

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 97-A-6

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

Mr. [REDACTED]^{1/} seeks review of a decision by the United States Trustee for Region [REDACTED] not to reappoint him to the panel of chapter 7 trustees for the United States Bankruptcy Court for the Western District of [REDACTED].^{2/} Based upon the record before me, I affirm the United States Trustee's decision.^{3/}

I. Course of this Proceeding

The trustee has been a member of the panel of chapter 7 of trustees for the United States Bankruptcy Court for the Western District of [REDACTED] since April 1989. Due to perceived inadequacies in his administration of cases, the trustee was placed on suspended status on January 13, 1994, and remained on inactive status until his non-renewal. On September 18, 1997, the United States Trustee declined to renew the trustee's appointment to the chapter 7 panel. By

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

^{2/} United States Trustees are Justice Department officials appointed by, and who 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 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; correspondence submitted by the trustee to the Director; materials that the parties produced at the request of the Director; documents that accompanied those various submissions; and a transcript of a face to face meeting that occurred on March 18, 1998. As part of his request for review, the trustee asked that I award damages to him as a result of his non-renewal. Money damages are not compensable in this proceeding. Consequently, this decision does not deal with that issue.

letter dated October 10, 1997, the trustee sought administrative review of that decision from the Director of the Executive Office for United States Trustees. By letter dated December 11, 1997, the United States Trustee set forth her bases for removing the trustee from the panel (the "Notice"). The trustee responded to the Notice on January 5, 1998 (the "1/5/98 response"). In his cover letter accompanying his 1/5/98 response, the trustee asked the Director to conduct a face to face meeting to resolve certain disputed issues of material fact. The United States Trustee responded to the trustee's submission in a letter dated January 28, 1998 (the 1/28/98 letter).

The Director granted the trustee's request for a meeting and designated a member of his staff to conduct it. The meeting occurred in [REDACTED] on March 18, 1998. At it, the trustee was given the opportunity to respond to all the statements contained in the United States Trustee's Notice and 1/28/98 letter. In addition, the Assistant United States Trustee for [REDACTED] addressed the problems that the trustee experienced in case administration. At the trustee's request, two members of the United States Trustee's staff appeared and discussed certain matters that the trustee believed were relevant to this review. The trustee then responded to the matters addressed by the Assistant United States Trustee and the staff. A transcript of the meeting was prepared and I have reviewed it in reaching my decision.

II. Standard of Review

In reviewing the United States Trustee's decision, I 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.

I apply these factors because they are identical to those the Director must consider pursuant to a final Rule the Department of Justice recently promulgated to formalize the procedures to be used by the Director in reviewing decisions by United States Trustees to cease assigning future cases to panel and standing trustees. *Procedures for Suspension and Removal of Panel Trustees and Standing Trustees*, 62 Fed. Reg. 51740 (Oct. 2, 1997). The final Rule, which is codified at 28 C.F.R. 58.6, is not effective for non-renewal decisions, like this trustee's, that were made prior to November 3, 1997. 62 Fed. Reg. at 51740. Nevertheless, I apply the Rule's factors, which are set out in subsection 58.6(i), because they constitute a rational basis upon which to review the United States Trustee's decision in this case.

III. Analysis

The United States Trustee removed the trustee based upon her conclusion that he was deficient in basic case administration. Notice at 2. She concluded that he had failed to perform his duties in a consistently satisfactory manner, to comply with policies of the Office of the United States Trustee, and to correct deficiencies which were occurring on a continuing basis. Id.

The record reflects that the trustee's problems first became apparent in July 1993, when the United States Trustee conducted an internal audit of his operations. It revealed that the trustee's case administration was deficient in basic ways. Notice at 2. One of the trustee's problems was his failure to prepare and maintain adequate records for the estates he was administering. A chapter 7 trustee liquidates a debtor's nonexempt assets for the benefit of the estate's creditors. 11 U.S.C. 704(1). By law, the trustee is "accountable for all property received." 11 U.S.C. 704(2). In order to ensure that trustees are fulfilling this responsibility, United States Trustee Program policy requires trustees to submit reports every 180 days on the administration of all cases in their charge. One of those reports, a Summary Interim Asset Report, commonly referred to as Form 3, requires a trustee to specify for each estate the amount of funds deposited by the trustee, the value of remaining assets that need to be administered, and the disposition of the case. As such, it is an important document. The United States Trustee's audit of this trustee revealed that the trustee had omitted entire cases from Form 3 of his report. In addition, the audit revealed that the trustee had maintained funds at a bank with whom the trustee did not have a depository agreement. Id. Finally, the audit revealed that the trustee had failed to record his receipt of checks contemporaneous with their receipt. Id.

Approximately six months later, on December 22, 1993, the Office of Inspector General of the United States Department of Justice ("OIG") issued an audit report regarding the trustee's case administration. Notice at 2-3 and at Exhibit 1. The OIG audits panel trustees to evaluate their administrative and cash management procedures. Notice at Exhibit 1 at 2. The audit assesses the quality of the panel trustee's accounting for bankruptcy estate assets and related cash management practices and procedures. Id.

