

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 02-0009

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

[Redacted], (“trustee”), a chapter 13 standing trustee in the [redacted district], seeks review under 28 C.F.R. § 58.6 of a decision by the United States Trustee for Region [redacted] suspending his receipt of new case assignments. The United States Trustee suspended the trustee for writing an abusive letter in response to a debtor inquiry, intimidating auditors, and inadequate case administration. In conducting this review, I must consider two factors set forth by regulation: (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? 28 C.F.R. § 58.6(i). Based upon the record before me¹, I affirm the United States Trustee’s decision for the reasons set forth below.

Factual Background

On November 20, 2002, [L], a principal at the accounting firm of [M], a firm retained to conduct an independent audit of the trustee, sent to Standing Trustee Coordinator [redacted] a letter detailing the trustee’s interaction with the auditors on November 19. Notice Exhibit 3. According to the letter and attached memoranda, the trustee engaged in a “belligerent tirade” of about five minutes against the two auditors present in his office, referring to “stupid”, “obnoxious”, and “damn” auditors. *Id.* After hearing of the incident, [L] called the trustee to intercede. *Id.* In a memo to the file, [L] reported that

His [the trustee’s] tone was very affrontive and there was no dialogue or interest on his part regarding cooling down the rhetoric. I stated to him that I would continue to direct our audit team to be professional. He stated something somewhat confrontational of

¹The Notice of Suspension, dated November 29, 2002, and accompanying exhibits (“Notice”); the trustee’s Request for Review, dated December 16, 2002, and accompanying exhibits (“Request for Review”); and the United States Trustee’s Response dated December 30, 2002, and accompanying exhibits (“Response”).

which I can't recall what it was. As I was requesting him to transfer me to our auditor he hung up the phone.

Id.

In response, the trustee argues that he was confrontational for “no more than 50 seconds” and that he was somehow “set up” by [redacted Standing Trustee Coordinator]. Request for Review 13. The trustee does not explain nor provide evidence of how he was “set up.” Given the tone of his letter to the [redacted debtors], *infra*, and the trustee’s own admission of confrontational behavior, I accept the version of the auditors.

On November 21, 2002, [L] sent another letter to [redacted Standing Trustee Coordinator] regarding a recent letter by the trustee to debtors [redacted] (“Debtors”). Notice Exhibit 1. The trustee’s letter was triggered by the following letter dated November 16, 2002, quoted in full:

Dear [redacted trustee],

Enclosed you will find copy [sic] of the statement that we recently received from the [redacted] Bank. We thought that all correspondence was to go thru you and that there were to be no late fees or charges.

I have also enclosed a copy of the taxes. I have spoken to the [redacted] County Treasurer and was told that they are unable to remove and stop charging interest without a notice from the bankruptcy court. Even with paying the current taxes the balance keeps going up.

Sincerely,

/s/

[redacted debtors]

cc: [redacted attorney]
Attorney

Id.

In response to this apparently innocuous letter, the trustee responded in a letter dated November 20:

* * *

Kindly be warned that you should never under any circumstances communicate with me or my office personnel.

Unfortunately, most Chapter 13 debtors erroneously believe that I am **THEIR** trustee; their friend, and their helper.

Be apprized that **BY LAW**, I am none of those things! For example, I am **NOT** your Trustee, but instead I am the Trustee assigned to Case #[redacted]. As such I **DO NOT** represent you, but instead, I represent the Bankruptcy estate established in Case #[redacted]. Additionally, I have legal interests which are adverse to your legal interests! In layman terms this means that I am **NOT** your friend, but instead, I am your arch enemy!

In fact, by law, if I simply believe that you have committed a crime, then I have an absolute legal duty to turn you over to the United States Attorney General (John Ashcroft) for indictment and criminal prosecution.

* * *

Obviously, given the above facts it would be utterly foolish of you to ever contact me in any manner. Writing to me (or anyone else like the Judge or the U.S. Trustee) is especially foolish because all of us have no duty to help you, but instead, have the absolute legal duty to have you prosecuted if we believe you have committed a crime.

I have turned other debtors who phoned me or wrote to me over to the Department of Justice for indictment and prosecution and some were convicted.

As of this point I know of no crime committed by you, but, don't under any circumstances, be foolish enough to contact me again.

* * *

. . . because you are \$11,165.12 behind on your payments we will immediately file a Motion to Dismiss your case.

* * *

. . . . Eight months ago you went off a wage deduction and have performed miserably ever since.

