

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

FINAL AGENCY ACTION
CASE NO. 06-0003

REVIEW OF THE DECISION OF THE
UNITED STATES TRUSTEE FOR [REDACTED]
TO TERMINATE CHAPTER 7 TRUSTEE [REDACTED]

[REDACTED] a chapter 7 panel trustee for the [REDACTED] (“trustee”), seeks review of a decision by the United States Trustee for [REDACTED] (“UST”)^{1/} terminating his appointment to the panel of chapter 7 trustees. Based upon the record before me,^{2/} I modify the UST’s decision. At the time the UST decided to terminate the trustee, 29 days remained under a voluntary suspension agreement between the UST and the trustee. The record amply demonstrates unacceptable performance by the trustee. However, because the record does not reveal new or changed circumstances arising during the suspension period that would have justified immediate termination of the trustee, the UST should have given the trustee the opportunity to perform under the voluntary suspension agreement before evaluating whether to terminate him. The involuntary termination was premature. Accordingly, it is my decision that the trustee shall have 29 days from the date of this final agency action to perform under the voluntary suspension agreement, after which time the UST shall have 30 days to evaluate whether to restore the trustee to the panel, to continue the suspension, or to terminate the trustee. During the 30-day evaluation period afforded to the UST, the trustee shall remain suspended.

I. **Course of the Voluntary Suspension, Involuntary Termination, and this Proceeding**

The UST and the trustee agreed that the trustee would be voluntarily suspended from active chapter 7 case rotation from November 1, 2006, to January 25, 2007. This agreement is set forth in a letter from the UST to the trustee dated October 12, 2006 (“voluntary suspension agreement”). By a notice of termination dated December 27, 2006 (“notice”), the UST informed the trustee that he would be terminated from active chapter 7 case rotation effective 20 days after the date of the notice. On January 16, 2007, the trustee filed a timely request for review under 28 C.F.R. § 58.6 with the Director of the Executive Office for United States Trustees (“request for review”). On January 30, 2007, the United States Trustee filed a timely response to the

^{1/} 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.

^{2/} The record in this matter (“record”) consists of the UST’s Notice of Termination, dated December 27, 2006, and accompanying exhibits; the trustee’s Request for Review, dated January 15, 2007, and accompanying exhibits; the UST’s Response, dated January 29, 2007, and accompanying exhibits; and the trustee’s Reply, dated February 2, 2007, and accompanying exhibits.

request for review (“response”). On February 5, 2007, the trustee filed a reply to the response (reply).^{3/}

II. The United States Trustee’s Decision

In the notice, the UST alleged as general grounds for the termination: (i) trustee’s failure to perform duties in a timely and consistently satisfactory manner (*see* 28 C.F.R. § 58.6(2)); (ii) trustee’s failure to cooperate and to comply with orders, instructions, and policies of the court, the bankruptcy clerk, or the United States Trustee (*see* 28 C.F.R. § 58.6(4)); (iii) substandard performance of general duties and case management in comparison to other members of the chapter 7 panel (*see* 28 C.F.R. § 58.6(5)); and (iv) trustee’s failure to file timely, accurate reports, including interim reports, final reports, and final accounts (*see* 28 C.F.R. § 58.6(2)). The notice also contains allegations of specific facts relating to these failures, including allegations incorporated into the notice by reference to the allegations set forth in a letter from Assistant United States Trustee [redacted] to the trustee dated December 12, 2006 (Notice Exb.1; “December 12 letter”).

Reviewing the notice and the December 12 letter together, it appears that the UST based her decision to terminate the trustee on a host of reasons and principally relied on the following allegations.

