

Department of Justice
Executive Office for United States Trustees

Final Agency Action
Case No. 00-0001
[Decided April 28, 2000]

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

[Redacted], a chapter 13 standing trustee for the United States Bankruptcy Court for the District of [Redacted],^{1/} seeks review of a decision by the United States Trustee for Region [Redacted] terminating his eligibility to receive new case assignments.^{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 chapter 13 standing trustee in this district since 1984. By notice dated February 25, 2000, the United States Trustee notified the trustee that the trustee's appointment would be terminated effective the close of business

^{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.

^{3/} The administrative record in this matter includes the trustee's Request for Stay of the Interim Directive issued by the United States Trustee; the United States Trustee's Response to the Request for Stay; the trustee's Reply to the United States Trustee's Response to the Stay Request; the United States Trustee's Notice of termination of future case assignments; the trustee's Request for Review of the termination decision; the United States Trustee's Response; and the documents that accompany those various submissions.

on March 1, 2000, which meant the trustee would not be eligible for new case assignments after that date (the “Notice”). Notice at 5. See also 28 C.F.R. 58.6 (Department of Justice’s procedures governing administrative review). The United States Trustee concluded the trustee had engaged in gross misconduct which required the imposition of an Interim Directive; this meant new case assignments would cease effective March 1, 2000, rather than at the end of the review process available to the trustee under 28 C.F.R. 58.6.^{4/} Notice at 5. See also 28 C.F.R. 58.6(c) and (d). On March 15, 2000, the trustee filed a request for review with the Director of the Executive Office for United States Trustees (the “Request for Review”). On March 30, 2000, the United States Trustee filed a response to the Request for Review (the “Response”).

II. Standard of Review

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

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

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

^{4/} In normal circumstances, a termination takes effect upon the expiration of a trustee’s time to seek review by the Director or, if the trustee timely seeks such review, upon the issuance of a final written decision by the Director. 28 C.F.R. 58.6(c). In the unusual circumstance where a United States Trustee specifically determines that one of four extraordinary circumstances exists the United States Trustee may issue an Interim Directive, which immediately 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 letter dated February 28, 2000, the trustee asked the Director of the Executive Office for United States Trustees 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 February 28. The trustee replied on February 29. Given the administrative record before me, I did not issue a stay.

III. Analysis

Chapter 13 of the Bankruptcy Code makes bankruptcy relief available to individuals with regular income and limited debt. 11 U.S.C. 1301, *et seq.* Chapter 13 debtors propose plans to repay their creditors over a three-year period, unless the court, for cause, approves a longer period that cannot exceed five years. 11 U.S.C. 1322(d). A debtor's plan must satisfy certain requirements and must be confirmed by the court. 11 U.S.C. 1322 and 1325.

Chapter 13 cases are administered by chapter 13 standing trustees, who are appointed and supervised by United States Trustees and the Department of Justice.^{5/} 28 U.S.C. 586(b); 62 Fed. Reg. 51740, at 51741 (1997) (commentary to final rule establishing procedures for suspension and removal of panel and standing trustees, codified at 28 C.F.R. 58.6). 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. *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.).

Chapter 13 standing trustees administer bankruptcy cases within a specified geographic area. In some districts only one chapter 13 standing trustee is appointed to administer future cases. 62 Fed. Reg. at 51741. Other districts have multiple standing trustees. *Id.* Standing trustees are not government employees although the Department of Justice regulates them and supervises their administration of bankruptcy cases. 28 U.S. C. 586(a)(3), (b), and (d).

In a chapter 13 case, a standing trustee collects, protects, and accounts for plan payments obtained from the debtor, and distributes those monies to creditors in accordance with the payment provisions set forth in the debtor's repayment plan and the Bankruptcy Code. 11 U.S.C. 1322, 1325 and 1326; 62 Fed. Reg. at 51741. Standing trustees typically oversee many cases; some administer thousands. *Id.*

^{5/} A United States Trustee is authorized to appoint one or more standing trustees, subject to the Attorney General's approval, if "the number of cases . . . commenced in a particular region so warrants" 28 U.S.C. 586(b).

Trustees exercise significant control over debtors' finances, including their ability to confirm a chapter 13 plan. See, e.g., 11 U.S.C. 1322(a)(1) (requiring a chapter 13 debtor to turn over "future earnings or other future income of the debtor to the supervision and control of the trustee" for use in repaying the debtor's debts) and 11 U.S.C. 1325(b)(1) (prohibiting a court from confirming a debtor's plan if the trustee objects unless the court determines all the debtor's disposable income for the next three years will be applied to make payments under the plan). Significantly, chapter 13 debtors have no right to select or approve their chapter 13 trustee. Fed. Reg. at 51741. Debtors must accept the trustee who is assigned their case. Id. The same is true for creditors. Although trustees collect funds on behalf of those creditors, the creditors have no right to select or approve their trustee. Id.

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 the Department of Justice has promulgated a formal rule conditioning a trustee's appointment upon the possession of those attributes. See 58 C.F.R. 58.3(b)(3) (a trustee must "[b]e courteous and accessible to all parties") and 58 C.F.R. 58.3(b)(4) (a trustee must "[b]e 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 also 28 U.S.C. 586(d) ("The Attorney General shall prescribe by rule . . . qualifications for appointment under subsection (b) of this section to serve as standing trustee").

