

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

**Final Agency Action
Case No: 15-003**

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

, a chapter 13 standing trustee for the (the “trustee”), seeks review of a decision by the United States Trustee for Region (the “United States Trustee”)¹ terminating the trustee’s eligibility to receive new case assignments and removing him from his appointment as standing trustee. Based upon my review of the administrative record, I affirm the United States Trustee’s decision.

I. Course of this Proceeding

Since , the trustee has served as a chapter 13 standing trustee for the . By Notice of Termination dated June 22, 2015 (the “Notice of Termination” or “Notice”), the United States Trustee removed the trustee from his appointment as a chapter 13 standing trustee based upon repeated false statements or omissions concerning his failure to timely file his personal federal income tax returns and pay his personal federal income taxes, and the allegations in an action pending before the bankruptcy court that call the trustee’s financial responsibility and trustworthiness into question. Notice of Termination at 1-8.

On July 9, 2015, the trustee requested that the Director of the Executive Office for United States Trustees (the “EOUST”)² review the United States Trustee’s decision to remove him as chapter 13 standing trustee (the “Request for Review”). Request for Review at 1. On July 24, 2015, the United States Trustee submitted a response to the trustee’s Request for Review (the “Response”). Response at 1.

On January 22, 2016, the United States Trustee submitted additional information relevant to the matter that the United States Trustee became aware of during the course of discovery in the action pending before the bankruptcy court, which the Deputy Director accepted for consideration pursuant to 28 C.F.R. § 58.6(h) (“Supplemental Information”).³ Supplemental Information at 1.

¹ United States Trustees are officials of the Department of Justice who are appointed by the Attorney General. 28 U.S.C. §§ 581(a) and (c).

² The Director of the EOUST is a Department of Justice official who acts under authority delegated by the Attorney General. 28 C.F.R. § 0.37. EOUST Director Clifford J. White III is recused from this matter. Therefore, EOUST Deputy Director and General Counsel Ramona D. Elliott issues this final agency decision.

³ It is not uncommon for trustees to submit additional information for consideration in connection with an administrative review. Although the trustee was afforded an opportunity to respond to the United States Trustee’s Supplemental Information, he did not provide a response or any additional information for consideration.

Accordingly, the administrative record in this matter consists of: (1) the United States Trustee's Notice of Termination and supporting exhibits ("UST Exhibits"); (2) the trustee's Request for Review and supporting exhibits ("Trustee's Exhibits"); (3) the United States Trustee's Response to the trustee's Request for Review; and (4) the United States Trustee's Supplemental Information and supporting exhibits ("UST Supplemental Exhibits").

II. Standard of Review

In reviewing the United States Trustee's decision, I must determine:

1. Whether the United States Trustee's decision is supported by the record, and
2. Whether the United States Trustee's action is an appropriate exercise of discretion.

See 28 C.F.R. § 58.6(i).

I may "adopt, modify or reject the United States Trustee's decision to suspend or terminate the assignment of future cases to the trustee." Id. My decision shall constitute final agency action. Id.

III. Analysis

A. Duties of the United State Trustee and the Chapter 13 Standing Trustee

Chapter 13 of the Bankruptcy Code makes bankruptcy relief available to individuals with regular income and limited debt. 11 U.S.C. § 1301, et seq. Chapter 13 debtors propose plans to repay their creditors over a period of three to five years. 11 U.S.C. § 1322(d). A debtor's plan must satisfy certain requirements and must be confirmed by the court. 11 U.S.C. §§ 1322 and 1325.

Subject to the approval of the Attorney General, United States Trustees may appoint one or more individuals to serve as standing trustees in chapter 13 cases, and shall supervise any such individual appointed as a standing trustee in the performance of the standing trustee's duties. 28 U.S.C. § 586(b); see also 28 C.F.R. § 58.2. If the United States Trustee appoints an individual under section 586(b) of title 28 to serve as trustee in chapter 13 cases and such individual meets the bonding requirements of 11 U.S.C. § 322 and the requirements of 28 C.F.R. § 58.4(b), then such individual shall serve as the trustee and perform the duties set forth in 11 U.S.C. § 1302(b). 11 U.S.C. § 1302(a).

Under 28 C.F.R. § 58.4(b), to be eligible for appointment as a chapter 13 standing trustee, an individual must have the qualifications for membership on a private panel of trustees set forth in 28 C.F.R. §§ 58.3(b)(1)-(4), (6)-(8). Individuals appointed as chapter 13 standing trustees are fiduciaries responsible for administering cases filed under chapter 13 of the Bankruptcy Code. As fiduciaries, trustees are held to high standards of conduct. See generally Mosser v. Darrow, 341 U.S. 267 (1951); Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 278 (1941). See also Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

Chapter 13 standing trustees administer bankruptcy cases within a specified geographic area. In some districts, only one chapter 13 standing trustee is appointed to administer cases. See Procedures for Suspension and Removal of Panel Trustees and Standing Trustees, 62 Fed. Reg. 51739, 51741 (Oct. 2, 1997) (codified at 28 C.F.R. pt. 58). Other districts have multiple standing trustees. Id. Standing trustees are not government employees although the Department of Justice regulates them and supervises their administration of bankruptcy cases. 28 U.S.C. §§ 586(a)(3), (b), and (d). See also California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 849-50 (1989) (bankruptcy trustee is not an arm of the government); United States v. Crispo, 306 F.3d 71, 82 (2d Cir. 2002) (bankruptcy trustee was not a “government officer or employee” under the Federal sentencing guidelines); Joelson v. United States, 86 F.3d 1413, 1417 (6th Cir. 1996) (bankruptcy trustee’s panel membership is not a “license” under section 551(8) of the Administrative Procedure Act); In re Meyers, 147 B.R. 221, 243 (D. Or. 1992) (standing trustee is not an employee of the United States).

