

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 01-0002

Review of the Decision of the
United States Trustee for [Redacted]
Regarding [Redacted]

[Redacted], a member of the panel of chapter 7 trustees for the United States Bankruptcy Court for [redacted],^{1/} seeks review of a decision by the United States Trustee for [redacted] to terminate her receipt of new case assignments.^{2/} Based upon the record before me, I reverse that decision. The record does not support two of the three bases the United States Trustee relied upon in terminating the trustee: the trustee caused losses of estate funds in three cases, and she failed to supervise professionals. While the record does demonstrate reporting problems, the record does not establish that this deficiency, standing alone, was of a magnitude to justify removal at this time. Prior to termination, the trustee implemented detailed procedures to rectify these reporting problems and those procedures should be given an opportunity to work. The United States Trustee should evaluate whether the trustee's new procedures improve her reporting, and I set out a methodology for conducting that evaluation in Section III. D. 3. below.

This decision does not vindicate the performance of the trustee. Rather, it reflects the insufficiency of the record in this case to justify termination at this time. The trustee's difficulty in submitting accurate records has been a problem. She must prove she has rectified the problem if she is to remain a trustee.

I. Course of this Proceeding

^{1/} Hereinafter, for ease of reference, "the trustee."

^{2/} United States Trustees are Justice Department officials who are appointed by 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, such as this trustee, generally serve under renewable appointments that have a term not to exceed one year.

The United States Trustee notified the trustee on February 27, 2001, that new case assignments would be terminated effective February 28, 2001 (the “Notice”).^{3/} By letter dated March 19, 2001, the trustee filed a request for review of the termination decision with the Acting Director of the Executive Office for United States Trustees (the “Request for Review”). On March 28, 2001, the United States Trustee filed her response to the trustee’s Request for Review (the “Response”). Thereafter, the parties submitted a number of supplemental letters regarding matters raised in the Notice, the Request for Review, and the Response. Pursuant to 28 C.F.R. 58.6(h), I have chosen to include that material in the administrative record in this case and have relied upon it in reaching my decision.^{4/}

II. Standard of Review

In conducting this review, the Director must 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.

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

III. Analysis

A. The United States Trustee’s Bases for Termination

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. at 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

^{3/} The United States Trustee did not issue an Interim Directive. See 28 C.F.R. 58.6(d) (setting forth the bases for an Interim Directive). Accordingly, the trustee has continued to receive new case assignments while this review has been conducted. See 28 C.F.R. 58.6(c) (providing that a trustee shall continue to receive new case assignments during the review period unless the United States Trustee issues an Interim Directive).

^{4/} The record in this matter includes the Notice, the Request for Review, the Response, all correspondence, and the documents accompanying these various submissions.

particular chapter under which a bankruptcy case is filed. Because they are fiduciaries, trustees 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. 267 (1951). See also Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

The United States Trustee terminated new case assignments to the trustee for three principal reasons. First, the United States Trustee could not determine whether the trustee had secured estate assets in eight cases, and the United States Trustee concluded estate assets were lost in three cases because the trustee did not secure them. Notice at 3. Second, the United States Trustee concluded the trustee had too many “sloppy, inaccurate and incomplete” TDRs, TFRs, and 180-Day Reports.⁵¹ Notice at 5-6. Finally, the United States Trustee also concluded the trustee failed to adequately supervise professionals. Notice at 3-4.

B. Summary of Decision

I cannot affirm a decision to terminate the trustee at this time because I find the record does not support such a supervisory action. First, the record in this case does not establish that the trustee failed to secure estate assets or that she caused losses to the estate. Second, the record does not support a conclusion this trustee has failed to supervise professionals or has engaged in a pattern of delegating core trustee duties to her professionals that would warrant termination.

The record does support the United States Trustee’s conclusion the trustee’s reporting was deficient, but the worst of these problems arose during late 1998 and 1999, when the trustee was coping with “a severely disabled” child who allegedly was the victim of physical abuse at a day care center and who nearly died due to “intensive pharmacological intervention” designed to rectify the child’s illnesses, and was on maternity leave. March 19, 2001-cover letter accompanying the trustee’s Request for Review at n.1; Request for Review at 7,n.7, and at Ex. M-5, Ex. M-5A, and Ex. M-33; trustee’s April 9, 2001-letter (the “Reply” or the “Trustee’s Reply”) at Ex. 5. Before and after this period, the trustee’s reports seem to have been of better - though far from superior - quality. Id. See also, n. 8, below.

The trustee’s most recent Performance Review, for the period ending June 30, 1999, contained no inadequate findings, but did rate the trustee as “adequate except for” in three categories involving trustee reports.⁵² Notice at Ex. 1. While the overall rating of “adequate except for” certainly put the trustee on notice that the three areas needed improvement, the Review would not put a reasonable trustee on notice that his or her case administration was so

⁵¹ A TFR is a Trustee’s Final Report, a TDR is a Trustee’s Distribution Report, and a 180 - Day Report is a case summary report submitted by the trustee to the United States Trustee every 180 days. I discuss TFRs, TDRs, and 180-Day Reports in some detail later in this decision.

⁵² The United States Trustee did not issue a Trustee Performance Review for the Period ending June 30, 2000 for the trustee.

seriously inadequate that termination might be imminent.⁷ The trustee obtained a voluntary suspension during the Summer of 2000, in order to devise procedures to improve the quality of her reports. The record reflects that the trustee implemented significant changes to her procedures during this period but due to her termination, the United States Trustee did not have a full opportunity prior to February 27, 2001, to determine whether those changes would produce satisfactory reports.

C. The Termination Decision

The trustee was appointed to the chapter 7 panel effective September 30, 1993. Notice at Ex. 3, at 1. The record does not indicate whether this trustee had serious problems during her first four years as a trustee. The Trustee Performance Review issued by the United States Trustee for the period ending June 30, 1999 concluded the trustee adequately met most Performance Review Factors but required improvement in submitting acceptable (1) No Distribution Reports; (2) Trustee's Final Reports and Trustee's Distribution Reports; and (3) 180-Day and Operating Chapter 7 Reports.⁸ Notice at Ex. 1, at 1. The 1999 Review did not find her performance to be inadequate in any of these areas, the lowest mark a trustee may receive.⁹ Id.

