

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 01-0004

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

[Redacted] (“trustee”), a member of the panel of chapter 7 trustees in [redacted], seeks review under 28 C.F.R. § 58.6 of a decision by the United States Trustee for Region [redacted] to terminate his receipt of new case assignments. I affirm the United States Trustee’s decision based upon the record before me.

Course of this Proceeding

By a Notice of Termination dated August 24, 2001, the United States Trustee terminated the trustee’s appointment to the panel of chapter 7 trustees.¹ The decision to terminate was set based upon the following:

1. Your failure to safeguard or to account for estate funds and assets;

* * *
2. Your failure to perform duties in a timely and consistently satisfactory manner;
3. Your failure to cooperate and to comply with orders, instructions and policies of the Court, the bankruptcy clerk or the United States Trustee;
4. Your substandard performance of general duties and case management in comparison to other members of the chapter 7 panel or other standing trustees; and

¹The trustee continued to receive new case assignments during the pendency of this review. 28 C.F.R. 58.6(c).

5. Your failure to file timely, accurate reports, including interim reports, final reports, and final accounts.

Notice of Termination 1-2. Cf. 28 C.F.R. § 58.6(a) (providing nonexclusive list of grounds for termination or suspension).

The trustee timely filed a Request for Review dated September 12, 2001. He does not dispute any of the factual bases for the decision to terminate other than to state that “I do not believe that the matters [set forth by the United States Trustee in support of termination] rise to a level requiring termination.” Request for Review 1. The trustee contends:

While I am aware of areas in which there needs to be improvement, I would state that “the Review would not put a reasonable trustee on notice that his or her case administration was so seriously inadequate that termination might be imminent. . . .”

Request for Review 1 (quoting Final Agency Action Case No. 01-0002 at 3-4). He also contends that the United States Trustee did not take into account that he now enjoys clerical support, as opposed to 1999, when he did not have clerical support and “the majority of the deficiencies occurred.” Request for Review 1-2.

The United States Trustee timely filed a Response dated September 26, 2001. Her response addresses the trustee’s two arguments of inadequate notice and failure to consider the trustee’s current use of clerical support, and argues that the facts of Final Agency Action Case No. 00-0002 are distinguishable from the present termination.

The documents referenced above, and their accompanying exhibits, constitute the record in this case.

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). Even though the trustee does not appear to substantively contest the factual basis for his termination, I will nevertheless independently review the decision to terminate the trustee under the above-quoted standard.

Analysis

I. THE DUTIES OF THE UNITED STATES TRUSTEE AND CASE 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. 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. 95-595, at 102 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6063. 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, 1978 U.S.C.C.A.N. at 6071.

Case 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 also 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.). A trustee also has the duty of exercising reasonable care in his custody of estate property unless relieved of such duty by agreement, statute, or order of court. United States ex rel. Willoughby v. Howard, 302 U.S. 445, 450 (1938).

II. THE DECISION TO TERMINATE SHOULD BE UPHELD

A. The trustee was put on adequate notice that the United States Trustee was considering corrective action

The trustee argues that his recent performance review, and other documents upon which the United States Trustee based her decision, did not place him on notice that his “appointment was in jeopardy.” Request for Review 1. This argument is not supported by the record. The United States Trustee has expressed concern over, and taken corrective action against, the trustee over a two-year period, culminating in his termination.

The trustee first received notice of problems with his performance when he received a six-month appointment (as opposed to the usual one-year appointment) on July 1, 1999 to the panel of trustees. Subsequently, the trustee received a report of an audit conducted by the Office of Inspector General, U.S. Department of Justice. Notice of Termination Collective Exhibit 2 (OIG audit). The report set forth numerous deficiencies, including reporting errors on Forms 1 and 3², a failure to indicate monthly reconciliation of trust accounts, and a failure to document asset

²“Form 1” is a record of estate assets; “Form 3” is a summary report of all asset cases under a trustee’s administration. The trustee must file these forms, together with “Form 2” (cash receipts and disbursements), semi-annually with the United States Trustee. See U.S. Dep’t of Justice, Exec. Office for U.S. Trustees, Handbook for Chapter 7 Trustees, 9-7 and Forms (March 1, 2001). All three of these forms are referred to as “180 day” reports. Id.

values. Id. The trustee's evaluation, dated November 30, 1999 found the trustee's performance "inadequate" in the preparation of Trustee Final Reports and Distribution Reports and "adequate, except for" in the areas of securing estate property, preparing 180-day reports, and responding to audits. Notice of Termination Collective Exhibit 2 (Trustee Performance Review). As a result of these problems, the trustee's appointment was again renewed for only a six-month period. Notice of Termination 5. The trustee continued to receive six month appointments until his termination.

