

On October 19, 2009, the trustee filed a request for review with the Director of the Executive Office for United States Trustees (the “Request for Review”). On November 4, 2009, the United States Trustee submitted a response to the trustee’s Request for Review (the “Response”), and, on November 13, 2009, the trustee submitted a reply to the United States Trustee’s Response (the “Reply”).

II. Standard of Review

In conducting this review, I must consider two factors:

1. Did the United States Trustee’s decision constitute an appropriate exercise of discretion?
2. Was the United States Trustee’s decision supported by the record?

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

I may “adopt, modify or reject the United States Trustee’s decision to suspend or terminate the assignment of future cases to the trustee.” Id.

III. Analysis

A. Duties of the United States Trustee and Panel 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. The 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. 595, 95th Cong., 1st Sess. 102, 101 (1977). Under the law, “[t]he 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.

Chapter 7 panel trustees are fiduciaries responsible for administering cases filed under chapter 7 of the Bankruptcy Code. As fiduciaries, trustees are held to high standards of conduct. See generally Mosser v. Darrow, 341 U.S. 267 (1951); Woods v. City Nat’l Bank & Trust Co., 312 U.S. 262, 278 (1941). See also Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

discontinues the assignment of new cases. 28 C.F.R. § 58.6(d) (setting forth the bases for an Interim Directive). If a United States Trustee issues an interim directive, the trustee may ask the Director to stay it. 28 C.F.R. § 58.6(e). By petition dated October 19, 2009, the trustee asked the Director to stay the Interim Directive during the review period. See 28 C.F.R. § 58.6(e). The United States Trustee responded to the stay request on November 3, 2009. Given the administrative record before me, I did not issue a stay.

Because debtors and creditors cannot choose their trustee, it is important that trustees be capable of dealing with a wide range of individuals and be perceived to be free of any taint of prejudice or bias. It is equally important that trustees exhibit good judgment and be perceived to be fair and balanced. Indeed, these attributes are so important that the Department of Justice promulgated a formal rule conditioning a trustee's appointment upon the possession of such attributes. See 28 C.F.R. § 58.3(b)(4).

Additionally, because the trustee is a fiduciary charged with protecting the interests of all estate beneficiaries, a trustee must be a person of integrity and good moral character. These attributes are similarly considered so essential that the Department of Justice promulgated a formal rule conditioning appointment upon the trustee's possession of "integrity and good moral character." See 28 C.F.R. § 58.3(b)(1).

The United States Trustees effectuate the goals of the United States Trustee Program, which include protecting the public interest by ensuring efficiency in the administration of cases and by protecting the integrity of the bankruptcy system. See United States Trustee Program's Mission Statement.^{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. It is against these high standards that the United States Trustee's decision to immediately terminate the trustee from active chapter 7 case rotation must be assessed.

B. Grounds for the United States Trustee's Decision to Terminate the Trustee

The United States Trustee terminated the trustee's eligibility to receive future case assignments for the reasons that follow. On May 21, 2009, the trustee conducted a digitally recorded examination of the debtors in Case No. _____ pursuant to Federal Rule of Bankruptcy Procedure 2004 (the "2004 examination"). After the 2004 examination had been concluded, unaware that the recording was still running, the trustee made derogatory and disparaging comments about one of the debtors to a member of his staff. Notice at 1; Transcript of May 21, 2009, 2004 Examination, at 68:9-12 (attached as Exhibit A to Notice). Specifically, the trustee referred to the debtor as a "four B," which he defined by a scatological reference characterizing the debtor by race and gender. Exhibit A to Notice at 68:9-12.

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

The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. 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 to promote and defend the integrity of the federal bankruptcy system.

The trustee subsequently discovered the inadvertent recording of his remarks and attempted to alter the digital recording to erase them. Notice at 2. Thinking he had successfully done so, he then transmitted the recording to the debtors' counsel. *Id.* Debtors' counsel subsequently played the trustee's comments for the debtors, and made them public when he filed with the bankruptcy court a motion to remove the trustee with a supporting certification explicitly detailing the trustee's remarks. Notice at 1-2.

