 1999, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended, initially on motion of the Charging Party, to which the other parties did not object, for good cause shown, to December 23, 1999, and later, on motion of General Counsel, to which the other parties did not object, for good cause shown, to January 6, 2000. Respondent, Charging Party and General Counsel each timely mailed an excellent brief, received on, or

before, January 12, 2000, which have been carefully considered; however, the Transcript and Exhibits were not received until May 30, 2000. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. Mr. Charles Tillman Snead, III, began his employment with the Securities and Exchange Commission (hereinafter, "SEC" or "Respondent") in 1979 as a computer specialist in what is now known as Office of Information Technology (hereinafter, "OIT") (Tr. 21, 23). Over time, his duties centered largely around computer security for mainframe computers (Tr. 70, 188) and he had become a GS-11, Step 9, Computer Specialist (Tr. 72).⁽²⁾

2. Before February, 1999, OIT had undergone a major reorganization, some work was contracted out and a number of positions were eliminated. After the reorganization, Mr. Snead's previous job duties no longer existed in OIT (Tr. 369) and Mr. Snead was not selected for one of the new positions and, accordingly, about 25 OIT employees, including Mr. Snead, were transferred to other jobs within the Commission (Tr. 23, 388). Each division was required to accept one or more of the former OIT employees and Mr. Snead was reassigned to the Division of Enforcement (Tr. 37, 69, 324). When the Division of Enforcement was notified of the intended reassignment, its Chief Administrative Officer, Mr. Charles Carpenter Staiger, and its chief computer specialist, Mr. David Whitaker, met with Mr. Snead and, ". . . we kind of laid out the work in the various offices and tried to find out what he might be interested in and if we could try to merge his interests with the needs that we had in the Division." (Tr. 324; see also, Tr. 37). Mr. Staiger said that Mr. Snead expressed an interest in working with Ms. Debra (Debbie) Kitteridge, Enforcement Information Advisor (Tr. 196), because, ". . . he [Snead] had worked with Debbie Kitteridge in the past and they had had a decent working relationship" (Tr. 324; see, also, Tr. 37, 70).

3. Ms. Kitteridge's duties, inter alia, involved setting up for Enforcement a Case Activity Tracking System, known as "CATS 2000" (Tr. 40, 200-201, 206). Mr. Staiger thought that having Mr. Snead work for Ms. Kitteridge would constitute a good fit because, when the CATS 2000 was set up and in operation, there would be a security system and Mr. Snead had done similar security work at OIT (Tr. 325). Indeed, Mr. Staiger said he discussed this with Mr. Snead and Mr. Snead seemed, ". . . very interested in making a transition." (Tr. 326); that he, Staiger, had told Mr. Snead that until CATS 2000 was up and running he would have to do other things (Tr. 325) and Mr. Snead had,

". . . indicated to me that it didn't matter whether it was a computer specialist type job. He was looking to try new and different things, and I [Staiger] indicated to him, well, obviously we don't have a mainframe in the Division of Enforcement. . . . but we were going to try to find some type of PC related or computer-related duties for him to work with." (Tr. 324-325).

After his interview with Messrs. Staiger and Whitaker, Mr. Staiger told Mr. Snead, ". . . Debbie's over in Greta's office [Ms. Greta Powers is Associate Chief Counsel (Ms. Joan McKown is Chief Counsel and is Ms. Kitteridge's direct supervisor)(Tr. 204)], go over there." (Tr. 76). In his direct testimony, Mr. Snead had made no reference to having met with Ms. Kitteridge and Ms. McKown (Tr. 38-39).

Ms. Kitteridge testified,

"A During the interview Tillman came in and he spoke a little bit and then Greta and I talked to Tillman. It was mostly me talking, I believe . . . as opposed to Greta. I -- we explained to him what the Office of Chief Counsel did . . . explained that . . . if he was interested and if we did make him an offer, he would work -- he'd be sharing the research center with Rochelle Galloway.

"And once CATS 2000 came on line -- we were still in development stage and still not in production . . . I told him . . . I envisioned him being very helpful with the security with it -- with the pass access and the people getting access to the database once it came on line.

"But he would also be helping out in the research center . . .

"And he seemed very interested. He seemed very enthusiastic about new job prospects.

. . .

"A . . . he said . . . he was willing to learn anything new and willing to help out and do whatever." (Tr. 204-205).

Because Mr. Snead was familiar with the procedures for issuing security codes, she and Ms. McKown concluded that Mr. Snead appeared capable of providing the help needed and made an offer to him (Tr. 206).

Mr. Snead denied that there was any discussion of his duties when he met with Messrs. Staiger and Whitaker (Tr. 38, 70, 71, 72); denied that when he met with Ms. McKown and Ms. Kitteridge there was any discussion of the type of work he was expected to help with (Tr. 76-77); denied that there was any explanation of the work of the Office of Chief Counsel (Tr. 77); and denied that he was told he would be assigned a desk in the research center (Tr. 77); but only that, ". . . Chuck [Staiger] told me that first day that space was tight in Enforcement and that . . . I'd just have to sort of make do until they got some other place for me to sit." (Tr. 77).

As to CATS 2000, Mr. Snead first said,

"Q Did she [Kitteridge] ever tell you that at some time in the future you would be working on the CAT system?

"A Yes, she came in to me and gave me a CATS 2000 manual, and she said we're thinking about having you maybe do some computer security work with that system since you're so familiar and have done so

much work with mainframe security." (Tr. 40).

Later, on cross-examination, Mr. Snead said,

"Q How did you first learn about CATS 2000?

"A Within the first four to six weeks that I was sitting in Enforcement.

"Q Who told you about it?

"A Debbie Kitteridge.

"Q What did she tell you about it?

"A She came in to the research center and handed me a CATS 2000 manual, and said that they were thinking about maybe having me down the road do some computer security for the CATS 2000 system, since that's where my experience lies." (Tr. 92).

4. Although Mr. Staiger said Mr. Snead seemed very interested in the prospect of doing security work when the CATS 2000 system was operational (Tr. 326) and Ms. Kitteridge said Mr. Snead seemed very enthusiastic about it (Tr. 205), Mr. Snead indicated he had no enthusiasm and little interest. Thus, he testified, when asked about doing computer security for the CATS 2000 system,

"Q Was that exciting?

"A No.

"Q Were you interested in doing that kind of work?

"A Well, so-so. Those are PCs. I'm a mainframe computer person." (Tr. 92).

5. Mr. Staiger stated that it had not occurred to him that Mr. Snead would require training on the use of computer software because, ". . . I would have thought he would have picked that up on his own or shown some interest to do that." (Tr. 365); and Ms. Kitteridge said, in like manner, ". . . I knew he [Snead] worked on

the mainframe. I made an assumption, I guess it was wrong, that everybody in OIT I assumed, everybody in the Commission, opens their e-mail and has some occasions since you work on e-mail and you're typing back and forth that you would have some knowledge of the word processing that goes with it. . . ." (Tr. 264). Ms. Kitteridge further said that she did not know that Mr. Snead did not know how to use Microsoft WordPerfect until she saw Ms. Galloway, Ms. Kitteridge's secretary (Tr. 298), helping him (Tr. 228).

Mr. Snead's plaint, that, ". . . They never trained me. Never offered me any training." (Tr. 92), is true; but the record shows, without contradiction, that the practice and procedure at SEC is for each employee to initiate a training request pursuant to e-mail posting of training opportunities. Thus, Mr. Staiger testified,

". . . We have a system in the commission for training. There's a regular training office run out of the Office of Personnel. Regular e-mails are posted offering the various training opportunities. Most of the training opportunities are in the various word processing and Microsoft applications, so that every month there's a number of slots for classes that people can check with their supervisor and send an e-mail back. And it's fairly simple to sign up. You just have to want to do it." (Tr. 364-365).

Ms. Kitteridge testified in like manner as follows:

"Q Was it your job to provide Mr. Snead with training on software packages on his PC?

"A No, in fact, training when it comes to the PC is handled by another portion of Enforcement. We have our own ADP, our computer section, but what they -- the way they do it, the Commission is all the training opportunities are sent out on e-mail, and the headings are very clear: Training courses available, and then it'll say what the course is and everybody in the Commission -- it's Commission-wide, I'm sorry -- everybody gets it and in it it tells you what the upcoming class is and what you need to do -- you know, fill out this and get the approval of your supervisor to take the class. So everybody's responsible for their --- you're supposed to look at that, and if I want to take a class, a supervisor doesn't come to me. I print out the thing, I fill out the application, get her permission, and then I send it over to Personnel and I'm put on the list for the class." (Tr. 290-291).

Although Mr. Snead well knew his lack of knowledge of Microsoft WordPerfect, in which he also well knew he needed to be proficient if he were to be able to perform security work for the CATS 2000 system, he never asked Ms. Kitteridge if he could take any class (Tr. 92, 265) notwithstanding that he complained of a lack of work (Tr. 24). Nor is there any dispute that Mr. Snead knew how to use e-mail for he testified that he knew how to use e-mail (Tr. 75) and that he had access to a personal computer (PC) while at OIT before coming to Enforcement (Tr. 74).

