Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 03-0004

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 [redacted] District of [redacted],[redacted] Division, seeks review under 28 C.F.R. § 58.6 of a decision by the United States Trustee[1] not to reappoint him to the panel of chapter 7 trustees, effectively terminating his right to receive new cases.[2] For the reasons set forth below, I modify the United States Trustee's decision and place the trustee on partial suspension to July 9, 2004. During this time period, the trustee's case assignments are to be reduced by half and the trustee must demonstrate to the satisfaction of the United States Trustee that he is more proactive in recovering assets and diligently performing his duties as trustee.

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],[Roanoke Division, [redacted] sincece August 18, 1987. By Notice of Non-Reappointment (hereinafter "Notice") dated April 23, 2003, the United States Trustee declined to renew the trustee's appointment to the panel of chapter 7 trustees. The trustee filed a timely Request for Review ("Request for Review"), which was received in the Executive Office for United States Trustees on May 13, 2003. The United States Trustee filed a Response to the Trustee's Request for Review ("UST Response"), which was received on May 27, 2003. I subsequently reopened the record in this matter pursuant to 28 C.F.R. § 58.6, allowing both parties to submit additional, relevant information. The United States Trustee's supplemental response ("UST's Supplemental Response") was received on August 18, 2003. The trustee's response thereto ("Trustee's Supplemental Response") was received thereafter on September 5, 2003.

[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 trustee continues to receive case assignments because the United States Trustee has extended the trustee's appointment until such time as a final written decision in entered in this matter.

II. The United States Trustee's Decision

The United States Trustee's decision not to renew the trustee's appointment to the chapter 7 panel was based generally on the trustee's overall finding of "inadequate" in the trustee's Performance Review for the period October 1, 1999, through September 30, 2002, and for three specifically articulated reasons, which were as follows:

1. Inability to identify asset cases;

2. Inadequate and untimely administration of asset cases; and

3. Failure to investigate and refer potential civil enforcement cases.

III. 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).

IV. 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 extremely 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 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 Mission Statement.[3] 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.

It is against these very high standards that I must evaluate the United States Trustee's decision not to renew the trustee's appointment to the chapter 7 panel. 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 light of each criterion.

A. Inability to Identify Asset Cases

The United States Trustee's decision not to reappoint the trustee to the chapter 7 panel was based, in part, on his conclusion that the trustee was not identifying a sufficient number of asset cases. The vigorous pursuit of assets is not discretionary; it is a fiduciary and statutory obligation of a chapter 7 trustee. To adequately perform his or her duties, it is imperative that a trustee be willing to pursue assets aggressively and possess the ability to do so effectively. Section 704(1) of the Bankruptcy Code, 11 U.S.C. § 704(1), requires that a trustee "collect and reduce to money the property of the estate. . . ." As a fiduciary, a trustee must investigate all sources of income for the estate. *See In re Martin*, 91 F.3d 389, 392-93 (3d Cir. 1996). Further, a trustee has a "duty to maximize the value of the estate . . . and in so doing is 'bound to be vigilant and attentive in advancing [the estate's] interests.'" *Id.* (*citing Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353 (1985)).

The United States Trustee's concern with the trustee's performance in this regard is a long-standing one. The United States Trustee had on a number of prior occasions advised the trustee that he was not identifying as many asset cases as he could. In April 2000, the then Assistant United States Trustee wrote the trustee as follows: "We discussed your asset caseload and case administration. You indicated that you would increase your vigilance in identifying and liquidating assets. We would like to see you become more pro-active and aggressive both in your case administration and in your court practice." Notice, Exhibit 4. In February 2001, another Assistant United States Trustee wrote to the trustee that "[i]t appears you need to improve in the area of identifying assets." Notice, Exhibit 3. In February 2002, the Assistant United States Trustee wrote: "The United States Trustee remains concerned that there are assets which are not

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[3/] The United States Trustee Program 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.

being administered for the benefit of creditors." Notice, Exhibit 2. In his evaluation for the year ending September 30, 2002, the United States Trustee gave the trustee an "inadequate" for his ability to identify assets to be administered noting as follows:

> The trustee was assigned 1031 cases out of which 894 were closed with an NDR. [The trustee] declared as Ch. 7 asset less than 2% of the entire case load assigned or 8 cases. During the period of 10/1/00-9/30/01, 1067 cases were assigned out of which the trustee designated 6 cases as Ch. 7 [asset cases]. . . . It is noted in the evaluations for 2000 and 1999 that the trustee should be more aggressive in identifying asset cases. There has been no significant improvement in this key area. . . . A review of [the trustee's] current open case assignment list reflects a total Ch. 7 asset case load of 12 cases out of which 4 were filed in 2002.

Notice of Termination, Exhibit 1 at 3.

When the United States Trustee subsequently issued his notice of termination, he relied heavily on a comparison between the trustee and the only other trustee who receives all his cases from the same geographical area, the [redacted] Division, [redacted] District of [redacted]. The United States Trustee drew this comparison because the [redacted] Division covers an economically disadvantaged area and a comparison between trustees in the same division was most appropriate. The United States Trustee noted that for the time period October 1, 1999, through September 30, 2002, out of a total case assignment of 2,861, the trustee identified 16 asset cases, or only .55 percent of his cases. In comparison, he notes that the other trustee identified 57 asset cases out of a total case assignment of 2,757, or 2.06 percent of his cases.

In his Supplemental Response, the United States Trustee offered another statistical comparison, stating that from October 1, 1998, through June 30, 2003, the trustee identified only 34 asset cases, while the other trustee identified 94 asset cases. United States Trustee's Supplemental Response at 2.[4] The United States Trustee later points out that over the six-year period of October 1, 1996, to September 30, 2002, the trustee received 5,517 cases and only closed 24 asset cases. *Id.* This was lower than any other trustee in the entire region except for two recent appointees and one receiving half of the trustee's caseload. *Id.*

The United States Trustee takes the position that the trustee's low asset case ratio demonstrates a deficiency in the trustee's performance. The United States Trustee asserts this conclusion is justified because it is based on "the assumption over time asset cases are evenly distributed between trustee[s] administering cases in the same geographic area where the economic situation of debtors is likely to be similar." UST Supplemental Response at 1. The

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[4/] The United States Trustee also stated that the problem is ongoing, noting that at present the trustee has 17 asset cases, of which six (35.3%) were converted from chapter 11 or 13, while the other trustee has 81 asset cases currently, of which 11 (13.6%) were converted from chapter 11 or 13. UST Supplemental Response, at 2.

United States Trustee further asserts that there is no more equitable way of assessing the trustee's performance in identifying assets; that the differences between the two trustees are consistent over an extended period and are pronounced; and, there is no explanation for this discrepancy other than the trustee's inability to identify assets. UST Supplemental Response at 2-3.

United States Trustees rely on statistical information frequently in monitoring the administration of bankruptcy cases and trustees. Statistics can present large amounts of information in an organized and understandable format. Such information is invaluable because it provides a quantified basis for assessing a variety of phenomena related to the administration of bankruptcy cases. The use of such information in assessing trustee performance has been and will continue to be an appropriate and valuable management tool for all United States Trustees.

The United States Trustee's comparison of the trustee's asset case ratio with that of the other trustee in the same division is understandable. A United States Trustee should be concerned whenever one panel trustee has an extremely low asset case ratio compared with similarly situated trustees. It may mean the trustee is not diligently pursuing assets in the cases to which he is assigned. Alternatively, there may be other reasons why the numbers are skewed. "In sum, statistics are the beginning point, not the ending point, of the inquiry." *See* Review of the Decision of the United States Trustee in Case No. 97-A-4 (available on the internet at http://www.usdoj.gov/ust/foia/admin-decisions/case97-A-4.htm).

