

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 99-0004
[Decided February 9, 2000]

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

[REDACTED], a member of the panel of chapter 7 trustees for the United States Bankruptcy Court for the Eastern District of [REDACTED],^{1/} seeks review of a decision by the United States Trustee for Region [REDACTED] suspending her receipt of new case assignments.^{2/} Based upon the record before me, I affirm the United States Trustee's decision.^{3/}

I. Course of this Proceeding

The United States Trustee notified the trustee on December 13, 1999 that new case assignments would be suspended due to perceived inadequacies in the trustee's case administration (the "Notice"). The United States Trustee also issued an Interim Directive on that date because the United States Trustee concluded that a continued assignment of cases to the trustee during the review period would "place the safety of estate assets at risk" (the "Interim Directive").^{4/} By letter dated December

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

^{2/} United States Trustees are Justice Department officials who are appointed by, and serve at the pleasure of, the Attorney General. 28 U.S.C. 581(a) and (c). The Director of the Executive Office for United States Trustees is a Justice Department official who acts under authority delegated by the Attorney General. Panel trustees, such as this trustee, generally serve under renewable appointments that have a term not to exceed one year.

^{3/} The record in this matter includes the United States Trustee's decision; the trustee's request for review; the United States Trustee's response; and the documents accompanying those various submissions.

^{4/} In normal circumstances, a suspension takes effect upon the expiration of a trustee's time to seek review by the Director or, if the trustee timely seeks such review, upon the issuance of a final written decision by the Director. 28 C.F.R. 58.6(c). In the unusual circumstance where a United States Trustee specifically determines that one of four extraordinary circumstances exists the United

29, 1999, the trustee filed a request for review of the suspension decision with the Director of the Executive Office for United States Trustees (the “Request for Review”) and asked that the Interim Directive be stayed so the trustee could continue receiving new case assignments during the review period (the “Stay Request”). By letter dated January 6, 2000, I declined to stay the Interim Directive.^{5/} On January 12, 2000, the United States Trustee filed her response to the trustee’s Request for Review (the “Response”).

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

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 particular

States Trustee may issue an Interim Directive, which immediately discontinues the assignment of new cases. 28 C.F.R. 58.6(d) (setting forth the bases for an Interim Directive). If a United States Trustee issues an Interim Directive, the trustee may ask the Director to stay it. 28 C.F.R. 58(6)(e).

^{5/} I did so because the continued assignment of new cases to this trustee would place the safety of estate assets at risk. See 28 C.F.R. 58.6(d)(1). The trustee informed the United States Trustee on November 24, 1999, that the trustee’s sister-in-law — who was her only full time employee — might have stolen or diverted funds from a number of estate accounts. For this reason, the trustee relieved this employee of her duties, thereby depriving the trustee of her only full time employee. At this time, the trustee had approximately five hundred open cases, most of which were asset cases. This was too many cases for this trustee to manage if new cases were assigned to this trustee.

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 suspended new case assignments to this trustee for three principal reasons. These included poor performance, lack of adequate staffing, and the trustee's need to focus her efforts on discovering whether the estates placed under her care may have been the victims of theft.

The record in this case reveals this trustee has a long history of inadequate case administration. The United States Trustee previously suspended new case assignments to this trustee in August 1997. See Administrative Decision 97-0001 at 1.^{6/} On November 12, 1997, while the trustee was on suspended status, the United States Trustee provided the trustee with her annual performance review. It concluded that the trustee needed to improve (1) the timeliness, accuracy and completeness of her trustee final reports; (2) the appropriateness and accuracy of her objections to creditors' claims and her proposed distributions to creditors; (3) her management of section 341 meetings of creditors; (4) her effectiveness in securing and protecting estate property; (5) her compliance with bankruptcy laws and procedures; (6) her timeliness in filing pleadings and in serving those pleadings; (7) the timeliness, accuracy and completeness of her 180 Day Reports; (8) her effectiveness and efficiency in collecting and liquidating estate assets and in collecting receivables, filing preference actions, and in recovering the maximum amount possible for the benefit of creditors; (9) the timely closure of her cases; (10) her preparation of bank reconciliations for estate accounts and her follow-up on problem bank statements; (11) her diligence in objecting to debtors' attempts to obtain discharge of their debts when a discharge was not warranted; and (12) her response to inquiries from the public and parties in interest and to requests of the United States Trustee. Id.

