

**Department of Justice
Executive Office for United States Trustees**

**Final Agency Action
Case No: 07-0003**

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

[] (“the trustee”), a chapter 7 panel trustee for the Eastern District of [] seeks review of a decision by the United States Trustee for Region [] terminating the trustee’s eligibility to receive new case assignments. Based upon the record before me, I affirm the United States Trustee’s decision.

I. Course of this Proceeding

This is the second administrative review involving this trustee. See Case No. [] [] In the prior decision, I affirmed the action of the United States Trustee dated November 30, 2006, suspending the trustee’s receipt of new case assignments. The suspension was based upon the trustee’s failure to expeditiously pursue and/or liquidate assets, and his failure to timely administer cases. Case No. [], Final Agency Action at 3. At that time, the trustee was informed that he was suspended “until he takes corrective action, satisfactory to the United States Trustee, to resolve the noted deficiencies.” *Id.* at 6.

On September 26, 2007, a Case Administration Review (CAR) was conducted by personnel from the United States Trustee’s office to determine if the trustee had corrected the deficiencies that led to his suspension. Based upon the CAR, the United States Trustee for Region [] by Notice of Termination (“Notice”) dated November 9, 2007, terminated the assignment of cases to the trustee and informed him that his appointment to the panel of chapter 7 trustees in the Eastern District of [] would not be renewed. Notice at 1; see also 28 C.F.R. § 58.6 (Department of Justice procedures governing administrative review). By letter dated November 28, 2007, the trustee filed a request for review with the Director of the Executive Office for United States Trustees (“Request for Review”). The United States Trustee filed a response (“Response”) dated December 13, 2007, and by letter dated December 17, 2007, the trustee supplemented his Request for Review (“Supplement”), which I accepted.

II. Standard of Review

In conducting this review, I must consider two factors:

1. Did the United States Trustee’s decision constitute an appropriate exercise of discretion?
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

A. Duties of the United States Trustee and Panel Trustee

United States Trustees supervise panel trustees, 28 U.S.C. § 586(a)(1), and appoint them to individual chapter 7 cases. 11 U.S.C. § 701. The United States Trustees “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. 595, 95th Cong., 1st Sess. 102, 101 (1977). Under the law, “[t]he United States Trustee is permitted to conduct his own investigation . . . to exercise effective supervision and make effective evaluation of the performance of the private trustees on the panel.” *Id.* at 110.

Panel trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of the particular chapter under which a bankruptcy is filed. As fiduciaries, trustees are held to very high standards of conduct. *See generally Woods v. City Nat’l 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 goals of the United States Trustee Program include protecting the public interest by ensuring efficiency in the administration of cases and by protecting the integrity of the bankruptcy system. *See* United States Trustee Program’s Mission Statement.¹⁷ In striving to fulfill these goals, United States Trustees are entitled to expect, and indeed should demand, that the trustees under their supervision perform their duties at the high standards that are required of fiduciaries. In furtherance of these goals, United States Trustees and their staffs should notify trustees at the earliest opportunity of any inadequacies in their performance so that any such deficiencies can be resolved promptly.

It is against these high standards that the United States Trustee’s decision to terminate the trustee from active chapter 7 case rotation must be assessed.

B. Grounds for the United States Trustee’s Decision to Terminate the Trustee

The United States Trustee terminated the trustee because the CAR noted several deficiencies: (1) the trustee failed to expeditiously pursue and/or liquidate assets; (2) the trustee failed to timely determine and administer cases; (3) the trustee failed to control and preserve estate

¹⁷ The United States Trustee Program’s Mission Statement provides as follows:

The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases to promote and defend the integrity of the federal bankruptcy system.

property; (4) the trustee failed to properly record transaction on Form 2; and (5) the trustee failed to properly list all scheduled and unscheduled assets on Form 1. CAR at 2-7.

C. Record Supports the United States Trustee's Decision to Terminate the Trustee

Among other duties, trustees are required to liquidate the property of an estate and to close a case as expeditiously as is compatible with the best interests of the parties in interest. 11 U.S.C. § 704(a)(1). They are also "accountable for all property received," 11 U.S.C. § 704(a)(2), and must furnish reports and information about their administration of cases. 11 U.S.C. § 704(a)(7), (8). In carrying out their supervisory responsibilities, United States Trustees require trustees to document their administration of estate funds. The *Handbook for Chapter 7 Trustees* ("Handbook") explicitly declares that a "chapter 7 case should be administered to maximize and expedite dividends to creditors and facilitate a fresh start for the debtors entitled to a discharge." Handbook at 6-1; see also Handbook at 8-10 to 8-21, 8-24, and 8-26 to 8-28. Failure to do so constitutes grounds for suspension or termination by the United States Trustee. In Appendix E of the Handbook, a non-exhaustive list of reasons for suspending or terminating a trustee are established, which includes the following:

- failure to perform duties in a timely and consistently satisfactory manner;
- failure to cooperate and to comply with orders, instructions, and policies of the court, the bankruptcy clerk, or the United States Trustee; and
- failure to file timely, accurate reports, including interim reports, final reports, and final accounts.