In his defense, the trustee states that he administers fewer asset cases because, unlike other trustees, he does not administer cases unless he can guarantee that there will be a three percent distribution to general unsecured creditors. Request for Review, at 1-2.[5] In response, the United States Trustee examined the asset cases closed by the trustee between October 1, 1996, and September 30, 2003, and determined that in four of the 24 asset cases the trustee had closed he made no payments to priority or general unsecured creditors. Response, at 2. The United States Trustee observed that these numbers mean that the trustee provided money to priority or unsecured creditors in 83 percent of his cases. *Id.*, at 2 n.5. He concluded that this compares unfavorably with the performance of the Roanoke chapter 7 panel, which as a whole made payments to priority or unsecured creditors in 96 percent of their cases. *Id.*

[5/] The trustee also made an oblique reference to the blind rotation system, by which reference he appears to suggest that the other trustee's asset case ratio is unfairly inflated because of the case assignment process. Chapter 7 cases, however, are randomly assigned by the Office of the United States Trustee. UST Response, at 2. The trustee has presented no evidence indicating that this system operates by anything other than blind rotation. The trustee also suggests that he has been prejudiced by receiving fewer cases that were converted or filed as asset cases. *Id.* The record demonstrates that case assignment has not prejudiced the trustee insofar as for the period from October 1, 1999, to September 30, 2002, the trustee received five converted cases, while the other trustee to whom he was compared received only four converted cases. UST Response, at 2 n.3.

Although the trustee claims he was originally taught to administer only certain cases, I fail to understand why this was not raised and discussed earlier with the United States Trustee, prior to the instant proceeding. The United States Trustee's repeated admonitions to the trustee that he was deficient in asset identification certainly provided him ample opportunity to address this issue. Indeed, there is nothing in the record to indicate that the trustee ever attempted to address this deficiency, much less that he recognized it to be an issue, although one would have reasonably expected some attempts after all the prior warnings.

The trustee's low rate of asset case identification and the discrepancy between the trustee and the other trustee in the same division supports the United States Trustee's conclusion that the trustee is not aggressive in identifying estate assets. Further support for the United States Trustee's conclusion is found in the fact that the trustee does not find assets other than those identified initially by the debtors. This specific finding was made in the trustee's Performance Review, in which the United States Trustee stated that "[a] review of the 6 Final Reports that were approved during 10/01/01-9/30/02, revealed that the trustee did not locate and administer ANY unscheduled assets." Notice, Exhibit 1. Further, the United States Trustee stated in the Notice of Non Reappointment that he had closely reviewed cases going back to January 1, 2001, and concluded that the trustee "almost never identified any unscheduled assets." Notice, at 2. n2. The trustee did not dispute this contention.

The trustee also contends the United States Trustee has not shown any particular asset that he failed to administer. Request for Review, at 4.[6] It is true that the United States Trustee has not cited a particular instance in which the trustee failed to discover an asset. The United States Trustee is not alleging, however, that the trustee failed to recover a particular asset. Rather, the charge is that the trustee is not as aggressive as he should be in identifying assets. The trustee's argument in this regard essentially suggests that the United States Trustee must prove a negative, a requirement which has been rejected in any number of contexts, and which I reject as well. The obligation to locate all possible estate assets in the thousands of cases administered by the trustee belongs to him, not the United States Trustee. While there must be a basis for the United States Trustee's decision in the record, this does not mean that the United States Trustee must actually find an overlooked asset in order to show that the trustee's performance on this score is unacceptable.

[6/] The trustee states that "in the last two (2) years the United States Trustee's Office in [redacted] has closely scrutinized my designation of cases as asset or no asset. No less than four (4) individuals seemed to have this responsibility of oversight. On each occasion I have responded promptly in explaining my reasons for designating a questioned case as a no asset case. Despite this micro management and close scrutiny of my case load, the United States Trustee's Office has not been able to identify a single case in my twenty-four (24) years of service to the Trustee's Office, which I have failed to fully and fairly administer." Request for Review at 4.