In response to the debtors' motion to remove him, the trustee acknowledged making the remarks and expressed regret, stating that they "will, unfortunately [sic] add further fuel to [the debtor's] evident anger towards whites and towards me." Notice at 2. Also in his response to the motion for removal, the trustee admitted that he "took steps, obviously unsuccessful, to delete that part of the recording." *Id.* The trustee did not notify the United States Trustee of his remarks or his attempt to redact them. *Id.* The motion to remove was set for hearing before the bankruptcy court on August 20, 2009, but because the trustee voluntarily withdrew from the case prior to the hearing, the court did not reach the issue. Exhibit 15 to Brief at 4.

Although not advised of any previous instances of disparaging racist or sexist comments made by the trustee, nor of any other attempted alterations of official recordings, the United States Trustee determined that the trustee's conduct was egregious and "indicative of bias towards blacks and women" sufficient to warrant the trustee's removal from the panel. Notice at 2. The United States Trustee determined that the trustee's comments "were highly offensive and inappropriate," and "cannot be condoned under any circumstances." *Id.* According to the United States Trustee, "the fact that they were made in [the trustee's] office to [the trustee's] staff member" did not in any way lessen the gravity of the situation. *Id.* In addition, the United States Trustee noted that the trustee's response to the debtors' motion for removal, "which speaks in racial terms, reflects a lack of sensitivity to people of color and a lack of understanding of the gravity of [the] conduct." *Id.*

The United States Trustee determined that she must assume that if the trustee were to remain a trustee, parties to bankruptcy cases in the district might question the motives behind his actions and whether his actions in a case resulted from bias. Notice at 2. The United States Trustee ultimately found that the conduct of disparaging a debtor based on race and gender in his office, in a context where the trustee did not think he would be discovered, indicated that the trustee was not "free of prejudices against any individual, entity, or group of individuals or entities which would interfere with unbiased performance of a trustee's duties." See 28 C.F.R. § 58.3(b)(4).

The United States Trustee further determined that the trustee's response to the motion to remove indicated that the trustee knew his comments had been recorded before he forwarded the comments to debtors' counsel, and yet he did not advise the United States Trustee of the existence of the comments or of his attempt to redact them. The United States Trustee determined that the failure to notify her, and the attempt to redact the offensive comments, indicated that the trustee did not "possess integrity and good moral character." See 28 C.F.R. § 58.3(b)(1). The United States Trustee also noted that the trustee's integrity and moral character must be questioned simply by the trustee's "invention or repetition" of the "four B" epithet. Notice at 2.

Because the trustee did not meet the qualifications for membership on the panel of trustees set forth in either 28 C.F.R. §§ 58.3(b)(4) or 58(b)(1), the United States Trustee concluded there were sufficient grounds to remove him from the panel of trustees under 28 C.F.R. § 58.6(a)(9) (providing that a United States Trustee may be terminated from the assignment of cases for, among other reasons, failure to meet the eligibility requirements of 28 C.F.R. § 58.3). Notice at 2. The United States Trustee also issued an interim directive immediately terminating the trustee from additional case assignments under 28 C.F.R. § 58.6(d)(1), on the grounds that the trustee appeared to be “ineligible to serve under applicable law, rule, or regulation[.]” Notice at 3.

C. The Record Supports the United States Trustee’s Decision to Terminate the Trustee

1. Prejudice Against Any Individual, Entity, or Group of Entities Interfering With Unbiased Performance of Duties

Based upon the offensive comments the trustee made to his staff member about the debtor after the 2004 examination, unaware that they were being recorded, the United States Trustee found that the trustee was not free from prejudice or bias as required by 28 C.F.R. § 58.3(b)(4). The trustee argues that these comments, made privately, do not in fact show racial prejudice or bias, and contends that substantial evidence shows that the trustee is free from bias or prejudice. Brief at 1-2, 5. Secondly, the trustee argues that the United States Trustee’s concern that the perception of bias will ensue among debtors is speculative, and thirdly, that the United States Trustee misinterprets prior termination decisions concerning racist and sexist remarks. Brief at 5-8. I will consider each of these arguments in turn.

Existence of Prejudice

As evidence of absence of bias, the trustee presents four statements, including “statements of two respected and experienced attorneys who have regularly appeared before him [sic] in many cases and have observed his actions and demeanor in cases being conducted before them,” the statement of “an African American woman who is a longtime friend of [redacted] and his wife, and a former client,” and his own personal statement. Brief at 5, Exhibits 1, 3-5.^{5/} The trustee also presents the docket of the bankruptcy case, which reflects the 2004 examination and subsequent proceedings, as well as a transcript of the entire digitally recorded 2004 examination. Exhibits 8-20 to Brief.