Although the trustee was terminated, in part, for not securing estate assets, the Review gave the trustee an adequate rating for "Securing Estate Property," both in "effective[ly] identifying and inventorying assets" and in "effective[ly] securing and protecting estate property." Id. at 6. Similarly, the 1999 Review gave the trustee an adequate rating for retaining and compensating estate professionals which included her supervision of professionals. Id. at 18.

The Review concluded the trustee was "a knowledgeable, experienced and aggressive trustee." Id. at 2. The Review noted one general area that needed improvement, providing "timely and accurate" TDRs, TFRs and 180-Day reports. Id. The Review noted that the trustee's

⁷ This conclusion is drawn from an overall assessment of the record and the absence of any other communications or indications of problems that were out of the ordinary. The trustee appears to have no history of receiving inadequate audits or field examinations nor does it appear that the United States Trustee has had to file objections or seek sanctions against the trustee.

⁸ The Review noted that the trustee had been previously advised to address this issue in her 1997 and 1998 Reviews. The trustee does not contest the fact that she received prior admonitions to improve her reporting.

⁹ Trustees can receive one of three possible ratings in their Performance Review: "adequate," "adequate except for," or "inadequate." There is no requirement that a trustee receive an inadequate rating as a condition precedent to the termination of new case assignments.

inability to submit acceptable reports required the Office of the United States Trustee to “expend unnecessary time and effort to review” her reports. Id. The Review concluded that the United States Trustee “fully expect[ed] that the trustee w[ould] take all necessary steps to improve in this area of case administration.” Id.

Submitting timely and accurate financial and case progress reports is central to the trustee’s performance of her fiduciary duties. TDRs, TFRs, and 180-Day reports serve important and distinct purposes. Under the Bankruptcy Code, a chapter 7 trustee liquidates a debtor’s nonexempt 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 information about their administration of cases, 11 U.S.C. 704(7) and (8). Two of these reports are called trustee’s final reports (TFRs) and trustee’s distribution reports (TDRs). A TFR is submitted to the court after the trustee has administered all assets in a bankruptcy case. The TFR informs the court and parties in interest how the trustee proposes to distribute assets so parties can object and the court can resolve any disputes prior to final distribution. See Handbook at 8-36 - 8-39 (discussing TFRs). A TDR is submitted to the court after all assets have been distributed to show how those assets were distributed and to confirm that all distributions have been made. See Handbook at 8-41 - 8-42 (discussing TDRs). As such, both are important documents, and it is important that they be timely and accurately filed.

The 180-Day Reports, also called interim reports and Semi-Annual Reports, are important supervisory tools. See Handbook at 9-7 - 9-9 (discussing 180-Day Reports). The reports extract information from the trustee’s case management system which is maintained on an ongoing basis by the trustee. Id. Submitted every 180 days to the United States Trustee, the reports enable the United States Trustee to determine whether a trustee is adequately protecting debtors and creditors and effectively managing estates. The reports also help prevent and detect fraud. Among other things, 180-Day Reports recount the status of all cases assigned to a trustee and the steps the trustee has taken to administer estate assets. The reports also show how a trustee has accounted for estate property, all cash receipts and disbursements in cases, and whether bank statements have been reconciled.

The quality of this trustee’s reports did not meet the United States Trustee’s standards. The trustee was suspended from assignment to new cases scheduled for hearing during the period May 5, 2000 through August 5, 2000 so she could work to improve her reporting.¹⁰

¹⁰ Because the United States Trustee did not issue a written notice of suspension, there is no clear evidence in the record why or how the suspension came about - although the trustee states the suspension was to allow her to implement new procedures. See Request for Review at 4 (“In April of 2000 the UST, citing poor performance, provided me with an opportunity to take a Voluntary Suspension or face action to remove me as Trustee . . . The UST identified the Suspension as a ‘breathing period’ that was an opportunity for me to ‘put your house in order’ and to afford a ‘clean slate’ from which performance could be assessed.”). See also Request for

Notice at 2; Request for Review at 4. The suspension occurred approximately six months after the trustee received her 1999 Review.

Both prior to, and at the time of her suspension, the trustee actively sought guidance from the Office of the United States Trustee about ways to improve her case reporting. See, e.g., Request for Review at 5 and Ex. 5a (collecting (i) a May 6, 1999-letter from the trustee asking to meet with the Senior Bankruptcy Analyst “to discuss procedure,” which the trustee stated “would improve efficiency in my office and in the preparation of reports”; (ii) an April 4, 2000-letter to the United States Trustee stating that the trustee was “very sensitive to the accountability of the Office of the United States Trustee for the performance of its panel of Chapter 7 Trustees” and noting “[i]t seems important for me to have some assessment at this time of whether the past five months have been on the right track [and] which areas continue to be of concern [so I can] assess changes that have been made, what is working and narrow the focus of where continued improvement is necessary”; and (iii) an April 10, 2000-letter to a senior official of the Office of the United States Trustee, noting that the trustee was being suspended and asking for “any suggestions you may have for remedial action.”).

The record indicates the region was reluctant to provide the trustee with specific advice regarding ways she could improve her performance. In an April 11, 2000-letter, issued one day after the trustee submitted her voluntary suspension, the region replied to the trustee’s April 10, 2000-letter requesting guidance by stating “[w]ith respect to your expectation that we will comment on the checklists and procedural requirements you are implementing, please be advised . . . we cannot engage in the micromanaging of your office . . . How each trustee accomplishes this is within the professional’s discretion subject to meeting the standards of our Program.” Request for Review at Ex. M-5B. But see Handbook at 10-1 (noting that meetings with trustees are an appropriate way to obtain compliance with applicable standards of performance).