The trustee further notes that he has a greater percentage distribution to creditors at a lower cost than other trustees. Request for Review, at 2. These facts were not a consideration in the United States Trustee's decision to terminate. Further, although the trustee compares favorably with other trustees in the percent he distributes to unsecured creditors, he has also been near the bottom of the trustees on his chapter 7 panel in total dollars distributed to creditors, ranking 11th out of 12 trustees. UST Response, at 2. This latter statistic is consistent with the United States Trustee's conclusion that the trustee is not aggressive enough in finding assets.

Finally, the trustee appears to suggest the existence of a personal animosity against him on the part of the present Assistant United States Trustee in connection with the decision not to reappoint. Request for Review, at 6. There is no evidence in the record which substantiates this claim. Moreover, it is the United States Trustee's decision to terminate a trustee, not the Assistant United States Trustee's. Finally, the record demonstrates that two prior Assistant United States Trustees also found the trustee to be deficient at identifying assets. The record about the trustee's performance was started long before the present Assistant United States Trustee ever arrived in the office.

B. Inability to Adequately and Timely Administer Asset Cases

The United States Trustee cites as another ground for termination that the trustee was inadequate and untimely in administering asset cases. In essence, in the few asset cases that the trustee does administer, he is slow and needs to be prodded.

The United States Trustee cites *Terry's, Inc.* and *Ison Coal*. In both cases, the trustee did not file claims objections until two years after the claims bar date and months after the final assets were recovered, thereby delaying case closure and final distribution to creditors. *Terry's* converted from chapter 11 to chapter 7 on June 2, 1999. UST Response, at 3. The estate's major asset, over $262,000 in life insurance proceeds, was recovered by the trustee in January 2001; he collected the last remaining asset May 11, 2001. Although the claims bar date had been set for October 5, 1999, the trustee did not file any claims objections until September 4, 2001.[7] The claims process was not completed until May 3, 2002. The trustee does not dispute the chronology, but attributes the delay to the fact that he had to administer a small parcel of real estate, re-notice his objections to a multitude of claims pursuant to judicial "directive,"and negotiate with the IRS. While these issues may contribute to an overall delay in preparing and filing a trustee's final report, none of them really explains why the trustee did not or could not commence the claims objections process earlier, which is the crux of the United States Trustee's argument.

Likewise with *Ison Coal*, the trustee was appointed when the case converted from chapter 11 to chapter 7 on May 12, 1999. The claims bar date was September 21, 1999. The

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[7/] The first hearing on objections to claims was set for October 23, 2001. On December 5, 2001, the court dismissed some of the claims, but on December 13, the trustee re-filed objections to those claims and provided additional notice, per the Judge's directive.

trustee recovered over $25,000 in September 1999, and administered the last asset on November 1, 2001. The first claims objection was not filed until February 2002, more than two years after the original claims bar date. The final report was not filed with the court until October 30, 2002.

The Handbook for Chapter 7 Trustees states: "A trustee should commence the claims review process after it is certain that there will be a distribution to creditors and as soon as possible following the expiration of the bar date for filing claims." It does not directly address when the trustee should file objections. The Handbook also directs the trustee to perform another claims review prior to distribution for new, tardy, or amended claims. It is common practice in many districts for trustees to delay the claims objection process until they are closer to completing their liquidation of assets. While the trustee may have caused some residual delay in postponing the claims objections process, and certainly could have acted sooner, it would not be appropriate to terminate the trustee based on these two circumstances alone.

In addition to the forgoing cases, the United States Trustee is critical of the trustee's administration of the *Hull* case which culminated in a creditor filing a suit on the trustee's bond. The United States Trustee states that the trustee admitted to him that he did not visit the property for over a month after the case converted from chapter 11 to chapter 7; that the trustee did not change the locks and allowed the debtor's principal to have unsupervised access to the property; did not reconcile the inventory at the commencement of the case with what was on hand at the time of conversion; made no effort to identify or collect receivables; made no effort to enter into an agreement with the landlord to continue occupancy; and made no attempt to sell unsecured assets prior to the end of the growing season. UST Response, at 4, n.7.