On November 20, 1997, the United States Trustee notified the trustee that she had not been reappointed to the panel of chapter 7 trustees when her term expired on November 19. Id. The trustee appealed that non-renewal. Administrative Decision 97-0001. After full consideration, I returned the trustee to the panel, although she remained on suspended status. Id. at 2 and fn. 4. I did so because the record revealed that notwithstanding the non-renewal the United States Trustee had not made a final determination whether the trustee should remain on panel. Id. at 1-2. Both immediately prior to and after the issuance of the non-renewal, the United States Trustee informed this trustee that the trustee would be allowed to remain on panel for some period of time while the trustee worked to rectify her inadequate performance. Id. at 2. Given the expressed intent to allow this trustee to continue on panel, I determined that the trustee should remain on the panel until such time as the United

^{6/} Administrative Decisions are found at the following location on the Department of Justice's Internet Web Site: www.usdoj.gov at /ust/Rules, Decisions, Guidelines/USTP Administrative Decisions.

States Trustee determined the trustee should no longer do so. Id. I encouraged “the region to reach a final decision regarding her status on the panel as expeditiously as possible, consistent with the region’s wise decision to afford [the trustee] the opportunity to attempt to rectify her performance problems.” Id. at fn. 4.

Although I returned the trustee to the panel on suspended status, my January 1998 decision specifically noted that it remained “unclear . . . whether th[e] [trustee’s attempts to improve her performance would] be successful.” Id. at 2. Based upon the record before me, I agreed with the United States Trustee’s determination that the trustee needed to improve her performance. Id. at 2. I also noted that the regional staff had spent considerable time working with the trustee in an effort to help improve her performance, had given the trustee substantial time in which to improve her performance, and had reduced her caseload so the trustee could focus her attention upon rectifying areas that needed improvement. Id.

In late 1997, the trustee submitted a Work Plan (the “Work Plan”) to the United States Trustee in which the trustee set out a framework for improving her administration of bankruptcy cases. Id. ; Notice at 3; Response at 4. Among other things, the Work Plan committed the trustee to submitting ten trustee final reports (“TFRs”) each month, and the United States Trustee expected the trustee to submit a similar number of trustee distribution reports (“TDRs”) as well. Response at 4. See Handbook for Chapter 7 Trustees (Oct. 1, 1998) at chapter 8, sections S(1) (discussing TFRs) and S(3) (discussing TDRs) (available at <http://www.usdoj.gov> at *ust/Private Trustee Library, 1998 Chapter 7 Trustee Handbook (Oct. 1, 1998)*); see also 11 U.S.C. 704(9) and Fed. R. Bankr. P. 2015(a)(1) (discussing the submission of reports).²¹

A TFR is a report that a trustee submits before distributing assets to creditors. See Handbook for Chapter 7 Trustees (Oct. 1, 1998) at chapter 8, section S(1). It discloses to the court, the debtor, the creditors, and the United States Trustee what assets have been recovered and liquidated by the trustee and the manner in which the trustee proposes to disburse funds among the estate’s 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 if estates are to be administered fairly and efficiently. See 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); see also Administrative Decisions 97-A-4, 97-A-6, and 97-A-7 (discussing TFRs).

A TDR is a second important disclosure document. It explains how the trustee actually disbursed those funds. See Handbook for Chapter 7 Trustees (Oct. 1, 1998) at chapter 8, section S(3). Once all checks have cleared the trustee’s account, the trustee submits the TDR to the United

²¹ The Handbook represents a statement of operational policy, Handbook at (i), and a copy is provided to each chapter 7 trustee.

States Trustee for review. The TDR confirms that the trustee has completed distribution and no longer holds any estate funds or property. All original bank statements and canceled checks since the filing of the TFR, including the last bank statement showing a zero balance, are to be attached to or submitted with the TDR. Id.

