

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

**Final Agency Action**  
**Case No. 97-A-4**

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

Mr. [REDACTED] (“trustee”) seeks review of a decision by the United States Trustee for Region [REDACTED] not to reappoint him to the panel of chapter 7 trustees for the United States Bankruptcy Court for the [REDACTED].<sup>1/</sup> For the reasons set forth below, the trustee is reinstated to the chapter 7 panel but remains suspended from active case rotation through June 30, 1998.<sup>2/</sup>

**I. Course of this Proceeding**

In February 1997, the United States Trustee suspended the trustee from active rotation. The trustee did not challenge the suspension. On September 19, 1997, the United States Trustee informed the trustee that she was not reappointing him to the panel. 28 U.S.C. 586(a)(1). By letter dated October 9, 1997, the trustee sought administrative review of that decision from the Director of the Executive Office for United States Trustees.

On October 31, 1997, the United States Trustee responded to the trustee’s request for

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<sup>1/</sup> United States Trustees are Justice Department officials appointed by, and who 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 are private individuals who serve under appointments that have a term not to exceed one year.

<sup>2/</sup> The record in this matter includes the United States Trustee’s decision; the trustee’s request for review; the United States Trustee’s response; correspondence submitted by the trustee to the Director; materials that the parties produced at the request of the Director; documents that accompanied those various submissions, as well as correspondence submitted by the former United States Trustee and data obtained from a national database maintained by the Office of Review and Oversight of the Executive Office for U.S. Trustees.

review (the “Notice”). The trustee responded to that submission in a letter dated November 14, 1997 (the “11/14/97 letter”). The United States Trustee replied in a letter dated December 1, 1997. The trustee requested permission to respond to that letter. Permission was granted and the trustee submitted a letter to the Director dated December 19, 1997.

## **II. The United States Trustee’s Non-renewal Decision**

The United States Trustee identified seven reasons why the trustee’s appointment was not renewed. These included:

- (1) Failure to safeguard or account for estate funds and assets;
- (2) Failure to perform duties in a timely and consistently satisfactory manner;
- (3) Failure to cooperate and comply with orders, instructions and policies of the court, the bankruptcy clerk and the United States Trustee;
- (4) Substandard performance of general duties and case management in comparison to other members of the chapter 7 panel;
- (5) Failure to display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee, and the general public;
- (6) Failure to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases; and,
- (7) Failure to file timely, accurate reports, including interim reports, final reports, and final accounts.

## **III. Standard of Review**

In reviewing the United States Trustee’s decision, I consider two factors:

- . Did the United States Trustee’s decision constitute an appropriate exercise of discretion; and,
- . Was the United States Trustee’s decision supported by the record.

I apply these factors because they are identical to those the Director must consider pursuant to a final Rule the Department of Justice recently promulgated to formalize the procedures to be used by the Director in reviewing decisions by United States Trustees to cease assigning future cases to panel and standing trustees. *Procedures for Suspension and Removal of Panel Trustees and Standing Trustees*, 62 Fed. Reg. 51740 (Oct. 2, 1997). The final Rule, which

is codified at 28 C.F.R. 58.6, is not effective for non-renewal decisions, like this, that were made prior to November 3, 1997. 62 Fed. Reg. at 51740. Nevertheless, I apply the factors set out in subsection 58.6(i) because they constitute a rational basis upon which to review the United States Trustee's decisions in this case.

#### **IV. Analysis**

The United States Trustee applied several criteria in considering whether to renew the trustee's appointment to the chapter 7 panel. We evaluate the record in record in light of each criterion.