A. **Trustee’s failure to timely complete various tasks related to administration of cases.**

- In the trustee’s 2006 performance review (covering the period May 1, 2004, to April 30, 2006), the UST rated the trustee as “adequate except for” with respect to trustee final reports (“TFRs”), trustee distribution reports (“TDRs”), trustee interim reports (“TIRs”), and case progress. Notice, at 1. The trustee does not dispute this allegation.
- The trustee’s “most recent report” (not further specified by the UST) was untimely and replete with grammatical errors to the extent that the UST was unable to understand it. When asked to review and resubmit the report, the trustee refused. December 12 letter, at 3.
- The UST filed motions to compel the trustee to file TFRs in the [redacted] [redacted] and [redacted] cases. The trustee filed these TFRs

^{3/} Although the reply is not specifically contemplated under 28 C.F.R. § 58.6, I have authority to consider it under 28 C.F.R. § 58.6(h). In the circumstances of this case, where the UST attached exhibits to the response that could have been attached to the notice, and where a potential issue was whether the trustee could have performed under the voluntary suspension agreement if allowed the agreed period to do so, the reply and its status report were relevant and potentially useful to me. That said, because I do not reach the merits of the UST’s allegations in my decision, I do not entertain the trustee’s request in the reply for discovery of the UST.

at the time the UST's motions were filed, but the reports were inaccurate. Notice, at 2. The trustee does not dispute this allegation.

- The UST asked the trustee to correct, within 30 days, informational deficiencies in dozens of cases covered by the TIR for the period ended January 31, 2006. The trustee failed to meet this deadline and did not seek an extension until 30 days after the deadline had passed. Notice, at 2. The trustee does not dispute this allegation.
- In accordance with the voluntary suspension agreement, the trustee was required to complete various specified tasks, such as entering case dispositions after section 341 meetings, providing status reports to the UST, and filing TFRs. As of the date of the notice, the trustee virtually had failed to perform any of the tasks set forth in the letter. Notice, at 2.
- The trustee failed to enter a disposition for the September 13, 2006, meeting of creditors in the [redacted] case within the time set forth in the voluntary suspension agreement. Notice, at 2.
- Despite three requests from the UST between February 21, 2006, and December 12, 2006, the trustee failed to provide a financial folder with respect to the TFR in the [redacted] case. December 12 letter, at 2.
- As of December 12, 2006, the trustee had filed TFRs in only six of 20 cases identified in the voluntary suspension agreement for attention by the trustee and possible TFRs. The dockets in 13 of those cases indicated no activity by the trustee. December 12 letter, at 2.
- As of December 12, 2006, the trustee had filed only 18 TDRs during the year, only three TDRs since October 12, 2006, and none in the last six weeks. This was in comparison to the [redacted] trustee average of 94 as of that date. December 12 letter, at 2.

In addition, the UST cited past deficiencies to support the decision to terminate the trustee, including a prior suspension from active rotation for the month of February 2005 for failing to file timely TIRs and TFRs, sloppy reporting in 2004, and inadequate reporting and case progress between 1998 and 2000, and in 2002. The notice indicated that performance evaluations of the trustee from the early 1990s (not further specified by the UST) generally stressed timely reports and eliminating typographical errors as areas for improvement by the trustee. December 12 letter, at 3.

B. Trustee's inadequate responsiveness to the UST's requests for information.

- In the trustee's 2006 performance review, the UST rated the trustee as "inadequate" with respect to responding to inquiries of the UST. Notice, at 1. The trustee does not dispute this allegation.

- In the June 5, 2006, cover letter to the trustee's 2006 performance review, the UST asked the trustee to contact the UST within one month to discuss how the trustee would resolve each of the concerns identified in the review. The trustee failed to respond to this request. Notice, at 1-2. The trustee does not dispute this allegation.
- In a letter dated September 7, 2006, the UST asked the trustee to immediately provide the UST with a detailed written explanation of how the trustee would address numerous concerns about his performance that were identified in the letter. The trustee failed to respond to this request. Notice, at 2. The trustee does not dispute this allegation.
- In the voluntary suspension agreement, the UST asked the trustee to provide a status report on eight specified cases. The trustee failed to respond to this request. Notice, at 2.
- In the voluntary suspension agreement, the UST requested a status update on the [redacted] case within five days of a pretrial conference scheduled for October 24, 2006. The deadline was not met, and no status report was made as of December 12, 2006. December 12 letter, at 1.
- The trustee does not answer communications from the UST within one business day (apparently a reference to one of the terms of the voluntary suspension agreement). The UST specifies only one such failure. On November 21, 2006, the UST sent the trustee via fax a question regarding a case (the UST does not specify the case in her allegations). The trustee did not reply until November 30, after the UST emailed a reminder to him. December 12 letter, at 2.
- In the voluntary suspension agreement, the UST requested an update about the possibility of a criminal referral in the [redacted] case. As of December 12, the trustee had not provided this information. December 12 letter, at 2.

