

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 97-A-7

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

[REDACTED] 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 District of [REDACTED].^{1/} Based upon the record before me, I affirm the United States Trustee's decision.^{2/}

I. Course of this Proceeding

Prior to his non-renewal, the trustee had been a member of the panel of chapter 7 trustees for the United States Bankruptcy Court for the District of [REDACTED]. On October 17, 1997, the United States Trustee notified the trustee that she was not reappointing him to the panel when his current one year appointment expired. By letter dated November 26, 1997, the trustee sought administrative review of that decision from the Director of the Executive Office for United States Trustees. By letter dated January 12, 1998, the United States Trustee set forth her bases for not renewing the trustee to the chapter 7 panel (the "Notice"). The trustee responded to the Notice on January 30, 1998 (the "1/30/98 response"). The United States Trustee responded to the trustee's letter by letter dated February 9, 1998 (the "2/9/98 response").

II. Standard of Review

^{1/} 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 generally serve under appointments that have a term not to exceed one year.

^{2/} 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; and documents that accompanied those various submissions.

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

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

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 the trustee's, that were made prior to November 3, 1997. 62 Fed. Reg. at 51740. Nevertheless, I apply the Rule's factors, which are 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.

III. Analysis

The United States Trustee removed the trustee based upon her conclusion that he was deficient in basic case administration. Notice at 2, 5-19. She concluded that he had failed to perform his duties in a consistently satisfactory manner, comply with policies of the Office of the United States Trustee, and correct deficiencies which were occurring on a continuing basis. *Id.* The United States Trustee concluded that, among other things, the trustee consistently submitted inaccurate and inadequate Semi-annual Reports^{3/} (Notice at 5-8), Trustee Final Reports ("TFRs") and Trustee Distribution Reports ("TDRs") (Notice at 9-11). She also based removal upon concerns raised by the Bankruptcy Clerk's office regarding the trustee's failure to submit court papers in a timely and accurate fashion (Notice at 11-12), and concerns raised by the bankruptcy court regarding the trustee's administration of his trustee duties (Notice at 13-18). Finally, the United States Trustee concluded that the trustee had poorly performed his duties when acting as a chapter 11 trustee and that performance supported her conclusion that the trustee could not adequately administer chapter 7 estates (Notice at 18-19).

The record reveals that throughout his tenure as trustee,^{4/} the trustee constantly failed to perform a number of his important trustee duties in an accurate or timely manner and failed to prepare or maintain financial and case records. Under the Bankruptcy Code, a chapter 7 trustee liquidates a debtor's non-exempt assets for the benefit of the estate's creditors. 11 U.S.C. 704(1). Trustees thus hold large numbers of assets in trust for an estate's creditors. By law, trustees must "be accountable for all property received," 11 U.S.C. 704(2), and must furnish reports and

^{3/} Semi-annual reports are customarily referred to as 180 day reports.

^{4/} The trustee was appointed to the panel on May 1, 1994. Notice at Exhibit 19 at 1.

information about their administration of cases, 11 U.S.C. 704(7) and (8).

United States Trustees supervise panel trustees. 28 U.S.C. 586(a)(1). In order to determine whether panel trustees are protecting and accounting for property received, United States Trustees require trustees to provide a detailed report to the United States Trustee every 180 days. These reports enable United States Trustees to evaluate all aspects of a trustee's performance to determine whether the trustee is adequately protecting debtors and creditors and effectively managing estates. The reports also help prevent and detect fraud. As the *Handbook for Chapter 7 Trustees* ("Handbook") specifies, "[t]he responsibility to timely and accurately report on case status to the United States Trustee is a basic duty and should be taken seriously."^{5/} Handbook at 65. Among other things, 180 day reports recount the status of all the trustee's cases and the actions the trustee has taken in administering them. In them, a trustee accounts for the property of the estate. Trustees identify the tangible property of the estate they have received from debtors and describe the steps taken to dispose of it. Trustees also identify all cash receipts and disbursements and show that bank statements are accurate and have been reconciled.

The trustee's 180 day reports were habitually incomplete and inadequate and they revealed that he was not adequately administering his cases, was not properly recording transactions he took as trustee and was unable to account for his performance of basic trustee duties. The trustee's recurring problems led the United States Trustee to conclude that the trustee should not be reappointed to the chapter 7 panel. Notice at 5-8. As the United States Trustee noted in her letter to the trustee informing him of his non-renewal:

Your mandatory semi-annual reports for 1994 through 1997 have consistently contained incomplete and inaccurate information, many of the mistakes occurring over and over in each successive report.