In a chapter 13 case, a standing trustee collects, protects, and accounts for plan payments obtained from the debtor, and distributes those monies to creditors in accordance with the payment provisions set forth in the debtor’s repayment plan and the Bankruptcy Code. 11 U.S.C. §§ 1322, 1325, and 1326; 62 Fed. Reg. at 51741. Standing trustees typically oversee many cases; some administer thousands.

Trustees exercise significant control over debtors’ finances, including their ability to confirm a chapter 13 plan. See, e.g., 11 U.S.C. § 1322(a)(1) (requiring a chapter 13 debtor to turn over “future earnings or other future income of the debtor to the supervision and control of the trustee” for use in repaying the debtor’s debts); 11 U.S.C. § 1325(b)(1) (prohibiting a court from confirming a debtor’s plan if the trustee objects unless the court determines all the debtor’s disposable income for the next three years will be applied to make payments under the plan). Significantly, chapter 13 debtors have no right to select or approve their chapter 13 trustee. Fed. Reg. at 51741. Debtors must accept the trustee who is assigned to their case. Id. The same is true for creditors. Although trustees collect funds on behalf of those creditors, the creditors have no right to select or approve their trustee. Id.

Because debtors and creditors cannot choose their trustee, and because the trustee is a fiduciary charged with protecting the interests of all estate beneficiaries, it is essential that a trustee be honest and law-abiding, and exhibit good moral character. Indeed, these attributes are so important that appointment of a chapter 13 standing trustee is conditioned upon the trustee’s possession of “integrity and good moral character.” See 28 C.F.R. § 58.3(b)(1).

In supervising chapter 13 trustees, United States Trustees effectuate the mission of the United States Trustee Program (“USTP” or “Program”), which includes protecting the public interest by ensuring efficiency in the administration of cases and by protecting the integrity of the bankruptcy system.⁴ In striving to fulfill these goals, United States Trustees are entitled to expect,

⁴ See United States Trustee Program’s Strategic Plan FY 2012-2016, available at the Department of Justice website at <http://www.justice.gov/ust/strategic-plan-mission> (last visited April 25, 2016) (“The mission of the United States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public.”).

and indeed must demand, that the trustees under their supervision are qualified to perform their duties at the high standards that are required of fiduciaries. It is against the backdrop of these high standards that the United States Trustee's decision to terminate the appointment of a chapter 13 standing trustee must be assessed.

B. Grounds for the United States Trustee's Decision to Terminate the Trustee

As set forth more fully below, the United States Trustee terminated the trustee's eligibility to receive future case assignments based upon:

- (1) the trustee's failure to timely file his federal income tax returns in 2012 and 2013, and failure to timely pay his federal income taxes in 2002, 2011, 2012 and 2013;
- (2) the trustee's false representation in a Tax Check Waiver⁵ signed on May 14, 2014 (the "Waiver") that he had timely filed all federal income tax returns required to be filed for the last three years, when in fact the trustee had not filed his 2012 and 2013 returns until, at the earliest, October 30, 2014;
- (3) the trustee's acknowledgment in the Waiver that he was delinquent in filing at least one federal income tax return in the preceding three-year period, and was delinquent in paying his federal tax obligations during the preceding three-year period;
- (4) the trustee's acknowledgment in a Declaration for Federal Employment⁶ also signed on May 14, 2014 (the "Declaration") that he was delinquent in paying his 2011, 2012, and 2013 federal income taxes;
- (5) the trustee's false representation in the Declaration that his then-outstanding 2011 federal tax liability was \$15,000.00, when as of August 22, 2014, it was actually \$47,796.43;
- (6) the trustee's statement in a July 15, 2004 affidavit that he would never again fail to timely file and pay his taxes as he had in 2002; and

⁵ The Tax Check Waiver is a Department of Justice form that a panel or standing trustee must complete and sign in conjunction with the trustee's appointment to permit the Internal Revenue Service to release to the Program's Security Officer tax-related information about the trustee that would otherwise be confidential. See Notice at 2; Exhibit 4 at 1. See also 26 U.S.C. § 6103(c).

⁶ Although not a federal employee, a panel or standing trustee must complete Office of Personnel Management (OPM) Optional Form 306 Declaration for Federal Employment, a form used to assess fitness for federal employment or federal contractor employment, as part of an initial background investigation or a five year reinvestigation. See OPM Optional Form 306 (revised Oct. 2011), available at https://www.opm.gov/forms/pdf_fill/OF0306.pdf (last visited April 25, 2016).

- (7) the existence of an action by the United States Trustee pending in the bankruptcy court calling the trustee's financial responsibility and trustworthiness into question.⁷

Notice at 2-3; UST Exhibits 1-7.

On January 22, 2016, the United States Trustee submitted "new information" concerning the trustee's "additional misrepresentations and delinquencies" that the United States Trustee contends provide further support for the trustee's termination as a chapter 13 standing trustee:

- (1) the trustee's failure to timely file his state income tax returns and failure to timely pay state income taxes for 2011, 2012, 2013 and 2014;
- (2) the trustee's failure to timely file his federal income tax returns in 2010 and 2011, and failure to timely pay his federal income taxes in 2008, 2009, 2010 and 2014;
- (3) the trustee's false representation in the Declaration that he owed only \$15,000 for his 2011 federal income taxes and the debt would be paid off in 24 months, when in fact he lacked personal knowledge of the actual balance he owed to the IRS or the duration of the repayment plan;
- (4) the trustee's false representation in the Request for Review that "he was working on a funding to clear up 2012 [tax liabilities] which would include a payment of \$20,000 he had in hand at the time" of the Declaration, and a similarly false representation in the Waiver, when in fact he did not have \$20,000 "in hand" at that time; and
- (5) the trustee's false representation in the Request for Review that he had been making "routine and regular" payments to the IRS under a payment plan for his 2011, 2012 and 2013 tax obligations, when in fact the trustee did not have a payment plan for 2012 or 2013 until after the Notice and on or about June 30, 2015, which plan did not require payments to begin until September 2015, and in fact he had not made any payments on his 2011, 2012 and 2013 taxes between December 2014 and his deposition on December 10, 2015.