6. I did not find Mr. Snead to be a credible witness. For example, his testimony was self-contradictory, as shown by his testimony concerning his labeling of boxes for tape storage. He first testified as follows:

"A . . . she [Kitteridge] said to take all the tapes and put them in old Xerox boxes, and then type on a piece of paper the tapes that were in each box and number each box.

. . .

"A She said when you get through, stack them up on top of the file cabinets.

"Q And did you do that?

"A No, I told Debbie, I said, I have chronic lower back problems. . . . She said, no problem, just call them [facilities] when they need to be moved.

. . .

"Q Did you number the boxes?

"A Yes, I did.

"Q Did you create the index of what was in each box?

"A Yes, ma'am.

"Q And did you then call facilities?

"A Yes, I did.

. . .

"A They came and they moved the boxes to the top of the file cabinets.

"Q When this was done, did you inform Ms. Kitteridge?

"A I don't believe so, because it was pretty obvious that they were on top of the file cabinets.

...

"A What facilities had done -- I numbered the boxes on one side, and they just kind of threw them up there where if you were looking at the file cabinet, you couldn't see the numbers on some of the boxes, so she said, just take a magic marker and write down on the side facing out what the number of the box is, and I did that." (Tr. 49-51) (Emphasis supplied).

On cross-examination, Mr. Snead testified about the same matter as follows:

"A Well, she [Kitteridge] told me to put tapes on the boxes, write down the box number, and then type on a piece of paper what was in each box. I did that.

"Q And did she give you specific instructions as to how to label the boxes?

"A No, she just said to write down on each box what the box number is.

...

"Q Do you recall, sir, her asking you to make sure that the label that you put on the boxes, the numbers that you put on the boxes, would be on the short side panel?

"A No, I can tell you right now she never told me that. I can tell you 100 percent she didn't say that.

"Q Okay, where did you put the numbers on the boxes?

"A I put the number where I thought they ought to be.

"Q And where was that?

"A Well, I don't know. It might have been a different place on every box.

...

"A But I assumed it would have been -- I've got enough common sense that if the boxes are going to be stacked back up on the file cabinet, in order to stack them up there, you're going to have to put the number on the short side because the long side is going to be jammed back up in to the wall.

...

"Q . . . did you put numbers on all sides of the box?

"A No, I don't think I did.

"Q Where did you put the numbers?

"A I just told you where I put them.

"Q If not on all sides, then where? On the top? On the bottom? One side, two sides, three sides, what?

"A I don't know. I wrote the number on the box. I know I wouldn't have written it on the top cover of the box because nobody could see it, so it had to be put on the box, and I would assume, like I told you, that I would have put it on the short side, where, when it was pushed back up against the wall, the person could see the numbers.

" Q Where were the boxes when you put the numbers on them? . . .

"A . . . they were sitting on the floor.

"Q And how did the boxes get returned to the top of the file cabinets?

"A Facilities put them up there.

"Q Were you there to sort of help --

"A No.

"Q -- manage?

"A No.

"Q Or to give direction on where the boxes should be placed?

"A No.

"Q Did you examine the boxes after they had been all replaced on the top of the file cabinets?

"A I don't think I did.

"Q Did you examine them to see whether or not the numbers that you put on the boxes were visible?

"A No.

...

"A I wasn't sitting in that area then. I was sitting in the private office.

"Q . . . did you, after Facilities put these boxes back on top of the file cabinet, return to the research center where the boxes were located --

"A Just to see if they were --

"Q Yes, to make --

"A I don't -- I don't think --

"Q -- to make sure the numbers were visible?

"A I don't think I did do that.

...

"Q So after Facilities has accomplished the movement of the boxes, wasn't it part of the assignment that you had been given to make sure that the boxes were properly arranged on the cabinets, or at least at the very least, the numbers were visible.

"A Ms. Kitteridge didn't tell me to do that.

"Q . . . Did you complete the assignment.

"A Yes, I completed the assignment.

"Q It doesn't sound like you did. If you didn't follow up and make sure that the boxes were in readable fashion, you didn't finish the assignment did you?

"A Well, that's your take on it. That's not my take.

"Q I'm asking you sir.

"A No, that's not correct.

"Q You felt that you had completed the assignment?

"A You're darn right I did.

"Q After you put the numbers on the box.

"A You'd better believe it.

"Q No matter how they were returned to the top.

"A You've got it exactly." (Tr. 103-108) (Emphasis supplied).

With regard to what he was to do concerning his recording of the contents of the boxes, Mr. Snead was evasive, contradictory and equivocal. Thus, Mr. Snead first testified as follows:

"Q Did you create the index of what was in each box?

"A Yes, ma'am.

"Q Did you give her a copy of the index that you created?

"A Yes, I did." (Tr. 50-51) (Emphasis supplied).

On cross-examination he testified as follows:

"Q Would you take a look at the document that's marked Exhibit C [Res. Exh. C]? Can you identify that?

"A These are the boxes of video tapes.

"Q Or more accurately, that's the index of the boxes of video tapes?

"A Well, I don't know if it's an index. I did what she told me to do. She told me to type up what was in every box and put it on a piece of paper.

"Q What would you call it?

"A I call it typing.

..

"Q Alright, then I'll ask you sir, what is Exhibit C? Is it a collection of typed pages fastened together by a staple?

"A That's correct.

"Q And is it also an index of the video tapes that you were asked to create by Debbie Kitteridge?

"A It's not an index, it's the contents of the boxes.

"Q Then it would be a catalog?

"A Well, I guess so.

...

"Q Now, the purpose of writing down on the box the box number would be so that there would be some correspondence between the box number and the designations on your catalog of what was contained in the boxes?

"A That's a good assumption." (Tr. 102-104) (Emphasis supplied).

With regard to being away from his desk, Mr. Snead also was evasive, contradictory and equivocal. Thus, he first said,

"Q Did you ever speak with Ms. Kitteridge about being away from your desk?

"A There was a couple of times she put a little sticky yellow Post-it note on my computer screen saying when you're not at your desk, please let me know. And the second time that I got one of those Post-it notes, I went in and talked with her.

...

"A I told Debbie, I said, I said there's only three places I can be when I'm not at my desk. I said, I'm either at lunch. [sic] I'm either taking a smoke break, or I'm at the bathroom, and I said, in my entire 28 year federal career, I've never had a supervisor ask me to do that, and I said I find it demeaning to have to tell a female when I have to go to the bathroom. And she said, well, that's okay, don't worry about it."
(Tr. 43-45) (Emphasis supplied).

On cross-examination, Mr. Snead testified as follows:

"Q Did you indicate earlier that -- in your testimony on direct -- that Debbie had asked you on occasion to let her know when you'd be away from your workstation?"

"A Now, you're going to have to repeat. I didn't follow.

"Q Did your supervisor, Debbie Kitteridge, ask you at any point in time when you were working for her that you let her know when you would be away from your workstation.

"A Not that I can recall.

"Q At no point in time did she ask you to do that?

"A I said not that I can recall.

"Q Are you denying that she ever did ask you to do that?

"A Pretty much, leaning that way. That's correct.

"Q You've indicated that some -- on at least two occasions she came to see you and you were not at your desk and she left Post-it notes on your computer.

"A That's correct.

"Q And did you respond to her on both occasions?

"A No, I did not.

"Q Why did you not respond to her on one or the (sic) occasion?

"A The first occasion I didn't because I thought it was kind of a joke.

"Q What was the joke? What do you mean by it was a joke? The note was a joke?

"A Because in 28 years of working for the federal government I have never had a supervisor to tell them when I wasn't going to be at my desk. That's why I thought it was a joke.

"Q Was that the substance of her note?

"A That's correct.

"Q So then you do have a recollection, sir, as you sit here now, that she did indeed ask you to let her know when you would be away from your desk?

"A No, you asked me if there was a Post-it note twice, and I answered yes. Do I remember her asking me physically not to do that, not that I can recall. I already answered the question for you.

"Q The Post-it note itself indicated that she'd like to know when you'd be away from your desk.

"A Yes, sir, that's correct.

"Q And did you ever let her know when you would be away from your desk?

"A No, I did not." (Tr. 78-80) (Emphasis supplied).

As to Ms. Kitteridge coming to his private office, Mr. Snead first testified,

"A . . . I never saw her. She never came to my office." (Tr. 57).

On cross-examination, Mr. Snead said,

"A . . . I told Debbie I didn't know how to do it, [forward computer data] and she said no problem, and she came over and did it." (Tr. 86).