After approving the Work Plan, the United States Trustee modified the suspension by assigning the trustee approximately one-half the number of new cases that other trustees were receiving. Response at 5 and Ex. 4. At that time, the United States Trustee stressed that assets must be timely and properly administered; the delays experienced in the past must not be repeated; errors must be reduced; and creditors' meetings must occur in timely fashion. Response at Ex. 4. Finally, the United States Trustee stressed that the trustee must meet the requirements set forth in the Work Plan. Id.

On June 1, 1999, the United States Trustee issued a Trustee Performance Review for this trustee for the period June 1, 1998 through May 31, 1999 (a copy is attached to the United States Trustee's Notice). The Performance Review identified a number of problems with the trustee's performance, including many of the same problems that led to the trustee's 1997 suspension. Id. Among other things, the Performance Review noted that the trustee's TFRs and TDRs had more errors than other trustees' and that the United States Trustee's staff had to spend too much time monitoring the trustee's administration of cases. Id. The Performance Review also noted that the trustee had not complied with the terms of her 1997 Work Plan because she had filed only 77 TFRs and 47 TDRs during the twelve-month review period. Trustee Performance Review at 2.

The trustee fell far short of her TFR and TDR filing commitment both in 1998 and 1999. In 1998, the trustee submitted only 90 TFRs and 65 TDRs. In 1999, she submitted 79 TFRs and 63 TDRs. Response at 4. Only twice in 1998 did the trustee meet her monthly goal of submitting ten TFRs. Response at Ex. 3. In 1999, she met that goal only four times. Id. Similarly, she submitted ten or more TDRs only three times in 1998 and only three times in 1999. Id. Indeed, the trustee submitted no TDRs in seven of those 24 months. Id.

Moreover, there were serious errors in reports the trustee did submit. See June 1, 1998-May 31, 1999 Trustee Performance Review attached to Notice, and Response at 2; see also Response at Ex. 7 (identifying specific cases in which improper reports were filed). These included overpayments to herself for trustee fees; incorrect disbursements; and duplicate payment of claims. Response at 2.

In addition to her failure to file timely and accurate TFRs and TDRs, the record in this case also reveals the trustee failed to submit proper 180 Day Reports. Response at 5-6 and Ex. 8 (analyzing the trustee's failure in this regard). Each trustee must submit a report on all their cases to the United States Trustee at least every six months. *Handbook for Chapter 7 Trustees* (Oct. 1, 1998) at chapter 9, section B. These 180 Day Reports recount the status of all cases that have assets that can be liquidated for the benefit of an estate's creditors. Id. Among other things, the reports describe the actions the trustee has taken in administering each case, account for the property the trustee has received, describe

the steps the trustee has taken to liquidate those assets, identify all cash receipts and disbursements, and show that bank statements are accurate and have been reconciled.^{8/} Id.; see also Administrative Decision 97-A-4 (discussing 180 Day Reports).

Thus, the 180 Day Report is an important supervisory tool that enables the United States Trustee to evaluate all aspects of a trustee's performance. It helps the United States Trustee determine whether the trustee is adequately protecting debtors and creditors and effectively and expeditiously managing estates. The report also helps prevent and detect fraud. Id.

The record in this case includes a detailed analysis of this trustee's 180 Day Reports. See Response at Exhibit 8 (analysis of the trustee's 180 Day Reports). It reveals the trustee's reports were deficient in significant ways. The trustee failed to file a report in a large number of cases. Response at 5 and Ex. 8. In some cases the bank balances on Forms I and II did not agree. Id. In others, her reports showed residual bank balances when there should have been none. Id. These were not aberrations. The record establishes there were many cases in which the trustee failed to file timely or correct 180 Day Reports. Response at Ex. 8.