Supplemental Information at 2-5; UST Supplemental Exhibits 1-4.

The specific facts pertaining to the trustee's federal income tax obligations, the related acknowledgments and representations, and the relevant bankruptcy court action, are as follows.

⁷ The United States Trustee's action was later removed to the district court and is currently pending under seal. See Miscellaneous Proceeding No. (filed June 22, 2015).

The Trustee's 2002 and 2003 Federal Tax Obligations

From a routine background investigation of the trustee conducted in 2004,⁸ the United States Trustee learned that the trustee had failed to pay his federal income taxes for the year 2002 and that tax liens had been filed against him as a result. Notice at 2. The United States Trustee notified the trustee that he would “take action” unless the trustee filed his returns, paid his taxes, and provided him with confirmation of the same. Id. In response, via a July 15, 2004 affidavit attached to the Notice as Exhibit 3, the trustee stated:

1. I had [an] old tax lein [sic] on file against me. I believe now that has been paid in full. It should have been released by now.
2. I have filed all of my 2003 tax returns, and have paid all known tax obligations in full.
3. I have set a savings account for regular monthly tax deposits, ***this situation will never occur again.***

Notice at 2; UST Exhibit 3 (emphasis supplied). In discussions of these issues, the United States Trustee warned the trustee that a chapter 13 trustee must timely file tax returns and pay tax obligations and all other obligations timely, and warned the trustee that he could be removed from his position if he did not meet his tax obligations. Notice at 2.

The Trustee's 2011, 2012 and 2013 Federal Tax Obligations

Subsequently, as part of a 2014 background investigation, the trustee completed, signed, and provided to the Program the Waiver, a copy of which is attached to the Notice as Exhibit 4. Notice at 2; UST Exhibit 4.

In response to Question 1 on page 1 of the Waiver, which inquires whether the trustee has failed to file any federal income tax return for any of the last three years for which filing of a return might have been required, the trustee responded “no.” Notice at 2; UST Exhibit 4 at 1.

In response to Question 2, which inquires whether any of the returns referenced in Question 1 were filed more than 45 days after the due date for filing, the trustee responded “yes.” Id.

⁸ The United States Trustees conduct periodic background investigations of chapter 13 trustees in fulfilling their statutory responsibility to supervise standing trustees under 28 U.S.C. § 586(b). Trustees must successfully undergo an initial background investigation and subsequent background checks every five years. As part of these background investigations, the trustee must complete and sign the Department of Justice Tax Check Waiver form and the OPM Optional Form 306 Declaration for Federal Employment described previously in notes 5 and 6. See 28 C.F.R. § 58.4(b) referencing 28 C.F.R. §§ 58.3(b)(1), (8); see also USTP's Handbook for Chapter 13 Standing Trustees (“Handbook”) § 2.A. at 2-1 (2012), available at https://www.justice.gov/sites/default/files/ust/legacy/2015/05/05/Handbook_Ch13_Standng_Trustees_2012.pdf (last visited April 25, 2016).

Similarly, in response to Question 3, which inquires whether the trustee had failed to pay any tax, penalty, or interest during the current or last three calendar years within 45 days of the date on which the IRS gave notice of the amount due and requested payment, the trustee responded “yes.” Id.

Also on May 14, 2014, the trustee provided the Program with the Declaration, a copy of which is attached to the Notice as Exhibit 5. Notice at 3; UST Exhibit 5. Information provided on the Declaration is certified by the signer to be “true, correct, complete and made in good faith,” to the best of the signer’s knowledge and belief.⁹ UST Exhibit 5 at 2, Item 17.

In response to Item 13 of the Declaration, which inquires whether the trustee is delinquent on any federal debt, including delinquencies arising from Federal taxes, the trustee checked the box marked “YES.” The instructions to Item 13 advise that if the response is “YES,” the signer should use Item 16 of the Declaration “to provide the type, length, and amount of the delinquency or default, and steps [the signer is] taking to correct the error or repay the debt.” UST Exhibit 5 at 1, Item 13.

In response to Declaration Item 16, the trustee answers “see attachment,” which refers the reader to Attachment A,¹⁰ also provided by the trustee to the Program on May 14, 2014. Notice at 3. Attachment A provides the following supplemental information about the trustee’s federal tax delinquencies as of the date of his May 14, 2014 Declaration:

2011 Taxes: The trustee states that he owes approximately \$15,000.00, reduced from an original balance of \$48,000.00, being paid through an installment plan the trustee anticipates completing in approximately 24 months.

2012 Taxes: The trustee states that he owes approximately \$42,000.00, and is “working with the IRS regarding a credit of \$10,000.00” that he anticipates will be approved; and that the trustee has “in hand the sum of \$20,000.00 which will be remitted to the IRS . . . by the end of this week;” and the trustee is working on funding for the remaining balance, which he anticipates paying in full in the next 90 -100 days.

2013 Taxes: The trustee states that he owes “approximately \$45,000.00” and is attempting to work out, but has not yet reached final agreement on, an installment payment arrangement with the IRS.”

UST Exhibit 5 at 3.

⁹ The certification paragraph at Item 17 includes the following statement: “**I understand that a false or fraudulent answer to any question or item on any part of this declaration or its attachments may be grounds for not hiring me, or for firing me after I begin work, and may be punishable by a fine or imprisonment[.]**” and “I understand that any information given by me may be investigated for purposes of determining eligibility for federal employment as allowed by law or Presidential Order.” UST Exhibit 5 at 2, Item 17 (emphasis in original).