Id. (emphasis in original). The portions of the letter not quoted are in the same vein. The trustee also informed the auditors that he responded to another debtor in the same manner as the above-quoted letter. Notice Exhibit 2.

Analysis

I. THE RECORD SUPPORTS SUSPENSION

A. The duties of a standing trustee

United States Trustees appoint and supervise standing trustees for chapter 13 bankruptcy cases. 28 U.S.C. § 586(b). Bankruptcy trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of the particular chapter under which a bankruptcy case is filed. Because they are fiduciaries, trustees are held to very high standards of honesty and loyalty:

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 market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.). See generally Woods v. City National Bank & Trust Co., 312 U.S. 262, 278 (1941); Mosser v. Darrow, 341 U.S. 267 (1951). Another key fiduciary duty is the duty of reasonable care and diligence toward the estate. U.S. ex rel. Willoughby v. Howard, 302 U.S. 445, 450 (1938); In re Cochise College Park, Inc., 703 F.2d 1339, 1357 (9th Cir.1983).

In addition to their overarching fiduciary duties, standing trustees are also entrusted with certain statutory duties. Among these duties are the duties to “furnish such information concerning the estate and the estate’s administration as is requested by a party in interest,” 11 U.S.C. § 1302(b) (incorporating by reference 11 U.S.C. § 704(7)), and to “advise, other than on legal matters, and assist the debtor in performance under the plan.” 11 U.S.C. § 1302(b)(4).

B. The trustee’s egregious conduct supports suspension

The trustee argues that his policy forbidding debtors to “under any circumstances communicate with me or my office personnel,” Notice Exhibit 1, is based upon the “cannons [sic] of ethics.” Request for Review 4. This policy appears to be based upon a reading of [redacted]. R. Prof. Conduct. 4.2, which states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Although the trustee's interpretation might merit further scrutiny under different circumstances,² it does not excuse his venomous response to the Debtors' letter. The trustee's own response, if you accept his interpretation of [redacted] R. Prof. Conduct 4.2, itself violates the rule because it is a communication with a represented party. A short form response stating something to the effect of "The rules of professional conduct governing attorneys prohibit me from communicating with persons represented by an attorney absent that attorney's permission" would have sufficed and likely would have not implicated Rule 4.2.

I also seriously question the fitness of a trustee who would threaten criminal prosecution and file a motion to dismiss merely because the Debtors asked a question. As the United States Trustee correctly notes in her Notice, it is unethical (with limited exceptions not applicable here) for an attorney to threaten criminal action to gain a civil advantage. Notice 2 (citing ABA Comm. on Ethics and Prof. Resp., Formal Op. 92-363). Not only did the trustee discourage any contact with him by his threatening behavior, he also told the Debtors that it would be "foolish" to write to the "Judge or the U.S. Trustee." Notice Exhibit 1. By creating a climate of fear, the trustee is attempting to create a forum where he can act without any checks on his behavior.³

Therefore, I conclude that the trustee's outrageous behavior supports, at a minimum, suspension.

C. The trustee's attempted intimidation of the independent auditors supports suspension

As discussed above, I find that the trustee engaged in a tirade for approximately five minutes against the "stupid", "obnoxious", and "damn" auditors in his office. As a fiduciary, the trustee controls millions of dollars which he must apply in accordance with the confirmed plans of debtors and his approved operating budget. The United States Trustee Program as a necessary part of its statutory oversight requires that the operations of all standing trustees be audited annually by independent auditors. The auditors in that office were present to conduct an audit.

²At least one state bar committee has opined that a trustee, as a party and not merely an attorney for a party, would not be subject to the ban on attorney communication with a represented party. Cal. Bar Standing Comm. on Prof. Resp. and Conduct, Formal Op. 1989-110. In addition, the trustee's blanket ban on communications runs counter to an aspirational goal of the National Association of Chapter 13 Trustees, of which the trustee is a member: "The trustee should have a system in place to promptly respond in a meaningful manner to inquiries from debtors, creditors, attorneys, and other interested parties." Standing Trustee Pledge of Excellence ¶ 2.

³I also read the two affidavits from local practitioners supplied by the trustee in this light. Request for Review Exhibits 2 and 3. Given the trustee's outrageous behavior toward the Debtors, the local bar undoubtedly fears antagonizing the trustee.