Notice at Exhibit 4 (October 17, 1997 letter to the trustee). The mistakes included failing to submit reports for cases in which the trustee was trustee; administering matters, such as pre-petition rental income, that were outside the trustee's ambit of responsibility; failing to account for receipts; failing to account for tax refunds; failing to account for receipts from law firms; failing to report on rents owing to the debtor; improperly transferring debtors' funds to non-interest bearing accounts; not reporting or referencing receipts; taking too long to file TFRs and TDRs; inaccurately listing assets; inaccurately valuing assets; failing to reconcile bank statements properly; failing to provide information about asset sales; reporting for improper periods; failing to establish that bank statements had been reconciled; discrepancies in reconciliations; incomplete descriptions of transactions; failing to provide mandated forms; reporting on cases that had been converted to chapter 13; failing to provide required appraisers' reports; failing to reflect the abandonment of assets by the trustee; and failing to provide a synopsis of estimated case closings.

^{5/} The Handbook represents a statement of operational policy. Handbook at (i). See Notice at Exhibit 20 (attaching relevant portions of the Handbook). A copy is provided to each chapter 7 trustee.

See Notice at 5-8 and Exhibits 1, 4, 5-17, 21 22.

The record reveals that the problems identified in the trustee's 180 day reports recurred throughout his trusteeship. See, e.g., Notice at 5-8; Notice at Exhibit 1-B-2 (June 29, 1994 letter to the trustee disclosing numerous problems with case administration and maintenance of financial and case data); Exhibit 10 (December 30, 1994 letter to the trustee detailing numerous problems with the trustee's maintenance of financial and case data); Exhibit 11 (June 27, 1995 letter to the trustee detailing numerous problems with the trustee's maintenance of financial and case data); Exhibit 12 (August 29, 1995 letter to the trustee detailing continuing problems with the trustee's financial and case data); Exhibit 13 (September 28, 1995 letter to the trustee informing him that previously disclosed problems remain unresolved); Exhibit 14 (January 29, 1996 letter to the trustee detailing numerous problems with the trustee's maintenance of financial and case data); Exhibit 15 (March 12, 1996 letter to the trustee informing him that previously disclosed problems remain unresolved); Exhibit 5 (August 1, 1996 letter to the trustee disclosing problems with case administration and maintenance of financial data); Exhibit 6 (September 26, 1996 letter to the trustee disclosing additional concerns with 180 day report); Exhibit 7 (March 31, 1997 letter to the trustee detailing problems with 180 day reports); and Exhibit 9 (April 7, 1997 letter to the trustee disclosing numerous problems with case administration and maintenance of financial and case data).

The record also reveals that the trustee failed to file timely and accurate reports with the court. Section 704(9) of the Bankruptcy Code mandates that a trustee submit a final report in every case. 11 U.S.C. 704(9) (requiring the trustee to "make a final report and file a final account of the administration of the estate with the court and with the United States trustee."). See also Notice at Exhibit 20 at 6-9 (section of *Handbook for Chapter 7 Trustees* describing need for and the method used to prepare timely and accurate final reports). 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 estates are to be administered fairly and efficiently.

The record reveals that the trustee regularly submitted deficient TFRs in his cases. See, e.g., Notice at 9-11; Notice at Exhibit 26 (October 2, 1995 letter to the trustee specifying problems); Exhibit 33 (October 6, 1995 letter to the trustee specifying problems); Exhibit 30 (December 2, 1996 letter to the trustee specifying problems); Exhibit 31 (January 15, 1997 letter to the trustee specifying problems); Exhibit 36 (April 21, 1997 letter to the trustee specifying problems); Exhibit 34 (May 14, 1997 letter to the trustee specifying problems).

The trustee experienced other problems in case administration. On April 4, 1997, the Deputy Clerk for the United States Bankruptcy Court for the District of [REDACTED] at [REDACTED] wrote the trustee to inform him that his failure in 53 instances to file minutes for debtors' meeting of creditors or to file final reports was prejudicing debtors because "debtors in these cases cannot be discharged until one of these documents in on file with the Clerk's office."

Notice at Exhibit 38 at 2-3. Despite this admonition, the trustee did not correct this problem. As a result, the Deputy Clerk was compelled to write directly to the United States Trustee on May 22, 1997 to express concern regarding the trustee's failure to carry out these routine functions. Notice at Exhibit 30 at 1. The Deputy's letter noted that 32 of his cases remained delinquent even though six weeks had elapsed since she had asked to the trustee bring his cases current.⁹ Id.