¹⁰ Attachment A reflects that it is an Attachment to both the Declaration and the Waiver. See Notice at 3; UST Exhibit 5 at 3.

Notwithstanding the trustee's foregoing representations in the Waiver and the Declaration, including Attachment A, concerning the filing of his returns and the payment of his taxes, the United States Trustee was notified of contrary information through the 2014 background reinvestigation of the trustee. Notice at 2-3; UST Exhibit 6.

First, the United States Trustee learned that, as of August 22, 2014, contrary to the trustee's representation in his July 15, 2004 affidavit that a failure to file a tax return (and to pay taxes) "will never occur again," and contrary to the trustee's answer in response to Question 1 of the Waiver denying any failure to file tax returns in the past three years, the trustee in fact had failed to file his 2012 and 2013 Federal Income Tax returns. Notice at 3. According to a November 13, 2014 affidavit described below, the trustee's 2012 and 2013 returns apparently were not filed until October 30, 2014. Id.

Secondly, the United States Trustee learned that, as of August 22, 2014, contrary to the information the trustee provided in Attachment A in response to Question 16 of his Declaration that the trustee's outstanding 2011 federal tax liability was \$15,000, reduced from \$48,000.00 via a payment plan, the trustee in fact had an outstanding 2011 federal tax liability of \$47,796.43. Notice at 3; UST Exhibit 5 at 3.

Due to these discrepancies, by letter of November 5, 2014, Assistant United States Trustee requested that the trustee submit to the United States Trustee's office within 10 days an affidavit responding to the background investigation's revelation of information concerning: (1) the trustee's failure to file 2012 and 2013 federal income tax returns; and (2) the actual amount of the trustee's unpaid 2011 tax balance. Notice at 3; UST Exhibit 6. The letter specified that the affidavit should include "any pertinent additional information or documentation showing resolution of this matter," such as "proof that debts were satisfied and tax returns filed, copies of cancelled checks, or copies of an IRS approved payment plan." UST Exhibit 6. The letter further specified that if plan arrangements had been made the documentation "must include proof of three consecutive payments made pursuant to the plan or arrangement." Id.

On November 13, 2014, the trustee provided to the United States Trustee's office an affidavit and attachments in response to the November 5, 2014 letter. Notice at 3; UST Exhibit 7. With respect to the trustee's failure to file his 2012 and 2013 federal income tax returns, the trustee's November 13, 2014 affidavit states: "My federal income tax returns for tax years 2012 and 2013 have been filed with the Internal Revenue Service. I am attaching herewith copies of those returns." UST Exhibit 7 at 1. The trustee's affidavit appends signed copies of the trustee's 2012 and 2013 returns, each bearing the date of October 30, 2014, and reflecting tax liabilities of \$42,987.00 and \$44,995.00, respectively. Id. at 3, 11.

With respect to the trustee's unpaid tax liability for the year 2011, the trustee's November 13, 2014 affidavit states: "I have been making payments towards my tax year 2011 obligations pursuant to an IRS approved payment plan and am attaching herewith proof of the plan as well as proof of ongoing payments." Id. at 1.

Rather than attach a copy of a repayment plan, the trustee's affidavit appends a September 18, 2014 Annual Installment Agreement Statement from the IRS detailing "installment-agreement activity from July 8, 2013 to July 7, 2014 for each tax period included in your agreement." Id. at 19. The tax period detailed in the statement is "12/31/2011." Id. at 20. With the exception of a \$635.00 payment on August 1, 2013, the detail reflects monthly payments of \$705.00 from September 2013 to June 2014, for total payments during the period of \$7,703.00. Id. at 20.

The trustee's November 13, 2014 affidavit also appends a November 13, 2014 Bank of the West account statement reflecting monthly "Direct Debits" of \$705.00 each to the IRS from a "55+ Interest Checking" account, during the period from March 3, 2014 to November 3, 2014. Id. at 21-22.

Action Pending Against the Trustee in the Bankruptcy Court

Subsequently, on June 22, 2015, the United States Trustee initiated a Miscellaneous Proceeding in the United States Bankruptcy Court for the _____ and filed in that proceeding a motion to remove the trustee from all cases in which he currently serves as chapter 13 trustee. Response at 3. A copy of the United States Trustee's Motion to Remove Chapter 13 Standing Trustee Pursuant to 11 U.S.C. § 324 (the "Motion") is attached to the Notice as UST Exhibit 1.

The Motion, grounded upon the same essential facts described above, along with the United States Trustee's conclusions regarding additional false information and assurances drawn from the trustee's November 13, 2014 affidavit, asserts that the trustee, who serves as a fiduciary in chapter 13 cases, has engaged in repeated instances of unlawful conduct and made repeated false statements relative to his federal income taxes, conduct that is unbecoming a fiduciary and warranting removal under 11 U.S.C. § 324(a), which provides that "[t]he court, after notice and a hearing, may remove a trustee. . . for cause." UST Exhibit 1 at 2-9.

The United States Trustee's Supplemental Information

In the course of litigating the Motion, the United States Trustee also developed additional information relating to the trustee's conduct with respect to his tax filing and payment obligations, as well as to his representations regarding those obligations in his Request for Review, Declaration and Waiver, including Attachment A.

In his responses to interrogatories dated November 16, 2015, the trustee revealed that, in addition to failing to timely file and pay federal income taxes, he also had failed to timely file and pay state income taxes for 2011, 2012, 2013 and 2014. UST Supplemental Exhibit 2 at 76-79; UST Supplemental Exhibit 4, Interrogatory Response No. 2 ("these returns were filed on or about 24 July 2015"). Moreover, the trustee disclosed that, contrary to his representation in the Waiver that he had timely filed all federal income tax returns required to be filed for the last three years, and in addition to failing to timely file his 2012 and 2013 federal income tax returns, he also had failed to timely file his 2011 federal tax returns. UST Supplemental Exhibit 4, Interrogatory Response No. 1 ("the 2011 Form 1040 was filed on or about 5 December 2012").