The record reveals the trustee made significant efforts to improve the quality of her recordkeeping - including the adoption of a number of forms.^{11/} I discuss those forms in some

Review at Ex. M-5A (April 10, 2000 letter to the Office of the United States Trustee noting the trustee was “not happy with this course of action”). Although the suspension was effective for cases in which hearings were scheduled during the period May 5, 2000 through August 5, 2000, the suspension decision was made on April 10, 2000. Request for Review at Ex. M-5A.

^{11/} The parties engaged in a spirited colloquy about the genesis of these forms. In her Request for Review, the trustee stated she “developed” these forms. Request for Review at 9. In response, the United States Trustee claimed this was untruthful, that another trustee had created these forms and this trustee “omit[ted] the copymark” of the other trustee from the forms. Thereafter, that other trustee drafted and signed a letter that the trustee in this case furnished to me as part of the record; in that letter that trustee stated he had “provided these Materials to [the trustee] with the understanding that they would be used by her and accordingly, do not consider her use and/or republication to constitute any form of copyright infringement.” Reply at Ex. 1.

detail in Section III. D. 3. below. The trustee also “hired new support staff with over 13 previous years banking experience, including asset management, reconciliation/aging analysis” (Request for Review at 9), purchased new software and implemented a computer “tickler system” (Request for Review at 10).

The United States Trustee returned the trustee to active case administration when the term of her suspension expired on August 5, 2000. Approximately one week before the suspension ended, the United States Trustee sent three employees to the trustee’s office to conduct a two-day “Case Administration Review.”^{12/} Notice at 3, Ex. 3. That Case Administration Review proved pivotal in the United States Trustee’s decision to terminate the trustee. Id.

The Case Administration Review is attached as Exhibit 3 to the United States Trustee’s Notice. Although the two-day on-site review ended July 27, 2000, the Review was not issued for seven months, until February 27, 2001 - the same day the trustee was terminated. Request for Review at 6 (“No report was ever issued prior to the receipt of the Notice of Non-Reappointment”).

The record in this case establishes that the trustee sought an exit interview when the two-day on-site review was concluded in July 2000. The unrebutted record in this case establishes the trustee never received an interview at which she could ask questions and respond to the region’s concerns. As I discuss in the next section, that was unfortunate because some of the conclusions reached in the Case Administration Review were wrong, or so the record before me leads me to conclude.

The Case Administration Review that was attached to the February 27, 2001 Notice was highly critical of the trustee’s operation in securing estate assets and reporting. Notice at Ex. 3. It also criticized the trustee’s supervision of professionals. Id.

The Notice and accompanying Case Administration Review were the first documents in the record that raised any serious concern about the trustee’s use and supervision of professionals and her alleged failure to secure estate assets. The record also indicates that prior to that time, the trustee had received adequate marks for performing those duties on her last Trustee Performance Review. Notice at Ex. 1. In sum, the record does not reveal that the trustee was informed of perceived problems with performance in these areas by the Office of the United States Trustee prior to February 27, 2001. There is no evidence that they were discussed. No documents have been provided to me indicating that she had serious problems in these areas or

^{12/} Section 2-3.12.5 of the United States Trustee Manual sets forth the policy for using Case Administration Reviews. Unlike OIG Audits and Field Examinations, which follow formal protocols, a Case Administration Review is a more flexible type of review tool that a United States Trustee can use to address specific areas of perceived weakness.

that her performance in these areas might affect her ability to receive future case assignments.^{13/}

The Notice relied principally upon the findings of the July 2000 field examination. After receiving the Notice, the trustee timely sought review of it.^{14/}

D. Discussion

1. Introduction

This dispute centers on three alleged problem areas - reporting, securing assets, and supervising professionals. Although the Program's Administrative Review Procedures expressly contemplate that a United States Trustee may have "prior communications in which the United States Trustee [will have] advised the trustee of the potential action," 28 C.F.R. 58.6(a), that did not happen here with regard to the assets and supervision issues.^{15/} Certainly, there are cases where it is counterproductive to provide the trustee with an opportunity to respond to problems before termination. For example, United States Trustees must take swift action to stop assigning cases to protect estate assets from loss.

Those are not the facts of this case. Here, the record reveals that the United States Trustee's concerns about the failure to secure estate assets, while certainly valid, were also subject to reasonable explanation once the trustee was made aware of those concerns. After reviewing the record submitted by both parties, I cannot conclude this trustee caused the loss of any estate assets. Moreover, the trustee provides reasonable explanations why matters that the United States Trustee thought were evidence of problem performance in this area actually were not, or at least not to the degree alleged.

^{13/} For example, the record does not reflect any prior communications on these issues nor does it reveal whether the United States Trustee objected to any fee request on these bases.

^{14/} By letter dated March 1, 2001, the trustee asked the region for her trustee file so she could use it in preparing her Request for Review. Request for Review at Ex. M-6A. By letter dated March 5, 2001, the region declined to "forward[] to you the documents you seek" and advised her to file a Freedom of Information Act Request for them. Request for Review at Ex. M-6B. But See Handbook for Chapter 7 Trustees (March 1, 2001 ed.) ("Handbook") at 2-4 (performance reviews and other trustee-related material "become[s] part of the United States Trustee's oversight file [regarding that trustee], which will be made available to the trustee for review, upon request."). The Handbook "represents a statement of operational policy." Handbook at 1-1. A copy is provided to each chapter 7 trustee.

^{15/} "Trustee conduct that does not rise to the level of dishonesty, fraud, or immediate asset risk merits the use of progressive or cumulative remedies," one of which is communicating perceived problems to a trustee so the trustee can attempt to rectify them. Handbook at 10-1.

The same is true for supervision of trustee professionals. As I have noted above, nothing in the record indicates that the United States Trustee had any concerns with this trustee's use and supervision of professionals prior to the site-visit and the record does not reflect that the trustee was put on notice about this issue prior to termination. As I will discuss below, the record does not show that the trustee's use of professionals was unreasonable or excessive.

Reporting is a more serious issue. The trustee candidly admits her reporting slid prior to her suspension. She has enacted significant controls to ensure better reporting. Those deserve the chance to work.