In his Request for Review, the trustee stated that he "did, in fact go to the property, inventory the property, change locks on the property, keep insurance on the property, and otherwise secure same." Request for Review, at 3-4. He provided no time frame, however, in which he accomplished any of these tasks. When he filed his Supplemental Response, it became clear that while he was appointed trustee on February 1, 2002, he did not take even a preliminary inventory of the estate's assets until April 23, almost two months later. Trustee's Supplemental Response, at 3. Moreover, the trustee did not prepare a complete inventory of assets until August 14, 2002, six and one half months after his appointment. *Id.* The locks to the premises were not changed until November 2002. *Id.*

The trustee also claims that "[n]o property was lost from the estate." Trustee's Response, at 4. This contention is not contradicted by the United States Trustee. The trustee further asserts that he personally knew three generations of the family of the debtor's principal and had no reason to distrust them. *Id.* The trustee's arguments in this regard miss the point. The test of whether the trustee breached his fiduciary and statutory obligation to secure the assets of the estate is the reasonableness of his actions. In this case, the debtor sold farm and garden equipment and had a substantial inventory on hand. The history of bankruptcy administration is replete with instances where parties acting in their own self interest should not have been trusted. Although the trustee

believed he had the only set of keys, he could not know for a certainty that at some point extra keys had not been made and shared with persons other than the debtor's principal. Because of the great potential harm to the estate, the only prudent course of action would have been to change the locks immediately. Under the circumstances, it is clear that the trustee's failure to secure the premises with new locks for almost 10 months was unreasonable.

The *Hull* case was converted from chapter 11 to chapter 7 on February 1, 2002. On February 18, the trustee filed an application to employ an auctioneer, which the court granted on March 18. Trustee's Supplemental Response, Exhibit 3. As mentioned above, on April 23, 2002, the trustee states that he made his preliminary inventory of estate assets using an inventory that the Debtor had provided dated December 1, 2001. *Id*. at 3. "The purpose of the preliminary inventory was to identify those assets that belonged to either secured creditors, or which were held for repair, consignment, or belonged to individuals other than the debtor." *Id*.

On April 25, 2002, [creditor # 1] commenced an adversary proceeding against the debtor to obtain possession of a disc mower that she purchased from the debtor while the case was in chapter 11, and to recover an administrative expense claim for another item of property she purchased but which the debtor failed to order. [Creditor #1] averred that when she contacted the trustee to gain possession of the disc mower, the trustee advised her to retain counsel because there were numerous claimants to the property and she would need to establish her claim in court. Request for Review, Exhibit 4, ¶ 7. At the initial pre-trial conference on June 19, 2002, [creditor #1]'s counsel stated that the trustee had authorized the president of the debtor to deliver the disc mower to [creditor #1] and that delivery had already occurred. "Because the Trustee concluded that (i) [creditor #1] was a buyer in the ordinary course of business of the mower and had become the owner of it, and (ii) that she was entitled to an administrative expense claim for the Bailer [sic] for which she had fully paid although the Debtor had never acquired such a piece of equipment to deliver to her, he filed no answer to the complaint. Neither did the Debtor." Request for Review, Exhibit 6, p. 2. Thereafter, the Court entered an order on September 16, 2002, awarding [creditor #1] an administrative claim against the chapter 11 estate in the amount of $11,300.

In the meantime, [creditor #2], filed a Motion to Intervene in the proceeding, asserting that its purchase money security interest in the disc mower was superior to any rights acquired by [creditor #1]. The Motion to Intervene was opposed by both [creditor #1] and the Trustee. It appears that on June 19, 2002, the same day the court held its pre-trial conference in [creditor #1's adversary proceeding], [creditor #2] had filed a "Joint Stipulation and Motion for Approval of Agreement" in which the Trustee abandoned to [creditor #2] all the equipment in which it claimed a security interest, including the very same mower that the Trustee had previously delivered to Nash. "Apparently the Trustee did not realize that the mower which had been delivered to [creditor # 1] was also included in the list of property abandoned to [creditor # 2]." *Id*. at 3.