In his deposition on December 10, 2015, the trustee testified regarding his 2011 federal tax obligations. Notwithstanding his assertions in Attachment A that he owed \$15,000 and had a payment plan in place that would retire the balance in 24 months, the trustee testified that he had no personal knowledge at that time of either the actual balance owed to the IRS, which was approximately \$48,000, or the time it would take to retire that balance. UST Supplemental Exhibit 2 at 31, 62.

The trustee also testified in his deposition regarding his 2012 tax obligations. Notwithstanding his assertions in the Waiver and the Request for Review that he had \$20,000 “in hand” to pay those taxes, the trustee testified that the money “was anticipated to be received in loans from family.” Id. at 62-63.

The trustee’s deposition testimony and the IRS Account Transcripts also confirmed that, notwithstanding the trustee’s representations in his Request for Review in July 2015¹¹ that he “continues to make routine and regular payments” on his 2011, 2012, and 2013 tax obligations pursuant to an IRS payment plan, Request for Review at 6, the trustee in fact had not made any payments under an installment payment agreement for tax years 2011, 2012, and 2013 or otherwise between January 2015 and December 10, 2015. UST Supplemental Exhibit 2 at 79, 99-100; UST Supplemental Exhibit 3 at 4-6.¹² In addition, the trustee’s deposition testimony confirmed that he had no payment plan in place for the 2012 or 2013 obligations until June 30, 2015 – shortly after the United States Trustee’s Notice and before the trustee’s Request for Review – and it did not require the trustee to commence payments until September 2015. UST Supplemental Exhibit 2 at 79-80, 97-100. See also UST Supplemental Exhibit 3 at 10, 13.

C. The Record Supports the United States Trustee’s Decision to Terminate the Trustee

Based upon the record as it existed on June 22, 2015, the United States Trustee found that the trustee’s repeated failure to timely file income tax returns and pay income taxes and his submission of false statements regarding such failures rendered the trustee unqualified to serve as a chapter 13 standing trustee under 28 C.F.R. § 58.6(a)(9). Notice at 1, 4. That subsection provides, in pertinent part, that the United States Trustee may terminate the assignment of cases to a standing trustee for failure to possess integrity and good moral character. 28 C.F.R. § 58.6(a)(9).¹³

¹¹ The United States Trustee also asserts that the trustee made additional misrepresentations in his objection to the Motion filed in the removal action, which allegations do not need to be addressed in this administrative review.

¹² At his deposition, in response to the question, “between November of 2014 and December of 2015, there was no payment plan or no payments being made on the ‘11, ‘12 and ‘13 taxes?,” the trustee testified, “Correct.” UST Supplemental Exhibit 2 at 99-100. Nevertheless, the IRS Tax Account Transcripts reflect receipt of a payment on December 1, 2014 under a payment plan established June 21, 2013 with respect to the 2011 tax liability. UST Supplemental Exhibit 3 at 2, 4.

¹³ The possession of integrity and good moral character is an eligibility requirement for chapter 7 panel trustees that is set forth in 28 C.F.R. § 58.3(b)(1) and made applicable to chapter 13 standing trustees by 28 C.F.R. § 58.4.

The United States Trustee observed that under 11 U.S.C. § 1307(e), a chapter 13 standing trustee is “charged with taking appropriate remedial action whenever a debtor fails to timely file a federal tax return or timely pay federal income taxes,” and concluded that the trustee’s “cavalier disregard for the tax laws of the United States after providing assurances to the United States Trustee” was indicative of a lack of integrity and good moral character, and that the trustee’s “false assurances, misrepresentations, and omissions” to the United States Trustee’s office concerning tax matters forced him to conclude that the trustee did not possess the requisite integrity and good moral character. Notice at 3-4.

The United States Trustee also concluded that these same facts indicated a lack of financial responsibility and trustworthiness. The United States Trustee noted that there was currently pending before the bankruptcy court the Motion seeking the trustee’s removal from pending cases, thereby establishing that termination of the trustee’s appointment was further warranted under 28 C.F.R. § 58.6(a)(11), which provides, in pertinent part, that a standing trustee may be terminated due to an action pending before a court which calls the trustee’s competence, financial responsibility or trustworthiness into question. Notice at 5.

The United States Trustee found additional justification for the trustee’s termination under 28 C.F.R. § 58.6(d)(3), which provides that a standing trustee may be removed if the trustee has engaged in conduct that appears to be dishonest, deceitful, fraudulent, or criminal in nature. Notice at 6. According to the United States Trustee, the failure to file personal income tax returns or to pay personal income taxes was unlawful, and possibly criminal in nature. *Id.* (citing Internal Revenue Code, 26 U.S.C. §§ 6601, 6012, 6017, 6072, 6151, 6651, 6654, 6672, 7203; 18 U.S.C. § 1001(a)).

Finally, the United States Trustee concluded that these same facts warranted termination under 28 C.F.R. § 58.6(d)(4), which provides that a trustee may be removed if the trustee “appears to have engaged in other gross misconduct that is unbecoming his . . . position as a trustee or violates the trustee’s duties.” Noting that the trustee’s statutory duties include being accountable for all property received, investigating the financial affairs of the debtor, examining and objecting to proofs of claim when appropriate, opposing plan confirmation and discharge when appropriate, making a final report and final account of the administration of the estate, advising and assisting the debtor in performance under the plan, and ensuring timely payments by the debtor, 11 U.S.C. § 1302(b) (incorporating 11 U.S.C. §§ 704(a)(2)-(7) and (9) and, in appropriate cases, § 1106(a)(3)-(4)), and that the trustee is a fiduciary with a duty of loyalty to both the estate and the creditors, *see, e.g. Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 131 (5th Cir. 2013), the United States Trustee found that the trustee’s conduct with respect to his tax liabilities fell “well below” the high standard of conduct expected of a chapter 13 trustee. Notice at 6-7. Quoting then-Chief Judge Cardozo in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928), the United States Trustee emphasized that:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior Only

thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Notice at 7. According to the United States Trustee, the trustee's numerous duties in his dealings as a trustee, which include enforcing the law, are simply not compatible with the trustee's conduct in "repeatedly and without excuse" ignoring the law with regard to his personal financial affairs and then making repeated misrepresentations about those affairs in connection with his continuing role as a fiduciary. Id.