Finally, the parties dispute a number of additional issues. Most notably, the parties spend a tremendous amount of time contesting whether the trustee has obtained good results for unsecured creditors. See generally Request for Review at 2-4; Reply at 2-12; and the many charts attached to those documents. Since the United States Trustee did not rely upon this ground as a basis for terminating the trustee, there is no need to address that issue in this decision in detail.^{16/}

2. Securing Estate Assets

In her Notice, the United States Trustee - relying upon conclusions drawn from the Report of Case Administration Review - concluded there were eight cases in which it was impossible to determine whether estate assets had been secured.^{17/} In three, [C], [D] and [B], the Notice concluded there were "actual failure[s] to secure estate property." Notice at 3.

These allegations of losses, if proven, violate one of a trustee's express duties under the Bankruptcy Code, to "be accountable for all property received." 11 U.S.C. 704(2). A trustee who does not perform this duty is subject to termination of new case assignments. See 28 C.F.R. 58.6(a)(1) (a trustee may be suspended or terminated for a "[f]ailure to safeguard or account for estate funds.").

I have carefully reviewed all of the allegations concerning loss of estate funds. I find them to be without basis in the record before me. I discuss [B] and [D] in the next two sections, but discuss [C] in Section III. D. 4. below, because the loss of estate assets issue in that case is intertwined with the use of professionals issue.

^{16/} The objective data before me establishes that this trustee's aggregate return to unsecured creditors exceeded office and regional averages. Notice at Ex. 1. I have confirmed this with the Office of Review and Oversight, Executive Office for United States Trustees.

^{17/} Identified as "[D2]; [C]; [D]; [S]; [B]; [P]; [G] and [J]." Notice at 3.

[B]

The Notice concluded that “the reviewers found examples of actual failure to secure estate property [in [B]]: your retained accountant had to contact a third party, rather than you, to gain access to the debtor’s records.” Notice at 3. In the Report of Case Administration Review, the reviewers stated that:

“[a] note on the inside cover of one of the manila folders included the note ‘called counsel 2/8 to follow-up on bank acct & cash will send.’ The note was supported by a February 15, 2000-letter from debtor’s counsel to the Trustee (attached hereto as exhibit WW), which referred to a recent telephone conversation in which the Trustee requested turnover of the funds in the bank accounts and cash listed on the schedules. The letter from debtor’s counsel stated that the amount reported in the First Financial account was overstated and that at the time of the filing the account had \$1,930.92 on deposit, not \$2,559.00 as reported on Schedule B. Furthermore, a check issued on April 21, 1999 in the amount of \$1,781.19, was cashed in October 1999. At the time of the letter he indicated that the bank account was reduced to \$119.74, the same amount deposited into the estate account on February 21, 2000. This reduced amount was a result of the April check being honored by the bank and the fact that the \$10.00 in service charges were assessed for each of the months of October, November and December. The Trustee’s ten (10) month delay in securing bank account funds appears to have resulted in a loss to the estate of \$1,811.18.”

Notice at Ex. 3 (emphasis in original).

The trustee addressed the bank account issue in Exhibit M-27 to her Request for Review. There, she stated, “[t]he debtor was requested to provide bank statements concerning the accounts listed in the schedules. He did provide information concerning the [redacted], but noted that the [redacted] listing was an error in that the Debtor did not have a [redacted] account. Following verification from counsel that the listing was counsel’s error, and amendment was made. . . .” Request, for Review Ex. M-27.

The trustee also discussed this issue in Exhibit M-29 There, the trustee explained that “I had various conversations with [redacted] at [redacted] regarding the ownership of funds in this account and have discovered that this account was titled to [redacted]. Consequently, the debtor was asked to amend his schedules to remove the [redacted] account.” Request for Review at Ex. M-29. Finally, “[c]oncerning the delay in procuring the bank account, it is the policy of this office to immediately secure proceeds of bank accounts in several fashions: letters are immediately sent to the banks freezing the activity and requesting turnover; debtors are advised in writing prior to the 341 and orally at the 341 of the prohibition of activity concerning estate property. See Exhibit R-12 [*trustee’s form letter to banks*]. I certainly am willing to recompense the estate for harm encountered by a delay in procuring funds. Adding a tickler function to securing bank accounts should assist in reducing any delay.” Request for Review at Ex. M-33.

The trustee’s response could be read as admitting that estate funds were lost. Thus, the

United States Trustee reiterated in her Response that:

“The Trustee’s untimely administration of an estate bank account resulted in a loss of funds for this estate. The Trustee provides no evidence that she exercised any degree of due diligence early in the case to secure the estate bank accounts. The Trustee continues that she will ‘recompense the estate for harm encountered by a delay in procuring funds.’ The issue here is that the Trustee’s failure to secure an estate asset directly resulted in a loss to the estate.”

Response at 20.

The matter was finally resolved by a May 11, 2001-letter from the trustee. In it, the trustee clarified that no loss had occurred. The trustee explained that the debtor in the case turned over three checks to the trustee. One was the check in question. The trustee explained that the debtor recovered the check - uncashed - from the payee and forwarded the check to the trustee’s office. “The funds went directly from the Debtor’s bank account to the Estate account. The entire balance of the debtor’s account was later secured and also deposited into the estate account. No funds were lost in the transaction.” Attached to the letter were copies of a deposit slip for the check, the check, and the reverse of the check showing that it had been deposited. Id.

The United States Trustee responded to the May 11 letter in a letter dated May 22, 2001 - which she amended by letter dated May 23, 2001. In it, the United States Trustee noted that the May 11 letter clarified that funds had not been lost, but noted that the United States Trustee’s staff would have had no way of knowing this because it was impossible for them to determine from the files that this check had been deposited. The United States cited this as another example of the trustee not reporting matters correctly.

After much confusion, it seems clear the United States Trustee’s initial conclusion in her Notice that there was a loss in this estate was a mistaken one. Better recordkeeping on the part of the trustee could have avoided the misunderstanding altogether.

