

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 99-0002

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

[REDACTED], a member of the chapter 7 panel for the United States Bankruptcy Court for the [REDACTED] District of [REDACTED],^{1/} seeks review of a decision by the United States Trustee for Region [REDACTED] to suspend his receipt of new case assignments for sixty days while he works to improve the performance of his trustee duties and the administration of his existing caseload.^{2/} Based upon the record before me, I affirm the United States Trustee's decision.^{3/}

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 [REDACTED] District of [REDACTED] since 1988, and has served as a trustee since 1977. Due to perceived inadequacies in his administration of cases, the trustee was notified on July 2, 1999 that new case

^{1/} Hereinafter, for ease of reference, "the trustee."

^{2/} 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, such as this trustee, generally serve under appointments that have a term not to exceed one year.

^{3/} The record in this matter includes the United States Trustee's decision; the trustee's request for review; the United States Trustee's response; and the documents accompanying those various submissions.

assignments would be suspended for a period of sixty days (the “Notice”).^{4/} By letter dated July 19, 1999, the trustee filed a request for review with the Director of the Executive Office for United States Trustees (the “Request for Review”). On August 10, 1999, the United States Trustee filed her response to the Request for Review (the “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. at 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.

The United States Trustee suspended the trustee for failing to (1) perform duties in a timely and consistently satisfactory manner; (2) maintain adequate internal controls; (3) properly administer assets; (4) maintain books and records in satisfactory fashion; and (5) for using profanity at a section 341 initial meeting of

^{4/} The United States Trustee did not issue an Interim Directive. See 28 C.F.R. 58.6(d) (setting forth the bases for an Interim Directive). Accordingly, the trustee has continued to receive new case assignments while this review has been conducted. See 28 C.F.R. 58.6(c) (providing that a trustee shall continue to receive new case assignments during the review period unless the United States Trustee issues an Interim Directive).

creditors. See Notice (and documents attached thereto); and Response at 2. The United States Trustee concluded the trustee should be suspended from receiving new cases for sixty days while he works to improve his performance in these areas. Notice; Response at 1-3.

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 record in this case reveals that the trustee has experienced significant problems in administering his cases. In 1991, the Office of Inspector General of the United States Department of Justice issued an audit report regarding the trustee's case administration. Response at Exhibit 2 at 2. The Office of Inspector General audits panel trustees to evaluate their administrative and cash management procedures. Response at Exhibit 2 at 1. An audit assesses the quality of the panel trustee's accounting for bankruptcy estate assets and related cash management practices and procedures. Id.

Among other things, the 1991 audit concluded that the trustee was failing to invest case funds and was not accurately reporting balances on Form 3.^{5/} The Inspector General conducted a subsequent audit of the trustee for the period October 1, 1994 to March 31, 1995. Response at Exhibit 2 at 1. The Inspector General concluded that the weaknesses identified in its 1991 audit had not been corrected. Id. at 2. As the United States Trustee noted, the 1995 Inspector General report identified no less than nineteen deficiencies in the trustee's administration of cases. Response at 3. Among other things, it found that the trustee's forms 1, 2 and 3 had errors; the trustee failed to maintain original bank statements;

^{5/} Trustees are required to file a Summary Interim Asset Report (Form 3) with the United States Trustee at least every 180 days. Form 3 is a summary listing of pending asset cases. It lists each case that is either expected to be or declared to be an asset case by the trustee, each case in which the trustee has received funds of the estate, and each case in which a no-asset report has not been filed and 60 days have passed since the initial examination of the debtor at the chapter 341 meeting of creditors. *Handbook for Chapter 7 Trustees* at 9-7, Forms-11.

and the trustee lacked support for receipts. *Id.* at 3.