In addition, the UST cites to the trustee's failure to timely respond to requests as an additional basis for the trustee's suspension in February 2005, and also notes an inadequate performance rating in 2000 regarding the element that measures responsiveness to the UST. The trustee's performance reviews in 1999 and in 1996 noted a need to improve in this area.

C. Other facts in support of termination.

- The UST noted in the trustee's evaluation folder (UST does not further specify the "folder") that "no one can remember the last time you referred a case as a possible civil enforcement problem." December 12 letter, at 2.

- The trustee declined an offer to receive training at the National Advocacy Center during the summer of 2006. December 12 letter, at 3.
- The trustee failed to attend mandatory training in September of 2005, although he did attend training in April 2006. December 12 letter, at 3-4.

III. Standard of Review

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

1. Did the UST's decision constitute an appropriate exercise of discretion; and
2. Is the UST's decision supported by the record?

See 28 C.F.R. § 58.6(I) (specifying the scope of the Director's review). The Director may “adopt, modify or reject the United States Trustee’s decision to suspend or terminate the assignment of future cases to the trustee.” *Id.*

IV. Analysis

A. **Duties of the United States Trustee.**

United States Trustees supervise chapter 7 trustees (28 U.S.C. § 586(a)(1)) and appoint them to individual chapter 7 cases (11 U.S.C. § 701(a)). United States Trustees “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, at 102 (1977). “The United States trustee is permitted to conduct his own investigation . . . to exercise effective supervision and make effective evaluation of the performance of the private trustees on the panel.” *Id.* at 110.

The goals of the United States Trustee Program include 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, and indeed should demand, that the trustees under their supervision perform their duties at the high standards that are required of fiduciaries. In furtherance of these goals, United States Trustees and their staffs should notify trustees at the earliest opportunity of any inadequacies in their performance so that any such deficiencies can be resolved promptly.

^{4/} The United States Trustee Program Mission Statement provides as follows:

It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases.

B. Duties of a chapter 7 trustee.

Trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of the particular chapter under which a bankruptcy is filed. As fiduciaries, trustees are held to very high standards of conduct. *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.).

Among their many duties, trustees are required to liquidate the property of an estate and close the case as expeditiously as is compatible with the best interests of all the parties in interest. 11 U.S.C. § 704(a)(1). They are also “accountable for all property received” (*id.*, at § 704(a)(2)) and must furnish reports and information about their administration of cases (*id.*, at §§ 704(a)(7), (8) and (9)). Submitting timely and accurate financial and case progress reports are central to a trustee’s performance of his or her fiduciary duties. TIRs, TDRs, and TFRs are three such important reports filed by trustees.

The TIRs are intended to enable a United States Trustee to evaluate all aspects of a trustee's performance and to determine whether the trustee is effectively managing estates. TFRs must be submitted by trustees when a case is ready to be closed. A TFR discloses to the court, the debtor, the creditors, and the United States Trustee the assets recovered and liquidated by the trustee, and the manner in which the trustee proposes to disburse funds among the estate's creditors so parties can object and the court can resolve any disputes prior to final distribution. *See Handbook for Chapter 7 Trustees (“Handbook”)*, at 8-36 to 8-39 (discussing TFRs). The trustee must sign the TFR under penalty of perjury. *Handbook*, at 8-36. As such, it is an important document, and a trustee must timely file accurate and complete reports. *See* 11 U.S.C. § 704(a)(9) (requiring the trustee to make a final report); *see also* Administrative Decisions 97-A-4, 97-A-6, 97-A-7, and 99-0004 (discussing final report).

