Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 2021-0001

Review of the Decision of the
[redacted]
Denying Approval of Budget Item Sought by
Chapter 13 Standing Trustee [redacted]

[redacted], a standing chapter 13 trustee for the United States [redacted] District of [redacted], requests review of the denial of approval by the Acting United States Trustee for [redacted] ("United States Trustee") of a benefit for [redacted] staff consisting of a proposed newly established "Educational Assistance Plan" ("Plan") as part of [redacted] budget.[1] Under the Plan, [redacted] would provide a benefit of up to $5,250 per employee for the purpose of student loan repayment. The impact in [redacted] FY 2021 budget was $15,750, as only three of [redacted] fourteen total employees would qualify for the benefit.

As set forth more fully below, I conclude that the current record could support the United States Trustee's decision to exercise [redacted] discretion and deny [redacted]'s requested expense, but I remand the decision to give [redacted] the opportunity to provide additional information in support of [redacted] proposed expense.

I. APPOINTMENT AND COMPENSATION OF CHAPTER 13 STANDING TRUSTEES

A United States Trustee, with the approval of the Attorney General, may appoint a standing trustee, or designate an Assistant United States Trustee, to serve in cases in his or her region arising under chapter 13 of the Bankruptcy Code. 28 U.S.C. § 586(b). The United States Trustee shall supervise any individual appointed as a standing trustee. *Id*.

A. The Role of Chapter 13 Trustees

A chapter 13 standing trustee's duties include: being accountable for property received; ensuring the debtor performs his or her stated intention with respect to the retention or surrender of property; investigating the debtor's financial situation; if a purpose would be served, examining proofs of claims and objecting to claims that are improper; if advisable, opposing the discharge of the debtor; furnishing information regarding the estate and its administration as

[1] United States Trustees are officials of the Department of Justice who are appointed by the Attorney General. 28 U.S.C. § 581(a). The Director of the Executive Office for United States Trustees (the "Director") is a Department of Justice official who acts under authority delegated by the Attorney General. 28 U.S.C. §§ 509, 510; *see also* 5 U.S.C. § 301 (head of an executive agency may prescribe regulations for the governance and operations of his or her department).

requested by parties in interest; making a final report and account of the administration of the estate; appearing and being heard at any hearing that concerns the value of property subject to a lien, confirmation of a plan, or modification of the plan after confirmation; disposing of moneys received in a chapter 13 case; advising, "other than on legal matters," and assisting the debtor in the performance of the plan; ensuring the debtor commences making timely payments; and providing applicable notice regarding a claim of a domestic support obligation (if any). 11 U.S.C. § 1302.

B. The Compensation and Expenses of Chapter 13 Standing Trustees

Chapter 13 standing trustee compensation is governed by 28 U.S.C. § 586(e). The statute provides that the Attorney General shall fix a percentage fee to be received by a chapter 13 standing trustee from bankruptcy cases for which he or she serves as a trustee based on a "maximum annual compensation" and "the actual, necessary expenses incurred by such individual as standing trustee." 28 U.S.C. § 586(e)(1); *see also* 11 U.S.C. § 1326(b); 28 U.S.C. § 586(e)(1)(B), (e)(2).[2] The statute does not define "actual, necessary expenses." *Id*.

The chapter 13 standing trustee must submit an annual budget to the United States Trustee for approval. The proposed budget should reflect estimated actual and necessary expenses of the trust based upon historical data, competitive bids, market research, and other analytical methods acceptable to the United States Trustee. *See* 28 U.S.C. §§ 586(b), (e)(1); 28 C.F.R. § 58.4(b) (referencing 28 C.F.R. § 58.3(b)(7)); 28 C.F.R. § 58.11.

A United States Trustee may deny a chapter 13 standing trustee's proposal for "actual, necessary expenses" for reasons that include, but are not limited to, failing to:

- provide sufficient justification of the expense;
- demonstrate that the expense is a cost-effective use of funds;
- demonstrate the expense is reasonably related to the trustee's duties;
- provide documents or information pertaining to the expense; and
- demonstrate that the expense is directly related to office operations.

