

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 00-0003

[Decided August 14, 2000]

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

[Redacted] (“trustee”), a member since December 1, 1990, of the chapter 7 panel for the United States Bankruptcy Court for [redacted], seeks review under 28 C.F.R. § 58.6 of a decision by the United States Trustee to suspend her receipt of new case assignments until the deficiencies set forth in a Field Examination Report dated April 24, 2000, are corrected. I affirm the United States Trustee’s decision based upon the record^{1/} before me.

I. Course of this Proceeding

On December 7, 1999, the United States Trustee commenced a Field Examination of the trustee by reviewing in detail fourteen cases administered by the trustee. A Field Examination is conducted by personnel of the United States Trustee Program and is designed to identify whether a trustee’s asset administration system and internal controls are adequate to safeguard bankruptcy estate funds. See 1998 Handbook for Chapter 7 Trustees at 9-16. On April 24, 2000, a Report of the Field Examination (“Field Examination Report”) was issued which concluded that

the quality of the trustee’s internal controls, financial record keeping, reporting procedures, and asset administration practices are **inadequate** for safeguarding bankruptcy estate funds in accordance with the [1998] Handbook [for Chapter 7 Trustees].

^{1/}The record includes the United States Trustee’s Notice of Suspension dated June 14, 2000 (“Notice”), which contained the Field Examination Report; the trustee’s Request for Review dated June 20, 2000 (“Request for Review”), which includes her response to the Field Examination Report (“Response”); the United States Trustee’s Response dated July 29, 2000, (“UST Response”); and the trustee’s second response dated August 4, 2000 (“2nd Response”). I granted the United States Trustee leave to file an untimely response.

Field Examination Report 3. Based upon this conclusion, and the trustee's "inadequate or inappropriate administration of estate property, as evidenced in the [F] case,"^{2/} the United States Trustee notified the trustee that new case assignments would be suspended until the deficiencies set forth in the Field Examination Report were corrected. The trustee timely filed her Request for Review with the Director of the Executive Office for United States Trustees.

II. Standard of Review

In conducting this review, the Director must consider two factors:

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

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

III. Analysis

A. The duties of the United States Trustee and case trustee

United States Trustees supervise panel trustees, 28 U.S.C. § 586(a)(1), and appoint them to individual chapter 7 cases. 11 U.S.C. § 701. 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. 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

^{2/}The [F] case was not reviewed by the field examiners, and no further explanation of the trustee's purported deficiencies in this case are given. In response, the trustee states that "I feel that I did administer the case properly" and discusses the itemization of accounts receivables, an issue that is not part of the Record. Request for Review 1. In response, the United States Trustee attaches a number of letters of complaint written by parties in interest in the [F] case. UST Response 22. The trustee responded further to the response of the United States Trustee. 2nd Response 20-22.

Because the United States Trustee does not detail the nature of his dissatisfaction with the trustee's performance in [F], I have not considered these allegations in determining whether the suspension was warranted. My decision with regard to the [F] allegations is without prejudice; therefore the United States Trustee is still free to take whatever corrective action he deems proper with regard to that case.

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.).

B. Does the Field Examination Report support suspension of the trustee?

1. *Overview of Field Examination Report deficiencies*

The outstanding^{3/} deficiencies as listed in the Report are as follows:

^{3/}The following deficiencies were stated in the Report but were either resolved or appear resolved pending a confirmatory office visit by staff of the United States Trustee:

Asset Administration

2. The trustee's estate file in one case failed to document any independent source used by the trustee to support the scheduled values for assets listed on Form 1.
3. Form 1 for three cases listed incorrect values for assets remaining to be administered.
5. The trustee failed to document, as detailed below, any follow up activity to collect on checks returned by the bank for insufficient funds. The trustee did not maintain a log of returned checks as recommended by the Handbook.
6. In one case, the trustee's estate file failed to evidence that estate assets were adequately insured.

Banking Procedures

1. In one case, the trustee indicated that the estate bank statements were reconciled. However, the statements were not initialed by the trustee or otherwise documented to evidence that the statements were reconciled in 1999.
2. One receipt was not deposited timely and was also not recorded in cash receipts log immediately upon receipt by the trustee.

Receipts and Disbursements

1. Disbursements in two cases were made without court orders.
2. The estate files did not contain adequate supporting documentation to support receipts.
3. In one case, an unscheduled bond premium refund receipt was not listed on Form 1 nor cross-referenced to Form 1 as required.
4. Numerous transfers (receipts) from other estate bank accounts were improperly recorded as negative disbursements in one case.
5. Receipts were incorrectly recorded and/or cross-referenced.

Asset Administration

1. **The trustee did not actively supervise estate professionals to ensure prompt and appropriate execution of duties, compliance with required procedures, and reasonable and necessary fees and expenses.**
4. **The trustee did not liquidate assets in a timely manner.**
7. **The trustee's files in one case did not contain any evidence to indicate that an analysis of the tax consequences of a sale of real property was performed prior to the sale.**

Field Examination Report 4-6, 7-8, The deficiencies stated in the Field Examination Report, if correct, represent a failure to safeguard estate funds and assets that justify a suspension or termination of assignment of cases. 28 C.F.R. § 58.6(a).

2. *The trustee's failure to supervise professionals*

The first deficiency in the asset administration category states that the trustee failed to actively supervise estate professionals based upon a review of the sampled cases. Field Examination Report 4. In support of this conclusion, the field examiners noted that in the case of [N], the trustee indicated that she did not have possession of the accounts receivable ledgers. Id. She did not know if her former

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6. Cash differences between Form 1 and 2 were noted in two cases.
 7. Form 2 in two cases did not contain complete transaction descriptions.