In its Order denying the Motion to Intervene, the Court pointed out that "[w]hile [creditor #2] contends that the mower was not properly 'abandoned' by the Trustee to [creditor #1], it fails to address the existing fact that [creditor #1] had obtained possession of the mower prior to the

filing of the Motion to Intervene and asks nothing more of this Court with regard to such mower." *Id*. at 6. Thereafter, [creditor #2] filed suit against the trustee and his bonding company to recover the value of property lost due to asserted breaches of fiduciary duty. Notice of Termination, Exhibit 5.

The identical circumstance occurred with regard to [creditor # 3], who also purchased a baler that [creditor #2] claimed was subject to its security interest.

The trustee's administration of *Hull* was extremely lax and a clear breach of his fiduciary obligation to the estate. He did not act quickly to take possession of the estate immediately upon his appointment. His failure to secure the property by promptly changing the locks was reckless, considering the valuable pieces of farm equipment that were on the premises. Although he believed he possessed the only set of keys, he could not have been certain of this. Moreover, he allowed the principal of the debtor unsupervised access to the premises.

When the trustee finally conducted a preliminary inventory, he relied on the inventory that the debtor's principal had given him. Further, he was negligent in preparing the inventory, because he failed to identify which assets were secured by security interests. As a result, he delivered possession of the disc mower and a baler to [creditor #1] and [creditor #3], respectively, and abandoned the very same items to the secured creditor, all which lead to confusion and needless litigation.

Finally, the United States Trustee also stated that the trustee's administration of the case was lacking because he "made no timely effort to sell any of the unsecured assets prior to the end of last year's [2002's] growing season." Notice, at 2.[8] He further alleged that the trustee failed to identify or collect receivables, or; enter into any agreement with the landlord for the continued use of the premises. *Id.* While the trustee agrees that he might have handled the case better, nowhere in his papers does he provide any justification for his failure timely to take these steps, which were essential to the proper administration of the case.

The trustee's various failures in the administration of this case appear to evidence an unwillingness or inability to be proactive. As such, they tend to support the United States Trustee's claim that the trustee is not adequately administering his cases.

C. Failure to Investigate and Refer Potential Civil Enforcement Cases

The record shows that for the year ending September 30, 2002, the trustee only referred one matter for civil enforcement, made no criminal referrals, and filed no objections to discharge. The United States Trustee comments that "[t]he trustee does not appear to be making even a rudimentary effort on substantial abuse or other civil enforcement issues." While the trustee's

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[8/] The record indicates that these assets were sold at auction on May 5, 2003. Trustee's Supplemental Response, at 4.

performance could certainly be improved, it is not appropriate to terminate the trustee based on his performance in a single year without more substantiation.[9] I must add, however, that his shortcomings in this regard are indicative of the same pattern and lax attitude as otherwise characterize his administration of cases.

Conclusion

In reaching this decision, I am bound by the applicable standard of review. The Director "*shall determine whether the United States Trustee's decision is supported by the record and the action is an appropriate exercise of the United States Trustee's discretion.*" The Director may "*adopt, modify or reject the United States Trustee's decision to suspend or terminate the assignment of future cases to the trustee*."

This case turns primarily on the trustee's performance of perhaps the most important duty of a chapter 7 trustee: the identification and liquidation of estate assets. *See In re Martin*, 91 F.3d at 392-93 (trustee must be vigilant and attentive in his efforts to maximize value of an estate). With respect to the first criterion of the standard of review, I find that there is a sufficient basis in the record to support the United States Trustee's conclusion that the trustee is not adequately performing this statutory and fiduciary obligation.