The foregoing merely are examples and not an exhaustive recitation of discrepancies in Mr. Snead's testimony. I also found his testimony concerning work assignments unconvincing and contrived as noted hereinafter. On the other hand, I found Ms. Kitteridge, Ms. Galloway, Mr. Staiger, Mr. Drews, Ms. Seidman and Mr. Bartell credible witnesses. Accordingly, I do not credit Mr. Snead's testimony when it conflicts with credited testimony and evidence.

7. Mr. Snead, when he joined Enforcement, sat in the research center which then was the only place available (Tr. 210). Mr. Snead said,

". . . my back was to the door . . . I don't like sitting in the door with my back to it. I want to see somebody when they're approaching me. It doesn't make me feel comfortable." (Tr. 76).

Accordingly, Ms. Kitteridge said, Mr. Snead closed the door. Ms. Kitteridge said,

"A He [Mr. Snead] did not like -- he didn't like that I'd leave it open and people looking down the hall at him, and I told him, I said, Tillman, your desk is facing the wall, they're looking at your back and this door has to be open because it's for everyone to come in here and use this office. It's not just a personal office space.

"Q Did you direct him to not close the door?"

"A Yes, I did.

"Q Did he obey that direction?"

"A No, he kept closing it. And at one point it just -- it was left half open." (Tr. 212).

Mr. Snead said,

"Q Did you indeed close the door to the research center?

"A I did not close it. Most of the time when I was in there, I would -- it was most of the way closed, about a three or four inch crack." (Tr. 179).

I credit Ms. Kitteridge's testimony, which I found wholly credible, and with which Mr. Snead essentially agreed.

8. Mr. Snead said,

"A The first assignment was Debbie Kitteridge --she showed me the file cabinets and she said it was like flip-flopping what was in one drawer to another drawer. She would like say, take all the stuff out of file cabinet number six, put it in file cabinet number five, and then put file cabinet five in file cabinet six,

and then I want you to type down on a word document, which is a software package on the computer, all the contents of the file cabinet.

"Q So do you recall when you got this assignment?

"A It was in the -- it was when I was sitting in the research center, the first four to six weeks I was there in Enforcement.

..

"A It was probably like after I had been working there about five or six days."

...

"Q And you were creating an index after the move?

"A That's correct." (Tr. 46-47).

Ms. Kitteridge said,

"So I asked Tillman to index the files. I told him what I needed -- I told him exactly what I needed. I needed for the case files, the case number and the name of the case. And then for the subject files, the subject file on each one of the folders. If a folder was empty, to mark that it was empty so that I would know that somebody had taken the contents. If the folders -- if there were several small folders that dealt with the same thing, then they could be collapsed into one folder or one small expansion folder.

"I told him that once the index was done, it would be used by Greta Powers and Ken Hall (Associate and Assistant Chief Counsel respectively (Tr. 228)) . . ." (Tr. 227).

As to creating his index (Res. Exh. D), Ms. Kitteridge stated as follows:

"Q Did you ask him . . . to produce or print all or the portion of what he had done so far so you could take a look at it?

"A Yes.

"Q And did he?

"A No -- well, the first time was when he discovered it was not there. . . . So he had to retype -- he had to start over again . . .

"So when he did type it and I did look at it, at the portion that he had done once he retyped it, I told me (sic), well, Tillman, these case files have to have case numbers on them. So you need to go back and put the case numbers in. . . .

"Q Did he follow that direction . . . ?

"A Sort of. He put the case numbers at the end instead of at the beginning . . ."

"A . . . I told him, file numbers at the beginning and then the name of the matter. When it came back, it was the other. When I looked at the next typed version I said no, the file numbers have to be at the beginning. I had asked for headings on some of them, and wrote headings on some, but I don't see headings on here, but that's typically we will say Case Number, Case Name.

"Q Well, if we go no further than the first page, does it appear from this index that he followed your directions?

"A No, . . .

..

"A . . . there's no page numbers . . .

"Q Did you ask him to do that?

"A Yes.

...

"Q Can you tell from this index where you should start looking for . . . HO [Insider Trading] files?

"A No, I also requested that they be put in numerical order . . .

"Q Are they in numerical order in the index?

"A No.

"Q . . . is this a satisfactory work product . . . based on the work assignment that you gave him?

"A No.

"Q Is this useful in any way to those who would come into the research center to try to use the

materials that are there?

"A No, . . . they would ask . . . can we pull the file on HO-2350? Well, she would have to look at every single one of these pages to see if 2350 even existed because they're not in numerical order."

(Tr. 230-235) (Emphasis supplied).

[Ms. Galloway testified as follows:

"Q Have you had occasion to try to use that index [Res. Exh. D] to locate items in the file cabinets?

"A Yes, one case. Greta Powers came down to the research center and she asked me did we have -- did I have the index of the file cabinets, and I said yes, and I gave them to her. She went through them and she couldn't find what belonged to what cabinet, so I also helped her and we couldn't find it. We went through each page, each file cabinet and this didn't help us. We were better off going through each file cabinet without this." (Tr. 308-309).] (Emphasis supplied).

Mr. Snead said,

"Q Did she [Ms. Kitteridge] ever check on your progress on this assignment?

A I can't really said (sic) she checked on it specifically. I remember one time she came in and asked how it was going and I said, well I'm just about through with this cabinet. And then she said when you get through let me know and I'll tell you what to do with the rest of them.

"Q Did you do that?

"A Yes, I did.

..

"Q Did there ever come a time that you had to redo some of the index that you worked on?

"A Never." (Tr. 47-48).

...

"Q Did you have any problems after you had created a document . . . in saving it? . . .

"A That's correct. I didn't lose it. The computer lost it.

"Q And how did the computer lose the work?

"A I don't know. You can talk to Bill Gates. It happens all the time in Microsoft Word. I lost four days worth of typing.

...

"A . . . it could have been the first cabinet, the second --

"Q First drawer, second?

"A No, it was a lot of stuff that I lost in four days.

"Q And did you finish with one whole cabinet in four days?

"A I don't think so.

"Q But all that work was gone?

"A That is correct.

"Q And it was the computer that did it.

"A That's right." (Tr. 89-90).

I do not credit Mr. Snead's testimony. His description of his work assignment was untruthful, evasive and misleading. He was not to "flip-flop" the drawers, rather, he was to index the contents of the file cabinets. Initially, he misrepresented his work progress at the outset of this assignment by representing that when Ms. Kitteridge asked about his progress he finished the first cabinet without incident and denied he ever had

to redo anything; but on cross-examination admitted that in doing the first cabinet he lost four days typing and had to do it over. I credit Ms. Kitteridge's testimony and specifically find that she told Mr. Snead to list the case number first and then the case name; that she did review his work on the first cabinet, after he had retyped it following its loss, and that she told him to go back and put case numbers in; that she told him to put in headings and she had written some headings; and that she told him to number the pages of the index. Mr. Snead did nothing he was told to do. Thus, he did not include case numbers for any ALJ decisions; he did not list case names in alphabetical order; he did not list case numbers, which he did include for "HO" [Insider Trading] cases, in numerical order; he did not include headings; and he did not number the pages of document.

For an index, the numbers Mr. Snead included, beginning with one, and the words, "In the matter of", before each case name provide no assistance whatever; his failure to number each cabinet impedes the location of material (Identification of a cabinet as "ALJ decisions A-I" and another cabinet as, "ALJ decisions J-Z", for example, in a sense, might suffice for ALJ decision, but for all other material, each as: "Dissolution of Injunctions - Non-Public", the absence of File Cabinet numbers in an index makes location of material uncertain and slow; material under headings, such as "Dissolution of Injunctions - Non-Public", is not alphabetized nor is material under a heading, e.g. cases under, "Modification of Injunction - Completed or Approved", alphabetized; the various "Research Files Non-Public" are neither listed together nor are they listed in alphabetical order, etc.

9. I credit Ms. Kitteridge's testimony that the first assignment she gave Mr. Snead during the first week he was in Enforcement (Tr. 246), before the "index" assignment, discussed in Paragraph 8, above, was a xeroxing assignment, ". . . I asked him to make one copy, I believe it was -- one or two. But it was . . . maybe about this thick. [Mr. Snead said, ". . . it might have been 20 pieces of paper. It might have been 30. . . ." (Tr. 123)]. Ms. Kitteridge said,

". . . when he came back and it was this way -- I mean the text and everything. He came back I got -- the pages was this way but the text was this way, chopped off. . . .

"So -- and I told him, no, Tillman, you need to redo this. I mean if he didn't know how to Xerox it, that's understandable . . . But he didn't -- he just handed it to me like it was okay. And I said, no, you have to go do it again" (Tr. 246).

Mr. Snead admitted he didn't look at it,

"Q You didn't look at it?

"A No.

"Q Did you look at the Xeroxed product to make sure it had copied properly?

"A Probably not." (Tr. 123).

and when asked, "Q Would that indicate that you didn't bother to look at the finished product to make sure that you had done the copy job properly?" Mr. Snead replied,

"A Maybe the Xerox machine was messed up." (Tr. 124).