TDRs are submitted to the court after all assets have been distributed to show how those assets were distributed and to confirm that all distributions have been made. *See Handbook*, at 8-41 to 8-42 (discussing TDRs). Similarly, the trustee must sign the TDR under penalty of perjury. *Handbook*, at 8-41. *See* 11 U.S.C. § 704(a)(9) (requiring the trustee to file a final account of the administration of the estate).

It is against these duties and very high standards that the UST’s decision to terminate the trustee must be assessed.

C. Appropriateness of UST’s decision to terminate the trustee.

1. Alleged failures to perform under the voluntary suspension agreement.

The trustee contests his December 27 termination principally on the ground that the UST agreed in the voluntary suspension agreement to give the trustee until January 25, 2007, to remedy various deficiencies and to meet various performance metrics. After January 25, the UST would review the trustee’s performance and determine whether to restore the trustee to

rotation, to continue the suspension, or to terminate the trustee. Specifically, the voluntary suspension agreement provides that “[d]uring the period of your suspension,^{5/} you are expected to accomplish the items listed below. Failure to accomplish these things may result in termination from the panel.” Voluntary Suspension Agreement, at 1. “Without timely compliance, returning to rotation will not be possible and termination could result . . . At the end of the suspension period we will review for compliance with the above matters, and randomly sample five cases that have been pending for at least 12 months to see if similar patterns of non-action exist in those cases.” *Id.*, at 6. The UST takes the position that she could terminate the trustee before January 25 notwithstanding the foregoing language because the agreement contained internal deadlines occurring before January 25 that the trustee missed. The trustee responds that there were no internal deadlines.

These conflicting interpretations of the voluntary suspension agreement require that I analyze (1) whether there were any internal deadlines, (2) whether any of these deadlines were missed, and (3) whether the missed deadlines (if any) would support the UST’s effective determination that no matter what additional performance the trustee rendered under the agreement by January 25, the UST would still have adequate grounds to terminate trustee.

The voluntary suspension letter sets forth approximately 59 tasks and performance metrics. Nine of these had deadlines or time frames associated with them. Four of those deadlines can be clearly determined from the record: (1) entry of the section 341 meeting disposition within one business day of the meeting for the [redacted] case (September 13, 2006, meeting, thus due September 14); (2) entry of the section 341 meeting disposition within one business day of the meeting for the [redacted] case (July 14, 2006, meeting, thus due July 17); (3) immediate resolution of issues regarding appointment of a certain professional in the [redacted] case; and (4) a status report to the UST within five business days after the pretrial conference in the [redacted] adversary (scheduled for October 24, 2006, thus due October 31).

Among the four deadlines that can be clearly determined from the record, the UST’s grounds for termination specifically addresses two of them: the trustee’s failure to meet the deadline for entry of the [redacted] section 341 meeting disposition, and the trustee’s failure to meet the deadline for submitting the [redacted] status report. The trustee does not dispute these allegations; thus, the remaining question for me is whether the trustee’s failure to meet these two deadlines provides the UST adequate grounds under the agreement to terminate the trustee. The [redacted] deadline occurred before the October 12 date of the voluntary suspension agreement, thereby placing the trustee in default from the start of the agreement. The voluntary suspension agreement cannot be fairly interpreted to provide a deadline that placed the trustee in breach of the agreement from the start. The [redacted] deadline was for an *ad hoc* status report. The record does not reflect the significance of the trustee’s failure to comply with the deadline. Without more, I cannot conclude that the trustee’s uncontested failure to comply justified an immediate termination. Thus, I do not believe these two deadlines, out of the 59 tasks and metrics specified

^{5/} The voluntary suspension agreement does not specify the period of suspension, but the UST and trustee appear to concur that it was November 1, 2006, to January 25, 2007. See Notice at 2 and Request for Review at 6 n.9.

in the voluntary suspension agreement, provided the UST with sufficient grounds to accelerate the evaluation of the trustee to a date sooner than January 25.

