

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

**Final Agency Action
Case No. 07-0004**

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

chapter 7 panel trustee for the District of (the "Trustee"), seeks review of the decision by the United States Trustee for Region not to renew his appointment. Based upon the record¹ before me, which relies on facts generated in 2006 and 2007, I decline to adopt the United States Trustee's decision, without prejudice to a renewed decision, as set forth more fully below.

I. Course of this Proceeding

The Trustee has served on the panel since December 1990. On October 22, 2007, the United States Trustee issued a Notice of Non-Reappointment to the Panel (the "Notice"). On November 8, 2007, the Trustee submitted to the Director of the Executive Office for United States Trustees a letter requesting review of the United States Trustee's decision (the "Request for Review").² On November 21, 2007, the United States Trustee responded to the Request for Review, and on January 5, 2008, the Trustee submitted his reply.

II. Standard of Review

In conducting this review, I must consider two factors:

1. Did the United States Trustee's decision constitute an appropriate exercise of discretion?
2. Was the United States Trustee's decision supported by the record?

See 28 C.F.R. § 58.6(i) (specifying the scope of the Director's review).

¹ The administrative record in this matter consists of: (1) the United States Trustee's October 22, 2007 Notice of Non-Reappointment to the Panel and Exhibits A-H (some of which contain numbered sub-exhibits); (2) the Trustee's November 8, 2007 Request for Review Regarding Notice of Non-Reappointment and Exhibits 1-17; (3) the United States Trustee's November 21, 2007 Reply to Chapter 7 Trustee Request for Review Regarding Notice of Non-Reappointment and Exhibits 1-9; and (4) the Trustee's January 5, 2008 Reply and Update Regarding Notice of Non-Reappointment to the Panel and Exhibits 1-9.

² The Trustee's Request for Review was timely submitted. Pursuant to 28 C.F.R. § 58.6(i) the Director shall issue a written decision no later than thirty calendar days from receipt of the Request for Review, unless the trustee and United States Trustee agree to a longer period of time. There is some question as to whether both the Trustee and United States Trustee agreed to an extension, however, the delay in issuing this final decision has posed no detriment to the Trustee. Under 28 C.F.R. § 58.6(c), the effect of the Notice has been stayed.

I may “adopt, modify or reject the United States Trustee’s decision to suspend or terminate the assignment of future cases to the Trustee.” *Id.* I also may “seek additional information from any party in the manner and to the extent” I deem appropriate. 28 C.F.R. § 58.6(h).

III. Analysis

A. Duties of the United States Trustee and Panel Trustee

United States Trustees supervise panel trustees, 28 U.S.C. § 586(a)(1), and appoint them to individual chapter 7 cases. 11 U.S.C. § 701. The United States Trustees “monitor the performance of panel members . . . in order to determine whether they should be continued in or removed from panel membership.” H.R. Rep. No. 595, 95th Cong., 1st Sess. 102, 101 (1977). Under the law, “[t]he United States Trustee is permitted to conduct his [or her] own investigation. . . . to exercise effective supervision and make effective evaluation of the performance of the private trustees on the panel.” *Id.* at 110.

Panel trustees are fiduciaries responsible for administering cases filed under chapter 7. As fiduciaries, trustees are held to very high standards of conduct. See generally *Woods v. City Nat’l Bank & Trust Co.*, 312 U.S. 262, 278 (1941); *Mosser v. Darrow*, 341 U.S. 267 (1951). See also *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

The United States Trustees effectuate the goals of the United States Trustee Program, which include protecting the public interest by ensuring efficiency in the administration of cases and by protecting the integrity of the bankruptcy system. See United States Trustee Program’s Mission Statement.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 high standards that the United States Trustee’s decision not to reappoint the trustee to the panel must be assessed.

B. Discussion

The United States Trustee alleges that the Trustee was “unable to sustain an acceptable level of performance” in several areas. Notice at 1. This determination was based on the outcome of the Trustee’s Performance Review for the period January 1, 2006 to December 21,

³ The United States Trustee Program’s Mission Statement provides as follows:

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

2006 (the “2006 Review”).⁴ Id. The Trustee disputes these allegations. I address their arguments below.

1. Failure to Perform Duties in a Timely and Consistently Satisfactory Manner

The United States Trustee alleges that the Trustee failed to perform duties in a timely and satisfactory manner, including that he failed to timely administer and close cases or to respond to the United States Trustee’s requests for information; he failed to adequately investigate or refer to the United States Trustee incidents of bankruptcy fraud and abuse; and that he was untruthful about an excused absence from his October 24, 2006 calendar of 341 meetings. Notice at 2-3.

The Trustee argues that most of the alleged deficiencies in his performance occurred during a time period in which he was seriously ill. Request for Review at Exhibits 17-C, E and F. He argues that he usually responds to the United States Trustee within one business day, and that despite his illness, he was only one day late in responding to the request for information about his aged cases. Request for Review at 13. He further disputes the numbers of aged cases on the United States Trustee’s list. He also argues that he was late in submitting one TFR and that he had not finished administering the estates of several cases on that list. Request for Review at 5.

He also disputes the number cited by the United States Trustee regarding investigation and referral of civil and/or criminal enforcement matters and denies that his performance in this area is low compared to any other trustee in the region. Request for Review at 18. He finally denies that he was untruthful about the need to be excused from the 341 meetings due to illness, and despite an inconsistent statement from his office, he provided copies of letters from several doctors in support of his claim. Request for Review at Exhibits 17-F, G and I.