10. Mr. Snead's third assignment was to index video tapes. Ms. Kitteridge said,

"A I asked him to catalog or index the video tapes, and once they were indexed, to pack them in boxes. . . . I asked him to create a list of video tapes by group. I mean if there were younger (sic)⁽³⁾ tapes on evidence that went one through five, to put evidence, younger (sic), tape one, two, three, and to put the format, meaning whether it was VHS or three-quarter inch. And I explained to him that you could tell the difference because the three-quarter inch are bigger and different boxes and you're familiar with VHS, and he said yes -- because anybody who has a VCR.

"And then I said once you have them cataloged, I want it to say box 1, and then list what's in box 1. And then put the video tapes in a box. When you put them in the box, I asked him to note on the side, box 1, on the short side because once they were all boxed up, I wanted them stacked on top of the file cabinets. He did tell me he would not stack them because he had a bad back and I told him I didn't expect him to, he could talk to Hilda Lucas, again, the Administrative Office and get some of the movers to come up here and stack them, but when they did get stacked to please make sure that they were stacked in numerical order with the short side out so we could see the numbers" (Tr. 235-236).

"Q Did there come a point in time when Mr. Snead gave you a work product that he indicated represented his completion of the video tape index?

"A Well, we did -- yes I did get a list . . .

"Q Did he give it to you or did you have to go ask him for it?

"A No, I had to ask for it.

"Q Would you look . . . for Exhibit C [Res. Exh. C].

..

"Q Is that the index that you received from him?

"A Yes.

"Q Does this -- is it formatted in the way that you had asked him to format it?

"A No, nor does it indicate whether they're VHS or three-quarter inch.

...

"Q Do you see page numbers?

"A No. . . . there is (sic) no page numbers on it.

"Q Did he get the box numbering assignment right?

"A No. . . . I cut through the research center . . . One time I was cutting through and I noticed that the boxes -- he was starting up but he was numbering either on the top of the box or on the side of the box, and I said, Tillman, I need you to renumber these and put them on the short side so that when they're stacked we can pull the boxes . . . and they're organized.

..

"A They were stacked on the floor, but they weren't in order. And I did show him, there was one box that was numbered right, on the short side, and that's the box I had used as a demonstration to show him where to number it, and --

...

"Q On the demonstration box, did you do the numbering yourself?

"A . . . I think Tillman did it with me pointing to where I wanted it written.

...

"A . . . so I told him, please renumber these on the short side . . . I said, now, when you have somebody else come -- when they come to stack them, be sure you're here because the movers won't know to stack them one, two, three, four, five, whatever.

"At some point, the boxes got stacked, but no, they were not in order and they were every which way they could be up on the file cabinet. . . .

. . .

"A I did mention to him that it didn't indicate to me whether they were VHS, it didn't tell me how many were in each set . . ." (Tr. 236-240).

Mr. Snead described the assignment as follows:

"A There was -- there was a lot of tapes, like VCR tapes in these black plastic cases, all on top of the file cabinets, and she said to take all the tapes and put them in old Xerox boxes, and then type on a piece of paper the tapes that were in each box and number each box.

. . .

"Q Did you create the index of what was in each box?

"A Yes, ma'am." (Tr. 49-50).

Mr. Snead's inconsistent, contradictory testimony concerning his numbering and stacking of the boxes has been set forth hereinabove and need not be repeated. Because his testimony was not credible and was false I do not credit it when it is in conflict with other credited testimony. On the other hand, Ms. Kitteridge was a wholly credible witness and I fully credit her testimony and specifically find: Ms. Kitteridge told Mr. Snead to make an index of the tapes; that Ms. Kitteridge told Mr. Snead to separate and identify VHS tapes from 3/4 inch video tapes; that Ms. Kitteridge told Mr. Snead to number the boxes on the short end of each box; that Ms. Kitteridge told Mr. Snead to be present when the movers came to stack the boxes on the file cabinets and to make certain the boxes were in numerical order with the numbers in plain sight; and that Ms. Kitteridge told Mr. Snead to indicate the number of tapes in each set. The record shows that Mr. Snead did nothing he was instructed to do. Thus, while he listed tapes he put in each box; he did not make an index and the listings did not identify which tapes were VHS and which were 3/4 inch video tapes; he was not present, and did not supervise, the stacking of the boxes on the file cabinets and, as a result, the boxes were not stacked in numerical order and, if he placed the number on the short end of each box, the number was not visible because the boxes were not stacked in an orderly manner with the short end out and/or he did not re-number the boxes with the number on the short end; he did not number the pages of his "index"; and he did not consistently

indicate the number of tapes in each set.

While Mr. Snead listed the content of each box, he created no index. Nor did he place like items together, e.g., enforcement training program tapes appear in many of the 25 boxes. They should have been collected, organized by year and alphabetized by subject. In like manner, material on Investigation should be collected and listed in alphabetical order, e.g., "Investigating Market Manipulation cases, Offerings (Box 2); Overview of Investigations; Insider Trading Cases, Broker-Dealer (Box 3); etc., should be collected and listed in alphabetical order by subject.

To constitute a catalogue or an index, subjects must be listed alphabetically with the box number indicated to the right. For example, if a person wanted material on accounting, he, or she, would expect to find in an index or catalogue in alphabetical order, a heading, "Accounting", with various material on accounting listed in alphabetical order thereunder, such as: "Accounting" (Box 23); "Accounting; and Auditing" (Box 3); "Accounting for Lawyers" (Box 20); Ethics for Accountants" (Box 4). Obviously, this is another example of like material which for ease of access should be collected rather than scattered in numerous boxes; but the point is, whether or not collected for storage, for an index or catalogue, like material must be collected under a common heading with the various items available listed thereunder in alphabetical order with the location [Box Number] noted to the right. The numbers Mr. Snead typed to the left for each box are utterly useless for purposes of an index or catalogue.

11. The record shows, without contradiction, that the policy in the Chief Counsel's Office of Enforcement, to which Mr. Snead was assigned, was that everyone was to inform a co-worker where they could be reached when they were away from their work station for more than a few minutes (Tr. 207-208, 307). Thus, Ms. Kitteridge stated:

"Q And do you ask your staff to let you know when they are away from their work station?

"A Yes, I mean everyone in the Chief Counsel's -- even Joan McKown [Chief Counsel] lets her secretary know when she's leaving, we all do that, just so if we're needed we can be located." (Tr. 207-208).

Ms. Galloway said,

"Debbie would tell me, Joan would tell Debbie, Greta would tell Debbie or -- and Debbie would tell me and Tillman each time she left, or I left, we would tell each other where we were going. Now, if it's to the bathroom, that's five minutes, ten minutes, you're coming right back. But if you're going to be gone for a certain amount of time, we just let each other know, . . ." (Tr. 307).

From the outset, Mr. Snead chronically was absent from his workstation, he refused to tell anyone where he was going and Mr. Snead was, ". . . nowhere to be found." (Tr. 307) (see, also, Tr. 247). Ms. Kitteridge, over and over, asked Mr. Snead, ". . . to please let me know when he was leaving the office, let me know where he was going. . . ." (Tr. 215); but he never did except, ". . . one time when he was going to a Union luncheon, and

I told him that wasn't a problem." (Tr. 216). She said, ". . . I told him, in fact, that he did not have to report when he was going to the men's room, just to let me know when he was leaving or was going to be away from his desk in case I needed him . . ." (Tr. 216). In addition to repeated personal, direct conversations with Mr. Snead in which she requested that he keep her informed when he was away from his work station (Tr. 215, 216-217, 265, 266, 278, 286-287), Ms. Kitteridge on repeated occasions, when she had gone to Mr. Snead's office and found him absent, left yellow Post-it notes on his computer screen asking Mr. Snead to please let her know when he was leaving his work area and/or to, "see me" or "give me a call" (Tr. 219, 280, 282), most of which he ignored (Tr. 281). Further, Ms. Kitteridge left Mr. Snead voice mail messages most of which he "wouldn't respond" (Tr. 219, 220, 281-282).

Mr. Snead stated,

"A There was a couple of times she put a little sticky yellow Post-it note on my computer screen saying when you're not at your desk, please let me know. And the second time that I got one of those Post-it notes, I went in and talked with her.

[Mr. Snead admitted on cross-examination that he did not respond on the first occasion. He stated,

"A The first occasion I didn't because I thought it was kind of a joke.

"Q What was the joke? What do you mean by it was a joke? The note was a joke?

"A Because in 28 years of working for the federal government I have never had a supervisor to tell them when I wasn't going to be at my desk. That's why I thought it was a joke." (Tr. 79).]

...

"Q When did you get the second one?

"A Probably two days after the first one."

...