The United States Trustee was correct to sanction the trustee for his blatant attempt at intimidation. A core trustee duty is to provide a full and fair accounting of his administration of estates. Cf. 11 U.S.C. § 702(2), (7), (8), (9). A trustee who attempts to subvert the integrity of an independent audit is qualitatively no different from a trustee who attempts to mislead or conceal when making an accounting to the court, and such behavior should not be tolerated.

D. The United States Trustee correctly questioned the trustee's substantive case administration

The trustee's letter, putting aside its tone and its blatant attempts to intimidate by threatening criminal prosecution, also raises serious questions about the trustee's ability to administer the cases in his charge. The letter states that the Debtors were \$11,165.12 behind on their payments; a table within the letter indicates that the Debtors were required to pay \$424.01 a week. Notice Exhibit 1. The letter further states: "For 22 months you followed that advice [wage order] and performed well. **Eight months ago** you went off a wage deduction and have performed miserably ever since." Id. (emphasis added). In other words, the Debtors were approximately 26 payments behind ($\$11,165.12 / \$424.01 = 26.33$). The Debtors were unlikely to make up the deficit, but continued to enjoy the protections of the automatic stay.

Although there is no hard and fast rule on when to file a motion to dismiss, at a minimum a standing trustee should have in place controls to ensure that **prompt** action is taken on delinquencies. Exec. Office for U.S. Trustees, Handbook for Standing Trustees 7-1 (Dec. 1, 1998). The trustee agrees with the United States Trustee's belief that a motion to dismiss should have been filed sooner, but states that "we, like all Trustees make mistakes." Request for Review 10. I conclude that the record supports the United States Trustee's concerns over case administration, and that these concerns, coupled with the trustee's misconduct, support suspension.

E. The matters set forth by the trustee do not mitigate his misconduct

The trustee makes three arguments to excuse his conduct: (1) the U.S. Trustee acquiesced in his "tone, tenor, words and phrases," (2) the U.S. Trustee does not allow him to adequately staff his office, and (3) the U.S. Trustee does not allow him to charge a percentage fee on mortgage payments paid through the plan, leaving him inadequate resources. Request for Review passim.

Regarding acquiescence, the only evidence provided is that the trustee uses the same "tone, tenor, words and phrases" in his preliminary comments at 341 meetings, and that an analyst from the [redacted] office attended the trustee's 341 meetings on May 30, 2002, but did not complain in the trustee's evaluation. Request for Review 2-6 and Exhibit 8. The United States Trustee notes that her staff do not attend every 341 meeting. Response 4. I conclude that the trustee's evidence of acquiescence is equivocal. At most the trustee points out a lapse of oversight on the part of the United States Trustee's staff, which does not excuse the trustee's threatening letter to the Debtors.

The other two arguments are closely related: the trustee does not have sufficient resources, and the United States Trustee does not allow the trustee to collect sufficient fees to adequately support his operations. I am not persuaded by the trustee's argument. The trustee cannot blame inadequate staffing for his own outrageous behavior in writing an abusive letter to the Debtors and intimidating the auditors. Regarding his case administration, the United States Trustee notes that the trustee's staffing is statistically in line with his peer group (the ten chapter 13 standing trustees closest in caseload size), and that the trustee is now permitted to charge a percentage fee on mortgage payments administered by him. Response 5-6.

II. THE TRUSTEE APPROPRIATELY EXERCISED HER DISCRETION IN SUSPENDING THE TRUSTEE

As discussed above, I have concluded that the record supports disciplinary action. I am also required to determine whether the penalty (suspension) was an "appropriate exercise of discretion." 28 C.F.R. § 58.6(i). The trustee argues that the punishment was too harsh because (1) "I have congestive heart failure", (2) "I have served for sixteen years in an exemplary manner," (3) "the only damage proven so far is that I upset [the auditor]," and (4) this is the first infraction." Request for Review 15.

I conclude that the United States Trustee appropriately exercised her discretion. The trustee's conduct in writing the letter and attempting to intimidate the auditors is outrageous. I suspect that the factors set forth by the trustee against suspension were taken into account by the United States Trustee.

Conclusion

The record in this case reflects that the trustee sent a threatening letter to the Debtors, attempted to intimidate the independent auditors auditing his operations, failed to exercise effective case administration in the Debtors case, and generally created a climate of fear that suppressed any questioning of his administration. The record also raises the question of whether the trustee is effectively administering the cases in his charge. The United States Trustee acted properly in suspending the trustee for his misconduct.

The foregoing constitutes final agency action in this matter.

Date: January 29, 2003

/signed/ _____
Lawrence A. Friedman
Director
Executive Office for United States Trustees