28 C.F.R. § 58.11(b).

The Executive Office for United States Trustees has published the *Handbook for Chapter 13 Standing Trustees* (Oct. 1, 2012) ("Handbook"), available at https://www.justice.gov/ust/page/file/1442271/download (last accessed Oct. 13, 2021), a document that discusses a variety of matters, including budgets submitted by chapter 13 standing trustees for approval by the United States Trustee. The Handbook states that the guidance for "operating expense line items" is "designed to ensure standing trustee expenses are actual and necessary." Handbook at 6-2. Further, the Handbook states that "[e]xpenses must be reasonable, actual, necessary, relate to the duties of the standing trustee and be supported by appropriate

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[2] The Attorney General has delegated this authority to the Director. *See* 62 Fed. Reg. 30172-01, 30172, 1997 WL 284838 (June 2, 1997).

documentation." *Id.* 6-2 to 6-3. Regarding employee benefits expenses of the chapter 13 trustee's staff, the Handbook states "[t]he overall employee benefits package including leave must be no greater than that provided by similarly sized service businesses in the community in which the standing trustee's operation is located." *Id.* 6-3.[3]

A chapter 13 standing trustee may seek administrative review by the Director of the denial of a claim for an expense. 28 U.S.C. § 586(e)(3); 28 C.F.R. § 58.11(e) – (n). After exhausting available administrative remedies, the trustee may obtain judicial review of the Director's final agency action denying a claim of "actual, necessary expenses." 28 U.S.C. § 586(e)(3). The decision of the agency "shall be affirmed . . . unless it is unreasonable and without cause based upon the administrative record before the agency." *Id.*

II. COURSE OF THIS PROCEEDING

On June 18, 2021, [redacted] submitted an amended budget for FY 2021, which included a line-item expense request for a benefit for [redacted] staff consisting of a proposed newly established Educational Assistance Plan. Under the Plan, [redacted] would provide a benefit of up to $5,250 per employee for the purpose of student loan repayment. The impact in [redacted] FY 2021 budget was $15,750, as [redacted] has three staff members who qualify for the benefit. Administrative Record ("AR") 9. [redacted] described [redacted] establishment of the Plan as a response to the passage of the Consolidated Appropriations Act of 2021, and asserted the Plan complied with the requirements of Section 127 of the Internal Revenue Code. *Id.* [redacted] did not otherwise provide any information in support of [redacted] proposed new expense.

By letter dated July 28, 2021 ("Notice"), the United States Trustee for [redacted][4] notified [redacted] of [redacted] decision to deny [redacted]'s request to increase [redacted] employee expense line item to fund the new proposed Educational Assistance Plan. AR 1. The United States Trustee denied the request because "[t]he overall employee benefits including leave must be no greater than that provided by similarly sized service businesses in the community in which the standing trustee's operation is located;" and [redacted] had not provided any information regarding whether the same benefit is offered by similarly sized service businesses in the community in which the trust operation is located to support that the Plan was an actual and necessary expense of the trust operation. AR 1-2; *see also* Handbook at 6-3.

By letter dated August 5, 2021 ("Request for Review"), [redacted] requested review by the Director of the United States Trustee's expense decision. AR 3-6. In [redacted] Request for Review, [redacted] first argues the United States Trustee's inquiry should have been limited to the total amount of benefits without regard to "the type or structure of the benefits provided." AR 4. The employee benefit percentage (the cost of employee benefits as a percentage of overall payroll) in [redacted] FY 2021 budget is 24 percent. *Id.* [redacted] states this percentage is below both what [redacted] has been informally advised is an acceptable employee benefit percentage (25%) and what was

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[3] I note that the Handbook is not binding. This decision is not based on the Handbook and I reference it here merely as useful background.

[4] This United States Trustee oversees bankruptcy matters in [redacted] 28 U.S.C. § 581(a)[redacted].

recommended in a 2018 Compensation & Benefit Report prepared for [redacted] office (30%) by a private contractor retained by [redacted]. *Id.*

[redacted] also provided examples in [redacted] Request for Review of other entities that purportedly provide benefits similar to [redacted] proposed Plan. AR 5 (citing [redacted] businesses ([redacted]) as well as major national corporations (AT&T, Bank of America, Best Buy, BP Oil, Comcast, Starbucks, UPS, Verizon, Wal-Mart, and Wells Fargo)). [redacted] conceded, however, that [redacted] only conducted "brief research" and did not "personally poll [redacted] business community." *Id.*

I requested additional information from the United States Trustee and [redacted] by email on August 16, 2021. AR 12. I asked the United States Trustee to provide me, with a copy to [redacted]: (a) the request for budget approval made by [redacted] and any supporting materials submitted with it; and (b) any communications with [redacted] regarding the request. *Id.* I asked [redacted] to provide me, with a copy to the United States Trustee, [redacted] Compensation & Benefits Report of February 2018, a page of which was excerpted and attached to [redacted] Request for Review. *Id.* [redacted] and the United States Trustee separately responded on August 19, 2021, providing me with the requested information ("Additional Information"). AR 13, 44.