"A I told Debbie, I said, I said there's only three places I can be when I'm not at my desk. I said, I'm either at lunch. I'm either taking a smoke break, or I'm at the bathroom, and I said, in my entire 28 year federal career, I've never had a supervisor ask me to do that, and I said I find it demeaning to have to tell a female when I have to go to the bathroom. And she said, well, that's okay, don't worry about it.

"Q Did she ever again talk to you about being away from your desk?

"A No, she did not." (Tr. 43-45).

I specifically do not credit Mr. Snead's testimony that Ms. Kitteridge talked to him only one time about notice of his absence from his workstation and I further specifically do not credit the inference of Mr. Snead's testimony that Ms. Kitteridge told him not to worry about reporting his absence from his work station. To the contrary I specifically credit the testimony of Ms. Kitteridge, corroborated by the credible testimony of Ms. Galloway (Tr. 304, 306, 307, 308, 309, 312, 314, 318, 319), that she asked him on repeated occasions to please let her know when he was leaving the office; that she did so in person, by voice mail and by written notes posted on his computer screen. Indeed, Ms. Kitteridge said,

". . . And one morning before hours . . . I had spoken to Tillman again -- we were back by the file cabinets -- and I had spoken to him, Tillman, please let me know where you're going when you leave the office. . . .

". . . He was very upset, very loud, and he said this is not kindergarten. We're adults, and you'll have to get used to the way I operate. . .

"And I told him no, I'm not asking you to do anything other than the rest of the people in this office do." (Tr. 217).

On cross-examination about the same conversation, Ms. Kitteridge further stated,

"A . . . This is talking about one particular instance when he got upset. I mean, he got loud and we were standing, like I said, at the file cabinets . . . and he was very loud and he was very upset about it. That was the one occasion when he got very upset about it.

"Other times when I would tell him that he had to do this, he may say okay, or not say anything. . . ." (Tr. 285-286).

Further, Ms. Kitteridge credibly testified that she quite frequently told Mr. Snead while he was in the research center (Tr. 215) and that, ". . . The problem increased once he moved down the hall, or it seemed to have increased. I left messages, I didn't get responses to my phone messages. I would leave notes on his -- little Post-its on his computer screen . . . A I'd ask him to please . . . give me a call as soon as he got back to his office. Q Did he follow through on that? A Or please see me. No. I can't say absolutely on every single message he didn't, but -- Q On the notes you left on the computer screen? A No. . . . He never responded to them." (Tr. 219). (See, also, Tr. 281-282).

Ms. Kitteridge said that on one occasion when she was "really crunched" that, knowing Mr. Snead was a

smoker, she,

". . . went downstairs to see if he was out smoking . . . I just needed him But he wasn't there. . . ."

(Tr. 247).

Ms. Galloway said that on one instance when the front office needed assistance, Mr. Snead,

". . . he was nowhere to be found. We didn't know where he was. It wasn't lunch time and nobody knew where Tillman was. . . ." (Tr. 307).

Mr. Staiger very credibly testified that on June 11, 1999, he first called Mr. Snead, but he did not answer, and that he then went to Mr. Snead's office, at about 10:00 a.m.,

". . . and left a note that I wanted him to come see me.

. . .

"A. He was not there. About 40 minutes later, he stopped by my office, and I gave him the memo reassigning him back to OIT." (Tr. 343),⁽⁴⁾

These examples alone demonstrate that Mr. Snead's strong assertion, that when he was not at his workstation he was, ". . . at lunch . . . taking a smoke break, or . . . at the bathroom", was highly questionable.

In any event, I find, as Ms. Kitteridge very credibly testified, that she asked Mr. Snead on many occasions throughout his assignment to Enforcement to let her know when he was away from his workstation and that Mr. Snead, as he admitted (Tr. 80), never let her know when he would be way from his desk.

12. Mr. Snead was assigned a task by Ms. Kitteridge relating to debt collection. Mr. Snead described the assignment as follows:

"A. . . It was after May 25th

. . .

"Q Can you tell me a little bit about that assignment?"

"A Well, she called me in her office and she gave me a piece of Xerox paper and told me to type it up on another piece of paper.

"Q Were there any changes or corrections or edits to be made when you retyped it?

"A No changes whatsoever.

"Q . . . was there any summarizing to be done?

"A No.

"Q Did she give you a deadline to complete it?

"A No, she did not.

"Q How long did it take you?

"A Fifteen, 20 minutes.

"A I took the paper back to her and I gave it to her, and then she handed me another piece of paper that was Xeroxed and told me to type that and she said, when you bring that to me, there's going to be a third piece of paper, and both of these papers have to be typed by three o'clock.

. . .

"Q Did you take the second sheet of paper?

"A Yes, I did.

"Q Did you go ahead and retype it?

"A I certainly did.

...

"A I took it back to her office, and her door was closed, so I put it in this little in box by her door, and then I either went to the bathroom or I went to smoke a cigarette, and when I came back to my desk there were some corrections on that second piece of paper I typed. Well, there were two things I couldn't understand her writing . . . and then the part that was legible, I didn't understand what she wanted me to do with the corrections. So I got on the phone and called her, and when I called her, her voice mail came on and I left her a message and explained to her, I needed to talk with her because I didn't understand what she wanted me to do.

...

"Q Do you recall what time it was when you left that [voice mail]?

"A It was some time in the afternoon.

"Q Did she ever call you back?

"A No, she did not.

"Q Were you able to do anything on that assignment?

"A No, I had to wait until she told me what she wanted done on it.

"Q What time did you leave work that day?

"A I left at 4:45.

...

"A . . . my normal time is 4:30, but I stuck around since she acted like it was such a big deal to have it

done by three, hoping that she'd call me back so I could do it for her.

...

"A No, no voice mails that afternoon.

...

"A When I got to work the next day, there was a voice mail from her. She apologized for not getting back with me. She said that she was in a meeting all afternoon, and she said don't worry about making those changes to the second document, or typing the third document. Just forward what ever you've done to Ms. Galloway.

"Q Did you do that?

"A No, I told her . . . I don't know how to transfer documents over the computer.

"A She said no problem, I'll be right over and I'll do them myself. And she came over and sat down at my PC and transferred the stuff to Ms. Galloway's PC." (Tr. 57-62).

On cross-examination, Mr. Snead testified, in part, as follows:

"Q And this is the one where she indicated to you at the beginning of the assignment that she needed it by three o'clock that day.

"A No, she didn't indicate it at the beginning of the assignment.

"Q Okay.

"A She said that after I handed the first piece of paper back to her --

"Q When was that?

..

"A . . . probably before lunch.

"Q So at least before 12 o'clock, you knew that the rest of the work assignment needed to be done by three.

"A No, that's not true.

. . .

"A I don't remember -- I don't remember the exact time . . . When she gave me that second piece of paper to type, do I know the exact time she gave it to me? No, I don't." (Tr. 113-114).

Ms. Kitteridge described the assignment as follows:

"Q With regard to that specific work assignment, what was it that you asked him to do?

"A What I needed is we were preparing for a big meeting with Treasury the next day⁽⁵⁾ . . . But I met with Tillman that morning and I told him what I needed. What I had done was --

"Q What time in the morning did you meet with him?

"A It was no later than nine o'clock. It might have been a little earlier. That was one of the days I got in early. But I met with Tillman and told him exactly what I needed. I had to summarize some reports. I have numerous reports on this program, and I had to summarize and make specific short reports based on totals and so forth, to be able to go over them with everyone from the SEC that was going to be at this meeting.

"Q Right, now he would have to read some document and make judgements about what he was summarizing?

"A No, that's what I was getting -- what it was basically is -- it's a lot of dollar amounts and referral

names and so forth, and I was focusing on the dollar amounts. So what I had done with the multiple reports that were more detailed, I had highlighted what would be transferred over on to the report I needed from him which would be a summary.

"Q So he was to summarize it by moving --

A The highlighted over to B and what I did in addition to that is that on pieces of paper I wrote across the top what the headings would be and the title for each particular summary that I needed. And for the various ones, I paper clipped those to the top of the detailed reports.

"Q Did you take time to explain to him exactly what you wanted him to do?

"A Yes, I did.

"Q Did you ask him once you were finished explaining the task, whether he had any questions about what he was supposed to do?

"A Yes, I did. I said, if you get to a point where you're stuck, if I'm -- because I'm in and out of meetings all day, and I do need this by a certain time -- and I believe the time was three o'clock, I'm not absolutely sure -- I said, if you do have questions, Rochelle is familiar with this stuff, because she's typed things up before and you could check with Rochelle and she might be able to help you through your questions. But I would be in meetings, and I would be in meetings with Greta and Joan, you know, if you absolutely needed me.

...

"A He had more than ample time . . .

...

"Q Did he finish that assignment?

"A No. I -- one meeting ended before the one that I was supposed to go to that dealt with this, and I checked -- he wasn't in his office and the report wasn't done, so I left him a message -- I called up and asked if I could give them the summary reports -- the meeting was coming up and if I could give them the summaries by the end of the day because I knew Tillman left at 4:30. So I left Tillman a voice mail message. I think I left him a note as well that said, I got an extension so please have this -- please finish this before you leave for the day. And leave it on my desk or -- I have an in box on the outside of my door . . .