In order to determine whether the trustee had resolved his deficiencies, the United States Trustee ordered her staff to conduct a Case Administration Review ("CAR") in May of 2000. Id. The trustee received a report of the CAR findings on June 7, 2000 detailing a number of continuing deficiencies in more than 25 cases. The report concluded:

In summary, it does not appear that the Trustee is timely in administering the estate after attending the 341 meeting. There is little evidence of review of claims to determine the legitimacy of secured claims. Also, there is little evidence of the Trustee's investigation of the financial affairs of the debtor. Unscheduled assets may go undetected even though procedures are available to disclose the assets. In many instances, assets have remained in the control of the debtor. The Trustee cannot protect against the unauthorized disposition of those assets.

Additionally, the Trustee has failed to keep his cases earning interest income.^[3] The Trustee's Forms 1 are not in accordance with the Handbook. The Trustee is not closing cases as expeditiously as possible. Further, it appears the Trustee is not pursuing assets except at the urging of other interested parties including the U.S. Trustee.

Notice of Termination Collective Exhibit 4 (CAR 14-15). As a result of these continuing deficiencies, the trustee voluntarily agreed to a suspension of the assignment of future cases from July 1 to September 30, 2000. Notice of Termination Collective Exhibit 5. The trustee was ultimately returned to rotation on October 11, 2000⁴, but with the following caveat:

Please be aware, however, that your return to rotation is tempered by the fact that the consequences, if any, caused from the delay in

³A trustee can be held personally liable for a failure to deposit estate funds in an interest-bearing account. E.g., In re Charlestown Home Furnishing, 150 B.R. 226 (Bankr. E.D. Mo. 1993).

⁴The trustee's continued suspension from October 1 to October 10 did not comply with 28 C.F.R. § 58.6. However, the trustee did not raise this matter in the instant review.

case administration will be evaluated on a case by case basis and dealt with accordingly.

Notice of Termination Collective Exhibit 4 (letter of Oct. 6, 2000 to trustee).

The trustee's evaluation dated December 18, 2000 once again found that the trustee's performance "adequate, except for" in a number of areas. Notice of Termination Collective Exhibit 7 (Trustee Performance Review 1). The United States Trustee noted in the evaluation:

. . . it is recommended that the trustee be reappointed for a six month period commencing January 1, 2001 through June 30, 2001. Prior to the end of the six month appointment, the United States Trustee will conduct another Case Administration Review to ensure that all cases are being timely and appropriately administered.

Id. (Trustee Performance Review 2). Another CAR was conducted during the week of June 4, 2001. Notice of Termination Collective Exhibit 8 (June 22, 2001 letter to trustee). The CAR reviewed 25 cases, 10 of which were filed in 2000 and 2001. The results of the CAR continue to reflect serious ongoing concerns about the trustee's attentiveness and willingness to timely administer assets:

There is little evidence of the Trustee's investigation of the financial affairs of the debtors.

It does not appear that the Trustee is actively pursuing assets, converting/reducing assets to money, administering the cases he is appointed to, and closing these cases expeditiously based on the requirements of the Bankruptcy Code. This is in spite of the findings in the June 2000 Case Administration Review which faulted the Trustee for this inactivity in pursuing assets and his non-compliance with the Handbook.

Id. (2d CAR).

Based upon this two-year period of increased scrutiny, the trustee's appointment to six-month terms, his voluntary suspension, and his opportunity to respond to all CAR reports and other correspondence outlining the United States Trustee's concerns, I conclude that the trustee was on adequate notice that he could be subject to corrective action including termination. The United States Trustee is not required to include the magic word "termination" in correspondence

and evaluations before actually seeking to terminate a trustee.⁵ In this regard, the trustee misconstrues the purport of Final Agency Action Case No. 01-0002 which reversed the termination of a trustee. In that case, I concluded that the United States Trustee failed to establish two of the three grounds in support of her action against the trustee. Final Agency Action Case No. 01-0002 at 3. The only deficiency remaining was one of reporting, and the United States Trustee's decision had not determined whether corrective actions undertaken by the trustee had resolved the deficiency. *Id.* at 14-15. Finally, the only document discussing these perceived deficiencies, a report of a Case Administration Review, was issued on the same date as the Notice of Termination – seven months after the underlying Case Administration Review. *Id.* at 7. In contrast, the trustee in this matter has been repeatedly notified of deficiencies and granted ample opportunity to change course.

B. The decision to terminate was supported by the record and was an appropriate exercise of the United States Trustee's discretion

As discussed above, the trustee was the subject of two Case Administration Reviews, conducted one year apart. The first CAR found little evidence that the trustee conducted any investigation of assets in his cases. Notice of Termination Collective Exhibit 4 (CAR 14-15). In order to improve his administration of cases, the trustee agreed to a three-month suspension. Notice of Termination Collective Exhibit 5. The trustee was reappointed to another six-month term while another CAR would be performed.