By letter dated August 25, 2021 ("UST Response" or "Response"), the United States Trustee responded to the Request for Review. AR 217-224. In [redacted] Response, the United States Trustee argues that [redacted] has not shown that the denial of [redacted] proposed Plan was an inappropriate exercise of discretion or lacked support in the record. AR 217. The United States Trustee argues [redacted] properly denied [redacted]'s requested expense because [redacted] "does not provide an adequate justification for the Plan." *Id.* [redacted] also argues that [redacted] "failed to demonstrate that the expense would amount to a cost-effective use of the trust funds when (a) the trustee's own evidence shows that the trust operation's current employee benefits program is competitive in the local marketplace and (b) the impact of the new Plan among the employees of the trust operation also would be inequitable or disproportionate." AR 217.

The administrative record in this matter consists of the Notice, the Request for Review, the Requests for Additional Information and the Responses to them, along with their respective attachments. AR 1-224.

III. STANDARD OF REVIEW

In conducting this review, I must determine:

1. whether the United States Trustee's decision is supported by the record, and

2. whether the decision constituted an appropriate exercise of discretion.

28 C.F.R. § 58.11(j) (specifying the scope of the Director's review of a United States Trustee's decision to deny a standing trustee's claim of actual, necessary expenses).

IV. ANALYSIS

Section 586 does not define "actual, necessary expenses." 11 U.S.C. § 586(e)(1). Nothing in the statute requires the United States Trustee to approve this particular expense. Likewise, section 586 does not explicitly prohibit such a benefit expense to provide the trustee's employees with student loan repayment assistance. Therefore, I consider whether [redacted] has established [redacted] proposed Plan is a reasonable, actual, and necessary expense.

[redacted] argues, based upon [redacted] reading of the Handbook, that [redacted] is only required to show that [redacted] "overall employee benefits package including leave must be no greater than that provided by similarly sized service businesses in the community . . ." AR 4 (quoting Handbook at 6-3). [redacted] suggests that so long as [redacted] benefit percentage remains under 30 percent (based on the recommendation in [redacted] 2018 Compensation Benefits Report), the specific benefits are not subject to further review, i.e., the benefit expense is per se actual and necessary. AR 4. But the expenses section of the Handbook follows the statutory "actual, necessary" language; and it advises that "[e]xpenses must be reasonable, actual, necessary, relate to the duties of the standing trustee and be supported by appropriate documentation." Handbook 6-2 to 6-3. The Handbook provision relied on by [redacted] does not limit the United States Trustee's authority to review specific employee benefits. Rather, it merely suggests a ceiling for the overall cost of employee benefits.

[redacted] asserts that the justification for [redacted] proposed Plan expense is "to ensure [redacted] ability to recruit and retain qualified employees."[5] AR 4. That may be a valid justification for such an expense and the United States Trustee does not argue it is not. [redacted] responds, however, that [redacted] failed to submit any information to establish recruitment and retention is an issue in [redacted] trust operation. The United States Trustee correctly notes that [redacted] has presented no evidence that [redacted] trust operation was having issues with employee recruitment or retention. AR 223. To the contrary, the United States Trustee points out that [redacted]'s most recent compensation and benefits report concluded that [redacted] "employee benefits program is competitive with other for-profit, government, and non-profit employers in the marketplace." AR 23. The compensation report also noted that [redacted] provided "reasonable, competitive, and fair salaries." AR 21. Even without the Plan benefit, the total benefit and compensation packages already offered by [redacted] would seem to mitigate any recruitment and retention concerns.