[D]

The Notice stated that in [D], the trustee’s “[f]iles contained no evidence that you secured estate property,” and the reviewers found examples of actual failure to secure estate property: you instructed the principal’s widow to liquidate the debtor’s bank accounts and send you the proceeds.” Notice at 3.

The Case Administration Review concluded “the Form 2 shows that the estate received funds from the turnover of the debtor’s bank accounts. The initial deposit of these funds did not occur until November 2, 1998, as reflected on the Trustee’s Form 2 (attached hereto as exhibit CC), four months after the Trustee were appointed. In fact, the §341 tape reveals that the Trustee instructed the late principal’s widow to liquidate the bank accounts and send the Trustee the proceeds. Delegating this responsibility is a breach of the Trustee’s fiduciary duty. Further,

the file contained no evidence that the Trustee demanded the turnover of these funds prior to the §341 meeting.” Notice at Ex. 3.

The trustee responded to these allegations in her Request for Review, explaining “. . . in the instance of [D], the allegation states the request is made to the Debtor, of course, the request is directed to Debtor’s counsel, an officer of the court prior to and during the 341 meeting. The voluntary turnover of an asset pursuant to the request of the trustee is an efficient administration.” Notice at 13.

After learning of this information, the United States Trustee’s reply did not allege this trustee’s conduct actually caused any loss. See Response at 20. The information before me indicates the trustee experienced difficulty in securing the account, but the asset in question ultimately was secured and no estate funds were lost.

Eight Cases Where Review Team Had Questions

The Notice noted a total of eight cases in which the review team could not determine whether losses had occurred. Among these, three cases involved allegations of actual loss: [D] and [B], discussed above, and [C], discussed below. I have analyzed the parties’ submissions on all the cases and find nothing that establishes a loss of estate assets. In each instance, the trustee has explained her administration to a sufficient degree such that if there is any other follow-up information the United States Trustee thinks appropriate, it should be requested in the normal course, outside the context of this appeal.

3. Reporting

Reporting is a core trustee duty. The requirement to produce timely, complete, and accurate reports on the administration of a case is rooted in a trustee’s fundamental duty as a fiduciary to be accountable for estate property. A trustee who fails to file timely, accurate reports is subject to termination. See Administrative Decision 97-A-7 ((1) for many years the trustee failed to submit reports for cases in which the trustee was trustee; (2) in 53 instances he did not file minutes for debtors’ meeting of creditors and/or final reports with the court; (3) he regularly submitted deficient TFRs; (4) he submitted 180 day reports that were habitually incomplete and inadequate; and (5) he took too long to file TFRs and TDRs.).

Timely filing is not an issue in this case. Rather, the United States Trustee acted because she concluded the trustee’s reports contained an excessive quantity of errors. Notice at 5-6 and Ex. 3. This seems particularly to have been a problem in 1998-1999 (see Request for Review at Ex. M-4, M-5, M5-A, —33, and Reply at Ex. 4 (and accompanying text) - but the United States Trustee contends that the trustee made too many mistakes both prior and subsequent to that period. Notice at Ex. 1; and Response at 5-12.

The United States Trustee is responsible for supervising the trustees within

her region. In furtherance of that duty, and as confirmed in a Memorandum of Understanding with the Administrative Office of the United States Courts, the United States Trustee must review a trustee's proposed TDRs and TFRs. See Handbook at 8-36 - 8-42 (discussing these review processes). This trustee's mistakes forced the office of the United States Trustee to spend time and resources reviewing and correcting her TFRs and TDRs. The trustee also failed to make requested changes quickly enough, which caused the Office of the United States Trustee to draft objections that later became unnecessary to file when the trustee made last second changes. On the other hand, at times the Office of the United States Trustee disapproved of her reports not because of inaccuracies but because of differences in business or legal judgment.

The trustee's suspension occurred in April 2000, during the same period she was developing extensive checklists to enable her to attempt to fix her reporting problems. This made perfect sense given her recent evaluation from the United States Trustee, Notice at Ex. 1. Reporting is one of those things that can be corrected through procedures and greater attention to detail if more serious problems are not involved.

The trustee's checklists appear to be comprehensive and well-designed to meet the United States Trustee's concerns if properly implemented. Among those checklists are a Bank Reconciliations form that contained tickling, voiding and reconciliation deadlines (Request for Review at Ex. M-7); a seven-page set of Instructions, Guidelines and Checklist for Preparation of Trustee's Final Report and Proposed Distribution of Property of the Estate (Request for Review at Ex. M-8); a TDR Preparation form that required verification that bank statements had zero balances, that Form 2 had a zero balance, that a TDR report had been run, that the report had been approved against the distribution, and that all originals were in the file as well as the last bank statement containing the zero balance was initialed and dated both by the preparer and the reviewer (Request for Review at Ex. M-9); a 180-Day Report Preparation form that contained guidelines for accurately completing forms 1, 2, and 3 (Request for Review at Ex. M-10); a five page set of guidelines to ensure that petitions, schedules, statements of financial affairs, and 341 meeting requirements were complied with (Request for Review at Ex. M-11); a Monthly Administration form that ensured that all asset cases would have completed bank reconciliations, that the status of outstanding receivables/assets was reviewed, that the status of closing was reviewed, that the status of outstanding information requests was reviewed, that the status of professional activity was reviewed that forms 1 and 2 were run and their accuracy reviewed, and time data was input (Request for Review at Ex. M-12); the report contained a similar checklist for no asset cases (Request for Review at Ex. M-12); a form to be used for the continuance of 341 meetings and the provision of new dates (Request for Review at Ex. M-13); an NDR Submission Protocol that dealt with the submission of documents within 72 hours of all 341 meetings to the clerk, the United States Trustee, and placement in the trustee's file, that continuances be documented and appropriate forms submitted, and that 341 interrogatories be adequately accounted for (Request for Review at Ex. M-14); and an Accounts Receivable Control Sheet that would provide for each case, the company's name, the invoice date, the invoice number, the invoice amount, the date mailed, the demand letter amount, the amount collected, the balance due, and appropriate comments and remarks (Request for Review at Ex. M-15).