The record also reveals that the trustee's performance reviews reflect a history of problems and those problems have become more serious over time. *Compare* Response at Exhibit 9 (performance review for the period July 1998 through June 1999) *with* Exhibits 3-8 (prior performance reviews). The trustee's two most recent performance reviews (exhibits 8 and 9) identified meaningful problems in a number of areas, including the preparation and filing of trustees' final reports;^{6/} legal administration; 180-day (Form 3) and operating chapter 7 reports; case progress; investigation of and response to bankruptcy fraud and abuse; and retention and compensation of professionals. Response at 3-4.

Given the breadth and depth of the trustee's problems, the Assistant United States Trustee for the district and a senior Bankruptcy Analyst conducted a field examination of the trustee's operations in June 1999. They set out their conclusions in a June 9, 1999, memorandum to the United States Trustee, which was attached to the Notice as Exhibit A. Among other things, the report identified cases in which the trustee failed to (1) timely administer assets; (2) timely and accurately file forms; (3) attempt to collect assets on behalf of the estate; (4) list receipts in the receipts log^{7/}; and (5) keep case files updated. The report also noted that the trustee allowed documents, pleadings and bank statements to sit unfiled and unattended in a box.^{8/} Notice at Exhibit A at 1-4; Response at 2.

^{6/} Section 704(9) of the Bankruptcy Code provides that a trustee must:

- (9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

A final report informs the court, the debtor, the creditors, and the United States Trustee about the assets recovered and the manner in which the trustee proposes to divide them among the creditors. It also discloses the compensation the trustee requests. As such, it is an important document, and trustees must timely file accurate and complete reports if an estate is to be administered fairly and efficiently.

^{7/} Trustees keep logs of receipts to ensure proper administration of assets and to prevent theft.

^{8/} Many of these inadequacies replicated deficiencies that the United States Trustee had previously identified in a November 20, 1998 report, which set forth the United States Trustee's findings arising from a November 1988 field examination. Response at 2; Notice at Exhibit B

The United States Trustee's June 1999 field examination report also addressed the fact that the trustee had directed profanity at a debtor at a section 341 meeting of creditors. Notice at Exhibit A at 4; Request for Review at 5-6; Response at 6. The United States Trustee verified the trustee's use of profanity from an audio tape of the meeting. See Fed. R. Bankr. P. 2003(c) (specifying that all section 341 examinations "shall be recorded verbatim by the United States trustee using electronic sound recording equipment . . . and such record shall be preserved by the United States trustee.").

In his response, the trustee acknowledged he took corrective action in some cases after the United States Trustee's June, 1999 field examination, including the [REDACTED] case (trustee filed his trustee final report on June 29, 1999); and the [REDACTED] case (final report filed on June 10, 1999). Request for Review at 2-5. He claimed, however, that he had properly administered all the cases specifically cited in the June report.

The trustee acknowledged that he used profanity at the [REDACTED] section 341 meeting. Request for review at 5. The trustee characterized his use of profanity as "nothing more than a response to the frustration of being unable to properly conduct a hearing because of the actions of the Debtor's representative and the Debtor's counsel." *Id.* The trustee also noted that the bankruptcy court denied a motion by the debtor to preclude the trustee from using his law firm to represent the [REDACTED] estate because the trustee had used profanity.

In response, the United States Trustee reiterated her view that the trustee's problems "include lack of responsiveness, failure to properly close cases, failure to oversee the status of cases and general neglect." Response at 4. The United States Trustee explained that trustee files were improperly intermixed, the trustee failed to take action, the trustee took too long to take action, or the trustee took action only after prodding by the United States Trustee. Response at 4-6. The United States

(November 1998 report). Given the serious nature of those problems, the trustee had been asked to respond to them within thirty days from receipt of the report, but he failed to do so in a timely fashion. Notice at Exhibit B (February 17, 1999 letter from the Assistant United States Trustee to the trustee noting that the report had been sent to the trustee on January 7, 1999 with a request that the trustee submit a response within thirty days (no later than February 8, 1999), and noting that the trustee had not done so during that thirty day period because he "had the flu.").