##### **A. Failure to safeguard or account for estate funds and assets**

The United States Trustee concluded that the trustee had failed to safeguard or account for estate funds and assets. Notice at 1-2. This conclusion was based, in large part, upon an audit of the trustee performed by the Office of the Inspector General of the United States Department of Justice ("OIG").<sup>3/</sup>

The OIG issued an inadequate opinion in its Audit Report for the trustee in February 1997. The OIG concluded that the trustee needed to implement additional policies and procedures to improve his case tracking, banking procedures, cash management procedures, and accounting practices. Most of these changes, while vital to proper financial management, were things that could be easily rectified. The most serious problem identified by the OIG was the trustee's practice of authorizing a long time bookkeeper to maintain custody over and use a signature stamp to sign checks drawn on estate funds, including checks made payable to the bookkeeper, when the trustee was out of town. The OIG concluded this practice was inadequate for the safeguarding of bankruptcy estate funds. Id. at 3. The OIG found that because of this practice it could not "give assurance as to the reliability of [the trustee's] accounting and cash management practices." Id.

The United States Trustee acted promptly upon receipt of the OIG audit and, in accordance with the policy set forth in the Department's Chapter 7 Initiatives, suspended the trustee from active rotation and instructed him to correct the inadequacies identified in the audit. On March 4, 1997, the United States Trustee instructed the trustee to provide a written response to the audit inadequacies by March 17. On March 6, the trustee asked that the time to respond be extended a week, until March 25, because he was going to be out of town from March 12 through March 20. On March 6, the United States Trustee's office explained to the trustee that the serious nature of the audit did not permit a one week extension.

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<sup>3/</sup> The OIG conducts audits to evaluate the administrative and cash management procedures followed by trustees. Notice at Exhibit 1 at 2. An audit assesses the quality of the panel trustee's accounting for bankruptcy estate assets and related cash management practices and procedures. Id.

The trustee filed his response on March 11. 11/14/97 letter at Exhibit B. It addressed each area of concern in detail and explained how the trustee had, or would, correct the identified inadequacies. It also defended the trustee's decision to allow his bookkeeper to have custody of and use a signature stamp, contending that prior OIG audits had not criticized this practice. The trustee indicated, however, that he would stop allowing his bookkeeper to use a signature stamp to issue checks if required to do so. On March 27, the trustee submitted a supplemental response to the OIG audit in which he pledged to comply with the audit's determination that he should not allow staff to use a signature stamp or sign checks. 11/14/97 letter at Exhibit D.

The United States Trustee reviewed the trustee's responses. Based upon that review, the United States Trustee determined that the trustee had responded to all the problems identified in the Audit Report. As the United States Trustee's December 1, 1997 submission in this proceeding acknowledges, "[a]ll deficiencies identified in [the] OIG audit [were] ultimately resolved, and, in this case, the office requested that [the trustee's] audit be closed on June 3, 1997." 12/1/97 letter at 2.

Responses to OIG audit deficiencies are not reviewed solely by United States Trustees. They also are reviewed by the Office of Review and Oversight ("ORO") of the Executive Office for United States Trustees. In this case, ORO reviewed the trustee's response to the Audit Report and also concluded that the trustee's written responses adequately addressed the areas of concern.

#### **B. Failure to perform duties in a timely and consistently satisfactory manner**

The United States Trustee concluded that the trustee had failed to perform his duties in a timely and consistently satisfactory manner based on the fact that the trustee had too many aged cases (cases open for more than three years). The United States Trustee noted that the trustee's old cases had risen from 3.1% of all cases to 4.3% of all cases during his 1996 evaluation period, a thirty-three percent rise. Notice at 2.

The United States Trustee relies upon statistical data in reaching this conclusion. A United States Trustee should be concerned whenever a panel trustee has a large volume of old cases and should analyze the situation to determine the cause. It may mean the trustee is not diligently administering the estates under his care. It also may mean that there is some fundamental problem in the trustee's ability to administer cases. Alternatively, there may be a legitimate reason why the trustee has a large number of old cases or why certain cases remain open. In sum, statistics are the beginning point, not the ending point, of the inquiry.

In this case, other available data shows that the trustee's case aging statistics compare favorably with other trustees. In January 1996, 3.1% of the trustee's cases were older than three years. This was better than the regional average of 5.9% old cases and the then national average of 7.3% old cases. The January 1997 results are similar. As of that date, 4.3% of the trustee's cases were old compared to the regional average of 7.5% and the national average of 5.6%.