The Review team reviewed older cases during its late-July, 2000 site visit, in most, if not all, of which the trustee had not used these forms. Notice at Ex. 3. By the time the report was issued in February 2001, that data were even more outdated. Notice at 1. Thus, the Notice was based upon events that occurred before the trustee's suspension had ended and did not reflect the implementation of the trustee's corrective procedures.^{18/}

The record as a whole indicates that rather than terminating the trustee on such stale data, it was appropriate to determine whether the trustee's new procedures and new personnel could rectify her reporting problems. In her Response, Sur-reply and other post-Notice filings, the United States Trustee alleges that inadequate reporting has continued. See, e.g., Response at 5-12. The trustee vigorously denies this. See Request for Review at 4-5; Reply at 4-5, 12-16. The record does not include the underlying documents from the case files that would establish the existence or the absence of these perceived post-implementation errors, and I cannot determine from the material before me how significant the trustee's post-implementation errors have been.

Based upon the record before me, it appears undisputed that the trustee's recordkeeping was problematic, particularly during the late-1998 and 1999 time period. On the other hand, there is no evidence her reports were not timely filed, that she lacked adequate internal controls, or that her record keeping mistakes placed estate assets at risk. The trustee has implemented detailed procedures in an effort to correct her record keeping problem. I can identify no reason why this problem could not be entirely corrected if the trustee exercises diligence. Accordingly, I determine that it is appropriate to give the trustee a limited opportunity to demonstrate that her deficiencies have been cured.

It is the trustee's responsibility to submit accurate reports if she wishes to remain on the panel. The United States Trustee should not have to tolerate mediocre reporting from a trustee nor should the United States Trustee's staff have to act as a continual proof-reader, bringing mistakes to a trustee's attention that the trustee should have caught on her own. At the same time, the trustee should be made aware of the severity of the reporting problem and the attendant consequences if the problem is not remedied.

The trustee's next Semi-Annual report will cover the period ending December 31, 2001. The United States Trustee should review that report, as well as TFRs and TDRs submitted during the period July 15, 2001 - December 31, 2001. If the United States Trustee finds apparent mistakes, she should provide the trustee with an opportunity to explain whether those are mistakes or are the result of misunderstandings. If, after gathering this data, the United States Trustee concludes this trustee has submitted reports with (1) material inaccuracies or omissions that prevent the United States Trustee from accounting for estate assets or transactions, or determining compliance with applicable statutes, rules, regulations, and guidelines, or (2) an

^{18/} Even stale data would justify stern remedial action if the information established loss of, or a significant threat to, estate assets. The record here does not establish the existence of loss or significant threat.

unusually large number of errors requiring correction, and thereby delaying the prompt filing of TFRs or TDRs, or the review of 180-Day Reports, the United States Trustee may wish to take additional administrative action, which would then be subject to appropriate administrative review.^{19/}

4. Supervision of Professionals

A trustee’s assignment of new cases may be suspended or terminated if the trustee “[f]ail[s] to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of the case.” 28 C.F.R. 58.6(a)(7). See, e.g., Administrative Decision 00-0003 (trustee suspended, among other reasons, for permitting professional to receive compensation “for work that was apparently not performed and for which she believed was unnecessary”). In that administrative decision, a trustee’s overuse of associated counsel, which financially benefitted the trustee at the expense of creditors, formed a principal basis for non-renewal. Id. The record in that case presented clear evidence of misconduct because the record before the Director established that the trustee’s and her associated law firm’s fees had been reduced by the bankruptcy court in four different cases, upon the motion of the United States Trustee, as excessive. Id. The Director found that “the trustee has employed her own law firm in every asset case to date, and on average the trustee and her law firm together receive slightly more than half (51%) of the average estate, while general unsecured creditors on average receive only 12%.” Id. Indeed, in one of the four cases in which her fees were reduced, “the trustee and her law firm appear to have received 76% of the estate's funds on hand.” Id.

Unlike the facts of Administrative Decision 00-0006, there is no allegation in this case that the trustee has sought to pay excessive fees to herself or to a law firm associated with the trustee. Unlike that decision, there is no evidence in the record that the trustee’s fees, or those of associated counsel, have ever been reduced by a court as excessive or as having been sought for unnecessary services. Indeed, the data appended to the trustee’s most recent Performance Review, Notice at Ex. 1, makes clear that the trustee’s distribution to the trustee and her law firm were below office and regional averages:

	TRUSTEE	OFFICE	REGION
% Distributed to Trustee/Trustee’s Firm (for Trustee Comp. And Atty/Prof. Fees)	4.66%	6.42%	8.57%

Notice at Ex. 1. Data compiled by the Office of Review and Oversight, Executive Office for

^{19/} The trustee’s reports should not be held to a higher standard than those of other trustees within her region.

United States Trustees, for 52 of the trustee’s cases do not indicate that this trustee’s fees and those of her associated firm are excessive in comparison with other trustees’. Thus, unlike Administrative Decision 00-0006, there is no evidence in the record that this trustee seeks to charge excessive fees to the estates she administers.

Nor does the record reflect she distributes excessive payments to other professionals:

	TRUSTEE	OFFICE	REGION
% Distributed to Professionals (not including Trustee/Trustee’s firm)	13.91%	17.50%	12.96%

Id. The Office of Review and Oversight also reports that the trustee’s returns to unsecured creditors in 52 cases were better than office and regional averages. They were slightly below national averages.

The Notice supported its conclusion this trustee failed to supervise professionals based upon information obtained during the July 2000, Case Administration Review. Based upon that review, the United States Trustee identified six cases in which she believed the trustee had failed to supervise professionals. Notice at 3-5.