Handbook, Appendix E, p. E-1.

On I affirmed the United States Trustee's decision to suspend the trustee based upon his failure to expeditiously pursue and/or liquidate assets, and to timely administer cases. A CAR was conducted on September 26, 2007, to determine whether the trustee had corrected these deficiencies. Unfortunately, the CAR revealed that the trustee continued to struggle with these deficiencies, along with additional deficiencies.^{2/}

In support of her conclusion that the trustee failed to expeditiously pursue and/or liquidate assets, the United States Trustee relies upon a particularly troubling case identified in the CAR. In this case, the trustee failed to pursue the debtor's interest in his deceased mother's home. CAR at 2-4. Approximately a year after the debtor filed bankruptcy, the debtor sold the home, which was then re-sold several times to different buyers. *Id.* The home was sold to the first buyer for \$15,000, and the deed was fraudulently signed by someone purporting to be the debtor's deceased mother; the buyer sold the property 10 days later for \$100,000. *Id.* The second buyer sold the

^{2/} I note that the relevant time period to evaluate the trustee's performance is from November 28, 2006, the date of the trustee's suspension, until September 26, 2007, which is the date of the CAR.

property 8 months later for \$240,000. *Id.* The trustee failed to seek recovery from the debtor or the purchaser, or to recover the property. *Id.* As a result, the asset was lost. *Id.* The trustee admits that his conduct was deficient, but contends that his deficiency occurred prior to his suspension in November 2006 and should, therefore, not be considered in the CAR. Request for Review at 4.

In her Response, the United States Trustee asserts that there were “other aspects of [this case] which took place after his suspension from rotation which reflect adversely on [the trustee’s] judgment and accuracy.” Response at 2. In support of her assertion, the United States Trustee states that it was not appropriate for the trustee to propose an informal abandonment of the property “based in part on the debtor’s exemption rights, when the debtor had formally withdrawn his exemption in the house and requested that it be administered.” *Id.* at 3. In addition, the United States Trustee points out that the trustee did not seek recovery from any of the purchasers of the home during the CAR evaluation period. *Id.* at 3-4.

From the record, it is apparent that the trustee discovered the debtor’s fraudulent transfer of his mother’s home before his suspension. However, the trustee did nothing during his suspension to seek to recover the property or to pursue legal action against the debtor or the purchaser. The trustee waited for more than a year, attempted to refund the \$300 to the debtor, and then improperly filed a Report of No Distribution (“NDR”) notice that no assets were available for distribution in the case. The trustee attempts to justify this action by claiming that he was engaged in “discussions with the U.S. Trustee’s Office as to acceptable closing procedures after this case was noted on the report that led to my suspension.” Request for Review at 4. This excuse is without merit. This case was not included in the November 28, 2006, Report of UST Field Examination (“UST Field Exam Report”) that led to the trustee’s suspension. It was included in the CAR because correspondence from the trustee to the United States Trustee’s office indicated the same type of delay and case mismanagement for which he had been suspended. Furthermore, the United States Trustee is not the trustee’s legal advisor. The trustee has served on the panel for [] years and has access to counsel of his choice.^{3/} If the trustee did not know how to close this case, which should have been closed months earlier, then that demonstrates his inability to properly manage cases.

When the trustee discovered the transfer of the house, he was obligated to evaluate whether the value of the asset would benefit the estate. Based on that determination, the trustee should either have sought to abandon the property or to pursue the debtor or purchaser to recover the property. It was not appropriate to file a NDR. The filing of a NDR informs creditors that there are no assets in the case. By filing the NDR, the trustee falsely represented to creditors the status of the case. In reality, a course of action to recover property or its value existed. If the trustee determined pursuing the property would not yield a return for the estate, then he was obligated to accurately inform creditors of that fact by filing a notice of abandonment.

