

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 97-A-1

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

August 21, 1997

[REDACTED], Esquire
[REDACTED]
[REDACTED]

Dear Mr. [REDACTED]:

On February 10, 1997, you sought administrative review of the decision of the United States Trustee for Region [REDACTED] not to renew your appointment to the panel of chapter 7 trustees for the District of [REDACTED]. The record in this case includes your letters (with exhibits) dated February 10, 1997, and May 10, 1997, as well as the United States Trustee's response dated March 19, 1997 (with exhibits), and some supplementary materials provided by the United States Trustee in April 1997. Additionally, we have enclosed for your convenience the documents listed in schedule A attached to this letter. Our review followed the method described in our December 31, 1995, letter to Saul Eisen, then president of the National Association of Bankruptcy Trustees, a copy of which has been provided to you.

The power to remove a chapter 7 trustee from a panel is committed to a United States Trustee's discretion. 28 U.S.C. § 586; Joelson v. United States, 86 F.3d 1413 (6th Cir. 1996); Richman v. Straley, 48 F.3d 1139, 1143 (10th Cir. 1995); Shaltry v. United States, 182 B.R. 836, 842 (D. Ariz.), aff'd 1995 WL 866862 (9th Cir. 1995). In conducting our review, we have considered whether the United States Trustee's decision not to renew your appointment is supported by the record and whether

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that action is an appropriate and reasonable exercise of the United States Trustee's discretion.

The United States Trustee did not renew your appointment for two reasons. First, your admittedly dishonest conduct caused her to conclude that you should not act as a trustee. See [REDACTED], [REDACTED] (en banc) (describing, based upon largely uncontested and stipulated facts, your conduct). Second, you have failed to perform your duties adequately. Based upon our review, we believe these constitute adequate grounds for not renewing your appointment to the panel of chapter 7 trustees.

Standing alone, the facts underlying your public censure by the [REDACTED] Supreme Court constitute an independent and sufficient basis for not renewing your appointment. Indeed, we conclude they mandate non-reappointment. The state hearing board that imposed disciplinary action against you found these facts were supported by "clear and convincing evidence." [REDACTED], [REDACTED] at 1102. In fact, you stipulated to most of them. Id.

Between June 1989 and January 1991, you wrote eleven checks to your mortgage lender that were dishonored by your bank; some were dishonored more than once. Id. You later sought to refinance your mortgage with another lender in order to obtain a better interest rate. Id. Concerned that your dishonored checks would lead to a declination, you threatened to sue your current mortgage holder if she did not submit false credit reports. Id. at 1102-03. She refused to do so and the refinancing company declined to issue you a mortgage. Id. at 1102. In response to your lender having made an accurate and good faith credit report, presumably as required by law, you made good on your promise to sue her by filing a lawsuit asserting claims based on libel per se, libel per quod, interference with contract, and misrepresentation. Id. at 1103. The trial court dismissed your complaint with prejudice and the court of appeals affirmed. Id. On appeal, the court upheld the trial court's finding that your lawsuit was "frivolous, groundless, and vexatious." Id. As a result, you were ordered to pay your lender's attorney fees. Id.

Based upon these facts the [REDACTED] Supreme Court publically censured you. Although you complain about the [REDACTED] Supreme Court's decision, you do not contest the accuracy of the Supreme Court's factual findings. Nor do you contest the accuracy of the factual findings made in your underlying lawsuit against your mortgagor in which the penalty against you was imposed.

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As a trustee, you are a fiduciary and are held to very high standards of honesty and loyalty. See generally Woods v. City National Bank & Trust Co., 312 U.S. 262, 278 (1941); Mosser v. Darrow, 341 U.S. 26 (1951). See also Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.). As a trustee, you collect and hold the property of debtors' estates and disburse estate money to pay creditors' claims. 11 U.S.C. § 704. Your role as a trustee also requires you to sign court papers and regularly appear in court on these estates' behalf.

Your conduct demonstrates it would be imprudent to entrust those powers to you. The un rebutted record reveals that you have attempted to coerce parties to lie in order to benefit you personally. You are willing to defraud potential creditors (your refinancing company) for personal gain (a better interest rate). Indeed, if it suits your personal financial purpose, you will file a false lawsuit against an innocent third party despite your obligations as an officer of the court.

These traits are unacceptable in a trustee, who holds other people's money and who routinely files suit on behalf of debtors' estates. We simply cannot, in good faith, allow you to hold estate assets, as you must do if you are going to act as a trustee. See 11 U.S.C. § 704. In addition, your decision to file a "frivolous, groundless, and vexatious" suit diminishes your ability to act as an effective advocate on behalf of estates because courts and opposing parties would be justified in discounting the veracity of what you say.

We also are deeply concerned by your conduct in writing eleven checks over several years that your bank dishonored for insufficient funds. Either you knowingly passed bad checks or your financial affairs were in such disarray that you regularly miscalculated your balance over a two-and-one-half year period. If it was the former, you knowingly engaged in dishonest, and perhaps criminal, conduct. Assuming it was the latter, this magnitude of financial incompetence makes it imprudent to allow you to act as a chapter 7 trustee. Trustees have many fiscal responsibilities, including controlling and accounting for estate funds, maintaining bank accounts, preparing financial reports, and calculating amounts due to creditors. In light of your history of bouncing eleven checks, some more than once, we are not comfortable assigning such important responsibilities to you.

You contend you should be allowed to continue acting as a trustee despite your dishonesty because the Supreme Court publically censured you rather than revoked your license. This is unpersuasive. First, decisions of the [REDACTED] Supreme Court are not binding on the United States Trustee. The United

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States Trustee had the right to independently assess the gravity of your misconduct. Moreover, it is not the mere fact that you were censured that led to your non-renewal. Rather, it is the misconduct underlying your censure that prompted the United States Trustee's decisions.