The United States Trustee also based her conclusion, in part, on the trustee's failure to file timely final reports. Notice at 2. The record reflects that the United States Trustee sent inquiries to the trustee in four cases asking why he had not closed them. Notice at 2. There is no indication of what the trustee's explanation was or whether the trustee failed to administer and close those cases after receiving the United States Trustee's inquiries.

The record does contain one motion in the Nova Records case in which the United States Trustee sought to compel the trustee to file a final report. The record reflects that the delay in this case was caused by a failure of the accountants to prepare tax returns. See 11/14/97 letter at 10-11; Panel Trustee's Exhibits at Exhibit 9. The record does not establish whether the trustee bore responsibility for this problem, although the United States Trustee indicates that the trustee's request for fees was reduced by 25% in the Nova case. 12/1/97 letter at 3.

Finally, the United States Trustee alleges that the trustee was late on nine separate occasions in submitting a calendar of hearings conducted under section 341 of the Bankruptcy Code within 14 days of the meeting as required by the clerk of court. Notice at 2. The United States Trustee did not provide supporting documentation, however. The trustee provided evidence that there were only three instances in which his filings exceeded 14 days. See Panel Trustee's Exhibits at Exhibit 15 (all reports filed within 14 days except one report was filed within 18 days, one within 21 days, and one within 22 days).

**C. Failure to cooperate and comply with orders, instructions and policies of the court, the bankruptcy clerk and the United States Trustee**

This factor is very similar to the United States Trustee's fifth basis, that the trustee has failed to display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee, and the general public. I consider them together. The principal support for this contention arises from the trustee's conduct in the [REDACTED] case. In that case, the United States Trustee's office filed an objection to the trustee's final report in which the United States Trustee disputed the trustee's compensation. See Notice at 3, and Exhibit 5; 11/14/97 letter at 15-16; Panel Trustee's Exhibits at Exhibit 17. The trustee filed a response in which he pointedly cast aspersions upon the knowledge and professional competency of the members of the United States Trustee's staff who were supervising his administration of the [REDACTED] case. Notice at Exhibit 5.

I have reviewed the United States Trustee's motion, the trustee's response and the transcript of proceedings before the bankruptcy court, including the court's ruling on the motion. That material reveals that the trustee's remarks were inappropriate and intemperate. However, the trustee correctly maintains that he apologized, albeit grudgingly, at the October 23, 1996, hearing held to consider the United States Trustee's motion and that the United States Trustee's office accepted that apology. Panel Trustee's Exhibits at Exhibit 17. Furthermore, the United States Trustee did not mention this matter when the United States Trustee suspended the trustee in February 1997.

The trustee's conduct in the [REDACTED] case appears to repeat itself throughout the record in this proceeding. The trustee states it is "extremely difficult for [him] to formulate an unemotional response" (11/14/97 letter at 1); he characterizes his non-renewal as "a retaliatory, malicious act based upon fabricated conclusions" (Id. at 2); he states that one of the United States Trustee's conclusions was "pure fabrication" (Id. at 7); he states that it was "shocking" that the United States Trustee "would attempt to misrepresent" the record (Id. at 11); he accuses the United States Trustee of trying to hide behind a "smoke screen" (Id.); he calls another statement made by the United States Trustee's a "pure fabrication" (Id. at 12 (emphasis in original)); he states that "one particular comment[] made [by the United States Trustee was] probably the most irresponsible of the many irresponsible comments" raised by the United States Trustee (Id. at 20); and accused the United States Trustee of engaging in "intellectual dishonesty" (Id. at 21). Finally, the trustee alleges that the United States Trustee removed him due to personal animus (Id. at 2-4 and 22) . Even accepting the fact that the trustee may have been upset with the United States Trustee's decision not to reappoint him to the panel, these statements are offensive and are unsupported by the record.<sup>4/</sup>