Trustee also explained how the trustee's discussions of specific cases generally ignored the substance of the United States Trustee's criticism: that cases were allowed to languish without justification. Id. Regarding the trustee's use of profanity, the United States Trustee reiterated there was "no valid reason" for such conduct. Id. at 6.

Based upon the record before me, I conclude that the United States Trustee's decision to issue a sixty-day suspension constituted an appropriate exercise of discretion and is fully supported by the record. This trustee has a longstanding history of significant performance deficiencies. He fails to keep his files in proper order. He fails to log all receipts or do so in a timely fashion. He fails to administer cases expeditiously. He fails to make decisions promptly.

These are serious problems. The weakness of his internal controls and his poor record-keeping practices pose unnecessary and unacceptable risks for the bankruptcy estates he administers. They could lead to defalcations, lost receipts, improper payments, mischaracterization of cases, missed deadlines, and unrecovered assets.

Letting cases languish, as this trustee does, is a significant problem as well. Chapter 7 trustees liquidate a debtor's nonexempt assets so those assets can be divided among the estate's creditors. The longer a trustee takes to administer a case, the longer these creditors must wait to receive payment from the estate. This trustee should use his sixty-day suspension to expeditiously administer those cases he currently has, and to devise ways to speed up and improve his administration of any future cases he might receive.

A sixty-day suspension also is supported by the fact that this trustee's 1998 and 1999 performance evaluations reveal that his performance has deteriorated during the past several years. Moreover, the two Inspector General audits and the two United States Trustee field examination reports reveal that some of these problems existed as early as 1991 and many of the trustee's case administration and record keeping deficiencies have continued, unabated, for many years.

Also troubling is the trustee's use of profanity at a section 341 initial meeting of creditors. 11 U.S.C. 341. As the presiding officer at the section 341 meeting, the trustee sets the tone for it. Typically at those meetings, a group of debtors are

examined by the trustee in succession to determine the nature of their assets and liabilities. For many debtors, this is their first experience with the bankruptcy and the judicial systems. For unsophisticated debtors, this can be a stressful and potentially intimidating experience, one in which they must disclose financial and personal histories in a public forum. For these reasons, it is imperative that the trustee conduct himself or herself in a professional manner.

A trustee is both an officer of the court and a fiduciary. No trustee has any business directing profanity at a debtor, a debtor's representative, an attorney, a creditor, or any other participant in the Bankruptcy System. It is far worse to engage in such conduct at a section 341 meeting -- where the trustee is the presiding official and the meeting is open to the general public. To engage in such conduct discredits not only the trustee, but the entire System. Thus, the trustee's conduct in the [REDACTED] bankruptcy case fell short of the conduct expected of a trustee and supports the United States Trustee's decision to issue a suspension in this case.^{9/}

I am particularly troubled by the fact that this trustee has failed to show any remorse for his discourteous conduct. See Notice at Exhibit A at 4 (noting that "[n]o remorse or apologies were given."); Request for Review at 5-6 (trustee's attempt to justify his use of profanity). Indeed, the trustee seeks to blame the debtor's counsel for his own transgression. Id. at 6. That is unacceptable. Nothing should cause a trustee to direct profanity at any participant in the Bankruptcy System. This trustee should not use such language again.

^{9/} Indeed, having the ability to be courteous to all parties is one of the express requirements for becoming a chapter 7 panel trustee. 28 C.F.R. 58.3(a)(3)

IV. Conclusion

The decision to suspend this trustee was an appropriate exercise of the United States Trustee's discretion and is supported by the record. The trustee has experienced a broad array of problems, and these problems have worsened. This trustee clearly needs an opportunity to devote more time to dealing with his pending cases and working to resolve his performance deficiencies. A sixty-day suspension will give him that opportunity.

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 for sixty days while the trustee attempts to improve his performance.

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

Dated: September 8, 1999

Joseph Patchan
Director
Executive Office for
United States Trustees