For his part, the trustee first asserts that the United States Trustee's decision to terminate him was inappropriate because there is nothing in his regularly conducted performance reviews, copies of which are attached to the Request for Review at Trustee's Exhibit A, to support the United States Trustee's "conclusory claims" of his lack of integrity and good moral character, financial irresponsibility, lack of trustworthiness, dishonesty, deceitfulness, fraud or criminal conduct as it relates to the trustee or his work performance as a chapter 13 standing trustee for . Request for Review at 4. The trustee asserts that he has served as the chapter 13 trustee in the for a period of years, that his office currently is administering confirmed chapter 13 cases, and that audited data provided to the United States Trustee's office reflects that in fiscal year 2014¹⁴ his office handled approximately in total trust fund receipts arising from those cases. Id. at 3. Moreover, the trustee argues that his business operations are subject to protective controls including internal checks and balances, United States Trustee oversight, and monthly and annual auditing, along with independent auditing in the United States Trustee's discretion, and his compliance with procedures over years of service has been "beyond reproach." Id. at 4. The trustee attaches copies of these various audits for the period of his service in support of his Request for Review. Trustee's Exhibit B.

I am unpersuaded by the trustee's argument. The Notice of Termination at issue clearly was not based upon the trustee's performance reviews and audits, but rather upon his failure to meet the eligibility requirements of 28 C.F.R. § 58.6(a)(9) (expressly requiring "integrity and good moral character"), and also called for under the provisions of 28 C.F.R. § 58.6(a)(11) (pending action causing question regarding trustee's competence, financial responsibility and trustworthiness), 28 C.F.R. § 58.6(d)(3) (trustee has engaged in apparently dishonest, deceitful, fraudulent, or criminal conduct), and 28 C.F.R. § 58.6(d)(4) (other gross misconduct unbecoming a trustee). Response at 3-4.

The trustee next argues that the sole basis and "gravamen" of the United States Trustee's termination decision is his personal and private financial difficulty resulting in his late federal income tax return filings and persistent inability to timely pay debt owed to the IRS. The trustee asserts that the United States Trustee omits to state that he has cooperated fully with the IRS, and that while he may have been "overly ambitious" in his statements regarding repayment, the "totality" of the information he provided suggests he was candid with the Program's investigator

¹⁴ Fiscal year 2014 encompassed October 1, 2013 through September 30, 2014. Each fiscal year, a chapter 13 trustee must submit to an independent audit conducted at the direction of the United States Trustee of the trustee's annual report of activity in the trustee's trust account and suspense account. Handbook at §§ 7.B., 7.C. at 7-1 - 7-2.

and that he is working cooperatively with the IRS to pay his debts. Request for Review at 5-6. The trustee adds that the United States Trustee omits to state that his tax lien issues were resolved to the satisfaction of the United States Trustee in 2004, and alleges that if such issues were material and disqualifying, the United States Trustee would have independently verified and checked up on his tax situation all along, as he states the United States Trustee had represented he would do. Id. at 5.

I also am not persuaded by this argument. It is true that, despite the trustee's statement in his affidavit from 2004 that he would never again fail to timely file his tax returns and pay his taxes, UST Exhibit 3, the trustee failed to timely file federal income tax returns for 2011, 2012, 2013;¹⁵ failed to timely pay federal income taxes totaling approximately \$100,000.00 for 2011, 2012, and 2013;¹⁶ and failed to timely file state income tax returns and timely pay approximately \$61,000 in state income taxes for 2011 through 2014.¹⁷ But it is also clear that the United States Trustee was concerned about the trustee's misrepresentations in the Tax Check Waiver and in the Declaration, including Attachment A, and that several additional false statements in those documents and the Request for Review came to light only through the trustee's deposition testimony and responses to interrogatories in the removal action, including that:

- (1) While it is true that the trustee had failed to file his 2012 and 2013 federal income tax returns as of the date of the Waiver,¹⁸ the trustee falsely denied any failure to file his tax returns in the Waiver;¹⁹
- (2) While it is true that the trustee had an outstanding 2011 federal tax liability of \$47,796.43 as of August 22, 2014,²⁰ the trustee misrepresented in Attachment A to the Declaration and the Waiver that this liability had been reduced to \$15,000;²¹
- (3) While it is true that the trustee had an outstanding 2012 federal tax liability of \$42,987.00 when he filed that return late on or about October 30, 2014,²² the trustee misrepresented in Attachment A to the Declaration and the Waiver that he had \$20,000 "in hand" to pay on that debt;²³
- (4) While it is true that the trustee had a payment plan for outstanding federal tax liabilities for 2011 and that he failed to make any payment under the plan between

¹⁵ Request for Review at 6; UST Supplemental Exhibit 4, Interrogatory Response No. 1.

¹⁶ Request for Review at 5-6; UST Supplemental Exhibit 3; UST Supplemental Exhibit 4, Interrogatory Response No. 3.

¹⁷ UST Supplemental Exhibit 2 at 77-78; UST Supplemental Exhibit 4, Interrogatory Response No. 2.