While the trustee generally is administering assets that are disclosed in the debtor's schedules, a very high proportion of his cases are closed as no asset cases. The United States Trustee is right to be concerned about the situation because other trustees in the same area are consistently outperforming the trustee and recovering significantly more assets. The challenge for any trustee is to turn what appears to be a no asset case into an asset case. This is accomplished most often by identifying and recovering assets that are not disclosed or properly valued, or that are difficult to administer.[10] That is, in fact, the trustee's job. Some trustees,

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[9/] In addition to the three specific grounds articulated by the United States Trustee in support of his decision not to re-appoint the trustee, he relied upon the rating of inadequate given the trustee in his most recent Performance Evaluation. In that Performance Review, the United States Trustee found the trustee's response to public complaints inadequate because of the trustee's treatment of an attorney for the second creditor in the *Hull* case. The attorney claimed that he called the trustee repeatedly and the trustee refused to return his calls or answer his letters. Notice of Termination, Exhibit 1 at 17. The trustee has a duty to provide information to parties in interest and should have handled the situation better.

[10/] In a recent study conducted in the Eastern District of Michigan, the Honorable Steven W. Rhodes found that 52 percent of administered assets were either undisclosed or undervalued by more than 20 percent. Further 53 percent of the cases contained such assets. Norton Bankruptcy Law Adviser, May 2002, No. 5 at 2. A similar query was posited by the Editor of NABTalk, a journal published by the National Association of Bankruptcy Trustees: "[T]hink about what differentiates those trustees who seem to find a lot of hidden assets and those who do not and what it takes to make a good Trustee. Why some trustees seem to uncover more assets

however, exert only minimal effort and administer only the most obvious assets. That creates an impression that the trustee is only on the panel to collect a $60 fee for each no asset case - which can be lucrative considering the volume of cases. In this regard, for the reasons discussed above, the evidentiary balance tips in the United States Trustee's favor.

With respect to the second criterion, *i.e.* whether non-renewal of the trustee's reappointment is an appropriate exercise of the United States Trustee's discretion, the question is more difficult. Some may think it appropriate to allow a mediocre performer to linger on the trustee panel, absent some egregious act. I do not agree. It is the United States Trustee's job to appoint and supervise trustees. As part of those duties, the United States Trustee evaluates performance and conducts periodic training to ensure that trustees perform their duties with skill and competence. If the trustee is on notice that he is not performing his duties adequately and fails to improve, the United States Trustee has a right to terminate that person before any actual harm or damage occurs.

In this case, the trustee was certainly advised that he was not performing satisfactorily, but it is not clear what efforts were undertaken by the trustee or the United States Trustee to address the situation. For example, what steps did the trustee take to improve his performance? Did the trustee seek assistance from the United States Trustee or advice from a colleague? Beyond the annual admonition, the record does not show whether the United States Trustee provided any more specific guidance that might have enabled the trustee to improve his asset identification abilities. After reviewing the record as a whole, I conclude that it would be more appropriate to impose a sanction, short of termination, which underscores the serious nature of the problems identified by the United States Trustee, yet permits the trustee to focus on the issues in earnest.

I am therefore modifying the United States Trustee's decision to terminate the trustee and require, instead, that the trustee be placed on partial suspension until July 9, 2004. During this period of time, his caseload will be reduced by half. The trustee should use the time to seek assistance from the United States Trustee and his colleagues. I would expect the United States Trustee to take an active role in this process. The trustee should explore changing his practices and obtain training to improve his asset identification techniques and procedures. His reduced caseload should allow him to focus even more of his time and resources on improving performance.[11] Prior to July 9, 2004, the United States Trustee shall re-evaluate the trustee's overall performance with specific emphasis on his asset identification. If the trustee evidences an unwillingness or inability to improve in this regard, the United States Trustee can then consider further remedial action, including suspension or termination from the panel.

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than others is a question that is not easily answered." Spring 2003, page 5.

[11/] Because the trustee continued to receive a full case load during the pendency of this appeal, one would expect that he has already undertaken some steps to improve his performance on this score. In any event, by July, this should allow sufficient time and cases for the United States Trustee to evaluate the trustee's performance.

Accordingly, based upon my review of the record, including the written submissions of the United States Trustee and the trustee, I modify the United States Trustee's decision not to reappoint the trustee.

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

Dated: January 21, 2004

Lawrence A. Friedman
Director
Executive Office for U.S. Trustees