

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 98-0004

Review of the Decision of the
United States Trustee for Region [REDACTED]
Regarding [REDACTED]

[REDACTED] (hereinafter “trustee”), a member of the chapter 7 panel for the United States Bankruptcy Court for the Middle District of [REDACTED], [REDACTED] Division, seeks review of a decision by the United States Trustee to suspend his receipt of new case assignments while he works to improve the performance of his trustee duties and the administration of his existing caseload.^{1/} I affirm the United States Trustee’s decision based upon the record before me.^{2/}

I. Course of this Proceeding

The trustee has been a member of the panel of chapter 7 trustees for the United States Bankruptcy Court for the Middle District of [REDACTED], [REDACTED] Division, since November of 1989. On July 31, 1998, the United States Trustee issued the 1997 Review for the trustee. On August 11, 1998, the United States Trustee notified the trustee that new case assignments would be suspended until completion of an assessment of the trustee’s fitness or December 31, 1998, whichever occurs first. The suspension was based upon deficiencies in trustee performance

^{1/}United States Trustees are Justice Department officials who are appointed by and serve at the pleasure of the Attorney General. 28 U.S.C. § 581(a) and (c). The Director of the Executive Office for United States Trustees is a Justice Department official who acts under authority delegated by the Attorney General. Panel trustees generally serve under appointments that have a term not to exceed one year.

^{2/}The record in this matter includes the United States Trustee’s Notice of Suspension with 21 exhibits (“Notice”); the 1997 Trustee Performance Review (“1997 Review”); the trustee’s Request for Review (“Request for Review”), which includes a June 3, 1998 letter to the local Assistant United States Trustee (“June 3 letter”); and the United States Trustee’s Response (“Response”).

detailed in the Performance Review^{3/}. The trustee timely filed his Request for Review with the Director of the Executive Office for United States Trustees. On September 10, 1998, the United States Trustee filed his Response.

II. Standard of Review

In conducting this review, the Director must consider two factors:

- (1) Did the United States Trustee's decision constitute an appropriate exercise of discretion; and,
- (2) Was the United States Trustee's decision supported by the record.

See 28 C.F.R. § 58.6(i) (specifying the scope of the Director's review).

III. Analysis

United States Trustees supervise panel trustees. 28 U.S.C. § 586(a)(1). They carefully "monitor the performance of panel members . . . in order to determine whether they should be continued in or removed from panel membership." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 102 (1977). Under the law, "[t]he United States trustee is permitted to conduct his own investigation . . . to exercise effective supervision and make an effective evaluation of the performance of the private trustees on the panel." Id. at 110.

Trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of the particular chapter under which a bankruptcy case is filed. Because they are fiduciaries, trustees are held to very high standards of honesty and loyalty. See generally Woods v. City National Bank & Trust Co., 312 U.S. 262, 278 (1941); Mosser v. Darrow, 341 U.S. 267 (1951). See also Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

The United States Trustee based his suspension upon the following deficiencies in the trustee's performance:

- (1) a failure to safeguard and account for estate assets;
- (2) a failure to adequately monitor the work of professionals and others employed by the trustee;
- (3) a failure to perform duties in a timely and consistently satisfactory manner; and

^{3/}The trustee continues to receive new case assignments during the pendency of this review absent the issuance of an interim directive. 28 C.F.R. § 58.6(c). The United States Trustee did not issue an interim directive in this matter.

- (4) a failure to perform corrective action in a timely manner.

Each of these deficiencies may be a factor supporting suspension or termination of assignment of cases. 28 C.F.R. § 58.6(a). The evidence supporting these deficiencies, and the trustee's response, will be addressed in turn.

A. Failure to safeguard and account for estate assets

A trustee must safeguard and account for all estate assets. 11 U.S.C. § 704(2); Handbook for Chapter 7 Trustees 20 (April 1992) ("Handbook"). The United States Trustee relates three instances in which the trustee failed to safeguard and recover estate assets. In the case of In re [REDACTED], the debtor listed a 41' sailboat valued at \$52,000 on his schedules. Notice, Exhibit P. The trustee successfully objected to the debtor's claimed exemption of the sailboat, but was informed by his appraiser that both the sailboat and the debtor were missing. Notice 8-9. The debtor's employer advised the trustee that the debtor may have sailed to Hawaii. Notice 9. Upon learning this information, the trustee should have taken immediate action by initiating a search for the missing sailboat, objecting to the debtor's discharge, and contacting the local Office of the United States Trustee. Instead, the trustee made no attempt to locate the sailboat and merely filed a report of no distribution. Notice, Exhibit P. The local Office of the United States Trustee eventually discovered the discrepancy between the asset value of the estate and the filing of a report of no distribution and contacted the trustee about this case in January and April of 1998. Notice 9. The trustee still took no action until June when he sought to revoke the debtor's discharge. Id.