"And when I got out of the other meeting, there was nothing in the box, so I went in my office and it wasn't there. I went up the hall and he was already gone, so I asked Rochelle if she could do me a favor and get the master key . . . and go in and see if it was on his desk and bring it down to me. She went and got it, and it wasn't finished. So I asked Rochelle if she could finish it by the end of the day, if she could finish it for me, which she did, and I was able to give the copies to the people that were going to be in the meeting the next day.

"Q Alright, now, you communicated to Tillman that you had an extension of time but that he still --

"A That I needed to have --

..

"A Before he left that day, yes.

"Q Before he left. You specifically remember saying it in your voice mail message to him, that I need this before you leave today?

"A Yes.

"Q Did he leave any voice mail message for you before he left for the end of the day?

"A No, there were no voice mail messages.

"Q Did he leave any written message for you relating to this work assignment before he left for that day?

"A No, he did not." (Tr. 221-226) (Emphasis supplied.)

With respect to the following day, Ms. Kitteridge stated,

". . . I mean when I missed the deadline and couldn't catch up with him on that final day -- on that day, rather, when I missed that deadline, the next day I went and talked to him about the fact that I had missed the deadline and he said, well, I got -- I had questions. I said, well, you could have asked Rochelle. And again, these aren't exact words, and he said, well, you know, I can finish it now. I said don't worry about it. Rochelle had to finish it. I told you I needed that before you left, and that was the end of that.

"I mean it wasn't a heated discussion, but that was the end of it and at that point it was like, I just can't deal with this. He's not even trying. He's not even making an effort" (Tr. 243).

On cross-examination, Ms. Kitteridge stated,

"Q . . . Do you recall receiving a voice mail at all on the day you assigned Mr. Snead that assignment that he did not fully understand what he was to be doing?

"A No, I didn't receive a voice mail from him. The next morning after it was overdue -- the next morning I spoke to him about it. I went out to his office to speak with him --

"Q On the day --

"A No, I didn't receive a voice mail from him.

"Q -- you didn't receive a voice mail?

"A No." (Tr. 272).

With respect to completing the assignment, Ms. Galloway stated,

". . . there was one case where Debbie had assigned him a project and he didn't complete it and I had to finish it for her because he had left for the day and apparently she needed it by the end of the day. So I completed that assignment.

"Q Did you know -- what -- do you remember what time of day you learned that you would have to finish the project that he had started?

"A I thought it was like quarter to five, because I know it was kind of close for me to go home, so I believe it was quarter to five.

. . .

"A I went in his office. His door was unlocked [Ms. Kitteridge was mistaken that Mr. Snead had locked his door] and the files were sitting on his desk. I took the files and I went to my office.

. . .

"A No, Tillman was not there. He was gone for the day.

"Q Had he come to you during that day to indicate that he needed to find Debbie and ask for your help in finding her?

"A No.

"Q Was he aware that if he needed to find her at any point in time that he could come to you and ask for help --

. . .

"THE WITNESS: Yes, he knew.

...

"Q Were you present when Debbie advised him that if she -- if she were away and he needed to find her, he could ask you?

"A Yes." (Tr. 305-306) (Emphasis supplied.)

On cross examination, Ms. Galloway said,

"Q You said earlier that you had to complete the assignment related to the debt referral.

"A Yes.

"Q Now is this the same assignment that Ms. Kitteridge had to forward to you via his e-mail?

"A Yes.(6)

"Q When was -- when did you complete the assignment? Was it on the day that he was supposed to complete it?

"A Yes, I did.

"Q And when did Ms. Kitteridge help him forward it to you?

"A I'm not sure when exactly.

"Q How did you complete the assignment without having had what he had done forwarded to you?

"A You make the marks on the paper -- on the stuff that she sent to me, that I got out of his office.

"Q So you -- are you saying that you had to recreate what he had done or you just added to what he

did?

"A I added to it on the paper." (Tr. 315-316).

Previously, I have found Mr. Snead not to be a credible witness and his testimony concerning the debt collection assignment is not credible, is internally inconsistent and was contradicted by the testimony of Ms. Galloway and Ms. Kitteridge which I found credible and which I credit. Mr. Snead's version, that Ms. Kitteridge gave him a piece of Xerox paper and told him to type it on another piece of paper makes no sense. If it were already typed on a piece of Xerox paper, why would it have been re-typed? He said it took 10 or 15 minutes to do and he took the paper back to Ms. Kitteridge who then handed him another piece of paper that was Xeroxed and told him to type it and also told him there would be a third sheet and she needed both typed by 3:00 p.m. When asked when he gave Ms. Kitteridge the first piece of paper, Mr. Snead said it was, ". . . probably before lunch." (Tr. 113); but then said, ". . . No, that's not true. . . I don't know the exact time . . ." (Tr. 113); ". . . I don't know when it was." (Tr. 115). He said he took the second sheet back to Ms. Kitteridge and, as her door was closed, left it in the "IN" box by her door. Mr. Snead said that when he returned from a smoke break, the second piece of paper was on his desk with some corrections. He said, ". . . I couldn't understand her writing . . . and then the part that was legible, I didn't understand what she wanted me to do with the corrections." Mr. Snead did not remember whether the changes altered the document or its format (Tr. 59, 60) and it is difficult to believe, assuming, as Mr. Snead said, corrections were noted, that it would not have been apparent where the corrections were to be made and, indeed, from the context, Ms. Kitteridge's handwriting aside, the intended meaning would not have been clear; but, in any event, if this were beyond Mr. Snead's comprehension, it was the sort of thing any rational person would have asked Ms. Kitteridge's secretary, Ms. Galloway, even if he had not been told that Ms. Galloway might be able to help if he had any problem. However, Mr. Snead did not ask Ms. Galloway for assistance. He said Ms. Kitteridge told him she would need the second piece of paper and a third, which she never gave him, both typed by 3:00 p.m. Putting aside the second piece of paper, if Ms. Kitteridge had not given him the third piece of paper by 3:00 p.m., obviously, he could not, through no fault of his own, complete the assignment, because a portion of the assignment, according to Mr. Snead, had not been received by 3:00 p.m. His reference to the end of his normal work day of 4:30 p.m., and his asserted staying until 4:45 p.m., standing alone is illogical. If he had not received the remaining part of the assignment by 4:30 p.m., he would have had no reason whatever to have waited because the only deadline, according to Mr. Snead, was 3:00 p.m. and that had long passed.

On the other hand, Ms. Kitteridge testified that she had written on pieces of paper for each report the headings and title for each summary, which she paper-clipped to the top of each report; that on the detailed reports she had highlighted the material that Mr. Snead was to transfer to the report he was to prepare; that she gave Mr. Snead this assignment no later than 9:00 a.m. and told him she needed the report completed by 3:00 p.m.; that, because she was going to be tied up in meetings all day, he should contact Ms. Galloway if he had any problem; that at 3:00 p.m. nothing had been received in her "IN" box from Mr. Snead and he was not in his office; that she contacted the SEC representatives, who were to attend the meeting the following day with Treasury, and got their leave to delay, until the close of the work day, receipt of the report; that she called and left a voice mail message for Mr. Snead that the time for completion of his report had been extended to the end of his work day (4:30 p.m.); that she had received nothing from Mr. Snead by 4:30 p.m., i.e., no report and no voice mail message from him; that she asked Ms. Galloway to complete the report before the end of the day, which Ms. Galloway did, and Ms. Kitteridge distributed copies to the SEC representatives that day. Ms. Kitteridge stated that the following morning she went to Mr. Snead's office to talk to him about the matter; that when Mr. Snead said he had questions she told him, ". . . you could have asked Rochelle"; and when he said he could then finish the report, she told him, ". . . Rochelle had to finish it. I told you I needed that before you left, and that was the end of it." (Tr. 243). Because Ms. Kitteridge sent Mr. Snead a voice mail

message after 3:00 p.m. advising him that the dead line for his report had been extended to 4:30 p.m., Mr. Snead knew of the 4:30 p.m. time limit; but I do not credit his testimony that he remained until 4:45 p.m. Ms. Galloway testified that she went to Mr. Snead's office at 4:45 p.m. and Mr. Snead already had left. I credit her time frame because she had to get the files, which were on his desk, take so much of the report as Mr. Snead had typed, return to her office and complete the report, make copies for distribution and deliver the reports to Ms. Kitteridge which she distributed to the SEC representatives.