The fact that the trustee attempted to conceal his failure to expeditiously liquidate this asset by filing a NDR rather than a notice of abandonment is particularly troubling considering the

^{3/} The trustee was first appointed to the panel on []

admonishments he received in the November 28, 2006, UST Field Exam Report. In that report, the trustee was advised:

... after the Trustee has taken material steps to administer property, he should not simply reverse course and file a No Asset Report. He should instead file a motion to abandon under section 554. See Handbook for Chapter 7 Trustees, page 8-1 through 4. Under no circumstances should the Trustee file a No Asset Report to avoid criticism regarding his failure to secure assets.

UST Field Exam Report at 12.

The trustee argues that he did not take “material” steps in this case to administer the property since the only steps he took were to speak with an attorney about filing a probate case and with a realtor about the value of the home, in addition to monitoring the probate court’s docket. Supplement at 5; Response, Exhibit F, #5. The trustee’s argument misses the point. The trustee initially had filed an asset report in this case. Consequently, creditors are entitled to know what happened to those assets. It was inappropriate and a breach of his duties to wait for more than one year after the trustee was aware that an asset was fraudulently conveyed by the debtor, fail to take any action to recover the asset, and then file a NDR in an effort to conceal his failure to act. The trustee’s contention that there may not have been sufficient value to warrant pursuit of the asset does not explain why it took more than one year for him to take action. The failure to properly administer this case straddled both his prior suspension and its aftermath. That fact is compelling because the trustee clearly was on notice that such conduct was sanctionable. While it may be true that much of the trustee’s sanctionable conduct occurred prior to his suspension, he failed to properly administer this case after his suspension. He waited more than one year to take action, and then he took improper action by filing a NDR.

In another case, the debtor claimed a 50 percent interest in inheritance property with his sister. CAR at 5. On February 7, 2007, the debtor waived his exemption to facilitate administration of the asset by the trustee. *Id.* At the time of the CAR on September 26, 2007, the trustee had not yet filed a written claim in the probate estate. *Id.* It was only through the urging of the United States Trustee that the trustee finally filed a claim in the probate estate, even though he continues to contend that he was not required to do so. Request for Review at 5. It is evident that the trustee would have missed the claims bar date and would not have filed a claim without the United States Trustee’s insistence that he do so. His actions in this case demonstrate his lack of judgment in preserving property of the estate and in timely administering the case.^{4/}

Finally, the trustee failed to properly record a transaction on Form 2 in one case, and also failed to properly list all scheduled and unscheduled assets in two other cases. CAR at 6-7. In the first case, the trustee “did not account for the gross sales proceeds and escrow disbursements from

^{4/} We also note that the trustee hired the debtor’s attorney to represent the trustee in the probate estate while the attorney simultaneously represented the debtor’s niece in her capacity as probate administrator. CAR at 5.

the recent sale of the Debtor's rental property." CAR at 6. In the other two cases, the trustee failed to identify all of the case assets. CAR at 6-7. In one of the cases, the trustee did not list a potential refund from an insurance company on Form 1, and did not maintain adequate notes explaining why the trustee determined there was no equity available. *Id.* In the other case, the trustee was negotiating a sale of the debtor's non-exempt interest in her home to the debtor's ex-husband, which the trustee failed to identify. *Id.* The trustee did subsequently provide corrected forms.

By themselves, these reporting errors are not particularly egregious. However, when considered in light of the trustee's past performance reviews, the reasons for his suspension, and his performance during suspension, they demonstrate that the trustee does not properly manage his cases.

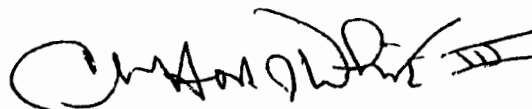
IV. Conclusion

In affirming the United States Trustee's decision, I base my decision on the trustee's post-suspension actions. The United States Trustee's decision to terminate did not occur in a vacuum. The trustee's prior suspension was upheld because of the trustee's failure to expeditiously pursue and/or liquidate assets, and his failure to timely administer cases. This suspension gave clear instruction to the trustee that he must significantly improve his administration of cases. The suspension was intended to give the trustee an opportunity to cure the noted deficiencies.

After providing a trustee with an adequate opportunity to correct deficiencies in performance, a United States Trustee may appropriately choose to terminate a trustee who does not demonstrate marked improvement. The CAR demonstrates that the trustee, while improving his performance in no-asset cases, failed to address the noted deficiencies that effect the timely and complete administration of cases. Therefore, I conclude that the United States Trustee appropriately exercised her discretion in choosing to terminate the assignment of cases to the trustee and not to renew his appointment as a panel trustee in the Eastern District of

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

Dated: 3/17/08



Clifford J. White III
Director
Executive Office for United States Trustees