The trustee does not dispute the United States Trustee's recitation of facts other than to note that he could not locate the debtor soon after the meeting of creditors, and to state his belief that recovery of the sailboat was unlikely. June 3 letter. The trustee does not indicate that he undertook any affirmative action to find the sailboat. Id.

Similarly, the trustee's inattention in the case In re [REDACTED] resulted in a loss to this estate. In that case, the trustee retained special counsel in New York to pursue a personal injury action but did not obtain an order of employment until December 1996, almost six months after the debtor's discharge in May. Notice 9, Exhibit Q. When special counsel was informed of entry of the order, he corresponded with the trustee and informed him that he had already settled the case, deducted his fee, and remitted the balance to the debtor because he assumed the debtor's case was closed due to the debtor's discharge. Id. This correspondence also appears to indicate that special counsel lacked a general familiarity with several aspects of the bankruptcy code and had no contact with the trustee until entry of the order appointing special counsel. Id. The local Office of the United States Trustee eventually discovered the loss and informed the trustee in March of 1998 to take immediate action to recover these funds. Id. The trustee did not send out a demand letter until April 1998 and did not file a turnover complaint until June. Id.

In response, the trustee contends that the loss resulted from special counsel's error of law, and special counsel's failure to consult with the trustee regarding this issue. June 3 letter. The trustee also states that he has filed an adversary proceeding that he believes will result in payment of all estate claims with interest. June 3 letter. The trustee has provided no adequate explanation for his failure to timely obtain an order of employment from the bankruptcy court and properly instruct special counsel. Instead, the trustee shifts all the blame upon special counsel. The trustee cannot fulfill his statutory duty to safeguard estate property by leaving a valuable cause of action in the hands of a poorly informed professional. The trustee could have probably avoided the loss if he had promptly obtained an order of employment and clearly instructed him of the estate's interest in the personal injury claim.

Finally, the trustee failed to secure the debtor's premises and view the debtor's assets in the case of In re [REDACTED], Inc. The debtor in that case stated that its assets were worth \$36,693.55. Notice 7. The trustee's failure was significant because subsequently he could not locate the assets or the auctioneer/appraiser he had retained. Id. As in the other cases, the trustee did not inform the local Office of the United States Trustee of the loss, even though other trustees were using the same auctioneer. Id. In response, the trustee states that he was a victim of the auctioneer's dishonesty, and had no previous indication that the auctioneer was untrustworthy. June 3 letter. The trustee also states that "it seems apparent" that the value of the assets was "an optimistic retail value" instead of a liquidation value. Id. A trustee fails to safeguard property when he blindly places assets in the control of third parties. Once again, although the trustee's assertions regarding value may have some merit, his prior failure to examine the assets seriously weakens any claim he may be able to assert against the auctioneer or his bond.

These losses are not isolated incidents, but reflect a common pattern. In all of these cases the loss was triggered by the trustee's inattention, and his failure to aggressively remedy the losses when they were discovered. The losses also call into question the trustee's willingness or ability to address problems when they are discovered.

B. Failure to adequately monitor professionals and other persons employed by the trustee

In addition to reflecting the trustee's failure to safeguard estate assets, the incidents in the [REDACTED] and [REDACTED] cases also reflect the trustee's failure to adequately monitor the professionals he employs. In particular, the acts of special counsel in the [REDACTED] case reveal that the trustee selected counsel lacking a basic knowledge of the operations of the bankruptcy code and failed to clearly instruct special counsel regarding his duties.

C. Failure to perform duties in a timely and consistently satisfactory manner

The United States Trustee detailed numerous instances where the trustee failed to timely and satisfactorily perform his responsibilities as a trustee in addition to the deficiencies described

above. Trustees have an express statutory duty to assist in the discovery and prosecution of criminal referrals and object to discharge if advisable. 11 U.S.C. § 704(6); 28 U.S.C. § 3057. The trustee failed to promptly notify the local Office of the United States Trustee of potential criminal activity by the auctioneer in the [REDACTED] case discussed above. The same auctioneer also failed to remit sales proceeds to the trustee in the case of [REDACTED], Inc. In both cases, the trustee cooperated only after the local Office of the United States Trustee discovered discrepancies. The trustee does not respond specifically to his initial failure to disclose or report this activity.