The first was [D2]. The United States Trustee raised two concerns about this case: (i) the trustee retained a law firm to file two adversary actions four months before the firm was retained, and (ii) the trustee used an accountant who had a conflict of interest. I conclude, based upon an affidavit submitted by the accountant, that the record fails to establish any conflict or other misconduct on that point.²⁰

²⁰ The parties dispute whether in the [D2] case, the trustee used an accountant to perform services for her who had represented a creditor and was paid by the creditor. Compare Request for Review at 14 (noting that “the accountant did **not** perform work **on behalf** of” the creditor (emphasis in original)) with Notice at 4 and Response at 16 (maintaining the position this accountant had worked for the creditor). After much briefing, an affidavit from the accountant finally settled the matter. Reply at Ex. 5, In the affidavit, the accountant unambiguously stated “[a]t no time did I, or any member of this firm perform . . .work on behalf” of the creditor. Id. It appears the estate lacked assets to pay for the review of certain matters, and the creditor allowed the trustee to use the accountant to confirm the trustee’s evaluation of the facts of the case. Indeed, a letter from the accountant to the trustee, which was attached to the United States Trustee’s Notice, established that at least some of the work done by the accountant was to further an “investigation of [the debtor] by the Office of the United States Trustee.” Notice at Ex. 3, ex E. The United States Trustee was aware that work was being performed. See, e.g., Reply at 4. Although the United States Trustee submitted a “Sur-Reply” to the Reply, dated April 18, 2001, she does not deny the accuracy of the accountant’s statements. Sur-Reply at 4.

Regarding the counsel issue, I agree with the United States Trustee that trustees should not use counsel before their retention has been authorized by the court. However, the record does not establish a pattern of this type of conduct. Counsel can be retained *nunc pro tunc* if justified by exceptional circumstances. In re Arkansas Co., Inc., 798 F.2d 645, 650 (3rd Cir. 1986). In the [D2] case, the Office of the United States Trustee was “aware of the delay in retaining counsel” and did not object to the retention.^{21/} Request for Review at 14. The record before me thus establishes there was no objection to the retention application, and the court approved it. In sum, this seems to have been an isolated event rather than a recurring problem. See Handbook at 8-21 (noting “some courts permit retroactive or *nunc pro tunc* orders of employment in special circumstances, but even where permitted, such orders should be rarely sought.”).

The second allegation arises from [C]. Notice at 4. There, the United States Trustee alleges that the trustee had counsel send a demand letter to a bank to turnover funds in the debtor’s account. Id. The United States Trustee also concluded the trustee “compounded” this failure to supervise by letting the funds remain in the account as of January 11, 2001. Id.

Regarding the use of counsel to send demand letters, I conclude that the trustee engaged in no form of serious misconduct. Although trustees should not delegate routine trustee duties, there may be occasions in which it is entirely appropriate to ask counsel to send demand letters. In this case, the record does not establish why the United States Trustee specifically believed the particular facts of this case made it inappropriate for counsel to send the demand letter. Absent such information, I cannot conclude the trustee acted inappropriately in that regard.

The trustee in response also noted that “initial demands for turnover of accounts receivables” typically are done by the trustee, who “draft[s], send[s] and track[s] initial accounts receivable demand letters.” Request for Review at 17. The trustee explained that in those instances in which professionals perform the task, “[n]either accountants nor attorneys charge the estate for ministerial or clerical functions.” Id. I find no fault with such a stated practice.

The United States Trustee also alleges that the trustee’s failure to properly supervise her professional in [C] resulted in \$865.05 in the debtor’s bank account not being brought into the debtor’s bankruptcy estate, thereby causing a loss. Notice at 3, 4, Ex. 3. It appears from the record before me that the review team did not ask the trustee why the \$865.05 remained uncollected. The trustee explains:

“The bank refused demand for turnover without a court order. The time and money involved to file a complaint, as outlined by Trustee’s counsel would exceed the recovery. More importantly, there was some concern that the proceeds of the account were subject

^{21/} The record in this case establishes the trustee met with counsel for the United States Trustee on January 14, 1998, at the same time she was filing her application to retain the counsel, and the United States Trustee did not object to the appointment of this counsel. Compare Request for Review at 14 (discussing January 14, 1998 meeting between trustee and United States Trustee’s counsel regarding the retention of this law firm) with Notice at Ex. 3 (noting that trustee’s application to employ was “dated January 14, 1998”).

to the 363 stipulations that gave automatically deducted membership fees deposited electronically to the purchaser. Thus there was a distinct possibility that this asset was no longer property of the estate.”

Request for Review at 15. See also Request for Review at Ex. M-20 (evidencing that a letter was sent to the bank); and Request for Review at Ex. M-21 (Asset Purchase Agreement). The trustee further explains that:

“The debtor possessed an operating account and an account for the automatic debit of membership fees and electronic transfer of said fees. The Asset Purchase Agreement attached hereto as Exhibit R-8, clearly shows that this account belonged to the purchaser.”

Request for Review, Ex. M-33.

In response, the United States Trustee contends that the mere possibility that the funds might not be property of the estate “does not condone [a trustee’s] failure to secure [the] asset” for the estate. Response at 17. I believe this misperceives the trustee’s reason for not pursuing this potential asset. The record indicates that the questionable nature of ownership simply buttressed the trustee’s business decision not to pursue the asset because the cost of collection would exceed its value. Given this, I cannot conclude the trustee acted improperly in determining that the questionable ownership of the funds further supported her business decision not to seek to pursue the \$865.05.

The United States Trustee next alleges that in [D], the trustee did not seek to retain an accountant but nevertheless used one “to review accounts receivable records.” Notice at 4. In response, the trustee explained that “[n]o accountant or other professional was hired in this matter because the size of the estate was so small, doing so would thwart efforts to produce a return to creditors.” Request for Review at 15. The trustee also explained that she personally analyzed the account receivables and the accountant only corroborated her conclusions. Id.

I agree with the United States Trustee that the appropriate practice is for a trustee to rely upon professionals only if the court has appointed them after determining the professional suffers from no conflict of interest and is disinterested. Although the trustee professes good motives in using an unretained professional, and it is not alleged the professional could not have been appointed, the United States Trustee is acting wisely in encouraging this trustee to use only retained professionals. That said, the record does not establish that the trustee’s use of unretained professionals is a pattern of conduct justifying termination; instead this appears to be an isolated event.