By this date the trustee had been a trustee for more than three years. There was no excuse for an experienced trustee, like this trustee, to fail to file these routine yet important papers with the court. Nor is there a good reason for a trustee to disregard a reasonable request from the Office of the Clerk that the trustee begin performing his duties in a timely manner.

The trustee's response in this matter does not contest many of the specific points raised by the United States Trustee. Indeed, the trustee "freely admit[s] having made mistakes." 1/30/98 response at 2. Instead, the trustee principally contends that the United States Trustee failed to afford him an opportunity to improve his performance and intimates this may have been due to his race. 1/30/98 response at 1-7, 22; Notice at Exhibit 3 at 1-3; see also November 26, 1997 letter from the trustee to the Director at 1. There is no evidence in the record that the trustee's race played a role in the United States Trustee's decision not to renew his appointment.⁷ It is clear from the record, however, that the United States Trustee's office worked diligently with the trustee for many years in an effort to assist him in correcting his problems.⁸ See, e.g., Notice at Exhibit 8 (June 29, 1994 letter to chapter 7 trustees discussing method for maintaining adequate financial records); Exhibit 22 (December 30, 1994 memorandum discussing same); Exhibit 16

⁹ The previous year, the Honorable [REDACTED], United States Bankruptcy Judge, had found it necessary to write to the trustee directly to admonish him for failing to notice discrepancies between schedules filed by the debtor and papers filed in court. Notice at Exhibit 42 (August 5, 1996 letter to the trustee from Judge [REDACTED]).

⁷ Separate from this proceeding, the trustee filed a Freedom of Information Act request seeking data regarding, among other things, the racial composition of chapter 7 panels around the country. The General Counsel of the Executive Office for United States Trustees located 278 pages of documents responsive to his request and provided those to the trustee by letter dated January 26, 1998.

⁸ Indeed, prior to issuing her notice of non-renewal, the United States Trustee disclosed her concerns to the trustee in a lengthy letter that was accompanied by supporting materials and which invited the trustee's response. Notice at Exhibit 1 (August 1, 1997 letter to the trustee). The trustee replied in a letter dated August 21, 1997. Notice at Exhibit 3. The United States Trustee considered that response in reaching her decision. Notice at Exhibit 4 at 1 (October 17, 1997 letter to the trustee). After considering all the data before her, the United States Trustee concluded that she "did not see a sufficient probability that [the trustee's] continued performance as a Panel Trustee would be any better than the performance [he] ha[d] demonstrated for the past three and one-half years." Notice at Exhibit 4 at 3 (October 17, 1997 letter to the trustee).

(September 29, 1995 letter to the trustee arranging for Chemical Bank to assist the trustee in improving his record keeping); Exhibit 18 (October 18, 1996 letter to the trustee describing a prior visit to the trustee's office to review his trustee operations and provide suggestions about them); Exhibit 24 (December 31, 1996 letter to the trustee providing his with instructions for preparing TFRs and TDRs); Exhibit 17 (January 29, 1997 memorandum explaining that arrangements had been made to have another panel trustee work with the trustee in improving his reporting requirements); Exhibit 39 (May 28, 1997 letter to the trustee informing him of the Clerk's dissatisfaction with his failure to comply with mandatory filing requirements and transmitting a memorandum to the trustee regarding this problem). The office also attempted to help the trustee improve his performance by providing the trustee with critiques that identified dozens of specific deficiencies in his 180 day reports. See Notice at 5-8 and Exhibits 1, 4, 5-17, 21-22.

IV. Conclusion

This record supports the United States Trustee decision not to renew the trustee's appointment to the chapter 7 panel. The record establishes that the trustee consistently failed to perform his basic duties in adequate fashion. The United States Trustee repeatedly attempted to help the trustee rectify his problems. This was to no avail. Indeed, the trustee continued to experience the same types of problems even after the United States Trustee issued her October 1997 notice of non-renewal. See Notice at Exhibit 40 (December 10, 1997 memorandum from the Deputy of the United States Bankruptcy Court for the District of [REDACTED], [REDACTED] Division, to the trustee informing the trustee that his failure to file required materials had resulted in the court's inability to discharge more than 30 debtors.). Given the trustee's consistent record of deficient performance, the United States Trustee acted appropriately in declining to reappoint him to the chapter 7 panel.

Based upon my review of the record, including the written submissions of the United States Trustee and the trustee, I affirm the United States Trustee's decision not to renew [REDACTED]'s appointment to the panel of individuals available for appointment as trustee in chapter 7 cases in the United States Bankruptcy Court for the District of [REDACTED].

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

Dated: March 24, 1998

Joseph Patchan
Director
Executive Office for
United States Trustees