The trustee exhibited a similar failure in 1996 when an employee of the trustee's law firm embezzled funds. The trustee did not report this embezzlement to the local Office of the United States Trustee, and the local Office only discovered the loss from other sources. The trustee in his response recognizes that "the better course of action would have been to immediately notify [the Office of the U.S. Trustee]" about the embezzlement. Fortunately, an on-site review of the trustee's books and records by United States Trustee staff later confirmed that no estate funds were embezzled.

The trustee's repeated failures to initially notify the United States Trustee of wrongdoing by employed professionals and other employees evidence either an unwillingness to correct existing problems (with the hope that they will "go away") or a desire to actively conceal his inattention to trustee duties. Neither alternative is consistent with the high standards of a fiduciary.

The United States Trustee also states the trustee failed to timely resign as trustee in two cases due to a conflict of interest. 1997 Review. In his defense, the trustee contends that the incidents were isolated. June 3 letter. The trustee, however, does not respond to the local Office's inquiry whether he checks assigned cases for conflicts within a week of receipt. Notice, Exhibit J. A failure to promptly resign from a case leaves a successor trustee little time to take appropriate action such as securing and recovering estate property and objecting to claimed exemptions. In the two cases mentioned, the trustee did not resign until after he conducted the meeting of creditors. It is unclear from the record whether the incidents were isolated and whether the trustee routinely checks cases for conflicts within a week of assignment. Even if the late resignation in these two cases were isolated instances, the other examples described above support the United States Trustee's contention that the trustee failed to perform his duties in a timely and consistently satisfactory manner.

The United States Trustee also states that the trustee failed to promptly close "old"^{4/} cases (during 1997 the number of old cases increased from 10 to 28). 1997 Review. In response, the trustee states that his old caseload is within acceptable Trustee guidelines and that he has implemented appropriate corrective action to increase case closings. June 3 letter. Although the

^{4/}This term is defined in the 1997 Review as cases filed in 1993 or before.

timely closing of cases is a significant trustee duty, the record does not reflect whether the trustee's failure to close his old cases is unjustified.

D. Failure to perform corrective action in a timely manner

The United States Trustee also asserts that the trustee has failed to promptly remedy other long-standing deficiencies. The record reflects that personnel in the local Office of the United States Trustee have spent inordinate amounts of time ensuring that the trustee has undertaken appropriate corrective action. For example, the trustee met with the local Office of the United States Trustee on June 25, 1998 and agreed to withdraw as trustee in the [REDACTED] case by July 1, amend the adversary proceeding against special counsel in the [REDACTED] case by July 3, file a complaint for turnover and related pleadings in the [REDACTED], Inc. case by July 9, and meet with a Tampa Office staff attorney on July 9. The trustee failed to completely adhere to this schedule, although he ultimately completed all corrective action by July 10.

In a vacuum, the trustee's mere failure to meet the deadlines that were established and agreed to at the June 25 meeting would not support his suspension. In light of the history of the trustee's failure to disclose problems, however, and his apparent past unwillingness to address serious deficiencies, this inability to adhere to simple deadlines is further cause for concern and evidence of the trustee's general failure to adequately perform his duties. Therefore, the imposition of a suspension is appropriate to ensure that the trustee addresses his inadequacies in administering existing cases before assuming additional cases.

The trustee states a willingness to remedy specific deficiencies in his performance. Request for Review. The United States Trustee has recognized the trustee's stated willingness to improve his performance and intends to meet with him to consider whether the trustee's ability to perform is commensurate with his stated intentions. Response 2-3. It is anticipated that the trustee will use this suspension to correct his deficiencies and endeavor to improve his performance.

IV. Conclusion

The decision to suspend this trustee was an appropriate exercise of the United States Trustee's discretion. The record supports the conclusion that the trustee has failed to safeguard and account for estate assets, failed to adequately monitor the work of professionals and others employed by the trustee, failed to perform his duties in a timely and consistently satisfactory manner, and failed to perform corrective action in a timely manner. A suspension will give the trustee an opportunity to undertake corrective action in pending cases, and work to resolve his performance deficiencies.

Accordingly, based upon my review of the record, including the written submissions of the United States Trustee and the trustee, I affirm the United States Trustee's decision to suspend the

trustee's eligibility for assignment to chapter 7 cases while the trustee attempts to improve his performance.

The foregoing conclusions and decisions constitute final agency action in this matter.

Dated: October 2, 1998

Joseph Patchan
Director
Executive Office for United States
Trustees