In addition to performance problems, the United States Trustee also suspended new case assignments because the trustee lacked adequate staff to administer new cases. Notice at 2; Response at 5. On November 24, 1999, the trustee informed the United States Trustee that the trustee's sister-in-law, who was her only full time employee, might have stolen or diverted funds from the estates that the trustee was responsible for administering. Notice at 1. As a result, the trustee lost her only full-time employee. Notice at 1 and 2. Among other things, this employee prepared the trustee's TFRs, TDRs, 180 Day Reports, and had handled the trustee's banking transactions. Notice at 1. The trustee had only one other employee, a student who worked part-time for the trustee while going to school. Notice at 2. Although the trustee was willing for the student to begin working full time, that did not solve the trustee's staffing problems because the student lacked the experience and knowledge to step into the shoes of the trustee's sister-in-law, who had been responsible for preparing TFRs, TDRs, and 180 Day Reports. Id.

Finally, the United States Trustee suspended new case assignments because the trustee was going to have to spend time helping determine whether estate funds were missing in each of the hundreds of cases she was administering. Id. Because this would place demands upon her time, the United States Trustee concluded it would diminish her ability to administer new case assignments. Id. at 1 and 2.

^{8/} Trustees use three forms — Forms I, II, and III — to present this information in their 180 Day Reports. For a discussion of these forms see *Handbook for Chapter 7 Trustees* and the appendices thereto (available at <http://www.usdoj.gov> at /ust/Private Trustee Library, 1998 Chapter 7 Trustee Handbook (Oct. 1, 1998).

Based upon this record, I conclude the United States Trustee's decision to suspend this trustee is a reasonable exercise of discretion and is supported by the record. The un rebutted record in this case establishes that this trustee has failed to close her cases promptly, has failed to administer them properly, and lacks the staff to rectify these serious problems.

More than two years ago, the trustee and the United States Trustee devised a Work Plan to help the trustee rectify her performance inadequacies and improve her case closure rate. The trustee has consistently fallen short of the goals set out in that plan. Indeed, her case closure rate is far worse than other chapter 7 panel trustees in this district. As of January 10, 2000, for example, this trustee had 55 cases that were three years old or older. Response at 5 and Ex. 6. The three trustees with the next highest number of three year or older cases had a total of 10 such cases, seven such cases, and three such cases. Response at 5. Thus, this trustee had two and a half times the number of very old cases as did the three next worst trustees combined. Id. As the United States Trustee notes, this is particularly troubling because this trustee had been on half rotation since early 1998, which should have given her ample time to close her lingering cases.^{9/} Id.

The lack of adequate staff and the trustee's failure to submit accurate reports also supports the United States Trustee's decision to suspend this trustee. The record reveals that prior to the departure of her only full time employee, this trustee was not closing cases expeditiously and was committing too many errors in those cases she was seeking to close. The sudden departure of her key employee worsened an already unacceptable situation.

Finally, suspension is justified because the possible theft of estate funds means this trustee must spend a significant amount of time reviewing her case files to determine the extent to which estate funds are missing. Because this will reduce the time she otherwise might have to administer new case assignments, the United States Trustee acted wisely in suspending such assignments.

IV. Conclusion

The decision to suspend this trustee was an appropriate exercise of the United States Trustee's discretion and is supported by the record. The trustee has experienced a broad array of problems. This trustee clearly needs an opportunity to devote more time to closing her pending cases and working

^{9/} The trustee blames some of her failures upon the non-cooperation of her bank. Request for Review at 3. By the trustee's own admission, she began experiencing problems with her bank only around December 1, 1999, when the bank apparently learned about her sister-in-law's alleged defalcations. Id. Even if the bank has failed to cooperate, it does not explain why this trustee utterly failed to meet the 1998 and 1999 goals she set in the Work Plan she submitted to the United States Trustee. Response at 2. Moreover, to the extent the trustee's bank is refusing to cooperate with the trustee it is not apparent how she could fulfill her duties to these estates' creditors.

to resolve her performance deficiencies. She also needs to be freed from the distraction of new case assignments while she works with the United States Trustee Program to identify the nature and scope of any defalcations that may have occurred on her watch.

Accordingly, 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 to suspend the trustee's eligibility for assignment to new chapter 7 cases.

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

Dated: February 9, 2000

Joseph Patchan
Director
Executive Office for
United States Trustees