Furthermore, we believe a sanction imposed by your State's highest court is a very serious matter, not lightly considered or often imposed. The fact that the sanction was less than the most severe available does not mitigate the gravity of your conduct, however.

You also fail to recognize that a trustee has a different relationship with a debtor than a lawyer has with a client. An attorney's clients are totally free to hire any attorney they wish. Any client who hires you to be their lawyer does so voluntarily and despite the fact that you have been publically censured for dishonesty. In contrast, debtors have no right to select who will act as their trustee. They rely upon the United States Trustee to maintain a pool of competent trustees from which one will be randomly assigned to administer each particular estate. Debtors cannot reject the trustee assigned. We believe it would be fundamentally unfair - and unwise - to compel debtors to entrust their assets to a dishonest trustee.

It also would be unfair to ask creditors to accept a dishonest trustee. One of a trustee's primary duties is to ensure that creditors receive fair compensation under the payment scheme set out in the Bankruptcy Code. Given your conduct, creditors would be wholly justified in lacking faith in you.

A trustee differs from a lawyer in a second important respect. A lawyer will occasionally hold third parties' funds. In fundamental contrast, a primary duty of a chapter 7 panel trustee is to hold estate money. Indeed, the first two duties specified for a trustee in section 704 of the Bankruptcy Code are (1) to collect and reduce to money the property of the estate; and, (2) be accountable for all property received. 11 U.S.C. § 704(1) and (2). Because the holding of other people's funds lies at the heart of a trustee's duties, it is imperative that a trustee's honesty be above reproach, and this is why the law holds trustees to a high standard of loyalty and honesty. Through your personal conduct you have demonstrated that you cannot be trusted to meet that standard.

The United States Trustee exercised her independent power, derived from federal law, not to renew your appointment. Given the scope of your misconduct she was fully justified in doing so. You repeatedly bounced checks. You asked your mortgagor to lie.

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You sought to defraud a refinancing company. You knowingly filed a frivolous, groundless, and vexatious lawsuit; indeed, it was so spurious that you had to pay your victim's attorney fees.

In addition to your dishonest conduct, your performance of your trustee duties supports the United States Trustee's decision not to renew your appointment. The record reveals that the United States Trustee's office continually had to question your management of cases. You frequently submitted semi-annual reports to the United States Trustee's office that were incomplete or inadequate; the United States Trustee's office spent an inordinate amount of time attempting to obtain satisfactory reports. Despite those efforts, you continued to submit deficient reports. Your trustee's final reports ("TFR") shared these problems. A TFR is the report a trustee files at the end of a case. See 11 U.S.C. § 704(9). It identifies, among other things, the amount of funds collected and the appropriate distribution of those funds among creditors. Your TFRs were very often inaccurate or incomplete. These problems with inadequate reporting and record keeping seem to echo the problems you have experienced in managing your personal financial affairs.

You contend that the poor quality of your semi-annual reports and TFRs was your staff's fault. This is not a persuasive justification. You - not your staff - are responsible for the proper accomplishment of these duties. You sign these documents and are ultimately responsible for their accuracy.

Moreover, your questionable administration of specific cases buttresses the United States Trustee's decision not to renew your appointment. The record in this matter sets forth the United States Trustee's concerns in detail and includes your responses to those concerns. Based upon our review, we conclude the record supports the United States Trustee's conclusion that you exercised poor judgment in your administration of a number of cases, including Aleman, [REDACTED] (delay in abandoning property); Kiefer, [REDACTED] (delay in objecting to claims); Fogle, [REDACTED] (failure to seek timely withdrawal of NDR); Phair, [REDACTED] (both the court and the United States Trustee found that you continued to take actions reserved to an estate's trustee - including issuing a notice of possible dividend - even though you had been discharged as trustee, and you also did not seek to have the case reopened although you should have done so); Doty, [REDACTED] (failure to abandon property in a timely fashion or to justify your delay); Lefevre, [REDACTED] (same); Register, [REDACTED] (same).

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For these reasons, we find that the United States Trustee's decision not to renew your appointment to the chapter 7 panel is supported by the record and was an appropriate exercise of the United States Trustee's discretion. Accordingly, I affirm her decision. At your request, I am also forwarding a copy of this decision to the President of the National Association of Bankruptcy Trustees.

Sincerely,

(Original Signed)
Kevyn D. Orr
Deputy Director

Enclosure

cc: [REDACTED]
United States Trustee
for Region [REDACTED]

Mr. Joseph Wittman
President,
National Association of
Bankruptcy Trustees

SCHEDULE A

Correspondence regarding your June 30, 1994, Semi-Annual Report

1. United States Trustee's review letter dated September 7, 1994.
2. Your response dated October 13, 1994.

Correspondence regarding your December 31, 1994, Semi-Annual Report

1. United States Trustee's review letter dated March 16, 1995.
2. Your response dated April 18, 1995.

Correspondence regarding your December 31, 1996, Semi-Annual Report

1. United States Trustee's review letter dated March 26, 1997.
2. Your response dated April 7, 1997.
3. United States Trustee's supplemental request for information dated April 15, 1997.

Correspondence concerning [REDACTED] Inc. ([REDACTED])

1. Auctioneer letter to [REDACTED] dated April 21, 1993.
2. Auctioneer letter to you dated July 11, 1994.
3. Your fax to [REDACTED] and [REDACTED] dated March 27, 1997.
4. Fax to you from [REDACTED] dated March 27, 1997.
5. Portion of a fax to you, dated April 14, 1997, regarding the Trustee's Final report.