The trustee admits that "I frequently get excited and my voice rises (usually without my even being conscious of it)." Id. at 4. The record reveals that the trustee may have a related problem: he is reluctant to accept constructive suggestions or to admit to having made a mistake. The following two examples from the record illustrate this problem. The first involves constituent services. One of a trustee's primary duties is to respond to concerns raised by the public, and by debtors and creditors of the estates they administer. See 28 C.F.R. 58.3(a)(3) (providing that one condition for becoming a trustee is a willingness to be "accessible to all parties with reasonable inquiries or comments about a case."). When the United States Trustee's office learned that the trustee was refusing to respond to repeated inquiries from a party in the Stanley M. case, the office wrote the trustee asking him to answer the party's letters. Notice at 4 and Exhibit 7. In response, the trustee refused to contact the individual, stating "I have no desire to become a pen pal for [the person] . . . and I see no reason to expend any effort on his behalf at this particular time." Id. at Exhibit 7. The trustee may have felt the party's requests were unjustified, but that person had the right to expect that the trustee would respond to them in a timely and courteous manner.

The trustee displayed a similar problem in responding to the Office of Inspector General's audit conclusions. The OIG explained in some detail why it is dangerous to have an employee have access to a signature stamp, including the power to use the stamp to issue checks to the employee. Notice at Exhibit 1. Rather than taking this advice to heart, the trustee went to great lengths to justify what is a patently dangerous practice. 11/14/97 letter at Exhibit B. It took him

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<sup>4/</sup> The trustee's criticisms extend beyond United States Trustee personnel to other trustees, whom he intimates may "not be competent to handle the matters presented by [a] particular case" (Id. at 22), and bankruptcy judges (Id.).

weeks to unequivocally agree to accept the Inspector General’s findings. See 11/14/97 letter at Exhibit D.

**D. Substandard performance of general duties and case management in comparison to other members of the chapter 7 panel**

The United States Trustee relied upon statistical data to conclude that the trustee’s performance of his trustee duties was substandard in comparison with that of other trustees in the region. The United States Trustee found that the trustee’s average distribution to general unsecured creditors in 1996 was the second lowest for all panel trustees in the region. Notice at 3. The United States Trustee noted that the trustee’s average distribution rate to secured creditors was the highest distribution rate to secured creditors of all panel trustees in the region. This data led the United States Trustee to conclude that the trustee was “administer[ing] cases primarily for the benefit of secured creditors.” Id.

As I indicated above, statistics are only a starting point for evaluating a trustee’s performance. In this matter, a review of other data shows that, except for 1996, the trustee achieved a return to unsecured creditors comparable to that of other trustees in the region during the past four years for which we have data:

**Average Percentage Distributed to Unsecured Creditors in All Cases**

<b>1993</b>		<b>1994</b>		<b>1995</b>		<b>1996</b>	
<u>Trustee</u>	<u>Region</u>	<u>Trustee</u>	<u>Region</u>	<u>Trustee</u>	<u>Region</u>	<u>Trustee</u>	<u>Region</u>
21.2%	17.6%	20.4%	20.7%	20.0%	11.7%	12.3%	16.8%

A comparison of distributions to unsecured creditors as a percentage of total distributions show again that, except for 1996, the trustee’s return to unsecured creditors approximated regional averages:

**Percentage of Total Distributions Going to Unsecured Creditors**

<b>1993</b>		<b>1994</b>		<b>1995</b>		<b>1996</b>	
<u>Trustee</u>	<u>Region</u>	<u>Trustee</u>	<u>Region</u>	<u>Trustee</u>	<u>Region</u>	<u>Trustee</u>	<u>Region</u>
25.1%	19.1%	14.0%	17.7%	10.0%	10.3%	4.2%	11.4%

I have reviewed the trustee’s 1996 caseload. The record reveals that his reduced payments to unsecured creditors in 1996 are primarily attributable to a single case, the [REDACTED] bankruptcy case. That case had large payments to secured and priority unsecured creditors. In fact, 57.79% of all payments the trustee made to secured creditors in all his cases were in the [REDACTED] case (\$722,530 of 1,250,178) and 82.6% of all payments he made to priority

unsecured creditors in all his cases were in the [REDACTED] case (\$268,403 of \$324,915). Because the trustee had to make large payments to those creditors, who had priority over general unsecured creditors, it is not surprising that there was little left to pay unsecured creditor claims in 1996. Thus, the 1996 data can be explained.