Bankruptcy attorney [redacted] states that [redacted] has been appointed trustee in many of his cases and served as counsel for the chapter 7 trustee in others; that “[redacted] has always treated everyone equally, fairly and impartially”; and that he has “never observed any incident of [redacted] having displayed any bias toward or against anyone based on race or ethnic background.” [redacted] does not specifically mention gender. Exhibit 4 to Brief at 1.

^{5/} The trustee was unable to provide an additional statement of [redacted], Pastor of the [redacted] due to an unexpected family emergency of the Reverend.

Bankruptcy attorney _____ states that he has dealt with _____ in his capacity as trustee, and sometimes as his adversary, in approximately 500 cases, and states “_____ approach is regularly forceful, direct, and, on occasion, lacks the requisite patience and civility some cases demand.” Exhibit 5 to Brief at 1. _____ goes on to state, “I have never known _____ to be dishonest, prejudicial or sexist in his dealings with my staff, nor have I observed any sexist or racially prejudicial behavior or treatment, towards any debtors who have appeared before him, in the hundreds of cases we have filed where _____ has been the panel trustee.” Id.

Retired teacher, current retail business owner, and the trustee’s former client _____ states that she has known _____ since 1985 and spent many hours with him, both socially and professionally, and states that “in all of my years of interaction with him [he] has never, even on one occasion, displayed any signs of being a racist.” Exhibit 3 to Brief at 2. She goes on to state, “I do know racism and recognize it readily . . . _____ is not a racist.” Id. She further states that if not for her firm belief that _____ is neither racist nor sexist, she would not have agreed to provide a statement for use in connection with this matter. Id.^{6/}

The trustee also submits his own testimonial, in which he characterizes his offensive comments as “an aberration,” Exhibit 1 to Brief at 1, “an anomaly,” Exhibit 1 to Brief at 3, and as a “thoughtless comment” made on a single occasion in a long, unblemished career as a trustee, not reflective of his character, or of any bias, either professional or private, Exhibit 1 to Brief at 1. The trustee submits that he does not take actions based on the race, gender, or ethnic background of any person and, in the aftermath of this incident, realizes that “even a private derogatory reference to someone based on race and ethnic background has the effect of seeming to condone racist or other discriminatory actions, perceptions and attitudes in others.” Exhibit 1 to Brief at 2. Until this case, the trustee states that has not been subject to any grievance or claim or charge of discrimination by any person based on race or ethnic background. Id.

As further evidence of his lack of prejudice or bias, the trustee also mentions his record of personal pro bono service to persons “of all races and socioeconomic backgrounds,” of commendable length and depth. Exhibit 1 to Brief at 2-3. The trustee served as a VISTA volunteer for two years in _____ as a paralegal in a legal aid office representing persons facing eviction or landlord-tenant difficulties. He has provided pro bono services through Legal Services of _____ through the _____ Pro Bono Bankruptcy Law Project and was the co-recipient in 2006, along with his wife and partner, of the “Legal Services of Equal Justice Medal,” in which it was recognized “that ‘this couple has generously taken on case after case for more than fifteen years . . . making invaluable contributions to securing justice through their pro bono efforts on behalf of low-income clients of South _____ Legal Services in _____ County.’” Exhibit 1 to Brief at 2-3. Additionally, the trustee has been involved in designing and promoting a _____ financial literacy project presented in high schools to students of all racial, ethnic, and socioeconomic backgrounds. Exhibit 1 to Brief at 3.

^{6/} _____ also states that she is “very sensitive to the racial divide that exists in our country,” but that she is also “very sensitive to the fabrication of racism where none exists.” Id.