In the fourth case, [B], the United States Trustee alleges a failure to supervise an auctioneer because the trustee failed to obtain turnover of auction proceeds within the 30 days required by the United States Trustee Handbook and by local policy. Notice at 4. In response, the trustee explained that a delay in obtaining title to one of the auctioned vehicles resulted in proceeds being held for 41 days. Request for Review at 15-16. The United States Trustee’s Response does not contest this. Response at 12, 16 (discussing other aspects of this case); Sur-Reply (no discussion of this case); and United States Trustee’s letter of May 22, 2001 (discussing other aspects of this case).

In the fifth case, [P], the United States Trustee noted that counsel prepared a demand letter and a TFR in the case. Notice at 4. As I discussed above, I conclude having counsel transmit a demand letter is not inappropriate conduct justifying termination.

Regarding the preparation of the TFR in [P], the trustee argues when “a professional can demonstrate the need to perform duties normally considered that of the trustee, the involvement of the professional has been permitted.” Request for Review at 16. This trustee would proceed at her own risk if she routinely delegated such basic trustee duties to her professionals. See 11 U.S.C. 704 (setting forth trustee duties). A trustee who has counsel perform her duties is subject to reduced fees, as is her counsel. Moreover, the preparation and filing of a final report, in particular, is a core trustee duty, which the trustee should perform without the assistance of counsel. See, e.g., United States Trustee v. Porter, Wright, Morris & Arthur (In re Knapp Co.) 930 F.2d 311 (4th Cir. 1991)(attorney cannot be compensated for performing ministerial duties of trustee); United States v. Freeland (In re Spungen) 168 B.R. 373, 377 (N.D. Ind. 1993)(same noting “if the Trustee can’t perform the duties of a Trustee with a modicum amount of proficiency, he is not authorized to be a Trustee.”). A pattern of such conduct would form the basis for supervisory action by the United States Trustee.

The final case, [G], again involves the use of a professional to send demand letters. Notice at 4-5. I have previously addressed that issue. In addition, the United States Trustee alleges this trustee improperly allowed the demand letters in the [G] case to state that payment should be made to the accountant rather than the trustee, that the accountant received checks and forwarded them to the trustee, and the trustee failed to confirm that all checks were transmitted by the accountant to the trustee. Notice at 5. These are more serious charges. In response, the trustee explained that this was a complex case with “thousands” of “potential account[s] receivable.” Request for Review at 16. The trustee explained that “[t]he accountant simply performed a clerical function” in sending out demand letters by “merging the information already in his computer onto a demand letter.” Request for Review at 17. The demand letter was sent out under the trustee’s authorized signature on the trustee’s letterhead. See Request for Review at Ex. M-23 (sample demand letter).

Regarding the submission of checks to the accountant rather than the trustee, the record establishes this occurred because an associate at the accounting firm made a mistake in asking that the checks be sent to the accountant rather than the trustee. See Request for Review at Ex. M-24 (letter from the accountant to the trustee stating “[a]n associate in my firm prior to my reviewing the document, sent the demand letter. I apologize for this. It was an error and not in accordance with our firm policy. We have discussed the modification of the demand letter to require payment sent to you directly rather than my office.”). See also Request for Review at Ex. M-23 (demand letter in this case on the trustee’s letterhead demanding that creditor “pay these monies to the order of” the trustee).

In her Request for Review, the trustee explained that all the checks that creditors sent the accountant as the result of associate’s mistake were forwarded by the accountant to the trustee

and the trustee verified receipt. Request for Review at 17.^{22/}

In response, the United States Trustee concludes:

“The Trustee is misrepresenting the facts respecting the demand letters sent out by her professionals in the case of [G]. The Trustee states that the error was immediately rectified. The letters issued by the accountant were dated June 6, 2000 while the letter she references reveals that she spoke with the accountant on July 5, 2000.”

Response at 17.

This response does not rebut the main points the trustee makes: (i) her normal practice is to have demand letters sent on her letterhead; (ii) her normal practice is to have checks made payable to her and sent to her; (iii) in this case, a junior person at her accountant made a mistake and sent out erroneous demand letters; (iv) upon discovery, that problem was rectified; (v) all checks were forwarded to the trustee; (vi) transfer was verified; and (vii) no estate funds were lost. I do not find that such a course of conduct supports a decision to terminate a trustee’s eligibility to receive future case assignments.^{23/}

IV. Conclusion

Based upon my review of the record, including the written submissions of the United States Trustee and the trustee, I reverse the United States Trustee’s decision to terminate this trustee’s eligibility to receive new chapter 7 cases.

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

^{22/} The trustee does not explain, however, how she verified that all checks were forwarded.

^{23/} There is one other issue the parties spend considerable time briefing that I will mention. In the [D], the parties contest whether the trustee worked out an improper carve-out agreement with a secured creditor, [redacted]. The United States Trustee believes the agreement produced an undeserved windfall for unsecured creditors at [redacted] expense. The Office of the United States Trustee claimed this type of agreement was unprecedented and violated section 724 of the Code, 11 U.S.C. 724. See Response at 7-12; Sur-reply at 10. The trustee disagreed with the United States Trustee’s interpretation of section 724, and stressed that [redacted] willingly entered into the agreement. The record before me contains an April 5, 2001 letter from the Assistant Counsel of [redacted] who negotiated the settlement with the trustee. Reply at Ex. 13. In her letter, the Assistant Counsel states the arrangement was not exceptional - in fact, she had “made such arrangements on [redacted] behalf in the past, and have not been questioned by anyone from the US Trustee’s office.” The record does not reflect why the Office of the United States Trustee went to unusual efforts to question a voluntary settlement in [D]. I find no basis to support termination on this point based upon the record before me.

Dated: July 24, 2001

Martha L. Davis
Acting Director
Executive Office for
United States Trustees