Based on my review of the record, the Trustee clearly was ill during the time period in which the United States Trustee makes many of his complaints. I find the letters written by the Trustee’s doctors to be credible and persuasive. I conclude that the Trustee’s medical condition likely impacted his ability to respond timely to the United States Trustee’s requests for information about his aged cases, and also impacted his ability to prepare, review, and ensure the timely filing of both TFRs and TDRs. I also conclude that the record does not support the allegation that the Trustee was untruthful about his absence from the 341 meetings, or that he has not adequately carried out his duties with respect to the Program’s civil or criminal enforcement efforts.

⁴ The United States Trustee found that the Trustee’s performance in 2004 was inadequate, that he had improved in 2005, but that he had reverted to an inadequate level in 2006. He submitted the Performance Review for the period January 1, 2003 to December 31, 2004 (the “2003-2004 Review”), and the Performance Review for the period January 1, 2005 to December 31, 2005 (the “2005 Review”) with the Notice as Exhibits A and B, respectively. The 2006 Review was attached to the Notice but was not designated as a separate exhibit.

2. Failure to File Accurate TFRs and TDRs

The United States Trustee alleges that the Trustee failed to file accurate Trustee Final Reports (“TFRs”) and Trustee Distribution Reports (“TDRs”). Notice at 6-8, 2006 Review. Examples of errors ranged from miscalculation of fees, failure to include certain amounts in proposed distributions to creditors, proposing distributions that did not match amounts approved by the court, and failure to include certain required forms with the reports. Id.

In the Request for Review, the Trustee addressed some of the allegations. He contends that discrepancies in some of his proposed distribution amounts were the result of changes between early estimates and either subsequent compromises or final allowed claims. Request for Review at 4. He also argues that other errors were ministerial in nature. Id.

Based on my review, I conclude that the record supports some but not all of the United States Trustee’s allegations. The record reflects that the Trustee submitted TDRs and TFRs that contained errors. However, some of the examples cited reflect a difference in opinion between the office and the Trustee as to the appropriate administration of estate assets. I am further mindful that the Trustee’s illness likely had an impact on his ability to prepare, review, and ensure the filing of accurate reports during portions of the 2006 review period. Therefore, while I find the Trustee’s performance in this area unsatisfactory, it is appropriate to determine whether he continues to submit erroneous reports or whether there has been improvement since 2006. Pursuant to 28 C.F.R. § 58.6(h), I direct that the Trustee undergo a Case Administrative Review (“CAR”) in accordance with the United States Trustee Manual.⁵

3. Failure to Adequately Monitor the Work of Professionals

The United States Trustee alleges that the Trustee failed to adequately monitor the work of professionals, specifically, that he failed to properly screen new cases for conflicts of interest and he failed to properly oversee the work of his counsel. He further alleges that as a result of his lack of supervision, the Trustee is unfamiliar with the details of his cases and is not sufficiently monitoring attorney fees. Notice at 2. The United States Trustee alleges that the fees incurred by counsel have rendered the estates administratively insolvent or have resulted in no payments to unsecured creditors. Notice at 1-2, 2006 Review.

The Trustee acknowledges that “individual practitioners, especially non-attorneys have a more difficult time in identifying and tracking conflicts of interest.” Request for Review at 12. He further acknowledges that he agreed to waive fees in the specific case cited by the United States Trustee, but he denies that his conduct was inappropriate. Id. He further disputes any assertion that he is unfamiliar with his cases, and argues that he personally reviews and initials every document pertaining to his asset cases. Id. at 8. He further argues that he and his counsel provided substantial benefit to the estates despite reductions ordered by the court. Id. at 9. In

⁵ The Trustee is scheduled to undergo a Field Exam within the next 60 days. The CAR is to be in addition to, and not in lieu of, the Field Exam.

some cases, he states, fees were reduced pursuant 11 U.S.C. § 326, and not due to improper conduct or excessiveness. Id.

My review of the record indicates that the Trustee misunderstands his fiduciary responsibility to exercise the highest degree of care and to comply with all provisions of the Bankruptcy Code and Rules, including those relating to employment of professionals. I also find that the allegations, while serious, appear to describe isolated events. For the reasons stated above, I find it appropriate to direct the Trustee to undergo a CAR so that the United States Trustee may determine whether the Trustee continues to have conflicts issues, or whether, since he received the Notice, he has instituted an improved system to correct this deficiency.

4. Substandard Case Management in Comparison to Other Members of the Panel of Chapter 7 Trustees

The United States Trustee alleges that the Trustee distributed more funds to secured creditors and less to unsecured creditors than any of the other trustees on the [] panel, and that his rates of distribution to unsecured creditors was the lowest in the country. Notice at 3, 2006 Review. In support, he provides information on distribution statistics from calendar years 2006 and half of 2007. In response, the Trustee claims that the United States Trustee's analysis is based on a flawed statistical calculation, and offered an alternative method which, he argues, clearly refute the allegations. Request for Review at 17.

Based on the record, I find that the United States Trustee has not provided data for a statistically significant period of time to enable me to properly evaluate this allegation. Statistical analysis is one of many types of data that are relevant in examining a trustee's performance. A CAR is appropriate to determine whether issues persist with the Trustee's administration of cases since the 2006 review period.

IV. Conclusion

I find that there is some support in the record for the United States Trustee's determination that the Trustee's performance has been unsatisfactory, but that I cannot conclude that the decision not to renew his appointment on the grounds stated was appropriate. 28 C.F.R. § 58.6(i). In the approximately 30 months since the Notice was issued, there have been no further performance reviews or evaluations, and the Trustee has continued to receive and administer cases. Accordingly, I find that the facts of this case warrant that I decline to adopt the United States Trustee's decision, and also warrant a CAR. Upon completion the CAR, if the United States Trustee determines that the Trustee should be removed from the panel or other enforcement action imposed, and the Trustee timely requests review of any such decision, his request will be promptly reviewed.

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

Dated: May 28, 2010



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