**E. Failure to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases**

The United States Trustee supports this conclusion with a brief reference to a single case involving [REDACTED] The United States Trustee states that the trustee had “a lack of communication” with his staff in the case. I have reviewed the material provided by the United States Trustee regarding this case. It appears that a failure to communicate with his staff caused the trustee to treat this as a no asset rather than an asset case. Based upon this error, the trustee had the case closed. When he discovered his mistake, he had the case reopened.

**F. Failure to file timely, accurate reports, including interim reports, final reports, and final accounts**

The final factor raised by the United States Trustee was the trustee’s failure to timely file accurate Trustee Final Reports (“TFRs”), and 180 day reports. 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.

In addition to filing TFRs, United States Trustee Program policy requires that every 180 days a chapter 7 trustee must provide the United States Trustee with a detailed report that describes their administration of their chapter 7 cases. These reports recount the status of the trustee’s cases, the actions the trustee has taken in the cases, the trustee’s accounting for estate funds, and many other matters. These reports are extremely valuable supervisory tools. They enable United States Trustees to determine whether trustees are effectively managing estates. They also help prevent and detect fraud.

The record reflects that the United States Trustee returned a number of TFRs and 180 day reports to the trustee for correction. Notice at 4-5. The trustee acknowledges this but contends that the corrections principally involve minor arithmetical errors and questions whether his return rate is greater than that of other trustees. 11/14/97 letter at 20-21. The United States Trustee’s December 1, 1997, response does not dispute this. Furthermore, the United States

Trustee's September 1996 review of his 180 day reports rated them acceptable. Notice at Exhibit 14.

## V. Conclusion

The record as a whole does not provide a clear picture of the nature or gravity of the problems that precipitated the United States Trustee's decision. Some of the grounds cited for the decision are not supported by the record, *e.g.*, distribution record, substandard performance, slow case closure. Other grounds find some support in the record, but appear to have been rectified, *e.g.*, failure to safeguard funds, monitoring the work of others. Certainly the trustee should continue to work on filing more timely and accurate reports.

The one issue that finds support in the record involves the trustee's professional demeanor. Although the trustee ultimately yields cooperation with the United States Trustee, it appears he does so only after engaging in unnecessary hostilities. On at least occasion, what appear to be reasonable requests were met with anger and opposition. A trustee must be able to work on a daily basis with members of the public, debtors, creditors, the judiciary, and members of the United States Trustee Program. He cannot function as an effective trustee if he fails to interact in a professionally appropriate manner. There must be civility among the participants in the bankruptcy system if that system is to serve the interests of debtors and creditors. That civility must extend to the relationship between trustees and United States Trustee Program personnel. The United States Trustee is responsible for supervising the trustees she appoints; if it is established that a trustee is unwilling or unable to accept supervision, it would be appropriate for the United States Trustee to not renew the trustee's panel appointment.

With these thoughts in mind, I have reviewed the circumstances presented in the record. The demeanor problem is of sufficient import that I believe the trustee should remain suspended from active rotation for a period of time during which he should explore means to improve the quality of his discourse. At the same time, the record before me does not support non-renewal to the chapter 7 panel at the present time. The United States Trustee certainly considered appropriate criteria and should continue to work with the trustee to improve his performance.

Accordingly, based upon my review of the record, including the written submissions of the United States Trustee and trustee, I determine that trustee is reinstated to the chapter 7 panel, but will remain suspended from active case rotation through June 30, 1998.

Dated: March 24, 1998

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Joseph Patchan  
Director  
Executive Office for  
United States Trustees