Finally, the trustee characterizes the bankruptcy case in which this incident occurred as one of the most difficult encountered in 21 years as a trustee and asserts that, aside from the improper post-examination comments, all his conduct in the case was correct and proper. Exhibit 1 to Brief at 3. The trustee submits the docket of the case and the transcript of the examination as supporting evidence. Exhibit 8 to Brief. The trustee essentially asserts provocation as justification for his comments – that it was the disruptive conduct of the debtors in his office immediately before the formal examination, as well as the distress his own staff felt at the debtors’ conduct, which caused his “anomalous private reaction.” Exhibit 1 to Brief at 5. According to the trustee, the debtor began a “tirade” as soon as she entered his office on the day of the 2004 examination which “resonated throughout [his] office,” and that he cannot recall any other person in his 21 years as a trustee being “so visibly and audibly loud, angry and disruptive.” Id.

In response, the United States Trustee notes that the qualifications set forth in 28 C.F.R. § 58.3 govern not only whether a person is initially “eligible for appointment to the panel,” but also whether he continues to “retain eligibility therefor.” See 28 C.F.R. § 58.3(a). The United States Trustee argues that it is vitally important that the trustees adhere strictly to the qualifications established by the Attorney General, as panel trustees are often the only person a debtor sees as representative of the bankruptcy system, citing 62 Fed. Reg. 51,748 (Oct. 2, 1997). As the face of the bankruptcy system, trustees must avoid not only partiality or bias, but also the appearance of partiality or bias. See Final Agency Action, Case No. 00-0001 at 14 (April 28, 2000).

The United States Trustee argues that the testimonials the trustee presents as evidence of his absence of bias are irrelevant because the United States Trustee did not take action against him on the basis of his subjective views about African-Americans and women, but rather because the trustee’s statements reasonably could cause debtors and creditors in cases assigned to the trustee to doubt his impartiality and question whether he holds racist and sexist views. The United States Trustee notes that the Supplementary Information to 28 C.F.R. § 58.6 expressly states that “one egregious act,” including “a single instance of using racial slurs against a debtor,” can justify termination, depending upon the circumstances.” See 62 Fed. Reg. 51,748 (Oct. 2, 1997).

Based upon my review, I find that the record supports the United States Trustee’s allegation that the trustee exhibited conduct which could reasonably lead participants in the bankruptcy system to conclude that he is not free from prejudice “against any individual, entity, or group of individuals or entities,” which would interfere with unbiased performance of his duties. 28 C.F.R. § 58.3 (b)(1). The three testimonials and the trustee’s own statement shed light on the trustee’s public demeanor and the performance of his duties, including his reputation for lacking necessary patience. Further, his record of pro bono service is one of which he can be justifiably proud. Nonetheless, the comments made by the trustee speak for themselves and, taken on their face, demonstrate a prohibited prejudice against a particular individual, and very possibly against African-American women, African-Americans generally, and/or women generally. The very existence of these statements, indisputable and admitted by the trustee, gave this debtor, and absent termination, would give other participants in the bankruptcy system a reasonable basis to question whether actions taken by the trustee are taken on the merits or are instead motivated by privately-held, personal views ordinarily concealed from public view. The recorded statements are, as

bankruptcy Chief Judge _____ characterized them at the August 20, 2009, hearing on the motion to remove the trustee, “outrageous slurs” that are “manifestly repugnant,” and “[i]nexcusable, outrageous, deeply disturbing, not only for the debtors, but for all of us.” Exhibit 15 to Brief at 22-23. As previously mentioned, a trustee is a fiduciary whose conduct is held to a very high standard in accordance with his position of trust. The United States Trustee Program, in fulfilling its mission to protect and preserve the integrity of the bankruptcy system, can have, in the words of Chief Judge _____ “zero tolerance for such sentiments, in or out of the public forum.” Id. at 23.

Perception of Bias

The trustee next argues that the United States Trustee’s concern that, in the future, debtors and creditors will not be able to be assured of the trustee’s impartiality and lack of bias is unsupported by any record evidence. According to the trustee, there has been no negative impact in the district from the incident, and he contends that more than mere speculation or fear of future controversy is needed to support a termination decision. Brief at 6. The trustee asserts that any future arising incidents stemming from his comments should be handled on a case-by-case basis, and “horrible imaginings alone cannot be allowed to carry the day.” In re BH and P, Inc. 949 F.2d 1300, 1313 (3d Cir. 1991).