To the extent there were a recruitment and retention issue with [redacted]'s trust operation, the United States Trustee also cited the fact that [redacted] failed to provide evidence that the proposed Plan is necessary to address that problem. [redacted] argues that

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[5] [redacted] also states that the Plan is justified by the passage of the Consolidated Appropriations Act of 2021, which [redacted] believes was a "Congressional effort to address the student loan debt crisis by reducing the burden on employees saddled with student loan debt and eliminating the drag on the overall economy trying to recover from the COVID-19 disturbance." AR 4. [redacted] also asserts that [redacted] Plan complies with the requirements of Section 127 of the Internal Revenue Code. AR 4. But these provisions do not purport to determine whether a trustee's proposed expense is reasonable, or substitute for necessary proof that a proposed expense satisfies section 586(e) of title 28.

the benefits provided at certain other companies show this is a necessary expense. AR 5. But [redacted] did not provide information that similarly sized, local businesses offer a similar student loan tuition repayment benefit. *Id.* [redacted] concedes that [redacted] only conducted "brief research" and did not "personally poll [redacted] business community." *Id.* The examples [redacted] relies on are inapposite. AR 221-222. The businesses [redacted] cites are major national corporations (AT&T, Bank of America, Best Buy, BP Oil, Comcast, Starbucks, UPS, Verizon, Wal-Mart, and Wells Fargo) or much larger [redacted] businesses ([redacted]). AR 5. Further, [redacted] did not provide evidence that these other businesses even provide the type of student loan repayment plan benefit [redacted] proposes, AR 5, and the United States Trustee's own review of the cited [redacted] companies' websites found no similar student loan repayment benefits, AR 221-22. But even if these larger companies did offer such benefits, [redacted] provided no evidence that [redacted] competes with the cited companies for employees.

Finally, [redacted]'s argument that the requested benefit is a necessary expense to "recruit and retain" employees is also undercut by the fact that only three out of [redacted]'s fourteen employees would qualify for the proposed Plan. Thus, any retention benefit is only for a select few employees. Not only is there no evidence of any difficulty in general in recruitment or retention, as noted above, but there is also no evidence that the expense is necessary to retain these three employees. Further, [redacted] did not provide any information about how a purported retention benefit that only applies to three out of fourteen employees is a cost-effective use of the funds.

To be clear, repayment of student loans may be a legitimate benefit if that added benefit satisfies a need to remain competitive in the marketplace. Similarly, repayment of student loans may be a reasonable benefit to confer in lieu of items of similar cost in the current benefits package. But the burden is on the trustee to show that [redacted] is expending estate funds prudently in accordance with established standards. The trustee is not entitled to offer merely conclusory statements or to decide to award certain select employees with a compensation increase without regard to the compensation paid in the relevant marketplace by comparable entities. If the trustee wishes to increase salary or benefits for some or all of [redacted] staff, [redacted] must demonstrate a bona fide need to increase the attendant costs to the trust operation. As a fiduciary, the trustee is not spending [redacted] own money, but rather the money of stakeholders in the bankruptcy system. Therefore, the standing trustee must exercise due diligence in establishing the need for the budget request.

Given the foregoing, the United States Trustee has made a strong case for affirmance because the current record does not show that [redacted]'s current benefits program leaves [redacted] at a disadvantage in competing for employees in the local market. Nevertheless, the case for affirmance is primarily based on [redacted]'s failure to provide sufficient information to justify the expense. As a result, out of an abundance of caution, I remand the decision to give [redacted] the opportunity to provide additional information in support of [redacted] proposed expense. Specifically, [redacted] should provide the United States Trustee with the following additional information:

- Information regarding documentation of issues related to employee retention, *e.g.*, employee turnover rates for his office and recent employee exit surveys;
- Documentation of the current staffing needs of the trust operation and issues related to finding qualified candidates, *e.g.*, current open positions in the trust operation, feedback from potential job candidates, feedback from job placement services; are candidates for open positions likely to be eligible for the benefit;
- Information regarding the nature of the educational expenses to be reimbursed, and how the education relates to the duty of the trustee or the trust operation; and
- An explanation why providing a benefit to only three out of fourteen current employees is a cost-effective use of funds to address retention and recruitment.

Once [redacted] has submitted additional information responsive to these requests, the United States Trustee should review [redacted]'s additional information (and request any additional information he deems appropriate) and issue a new decision on [redacted]'s expense request. If the United States Trustee denies [redacted]'s request, [redacted] may seek administrative review under 28 C.F.R. § 58.11(e).

V. CONCLUSION

Based upon my review of the record, and for all of the foregoing reasons, I remand the United States Trustee's decision to allow [redacted] the opportunity to provide additional information in support of [redacted] proposed expense.

This decision constitutes final agency action in this matter.

Clifford J. White III Digitally signed by Clifford J. White III Date: 2021.10.21 10:13:03 -04'00'

Dated: October 21, 2021

Clifford J. White III, Director
Executive Office for United States Trustees