I do not credit Mr. Snead's testimony that Ms. Kitteridge left a voice mail message in which she apologized for not getting back with him or that she said to forward what he had done to Ms. Galloway. In view of Mr. Snead's failure to complete the assignment, plainly, Ms. Kitteridge was not about to apologize to him for anything and, as the record shows, without contradiction, since Ms. Galloway had already completed the report, it would have been pointless to transfer anything to Ms. Galloway. Ms. Kitteridge very credibly said, she told Mr. Snead the following morning that, ". . . Rochelle had to finish it. I told you I needed that before you left, and that was the end of that." (Tr. 243). While Ms. Galloway testified that Ms. Kitteridge had shown Mr. Snead how to transfer material, or had done it herself, her reference came at the point she was talking about Mr. Snead's work on the file cabinet assignment and, at that point, said, "... I think it's Debt Referral . . ." (Tr. 303); later when she was asked when Ms. Kitteridge helped forward material to her, she said, "I'm not sure when exactly." (Tr. 315-316). In view of the uncertainty shown by Ms. Galloway's testimony, Ms. Kitteridge's testimony which shows that she did not transfer the portion of Mr. Snead's work he had completed to Ms. Galloway because Ms. Galloway had completed the assignment the preceding day and copies of the completed report had been distributed within the SEC, I do not find Mr. Snead's testimony convincing and do not credit his statement. The only significance of which, in any event, would be a possible bearing on Mr. Snead's credibility on other aspects of his testimony on the debt referral assignment; but, for reasons fully set forth above, for entirely separate and independent reasons, I have found Mr. Snead's testimony concerning the debt referral assignment was not credible. This is not to say that Ms. Kitteridge did not transfer material at some time from Mr. Snead's computer to Ms. Galloway's computer; but only that she did not transfer the portion of the debt referral report that Mr. Snead had completed, inasmuch as this would have been a pointless exercise since Ms. Galloway had already completed the assignment.

13. There is no dispute that Mr. Snead, while employed in Enforcement, acted on behalf of the National Treasury Employees Union ("NTEU") in organizing employees at the SEC (Tr. 28) and that his organizing activity was known to Ms. Kitteridge and Mr. Staiger (Tr. 109, 110, 361, 362), indeed, that he asked each about joining NTEU (*id.*). The record is clear that, despite knowledge of Mr. Snead's organizing activity, Respondent took no action to interfere with his activity. To the contrary, Ms. Kitteridge was interested and took some literature that Mr. Snead offered (Tr. 110) and Mr. Staiger had told Mr. Snead that, ". . . I didn't think that I was eligible"; that Mr. Snead had responded; "Oh, are you management?"; that he responded, "Yes"; and that Mr. Snead said, "'Okay.' And that was the end of the conversation." (Tr. 361).

14. Mr. Snead, after his transfer back to OIT, demonstrated unusual conduct, e.g., his announced intention to take an unloaded pistol, with accompanying ammunition, in his suitcase on a trip to New York City on business, which resulted in a letter from Respondent's Associate Executive Director instructing Mr. Snead, ". . . not to carry or possess a firearm on your New York Assignment." (Res. Exh. A); however, because the Complaint concerns only the reassignment, ". . . to a position . . . located in the Office of Information Technology, due to a 'demonstrated intention to his duties and a disregard of supervision' while in the Division of Enforcement" (G.C. Exh. 1(b), Par. 13), I have neither considered nor relied upon Mr. Snead's conduct or performance after his transfer to OIT.

CONCLUSIONS

One can understand the angst Mr. Snead felt when his OIT job was eliminated in a reorganization. Not only was he "cast adrift" but he was without the mainframe computer position he perceived to have given him elite status. Although, when seeking a job in Enforcement, Mr. Snead had expressed a willingness, ". . . to learn anything new and willing to help out and do whatever." (Tr. 205), the record shows his job performance in Enforcement was dismal. From the record of his performance, it would be difficult to conceive of a "sorrier" excuse for an employee. He chronically was absent from his workstation and refused to tell anyone when he was leaving. He ignored written messages from his supervisor to let her know when he was leaving because, he said, he considered it a joke. He refused his supervisor's direct requests that he let her know when he was leaving and he repeatedly ignored voice mail messages from his supervisor to contact her when she was trying to locate Mr. Snead for needed assistance.

On the simplest of jobs he was lackadaisical, neglectful and unbelievably incompetent. Anyone can place a document on a Xerox type copier improperly so that the copy is "cut off"; but to copy 20-30 pages without bothering to look at a copy is gross incompetence.

Enforcement was developing the CATS 2000 system which, when operational, would have a security system similar to the mainframe security system on which Mr. Snead had worked in OIT. Mr. Staiger and Ms. Kitteridge assumed, as I would have assumed, that Mr. Snead, as a GS-11 Computer Specialist, knew Microsoft Word Processing, which would be required for security work on the CATS 2000 system. In fact, Mr. Snead did not know "Windows" but he did not request training, the practice at SEC being that training courses are listed on E-mail and employees request desired training. Ms. Kitteridge became aware that he did not know "Windows" only when she saw Ms. Galloway, her secretary, assisting Mr. Snead and she did not fault Mr. Snead when he lost some four days typing because he had not known to execute the "save" command. Nevertheless, Mr. Snead showed no motivation to improve his knowledge of "Windows" for the time when CATS 2000 was operational and there would be the opportunity, again, to perform computer security work. Indeed, Mr. Snead had little interest in the prospect of CATS 2000 computer work and no enthusiasm for it, because, ". . . I'm a mainframe computer person." (Tr. 92).

Mr. Snead was given the job of creating an index for material in file cabinets; he was told, inter alia, to list cases by case number and case name, to list cases alphabetically by name and numerically by case number. Initially, he listed no case numbers at all and when told again that he must list by case number and case name, he included case numbers for Insider Trading cases (HO cases) only, but he did not list them in numerical order; he did not even list all ALJ cases in alphabetical order. The numbers he attached to the left of each item was a useless exercise for index purposes as was the phrase, "In the matter of" on each ALJ case; he did not number the file drawers; he did not list the file drawer number where each research file could be found; etc. In short, his "index" (Res. Exh. D) was useless for, as Associate General Counsel Powers commented when she tried to use it, ". . . this didn't help us. We were better off going through each file cabinet without this." (Tr. 308-309).

Mr. Snead next was given the job of gathering video and audio tapes, placing them in boxes and creating an index of the material. He was told, inter alia, to separate the VHS tapes and the 3/4" tapes, which Mr. Snead did not do. He was told to index the tapes, which Mr. Snead did not do. Again, he listed numbers to the left of each item that were, and are, useless for index purposes; he did not gather like material, e.g., Enforcement Training Programs by year; he did not consistently list the number of tapes in a particular title; and he did not

produce an index. Rather he made a listing, not in alphabetical order, of what he put in each box.

He was told to number each box on the small end so that the numbers would be clearly visible when the boxes were stacked on the file cabinets. This, Mr. Snead did not do. After first concocting a false story that, after the movers put the boxes on the file cabinets, Ms. Kitteridge told him, because some of the numbers were not visible, to, ". . . write down on the side facing out what the number of the box is, and I did that" (Tr. 51), he later admitted the boxes were on the floor (Tr. 105). He was told to make sure the boxes were stacked in numerical order; that they were neatly stacked and that the box numbers were clearly visible. He did not make himself available when the movers came, he did not supervise the stacking of the boxes and, as a result, the boxes were not neatly stacked in numerical order. He also said he hadn't even bothered to go back to the research center to see if the work had been done properly. His duty and his responsibilities had been to be present when the movers came and to make certain the boxes were neatly and properly stacked and he failed and refused to perform even this simple duty.

NTEU would "read" some evil motive in the fact that a position description for Mr. Snead (G.C. Exh. 2) for a job as "Regional Liaison Support" in OIT had been prepared on May 6, 1999, whereas the notice to Mr. Snead of his reassignment was dated June 8, 1999. I find nothing in the record that would indicate anything suspicious or remotely questionable. The record is clear that Mr. Snead's problems in Enforcement had caused Ms. Kitteridge to talk to Mr. Staiger, Enforcement Division's Chief Administrative Officer, on several occasions and Mr. Staiger said that about a month before May 25, 1999, he met with Chief Counsel McKown and Ms. Kitteridge at which time various options were discussed including his recommendation that Mr. Snead be reassigned to OIT (Tr. 349). With the prospect that Mr. Snead very probably would be reassigned to OIT, the problem became what work did they have that Mr. Snead could do and a Position Description for "Regional Liaison Support" which, ". . . was an organizational need for many years" (Tr. 418), was prepared for Mr. Snead. In point of fact, the final decision to reassign Mr. Snead was not made until May 25, 1999 (Jt. Exh. 2) and Mr. Bartell, head of OIT, did not sign the Position Description until July 29, 1999, after Mr. Snead had reported on June 21, 1999.