Other Reportable Matters

1. Form 1 in one case did not contain sufficiently accurate information with reference to the major activities affecting the closing of the case, i.e., pending adversary proceedings.
2. The trustee during 341 meetings of creditors regularly cuts off creditors from asking more than one or two questions.
3. The examiners found that the trustee has no plan on how to proceed in case of business interruption.
4. The trustee requested copies of business records from a corporate debtor, and not the original records, in one case.
5. The trustee did not maintain contemporaneous time records in compliance with United States Trustee requirements.

Field Examination Report 6-13. The remaining deficiencies, if accurate, continue to support a finding that the trustee's financial record keeping and asset administration are inadequate.

accountant (who had previously withdrawn from the case) had attempted to collect the receivables. Id. Indeed, the trustee herself had not taken any action. Id. This accountant had already received \$50,000 in approved fees, and a second application for \$70,000 was pending. Id. The accountant's first fee application disclosed time billed for accounts receivable collection. Id. The trustee stated that approximately \$70-80,000 of estate receivables had been collected by a third party, but that ownership of the funds was unknown because her former accountant had not made a determination regarding ownership of the funds. Id.

In response, the trustee stated, *inter alia*, that the accounts receivables ledgers were in her file and that further collection of these receivables would have wasted estate funds because of a large administrative claim. Response 2-3. The trustee's behavior in this case, and her response, evidence an abdication of her duties. She was unaware of whether accounts receivables were collected by the accountant and she was apparently unaware that he billed for collection activity even though she viewed such activity as futile because of a large administrative claim. In essence, the trustee permitted compensation for work that was apparently not performed and for which she believed was unnecessary.

In the case of [W], the trustee employed an accountant to review accounting records for possible preference actions. Field Examination Report 5. The accountant did not provide the trustee with a response for 21 months, and a response was provided just five days before the deadline to file any preference actions without any supporting documentation. Id. The trustee subsequently failed to file any preference actions. Id. In response, the trustee merely states that she was in constant contact with the accountant, but fails to explain why the analysis took so long and did not provide evidence of these contacts. Response 4.

Based upon this information, I find that the trustee failed to exercise effective oversight over this accountant, and failed to promptly administer this estate. A delay of 21 months to determine whether to file a preference action, absent any special circumstances, is simply inexcusable, and the trustee by her inaction may have given up an asset of real value to the estate, *i.e.*, the ability to recover funds in preference litigation. A resolution of this matter may require an independent analysis of whether the trustee has caused a loss to this estate.

In summary, these cases amply support the conclusion of the field examiners that the trustee failed to adequately supervise the professionals she retains to assist her in administering cases.

3. *The trustee's failure to timely collect liquidate assets*

The field examiners relied upon two cases for their conclusion that the trustee failed to collect and liquidate assets in a timely manner. In the [R] case, the trustee failed to send any demand letters to a tenant in arrears and, and the trustee's file evidenced no action to collect the outstanding funds. Field Examination Report 7. In the case of [J], the field examiners noted three things: the trustee failed to take action to pursue collection of payments under a stipulation, failed to timely cancel workers'

compensation insurance^{4/}, and failed to collect accounts receivable with a scheduled value of more than \$500,000. Field Examination Report 7-8.

In response to the issue in [R], the trustee stated that the amount owing was uncollectible. Response 7. Regarding [J], the trustee stated that collection under the stipulation was pursued, the workers' compensation was canceled retroactively, and the accounts receivables were subject to a security interest. Response 7-9. The United States Trustee in his response noted that the files reflected **no** collection activity on the part of the trustee personally such as demand letters. UST Response 9-10.

While the trustee may have justified her acts after the fact, these instances evidence a failure on the part of the trustee to take an active role in these cases, but instead to place the responsibility for administering a case upon professionals whenever possible. This conclusion is strengthened by the lack of documentation in her files supporting any collection activity whatsoever.

4. *The trustee failed to analyze the tax consequences in one case*

In the [W2] case, the trustee sold a one-half interest in a condominium for \$5,000. Field Examination Report 9. This resulted in a tax of \$1,249, and the case is administratively insolvent and thus will not result in a distribution to unsecured creditors. *Id.* In response, the trustee merely states that "an additional asset of \$3,000" created the tax liability, which was "not anticipated by anyone!" Response 10. The trustee's response fails to adequately explain why the liability was unanticipated, and the United States Trustee notes that no analysis of the sale was found in the trustee's files. UST Response 12-13. In her second response, the trustee states that an analysis was performed by her CPA, but still fails to clarify what this analysis was, provide a copy of this analysis, and state what was "not anticipated." 2nd Response 14. While this failure standing alone would not necessarily support suspension, I find that this deficiency has not been resolved satisfactorily.

5. *Summary*

The record supports the conclusions of the field examiners that the trustee's asset administration and record keeping practices are inadequate. A suspension is an appropriate remedy to give the trustee an opportunity to undertake and complete corrective action before taking on the administration of new cases.

IV. Conclusion

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 chapter 7 cases until her deficiencies are corrected.

^{4/}This conclusion was in error and the trustee appears to have canceled the insurance promptly. 2nd Response 11.

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

Dated: August 14, 2000

Kevyn D. Orr
Director
Executive Office for United States Trustees