In response, the United States Trustee asserts that the comments have already been widely disseminated and caused considerable harm because they are known to the Chief Judge of the Bankruptcy Court for the District of _____, as well as to debtors’ counsel who is a prominent filer of consumer bankruptcy petitions in the _____ vicinage. In addition, personnel from the _____ office of the United States Trustee have reported that attorneys from Northern, Central, and Southern _____ have “approached them, unsolicited, with commentary” about the trustee’s statements. Reply at 7. The United States Trustee asserts that her decision is, of necessity, forward-looking and she cannot await future disparaging remarks because it would be unfair to compel minority and female debtors who have a reasonable basis to believe the trustee harbors bias against them, to cede control of their assets or claims to the trustee in order to take advantage of their rights under the Bankruptcy Code. Reply at 6, citing Case No. 00-0001 at 16.

Having reviewed the record and considered the foregoing arguments, I find that an erosion of trust in the trustee’s unbiased performance of his duties is not speculative but has already occurred within the district, as evidenced by the debtors’ motion to remove him from the case in which his comments were made. At the August 29, 2009, hearing on the motion for removal, the bankruptcy court determined that because the trustee had voluntarily resigned, there was no need to act on the removal, but found it appropriate to consider other relief requested by the debtors – namely, that the trustee and his attorney be denied compensation for work done in the case. Exhibit 15 to Brief at 23, 26. In considering that request, the court scrutinized the record of the trustee’s work in the case both before and after the 2004 examination on May 21, 2009. The court found that as to work before May 21, 2009, “the [t]rustee appears to have been doing his job in a difficult case,” but as to work performed after May 21, 2009, and especially with regard to a motion to hold the debtors in contempt that the trustee filed on June 29, 2009, the court found the trustee’s work was “seriously flawed,” containing misrepresentations and mischaracterizations. Exhibit 15 to Brief at 26-29. The court denied the motion for contempt, ordered the trustee to pay

the debtors' expenses in connection with defending it, and ordered that the trustee could not be compensated for any work performed after May 21. Exhibit 15 to Brief at 26-30; Exhibit 16 to Brief.

Thus, the incident has already, in actuality, and not hypothetically, reflected negatively upon the trustee and the bankruptcy system. The events which occurred after the 2004 examination lend further credence to concerns of bias and lack of impartiality. Unfortunately, the trustee's own comments have given participants in the bankruptcy system a credible basis to question his impartiality, and the immediate aftermath of this incident persuades me that the United States Trustee's termination of the trustee pursuant to 28 C.F.R. § 58.3(b)(1) is well-grounded in actual fact and not the result of a speculative imagining of the future.

Prior Termination Decisions

Finally, the trustee asserts the United States Trustee's decision must be informed by and consistent with previous decisions made in other cases reviewed by the Director. The trustee asserts that the United States Trustee's decision to terminate him departs unacceptably from the standards of discipline in two prior decisions dealing with derogatory and inappropriate statements, namely, Case No. 05-0004 (Corrected decision dated November 1, 2005), and Case No. 00-0001 (April 28, 2000).

In Case No. 05-0004, a trustee publicly and repeatedly made inappropriate comments and statements at meetings of creditors conducted pursuant to 11 U.S.C. § 341(a), causing the United States Trustee to suspend the trustee for a period of six months.^{7/} The United States Trustee concluded that the trustee's comments during these first meetings of creditors demonstrated "a seriously unprofessional demeanor," Case No. 05-0004 at 5, and based the suspension upon the trustee's failure to "display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public." See 28 C.F.R. § 58.6(a)(6). Upon review, the Director reduced the suspension to a period of four months, in apparent recognition of the trustee's demonstration, after counseling on his deficiencies, of an ability and a desire to improve his professional demeanor.

In Case No. 00-0001, the trustee also uttered his offensive comments publicly, at a state Senate hearing which was convened to consider the state Governor's renomination of the trustee to

^{7/} The trustee's comments in Case No. 05-0004 appear to be a sadly mistaken attempt to inject inappropriate levity into section 341 proceedings. For example, the trustee made comments such as the following: To a Samoan woman, "Do you learn to dance early in your life? To dance like that? How do you get your hips to move like that?" Case No. 05-0004 at 14. To female debtors: "No sugar daddies on the side buying you any nice things?" "Why are you smiling? Are you sucking up to me here?" "Sometimes when I get nasty with the woman, they like to hang onto their husbands a little bit." "Oh yeah. I'm an independent woman right? I am, hear me now." Case No. 05-0004 at 10.

a position as Chairman of the Board of a state investment fund.^{8/} The comments gained notoriety after being reported in the media, resulting in widespread condemnation and the Governor's formal withdrawal of the trustee's chairmanship nomination. Case No. 00-0001 at 2-3. The United States Trustee commenced an investigation and ultimately terminated case assignments to the trustee on the grounds that the trustee's conduct before the state Senate could reasonably cause debtors and creditors to question the trustee's impartiality. Case No. 00-0001 at 3. The Director affirmed the termination and the issuance of an interim directive upon review. Case No. 00-0001 at 7.