¹⁸ Request for Review at 6; UST Supplemental Exhibit 4, Interrogatory Response No. 1.

¹⁹ UST Exhibit 4 at 1.

²⁰ Notice at 3; UST Exhibit 6.

²¹ UST Exhibit 5 at 3; UST Supplemental Exhibit 2 at 61.

²² UST Exhibit 7 at 11.

²³ UST Exhibit 5 at 3; UST Supplemental Exhibit 2 at 62-63.

January 2015 and his deposition on December 10, 2015,²⁴ the trustee misrepresented in the Request for Review in July 2015 that he had been making “routine and regular” payments under the payment plan;²⁵ and

- (5) While it is true that the trustee entered into a payment plan on or about June 30, 2015 for outstanding federal tax liabilities for 2012 and 2013 that did not require payments until September 2015,²⁶ and it is true that the trustee failed to make any payment under the plan prior to his deposition on December 10, 2015,²⁷ the trustee misrepresented in the Request for Review in July 2015 that he had been making “routine and regular” payments under the payment plan.

The trustee’s attempt to reduce the “gravamen” of the United States Trustee’s complaint to the trustee’s personal financial situation, while glossing over the United States Trustee’s evident concern with false statements made in the Tax Check Waiver and in the Declaration, including Attachment A, and later in the Request for Review, heighten, rather than diminish, my concerns about the integrity of the trustee. Rather than recognizing that these lapses in honesty in regard to the facts surrounding his personal tax situation – occurring, astonishingly, in the course of the very evaluation procedure designed to assess the existence and gravity of any such situations and later in the Request for Review – were extremely troubling in light of his role as a fiduciary, the trustee attempts to minimize their seriousness and even seeks to cast blame on the United States Trustee for not monitoring his tax-related behavior more closely.

Next, the trustee argues that none of the prior 52 administrative decisions issued by the Program, and attached to the trustee’s Request for Review as Trustee’s Exhibit C, terminate a trustee based upon personal financial problems or debts rather than performance problems. Request for Review at 7. The trustee also asserts that the USTP has employees with financial difficulties who remain entrusted to perform their official duties, and attaches a copy of the docket of a bankruptcy case relating to a USTP employee. Request for Review at 7; Trustee’s Exhibit E.

While prior administrative decisions may offer some guidance as to the appropriate weight of sanction, ultimately, the United States Trustee’s decision must be evaluated based upon the particular facts of record in the trustee’s particular case and against the backdrop of the special position held by a chapter 13 standing trustee. Moreover, at least one of those administrative decisions does address allegations of personal financial misconduct by a trustee that cast doubt on the trustee’s ability to act as a fiduciary in the bankruptcy system. See, e.g., Trustee’s Exhibit C-3, Case No. 2010-02 decided Feb. 2, 2011 (affirming trustee’s suspension where background investigation revealed a lawsuit alleging breach of fiduciary duty for purposes of personal gain relating to his prior business employment).

²⁴ UST Supplemental Exhibit 2 at 79, 99-100; UST Supplemental Exhibit 3 at 4-6.

²⁵ Request for Review at 6.

²⁶ UST Supplemental Exhibit 2 at 79-80, 97-100; UST Supplemental Exhibit 3 at 10, 13.

²⁷ UST Supplemental Exhibit 2 at 79, 99-100; UST Supplemental Exhibit 3 at 10, 14.

Similarly, it is not the personal financial difficulties of individual USTP employees that are at issue here. As the United States Trustee points out in his Response, there is nothing untoward or illegal about government employees availing themselves of the relief offered by the Bankruptcy Code. Response at 6. See also 11 U.S.C. § 525(a). The trustees, not Program employees, are the fiduciaries for the bankruptcy estates that they are appointed to administer.

Moreover, to the extent that other trustees or employees of the USTP may have experienced financial difficulties, such difficulties have no bearing on the issue of whether the trustee's termination is supported by the record here. The trustee ignores that the improper conduct at issue here is not the trustee's financial difficulty in itself, but rather the indifferent and unconcerned manner in which the trustee chose to handle his delinquent filing and financial obligations to the IRS, and as later learned to the state, as well as his brazen misstatements to the Program about them.

Finally, the trustee asks that in reviewing his situation, I take into consideration that there is a distinction between professional and personal activities. Request for Review at 7. The trustee suggests that in the absence of any evidence of deficiencies in how he has been discharging his duties in administering cases over the past years, it was an inappropriate exercise of the United States Trustee's discretion to terminate the assignment of cases to the trustee based upon a personal financial situation with which he is dealing "to the satisfaction of the IRS" and which has not impacted "in any measurable manner upon his trusteeship." Request for Review at 7-8.

Because bankruptcy trustees are held to very high standards of conduct, the regulations regarding their eligibility and setting forth grounds for their removal plainly provide that personal conduct is relevant. Trustees must maintain a personal reputation that is above reproach and that does not cast doubt on their honesty, integrity, or ability to faithfully administer bankruptcy cases. If they engage in serious misconduct even in the course of their private personal financial activities, as the trustee has done here, it reflects poorly upon them and upon the bankruptcy system as a whole, and, as the trustee was previously warned in this case, may justify their removal. Although the trustee asserts that he is handling this matter to the satisfaction of the IRS, the trustee provided no evidence to support that conclusion apart from his own statements.

Additionally, the United States Trustee developed the Supplemental Information subsequent to the Notice in the course of discovery in the pending removal action. While the United States Trustee did not consider this information at the time he decided to terminate case assignments to the trustee, the sworn information obtained through the trustee's deposition and interrogatory responses lends further weight and credence to the United States Trustee's determination that the trustee's repeated failure to meet his tax filing and payment obligations, and his manifest lack of candor about those failures, left the United States Trustee with insufficient assurance of this trustee's integrity and trustworthiness. The Supplemental Information assures me that the action taken by the United States Trustee with respect to the termination of case assignments was prudent and exhibited foresight.