The UST also alleged that the trustee failed to answer communications from the UST within one business day (apparently a reference to one of the terms of the voluntary suspension agreement). Only one such failure is specifically alleged. On November 21, 2006 (just prior to the Thanksgiving Day holiday), the UST sent the trustee via fax a question regarding a case (the case and the urgency of the fax is not stated by the UST). The trustee did not reply until November 30 after the UST emailed a reminder to him. December 12 letter, at 2. The trustee does not dispute this allegation. Instead the trustee responds that he estimates that since October 12, 2006, he received in excess of two dozen emails from the UST, all of which he responded to by the end of the next business day. Request for Review, at 6. The UST does not dispute the trustee's response. As emails and faxes are different, it appears that both parties' allegations may be correct. The voluntary suspension agreement directs the trustee to develop either an email or facsimile system for responding to UST inquiries, and he appears to have developed an email system that works. To the extent that failure to respond to the single fax constitutes a failure to meet a deadline under the voluntary suspension agreement, I do not find it sufficient to justify the UST's early termination decision.

The UST's remaining allegations regarding the trustee's failure to perform under the voluntary suspension agreement, such as the failure to file any TFRs or TDRs during the first half of the suspension period (December 12 letter, at 1) or to provide status reports on certain cases (Notice, at 2) are all premature, in that the trustee's performance of these obligations was to be evaluated after January 25.^{6/} The UST may still consider whether the trustee's failure to perform them sooner is grounds for termination; however, the UST's evaluation of that question must wait until the trustee has been given the agreed opportunity to perform under the voluntary suspension agreement.

2. Alleged failures to timely complete various tasks related to administration of cases and to respond to requests from the UST.

The UST asserts that her decision to terminate the trustee was based upon the trustee's performance during the voluntary suspension, as well as for reasons that predated that period. While the earlier conduct reveals an on-going and continuing pattern of objectionable conduct, that earlier conduct does not provide a basis to terminate the trustee prior to the conclusion of the voluntary suspension period. The trustee does not dispute many of the pre-suspension allegations, which are serious allegations indeed.

For example, the trustee does not dispute that the UST asked the trustee to correct within 30 days informational deficiencies in dozens of cases covered by the TIR for the period ended January 31, 2006. He does not dispute that he failed to meet this deadline and did not seek an

^{6/} The voluntary suspension agreement requires the trustee to file TDRs within 125 days after entry of the order allowing compensation and expenses, but does not specify any particular cases in which such TDRs are to be filed. The UST does not allege a failure to file a timely TDR in any specific case covered by the voluntary suspension agreement.

extension until 30 days after it had passed. The trustee does not dispute that the UST filed motions to compel the trustee to file TFRs in the [redacted] cases and does not dispute that the TFRs he did file were inaccurate. Further, the trustee does not dispute that the UST rated him as “adequate except for”^{7/} with respect to TFRs, TDRs, TIRs, and case progress in his 2006 performance review and as “inadequate” with respect to responding to inquiries of the UST. The trustee’s older performance reviews show a similar history. While the trustee questions the relevance of the older reviews, he nonetheless does not dispute their accuracy.

V. **Conclusion**

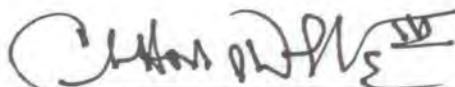
I modify the trustee’s termination for the reasons stated above. The UST clearly demonstrated abysmal performance by the trustee. The sole reason for modification of the termination is the ambiguity in the voluntary suspension agreement that renders immediate termination premature. Nothing in this decision is intended to prejudice the ability of the UST to again suspend or terminate the trustee for any appropriate reason, including without limitation any reason alleged in this proceeding by the UST.

The trustee shall have 29 days from the date of this final agency action to complete performance under the voluntary suspension agreement, after which the UST shall have 30 days to evaluate whether to restore the trustee to the panel, to continue the suspension, or to terminate the trustee. Until the UST takes such action, the trustee shall remain suspended.

When the UST evaluates the trustee at the end of the voluntary suspension period (as it is extended by this decision), she may consider the trustee’s past performance and his performance during the voluntary suspension period.

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

Dated: March 28, 2007



Clifford J. White III
Director

^{7/} A trustee can receive one of three possible ratings in his or her performance review: “adequate,” “adequate except for,” or “inadequate.” There is no requirement that a trustee receive an inadequate rating as a condition precedent to termination or suspension.