The trustee in this case argues that he did not engage in repeated misconduct as the trustee in Case No. 05-0004 did, that his comments were private, and that he merits a lesser sanction than termination for his behavior than the trustee received in Case No. 05-0004. Brief at 7. He further argues that, unlike the trustee in Case No. 00-0001, he immediately appreciated and took responsibility for the gravity of his comments and attempted to remove them from the public record to prevent the harm they might cause to debtors and the trustee system if they became public. Brief at 8.

The United States Trustee argues that the Case No. 05-0004 is distinguishable from this case because the comments in that case did not receive widespread public dissemination and, while certainly inappropriate, were far less offensive and assaultive. Response at 8-9. The United States Trustee maintains that Case No. 00-0001 is directly analogous and that the termination of the trustee in this case is consistent with the decision affirmed by the Director in Case No. 00-0001. Response at 6-8.

Upon review of the administrative decisions, I find that both Case No. 05-0004 and Case No. 00-0001 concerned comments which were publicly made in the first instance. Neither case concerned such clearly intentional derogatory comments made by a trustee in the course of a 2004 examination in the mistaken belief they were private, and neither involved a trustee's attempt to conceal such comments from the public by alteration of a record. Case No. 00-0001 is most closely analogous to this case and I agree with the United States Trustee that it offers some guidance as to the appropriate weight of sanction for public remarks exhibiting prejudice or bias which could cause debtors or creditors to question a trustee's impartiality. Ultimately, however, the United States Trustee's decision must be evaluated against the particular facts of record in this case and the special position held by a chapter 7 panel trustee.

As a fiduciary, a trustee occupies a significant position of trust and responsibility and is accountable for his actions not just to the United States Trustee, but also to the bankruptcy community and the public at large. These gratuitous and offensive statements, though made covertly and with the expectation that they would not be discovered, were made by the trustee in the context of a 2004 examination while carrying out his fiduciary duties. The trustee realized the gravity of these statements and tried to delete them. He then forwarded the recording to the

^{8/} In Case No. 00-0001, the trustee quoted his father's phrase "N---- and Indians" in responding to a question from one of the Senators asking why he had moved to the state. The trustee was attempting to explain that he wanted to leave behind the racist attitudes found in the state where he formerly resided.

debtors' counsel, believing that he had successfully removed them. But he failed, and they became public.

Having been made public, these statements can hardly be ignored or disregarded in terms of evaluating the existence of prejudices against any individuals, groups, or entities which would interfere with unbiased performance of a trustee's duties. Certainly the debtors' counsel and the debtors did not disregard or overlook these comments, deciding instead to approach the court with a request that the trustee be removed from the case. Chief Bankruptcy Judge likewise found the comments troubling, although not reaching the question of removal because the trustee voluntarily resigned from the case in which he made these comments. The trustee himself found it appropriate to resign from the case. The United States Trustee reached a similar conclusion regarding the gravity of the conduct as a result of her investigation of the incident and her supervisory expertise.

Based upon all of the foregoing, I find that the United States Trustee's administrative decision to terminate the trustee under 28 C.F.R. § 58.3(b)(4) and 28 C.F.R. § 58.6(d) was an appropriate response to the trustee's misconduct.

2. Possession of Integrity and Good Moral Character

A trustee's main responsibilities are to pursue, account for, liquidate, and distribute estate assets. 11 U.S.C. § 704. A trustee's access to estate assets, including cash, along with other responsibilities, necessarily requires that his or her integrity remain beyond reproach. Because the United States Trustee is charged under the bankruptcy laws with supervising panel trustees, he or she must be absolutely confident that a trustee has the highest degree of integrity. Indeed, the integrity of trustees is critical to the public's confidence in the bankruptcy system. Consequently, should a trustee be determined to be unreliable or dishonest, or to lack candor in either the administration of an estate or in his or her dealings with the United States Trustee, that determination alone would justify immediate termination of the trustee's panel membership.