In this case, the OIG determined that the trustee's accounting and cash management practices and procedures were deficient in a number of material respects. Id. at 3-9. The audit listed 15 specific deficiencies. Id. at 8-9. These included:

1. Numerous fund balance inaccuracies and omissions on Form 3;
2. Maintaining case funds in a bank which lacked a depository agreement;
3. Commingling case funds with his law firm's funds;
4. Failing to maintain estate case receipts and disbursement records, as required on Form 2 ;^{4/} and,
5. Failing to maintain Form 1, the Individual Estate Property Records, in a current and accurate manner.

These deficiencies bear on basic trustee duties. Several were repeat deficiencies from

^{4/} Form 2 records all receipts and disbursements. It requires a trustee to specify the transaction date, the check or reference number, the payer or payee, the description of the transaction, the amount of deposit or disbursement and the resulting change to the estate's checking account or savings balance. As such, it is a basic tool that ensures that all estate transactions are fully and accurately recorded.

earlier OIG or United States Trustee audits, including the inaccuracies found in the trustee's Form 3, his failure to enter into depository agreements, and the errors found on Form 2 relating to receipts and disbursements. Id.

Based upon the Inspector General's findings, the United States Trustee suspended the trustee from active case assignment on January 13, 1994. Notice at Exhibit 2. The suspension provided that the trustee would "not receive additional cases until all audit deficiencies are resolved and [his] accounting and cash management practices and procedures meet United States Trustee Program standards." Id. at 1. The Notice also required the trustee to provide a written response addressing ways to rectify the deficiencies identified by the Inspector General. Id. The trustee responded in letters dated January 20 and January 21, 1994. Id. at Exhibit 3. The office of the United States Trustee reviewed these responses. In a memorandum to the United States Trustee dated April 26, 1994, the Assistant United States Trustee for [REDACTED] concluded that the trustee had failed to rectify the identified inadequacies. Notice at Exhibit 4. The memorandum concluded that the trustee should remain on inactive status and advised that the office of the United States Trustee would conduct a follow-up compliance audit in a few months. Id. at 3.

The trustee did not resolve the problems identified by the Office of the Inspector General until January 10, 1995. Notice at 3 and Exhibit 5. At that time, the United States Trustee extended the trustee's suspension because he was still making too many mistakes in his administration of cases, even though his caseload had diminished significantly. Id.

Throughout 1994, 1995, and 1996, the office of the United States Trustee had to regularly alert the trustee about case administration problems and instruct him to rectify them. See, e.g., Notice at Exhibit 18 (September 9, 1994 letter to the trustee specifying inadequacies in his proposed Trustee's Final Report); Exhibit 19 (October 21, 1994 letter to the trustee specifying inadequacies in his proposed Trustee's Final Report); Exhibit 13 (October 24, 1994 letter to the trustee specifying inadequacies in his proposed Trustee's Final Report); Exhibit 15 (December 5, 1994 letter to the trustee specifying inadequacies in his Trustee's Final Report); Exhibit 16 (December 6, 1994 letter to the trustee specifying inadequacies in his Trustee's Final Report); Exhibit 23 (February 28, 1995 letter to the trustee specifying inadequacies in his proposed Trustee's Final Report); Exhibit 10 (March 15, 1995 letter to the trustee specifying inadequacies in his semiannual, 180 day report); Exhibit 17 (May 8, 1995 letter to the trustee specifying concern with his failure to file a Trustee's Final Report); Exhibit 24 (May 9, 1995 letter to the trustee specifying inadequacies in his proposed Trustee's Final Report); Exhibit 25 (June 9, 1995 letter to the trustee specifying inadequacies in his proposed Trustee's Final Report); Exhibit 26 (June 12, 1995 letter to the trustee specifying problems with his proposed Trustee's Final Report); Exhibit 27 (July 7, 1995 letter to the trustee specifying problems with his proposed Trustee's Final Report); Exhibit 28 (August 29, 1995 letter to the trustee specifying problems with his proposed Trustee's Final Report); Exhibit 14 (November 7, 1995 letter to the trustee specifying concern with his failure to file a Trustee's Final Report); Exhibit 30 (January 17, 1996 letter to the trustee specifying inadequacies in his semiannual, 180 day report); Exhibit 29 (March

11, 1996 letter to the trustee specifying problems with his proposed Trustee's Final Report); Exhibit 9 (July 25, 1996 letter to the trustee specifying inadequacies in his semiannual, 180 day report).

The recurrent problems with the trustee's Trustee Final Reports were significant. Section 704(9) of the Bankruptcy Code mandates that a trustee submit a final report in every case:

- (9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

A final report informs the court, the debtor, the creditors, and the United States Trustee about the assets recovered and the manner in which the trustee proposes to divide them among the 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 an estate is to be administered fairly and efficiently. For this reason, the trustee's inability to file accurate final reports was a source of legitimate concern for the United States Trustee.