Unfortunately for the trustee, the second CAR report concluded that the trustee continued to abdicate his responsibility to investigate and administer assets, “in spite of the findings in the June 2000 Case Administration Review which faulted the Trustee for this inactivity in pursuing assets and his non-compliance with the Handbook.” Notice of Termination Collective Exhibit 8 (2d CAR). For example, the second CAR report found serious deficiencies in [M], a case filed on March 27, 2000. The petition listed numerous assets with net values after subtracting secured claims, and the debtors confirmed the existence of assets to be administered. *Id.* The trustee filed a Report of No Distribution (“NDR”) the day after the meeting of creditors. *Id.* The NDR was later withdrawn after the trustee received \$11,175.83 from the proceeds of a foreclosure sale. *Id.* The debtors also disclosed to the trustee that they had collected \$180,000 in insurance proceeds prior to filing, but only \$33,000 remained. *Id.* The trustee did not investigate the disposition of

⁵Nor can the trustee rely on his 2000 Performance Review in support of his entitlement to continued service. The legend at the bottom of the summary page of the evaluation states in part “The renewal of the trustee's appointment to the chapter 7 panel is based upon a variety of factors, including this performance review. Nothing in this review should be construed as a guarantee of future reappointment.” Notice of Termination Collective Exhibit 7 (Trustee Performance Review).

these proceeds, Id., and did not object to the debtors' claimed exemptions.⁶ Notice of Termination Collective Exhibit 9 (Aug. 24, 2000 email to trustee). As of the date of the second CAR (some fourteen months after filing), there was no evidence that the trustee had examined, investigated, or sought to recover assets, except for the debtors' pontoon boat. Id. Collective Exhibit 8 (2d CAR). The trustee did not take possession of the boat until December, and sold it in January 2001 (eight months after the case was filed) for \$12,496.41. Id. Collective Exhibit 9 (Summary Report 4). This delay raises questions that the trustee does not answer regarding the boat's continued depreciation, control of the boat (in other words, were the debtors given the benefit of using the boat all summer?), and whether a sale in midwinter versus early summer would have obtained a better price. Id.

The trustee also failed to administer assets in [S], a case filed on November 12, 1998. The first CAR report stated that the Form 1 listed several assets with value, but that as of May 10, 2000, there was no evidence that the trustee had independently valued assets, reviewed claims, or even taken control of the listed assets. Id. Collective Exhibit 4 (CAR) at 11. The trustee's records even included the notation "all vehicles are uninsured." Id. When another CAR was conducted in 2001, no change was found. The trustee had not pursued liquidation of five vehicles, had taken no action to value or pursue a counterclaim and accounts receivable, and had taken no action with regard to real estate valued at \$395,000 and three time shares. Id. Collective Exhibit 8 (2d CAR). The trustee also had taken no action to investigate certain transfers and stock sales occurring within one year of filing. Id. The trustee did not even require the debtor to turn over his tax returns until August of 2000, and did not actually receive the returns until June of 2001. Id.

The two cases discussed above from the second CAR report are representative of the trustee's failure to administer assets. Other cases reviewed in the second CAR report, such as [T], [P], and [G], also demonstrate that the trustee has failed to administer assets. Id. In [P] and [G], the assets not administered consisted of publicly-traded stock, assets that can be readily liquidated. Id. I conclude that the trustee's history of inadequate administration, in conjunction with his failure to significantly improve his performance between the first and second CAR reports, support a decision to terminate future case assignments. I agree with the United States Trustee that the trustee's lack of clerical support should not be a defense. A clerical employee would have assisted in the preparation of timely and accurate forms, but would not have cured the trustee's continued failure to investigate or administer estate assets. After providing a trustee

⁶The trustee's only defense to the failure to object is the cryptic statement that "The attorney for the debtors has maintained an agreement with me to finalize the filing of the claimed exemptions. If the amendments are inappropriate I will file an objection within the allotted time period." Notice of Termination Collective Exhibit 8 (July 23, 2001 of trustee). There is no need for the debtor to "finalize the filing" of the exemptions. The original claimed exemptions are final because no timely objection had been filed. Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). Apparently, an amended schedule of exemptions was filed in this case. Docket, [M]. Based upon the record, the trustee's apparent misfeasance in a number of reviewed cases may have caused a loss to the estate, which should be investigated.

with an adequate opportunity to correct deficiencies “a United States Trustee may appropriately choose to terminate a trustee who does not demonstrate marked improvement.” Final Agency Action Case No. 01-0003 at 8.

Conclusion

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 terminate the trustee’s eligibility for assignment to chapter 7 cases.

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

Dated: October 24, 2001

Martha L. Davis
Acting Director
Executive Office for United States Trustees