Finally, there was the debt collection assignment Mr. Snead was given not later than 9:00 a.m., at which time he was told that the report must be completed by 3:00 p.m. Ms. Kitteridge had written titles and headings on slips of paper she attached to the detailed reports she gave Mr. Snead. He was to type the data she had highlighted on each detailed report onto the summary report he was to prepare. Because she knew she was going to be in meetings all day, she told Mr. Snead that if he had any problem to contact her secretary, Ms. Galloway. Ms. Kitteridge finished one meeting before 3:00 p.m. and went to her office and found nothing from Mr. Snead and Mr. Snead was not in his office. Because she had missed the 3:00 p.m. deadline, she called each of the SEC representatives, who were to attend the meeting the following day with Treasury, and to whom copies of the summary report of Respondents owing money under SEC decisions which the SEC had been unable to collect and was seeking the assistance of Treasury, for permission to submit the summary report by the close of the day. They agreed and Ms. Kitteridge left a voice mail message for Mr. Snead advising him that the time for completion of the summary report had been extended to 4:30 p.m., the end of Mr. Snead's work day. Ms. Kitteridge then went to another meeting. When she returned to her office, there still was nothing from Mr. Snead and Mr. Snead had gone. Ms. Kitteridge then asked Ms. Galloway to go to Mr. Snead's office and get the detailed files, any part of the summary report Mr. Snead had typed and complete the summary report. Ms. Galloway said she went to Mr. Snead's office at 4:45 p.m.; that he had already gone; that she took the files and the portion of the summary report Mr. Snead had typed to her office where she completed the summary report, made copies and delivered them to Ms. Kitteridge before she left at 5:30 p.m. Ms. Kitteridge distributed copies of the summary report to the SEC representatives who would

attend the meeting with Treasury the following day. The next morning, Ms. Kitteridge went to Mr. Snead's office to talk to him about the matter. Mr. Snead asserted he had questions which prevented him from completing the assignment. Ms. Kitteridge told him if he had had any questions he could have gone to Ms. Galloway, as she had instructed him to do, if he had any problem and that he had left without completing an assignment he knew she needed by the end of the day.

Mr. Snead fabricated a version of the assignment - Ms. Kitteridge gave him one piece of a Xeroxed paper to type on another piece of paper, without any changes, which he completed in 10-15 minutes and took back to her; that she gave him a second piece of paper and told him there would be a third and that she needed both by 3:00 p.m.; that he typed the second sheet of paper and took it back to her and he went for a smoke break; that when he came back, the second sheet was on his desk with some corrections; he said he could not understand where the corrections were to go and could not read some of her handwriting; etc. - which I found to be an attempt to hide the true nature of the assignment and that he received the complete assignment not later than 9:00 a.m., which was not credible and which I rejected; but even if Mr. Snead's version were accepted it is plain that work he knew was needed, first by 3:00 p.m., and later, because he had not completed it by 3:00 p.m., had been extended to the end of his workday, was not completed. Assuming that he had some questions or had difficulty reading Ms. Kitteridge's handwriting, Ms. Kitteridge had told him, because she knew she was going to be in meetings all day, to contact Ms. Galloway. Mr. Snead, again, blatantly failed and refused to do so and intentionally left the work assignment uncompleted.

Mr. Snead disliked instructions, "...What I do with my time when I do an assignment, I do it my way. . . ." (Tr. 117); he could not admit he was at fault, e.g., when he put copy on the Xerox machine improperly, he blamed the Xerox machine (Tr. 124); when he lost four days typing on his computer because he had not entered, "save", he blamed it on "Bill Gates" (Tr. 89); he contended, "... I've got enough common sense that if the boxes are going to be stacked back up on the file cabinet, in order to stack them up there, you're going to have to put the number on the short side because the long side is going to be jammed back up in to the wall." (Tr. 104), whereas, in fact, Mr. Snead said, "I put the number where I thought they ought to be. . . . It might have been a different place on every box." (Tr. 104) and conceded that when Ms. Kitteridge told him to mark them on the short end, which, obviously, he had not, the boxes were on the floor (Tr. 105) although he first had asserted it was after the movers had put them on the file cabinets (Tr. 51). He refused to follow instructions, he was insubordinate and he told Ms. Kitteridge on more than one occasion, ". . . he didn't like aggressive women." (Tr. 257).

Plainly, Mr. Snead was not "working out" in Enforcement and the record fully supports the reasons therefore set forth in the May 25, 1999, memorandum to Mr. Staiger (Jt. Exh. 1) and in the memorandum dated June 8, 1999 (Jt. Exh. 3), notifying Mr. Snead of his reassignment to OIT effective June 20, 1999. I find nothing in the record that indicates that Respondent gave any consideration whatever to Mr. Snead's activity on behalf of NTEU. While fully aware of his Union activity, Ms. Kitteridge had no hostility but told Mr. Snead her husband was a Union man and she was interested in NTEU and took the literature Mr. Snead offered. In like manner, Mr. Staiger showed no hostility to Mr. Snead's solicitation of him, although he told Mr. Snead he didn't think he was eligible, and nothing was done to interfere with Mr. Snead's Union activity, which he insisted he performed only before work (Tr. 29) or as part of his lunch time (Tr. 30, 82). Ms. Kitteridge tried to work with Mr. Snead but Mr. Snead's

performance, as noted above, was dismal, he failed and refused to follow instructions, was unreliable and his work product was inept and unacceptable and he was devoid of motivation. In truth, Ms. Kitteridge's conclusion that, Mr. Snead, wasn't even, ". . . trying to work with me" (Tr. 278) is beyond question on the basis of the record. Accordingly, I conclude that Mr. Snead was reassigned to OIT solely because of his abysmal work performance in Enforcement.

If, contrary to my conclusion, Mr. Snead's union activity were deemed to have been a consideration in his reassignment, I conclude that Respondent would have taken the same action in the absence of protected activity Letterkenny Army Depot, 35 FLRA 113 (1990). Here, the record shows beyond question that Mr. Snead's work performance in Enforcement had been terrible, he had demonstrated an unwillingness or an inability to perform work at an acceptable level in Enforcement, he failed and refused to follow instructions, was unreliable, had shown no motivation, and had stated to his supervisor he did not like aggressive women. As Mr. Snead had, following a reorganization of OIT, been placed in Enforcement, his reassignment to OIT was the least intrusive option available. Mr. Snead was not reduced in grade but was, simply, returned to OIT. On the other hand, General Counsel has failed to show by a preponderance of the evidence that Mr. Snead's reassignment was motivated by his union activity. The only basis is Mr. Snead's assertion that, ". . . the only reason they were doing this is because of my union activity." (Tr. 26). Contrary to Mr. Snead's assertion, the record demonstrates that in Enforcement Mr. Snead exhibited very poor conduct and wholly unacceptable work product; that he failed and refused to follow instructions; that he was unreliable; etc. Accordingly, Mr. Snead's unsupported assertion that he was reassigned because of his union activity is without basis in fact.

Having found that Respondent did not violate either § 16(a)(1) or (2) by its reassignment of Mr. Snead, as alleged by the Complaint, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. WA-CA-90560 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Issued: August 29, 2000

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(2) will be referred to, simply, as, "§ 16(a)(2)".

2. There was testimony that Mr. Snead, ". . . had been a performance problem in the Office of Information Technology that had not been dealt with." (Tr. 391); and, "I was aware that he was a performance problem before he left OIT the first time." (Tr. 423); however, I give such testimony no weight whatever in this proceeding. If his performance had not been worth "dealing with" when it occurred, it is not worthy of consideration on unsubstantiated statements.

3. Mr. Irving Younger was a marvelous lecturer and teacher and a tape by him on any particular legal matter was, and is, generally preferred to that done by any other.

4. Mr. Snead testified that Mr. Staiger called him at around 10:00 a.m. and asked him to come to his office (Tr. 25). Mr. Snead did not say what time he arrived at Mr. Staiger's office. I found Mr. Staiger a very credible witness; he specifically stated that he did not want to leave a voice message for Mr. Snead. I found Mr. Staiger's testimony more plausible and convincing and I found Mr. Snead not to be a credible witness. Therefore, I do not credit Mr. Snead's testimony that Mr. Staiger called and told him to come to his office; but rather, as Mr. Staiger credibly testified, he left a written note for Mr. Snead at about 10:0 a.m. and that Mr. Snead came to his office about 40 minutes later at about 11:00 a.m.

5. Ms. Kitteridge had explained that in SEC cases money often is ordered to be paid, ". . . and then when the SEC has done all they can do to try to collect the money, we have to ship it over to Treasury for collection, and all of this -- all of those referrals to Treasury have to go through me." (Tr. 221).

6. Ms. Galloway had also testified:

"Q Now was this work that he had done in cataloging the file cabinets -- the files that you were searching for, was that work that he had done in the process of working on that file cabinet assignment?"

"A Yes.

"Q Did he know how to use the e-mail?"

"A No, what happened was Debbie needed him to send me some stuff that he had done in Word in regards to -- I think it's Debt Referral -- and he needed to attach the file to CC mail to send them to me, and he didn't know how. So Debbie had to go down there and show him in order for him to send the files to me." (Tr. 303).