Accordingly, I conclude that under the applicable provisions of the law cited in the United States Trustee's Notice,²⁸ the United States Trustee's decision to terminate this trustee's eligibility to receive future case assignments was supported by the record and constituted an appropriate exercise of his discretion. Under the circumstances of numerous undisputed misrepresentations to the Program concerning the trustee's tax filings and liabilities, ample evidence of a sustained pattern of disregard for the necessity of timely filing and paying federal and state tax liabilities after the previous failures discovered by the United States Trustee in 2004, and clear evidence of a discussion and a warning at that time, I conclude that the trustee's termination is both warranted and prudent. Notwithstanding that the trustee has a commendable record of performance of _____ as revealed by the performance reviews and audit reports appended to the Request for Review, the trustee has violated his fiduciary duties by repeatedly engaging in deceitful conduct.

It is imperative that debtors and creditors believe their trustee to be honest, law abiding, and free from defects of character that could place their financial interests at risk. As the commentary to the final rule discusses, a trustee frequently is the only representative of the bankruptcy system that a debtor encounters. 62 Fed. Reg. at 51748. The debtor must appear and submit to examination under oath at a meeting of creditors that, in a chapter 13 case, is conducted by the trustee. 11 U.S.C. §§ 102(9), 341(a), 343; Fed. R. Bankr. P. 2003(b)(1).²⁹ If the debtor has outstanding tax returns as of that meeting, the trustee may hold the meeting open to allow the debtor additional time to file the returns, 11 U.S.C. § 1308(b), and may seek to dismiss or convert the case if the debtor fails to file these returns. 11 U.S.C. § 1307(e). The debtor must propose a plan that the trustee has the power to oppose. 11 U.S.C. § 1325(b)(1). If the plan is confirmed, the debtor must make periodic payments to the trustee so the trustee can, in turn, make payments to the debtor's creditors. 11 U.S.C. § 1322(a)(1) (putting the debtor's "future earnings" and "future income" under "the supervision and control of the trustee" for distribution under the debtor's repayment plan). Similarly, creditors must look to the trustee to enforce the Bankruptcy Code and administer the payment of their claims. 11 U.S.C. §§ 1322, 1325, and 1326.

One cannot seriously dispute that the trustee knowingly represented to the United States Trustee that he had filed his 2012 and 2013 tax returns at a time when he in fact had not filed them, and grossly underrepresented the amount of debt owed to the IRS in a certified statement to the United States Trustee concerning such delinquent debt. Or genuinely contest that the trustee knowingly represented in the Request for Review that he had \$20,000 "in hand" when in fact he

²⁸ 28 C.F.R. §§ 58.3(b)(1) (requiring a trustee to "possess integrity and good moral character" as qualifications for eligibility for appointment to membership on the panel of private trustees), 58.4(b) (making the qualifications of 28 C.F.R. § 58.3(b)(1) applicable to standing trustees), 58.6(a)(9) (establishing failure to meet the qualifications of 28 C.F.R. §§ 58.3 and 58.4 as grounds for a United States Trustee's decision to suspend or terminate assignment of cases to a trustee), 58.6(a)(11) (establishing as grounds for a United States Trustee's suspension or termination decision an "action pending before a court . . . which calls the trustee's . . . financial responsibility or trustworthiness into question"), 58.6(d)(3) and (d)(4) (permitting the United States Trustee's immediate suspension or termination of assignment of cases to a trustee where a trustee "has engaged in conduct that appears to be dishonest, deceitful, fraudulent, or criminal in nature" or "appears to have engaged in other gross misconduct that is unbecoming his or her position as trustee . . .").

²⁹ The United States Trustee designates the standing trustee to preside at the meeting of creditors and examine the debtor under oath. See also Handbook, § 3.B.1 at 3-9.

fact he had not made any payments since December 2014. At best, a reasonable person is compelled to conclude that providing false answers to the supervisory authority charged by law with overseeing his continuing eligibility to act as a fiduciary for hundreds of bankruptcy estates a year demonstrated a lack of candor, accountability, and trustworthiness.

As a fiduciary, a standing trustee occupies a significant position of trust and responsibility and is accountable for his actions not just to the United States Trustee, but also to the bankruptcy community and the public at large. He cannot cavalierly jettison his obligations as a private citizen and federal taxpayer, and make false statements concerning those obligations in documents provided to the United States Trustee, and reasonably expect that conduct to be disregarded in evaluating his trustworthiness and continuing ability to properly execute the professional position that he holds. He is subject to a higher standard than the debtors of the cases that he administers, who may suffer severe consequences if they fail to make, or are untruthful in, their required disclosures and do not timely file their tax returns. With the termination of case assignments to this trustee, debtors will not be left to wonder whether they can trust that the fiduciary assigned to their case will fully respect the law and fairly and competently deal with their interests and the interests of their creditors, including the Internal Revenue Service.

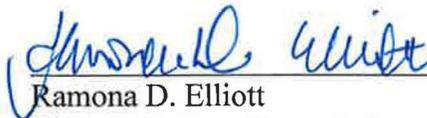
Having considered the facts and circumstances and the arguments of the trustee and the United States Trustee, I find that the United States Trustee's administrative action in terminating assignments to the trustee and removing him from his appointment as chapter 13 standing trustee was an appropriate response to the trustee's misconduct. For all of the reasons discussed above, I find that this determination is supported by the record and was an appropriate exercise of discretion.

IV. Conclusion

Based upon my review of the record, I affirm the decision of the United States Trustee for Region to terminate the trustee's appointment as a chapter 13 standing trustee for the

The foregoing constitutes final agency action in this matter.

Dated: 5/31/2016



Ramona D. Elliott
Deputy Director/General Counsel
Executive Office for United States Trustees