The United States Trustee identified three concerns about the trustee's integrity as a basis for his termination. Notice at 2. These concerns were the trustee's failure to notify her of his private comments, his attempt to remove his private comments from an official record, and his invention or repetition of the offending "four B" epithet. 28 C.F.R. § 58.3(b)(1)

The trustee argues that there is no rule, requirement, or standard that obligated him to report purely private comments "that were not and should not have been part of any proceeding" to the United States Trustee, and that the United States Trustee seems to be applying a special rule "not previously announced elsewhere" to him. Brief at 9. The trustee asserts that the integrity and preservation of a 2004 examination is not within the legitimate interest of the United States Trustee because such an examination is "in essence [a] pre-suit deposition[] the purpose of which is to facilitate investigation by trustees and others" and, although available to any party in interest, it is

not part of “the official public record” as would be a first meeting of creditors conducted pursuant to 11 U.S.C. § 341(a).^{2/} Brief at 8-9.

In response, the United States Trustee states that 2004 examination records are admissible as evidence and, thus, are subject to the same evidentiary concerns as apply to the recordings of section 341(a) meetings. Response at 9-10. Because the trustee’s offensive comments appeared on a “discoverable piece of evidence,” the United States Trustee maintains that a person of integrity and good moral character would have exercised the judgment to immediately inform the United States Trustee, his supervising authority, of the existence of such comments. Response at 10. The United States Trustee argues that the attempt to alter a 2004 examination recording, which can be used as evidence in proceedings that could deprive debtors of their property or personal freedom, exhibited a “shocking lack of judgment” on the part of the trustee, and that alteration of a recording containing sworn testimony should be a matter of serious concern to any supervising authority. Response at 10.

Based upon my review, I find that the record supports the United States Trustee’s allegation concerning the trustee’s lack of integrity in attempting to alter the record of a proceeding conducted pursuant to the bankruptcy rules, and capable of being utilized for both investigative and evidentiary purposes. The trustee examined these debtors pursuant to his duties as a trustee under 11 U.S.C. § 704. As previously mentioned, a fiduciary such as a trustee occupies a significant position of trust and is called upon to exercise good judgment in a plethora of challenging circumstances. While ethical decision-making is not always easy and the path of good judgment is undoubtedly clearer in hindsight, any matter involving the alteration of a record containing sworn testimony should give any lawyer and any trustee pause. That the trustee found the inadvertent recording of his private remarks alarming enough to cause him to believe they should be removed from the debtors’ purview should have been a strong indicator to him that any action he might take with respect to the recording could embarrass and reflect negatively not only upon himself, but also upon the bankruptcy system.

Instead of taking matters with respect to the inadvertent recording of those inappropriate comments into his own hands, the trustee should have notified the United States Trustee, his supervisory authority, of their existence rather than leaving the United States Trustee to find out about them some two months later, after receipt of notice of the debtors’ motion to remove him from the case. Response at 3, fn. 3. A person of the required integrity and good moral character is called upon to recognize the gravity of obviously inappropriate conduct and to come forward with candor to correct it rather than compounding errors by attempting to cover it up in secret. This is not a previously unannounced rule, but rather the application to the trustee, in regrettable circumstances, of the requirements of 28 C.F.R. § 58.3(b)(1). That section expressly conditions the continued eligibility of a trustee upon the trustee’s possession of integrity and good moral character, and under 28 C.F.R. § 58.6(d)(2), provides sufficient basis for the United States Trustee’s termination and interim directive here.

^{2/} The trustee notes that the May 21, 2009, 2004 examination, as conducted by him in _____, did not require either a prior court order or a subpoena, citing _____ LBR 2004-1(a) (if party appears voluntarily at Fed. R. Bankr. P. 2004 examination, no subpoena or court order is required). Brief at 8.

IV. Conclusion

Based upon my review of the record, including the written submissions of the trustee and the United States Trustee, I affirm the United States Trustee's decision to terminate the trustee's membership on the chapter 7 panel.

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

Dated: 12/3/09

/s/ _____

Clifford J. White III

Director

Executive Office for United States Trustees