The pattern of submitting deficient 180 day reports also was troubling. United States Trustee Program policy requires a chapter 7 trustee to provide the United States Trustee with a detailed report every 180 days that describes his or her administration of chapter 7 cases. These recount the status of the trustee's cases, the actions the trustee has taken in the cases, the trustee's accounting for estate funds, and many other matters. These reports are extremely valuable supervisory tools. They enable United States Trustees to determine whether trustees are adequately protecting debtors and creditors and effectively managing estates. They also help prevent and detect fraud. Given this, the United States Trustee had good cause for being concerned by the trustee's pattern of submitting inadequate 180 day reports.

In 1996, the trustee received an Evaluation that the United States Trustee signed on September 22, 1996. 1/8/98 letter at Exhibit A. That Evaluation recited the trustee's history of poor performance and concluded that problems persisted although performance had somewhat improved. Id.

The record reflects that the trustee's performance during 1997 was mixed. On the one hand, his final report in a large chapter 7 case, the Appliance Store, was "very well prepared." March 18 transcript, at 63. On the other hand, he continued to have problems maintaining adequate records about, and accounting for the performance of, his basic trustee duties. See March 18, 1998 transcript, at 54 (in 1997, the trustee "only had a couple of cases, and that's when we expected to see the work dramatically improve, and it simply didn't"); Notice at Exhibit 8 (February 18, 1997 letter to the trustee specifying problems with his 180 day report); and Notice at Exhibit 6 (July 17, 1997 letter to the trustee specifying problems with his 180 day report).

On September 18, 1997 the United States Trustee issued an Evaluation for the trustee. Notice at Exhibit 33. It noted that the trustee had made some progress in correcting his long-

standing inadequacies but determined that overall, his preparation of final reports, 180 day reports, and bonding were inadequate.⁵⁷ The United States Trustee concluded that the trustee's "performance of his trustee duties continues to be problematic." Id. As a result, the United States Trustee declined to reappoint him to the chapter 7 panel when his one year term expired. Id.

This record supports non-renewal. The trustee failed to master basic case administration. Although he experienced fewer problems in 1997, this is attributable, at least in significant measure, to the fact that his caseload has declined dramatically since he had not received new case assignments since January 13, 1994.⁶⁷

The trustee contends non-renewal was inappropriate for two principal reasons - because his performance had improved and because he was not specifically told in 1996 that he might not be renewed if he continued to experience problems. 1/5/98 letter at 6-10. Neither is persuasive. Contrary to the trustee's assertions, his performance never became adequate for the reasons specified above. In addition, the trustee either knew, or should have known, that his continuous and recurrent problems in basic case administration could result in non-renewal. The record establishes that the office of the United States Trustee repeatedly notified the trustee, from 1994 through 1997, that he was failing to adequately perform basic trustee duties. Thus, the office of the United States Trustee was forced to devote inordinate amounts of its resources to supervising a chronically under-performing trustee.⁷⁷

⁵⁷ The trustee experienced a fewer number of problems with 180 day reports and final reports but the United States Trustee attributed that to the fact that the trustee had "not received any new cases for the past three years. Therefore, TFRs are infrequently filed." Notice at Exhibit 33 at 4. The United States Trustee noted that "[w]hen filed, the Trustee's TFRs are frequently inadequate." Id.

⁶⁷ His caseload went from 105 active cases in January 1994 to one active case in January 1998.

⁷⁷ The trustee also contends his deficient performance was, at least partly, the result of his failure to use a computer software program to help manage his financial record keeping and case data. See, e.g., March 18, 1998 transcript, at 8-10. The trustee notes that he made efforts to obtain a suitable program from a bank and believes he could have signed a contract to obtain such a program if he had been returned to active case rotation. Id., at 15-17, 78. The trustee also contends the Assistant United States Trustee and the United States Trustee were aware of this situation at the time the United States Trustee issued her notice of non-renewal. Id., at 17, 67-68. The record is clear, however, that the trustee failed to implement a computer data management system for many years, despite prodding from the office of the United States Trustee as early as 1994 to do so (Id., at 51, 87), and "the mistakes, the errors, the omissions and the deficiencies" in his trustee operation evidenced a consistent pattern of inadequate performance that cannot fairly be attributed simply to a lack of computer software. Id., at 88; see also id., at 50-52, 53-55.

United States Trustees have a statutory obligation to supervise the administration of bankruptcy cases and trustees. See 11 U.S.C. 586. They do so to ensure that the participants in the bankruptcy system, debtors and creditors, are being well served. To fulfill that obligation, a United States Trustee must terminate the eligibility of a trustee who is deficient in basic case administration. The trustee in this case failed to satisfactorily perform basic trustee duties over a period of years. This caused the United States Trustee not to renew his appointment to the chapter 7 panel. Given the facts before me, I conclude that decision constituted an appropriate exercise of discretion.

IV. Conclusion

Based upon my review of the record, including the written submissions of the United States Trustee and the trustee, and the transcript of the March 18, 1998 meeting, I affirm the United States Trustee's decision not to renew Mr. [REDACTED]'s appointment to the panel of individuals available for appointment as trustee in chapter 7 cases in the United States Bankruptcy Court for the Western District of [REDACTED].

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

Dated: April 22, 1998

Joseph Patchan
Director
Executive Office for
United States Trustees