In this case, the United States Trustee terminated the trustee's eligibility to receive future case assignments because the trustee told the Commerce and Human Resources Committee of the [Redacted] State Senate that his father had questioned the trustee's decision to move to [Redacted] because [Redacted] was full of "N[derogatory noun] and Indians." Notice at 1; Request for Stay at 2; Request for Review at 4. The context in which the statement was made is significant. In addition to serving as a standing trustee, this trustee has served as the Chairman of the [Redacted] State Endowment Fund Investment Board (the "Board"), a post that requires nomination by the Governor and approval by the [Redacted] State Senate. Request for Stay at 2. During the week of January 31, 2000, the trustee appeared before the Commerce and Human Resources Committee of the [Redacted] Senate, which was considering the Governor's renomination of this trustee as Chairman of

the Board. *Id.* In response to a question from one of the Senators asking why the trustee had moved to the state many years before, the trustee repeated his father's statement regarding "N_____ and Indians." *Id.*

The trustee acknowledges that as soon as he made the remark "at least some of the legislators were bothered or offended by the comment." Request for Stay at 3. This is a bit of an understatement. Condemnation was instantaneous and before the end of the week the Governor had formally withdrawn the trustee's nomination as Chairman of the Endowment Fund Investment Board. [Redacted], Feb. 5, 2000 "Legislative Action," available on WESTLAW, 2000 WL [Redacted] (noting "Appointment returned to the Governor, [this trustee], for the Endowment Fund Investment Board").

An Associated Press article, "[Governor] Withdraws Appointment After Disparaging Racial Remark," described how the Committee Chairman and the Governor agreed the trustee's statement necessitated the withdrawal of his nomination. Associated Press, Feb. 4, 2000, available on WESTLAW, [Redacted]. The article noted that the Governor withdrew the trustee's reappointment nomination as the Chairman of "a key state investment board" because the trustee had uttered "a racial slur earlier in the week during his confirmation hearing." The article also noted that the State Senate had "formally returned" the trustee's nomination and the trustee had "submitted a letter" that "ask[ed] that his name be withdrawn for personal reasons." *Id.*

The article extensively quoted Senator [Redacted], the Chairman of the Commerce and Human Resources Committee, who said the trustee's fate was sealed when the trustee "repeated [a] disparaging reference to blacks and Indians his father had made 40 years before." *Id.* The Chairman specifically stated "[t]here was no chance that he would have been confirmed after that." *Id.* The Chairman emphasized that the Governor would not tolerate such a statement and "I would not tolerate it."^{6/} *Id.*

^{6/} Neither the trustee's Request for Stay nor his Request for Review disputes these statements. Nor did the trustee file a request, pursuant to 28 C.F.R. 58.6(h), asking that additional information be obtained regarding these points. Finally, the trustee did not submit an affidavit from Chairman [Redacted] in support of his Request for Review notwithstanding the fact he did submit affidavits from other state senators.

The Associated Press article specifically identified this trustee as “the federal bankruptcy trustee” in [Redacted], *id.*, as did a February 5, 2000, article in the [Redacted]. See [Redacted], Feb. 5, 2000 “Legislative Notebook,” available on WESTLAW, 2000 WL [Redacted] (identifying the trustee as “the federal bankruptcy trustee in” [Redacted]). This newspaper, which has the largest circulation in the state, contained the same quotes from the Committee Chairman as were set forth in the earlier AP article, including his statement that neither the Committee Chairman nor the Governor would “tolerate” the trustee’s remarks, and his confirmation had “no chance” of approval in light of those remarks before the Committee.^{7/} *Id.*

The United States Trustee commenced an investigation when he learned of this trustee’s alleged statements. Notice at 1. He personally met with the trustee and the trustee’s counsel. His office also interviewed State Senator [Redacted], Vice-Chairman of the Committee, who attended the hearing where the trustee uttered the term “N_____ and Indians.” *Id.*; Request for Review at Ex. 3 at 1. That Senator “confirmed” the language the trustee had used. *Id.* The Senator also explained that members of the Committee admonished the trustee for having made an inappropriate statement, expressed disappointment in the trustee, and advised the trustee never to repeat such statements.^{8/} Notice at 2. See also Request for Stay at 3 (trustee “realiz[ed] at least some legislators were bothered or offended by the comment”).

After completing his investigation, the United States Trustee determined it was appropriate to terminate the standing trustee’s ability to receive new cases. Notice at 1, 3-6. Before reaching this determination, the United States Trustee

^{7/} At least two other newspapers with significant readership within the state also reported the trustee’s statements. Notice at 2-3.

^{8/} The trustee appended an affidavit from this Senator to his Request for Review. Request for Review at Ex. 3. The Senator’s affidavit does not question the accuracy of any of the statements reported by the AP and the local press. Unfortunately, the affidavit is of limited use in discovering what occurred at the Committee hearing because it does not repeat the words the trustee spoke. Instead, it describes what the Senator “believed [the trustee] believed” when he spoke, and describes the Senator’s “beli[ef]” about the intent behind the words the trustee actually spoke.

considered several alternative administrative actions, including requiring the trustee to undertake “sensitivity training.” Notice at 3-4. After weighing all factors, the United States Trustee determined to terminate case assignments to the trustee, a remedy concomitant with that imposed by the Governor in withdrawing the trustee’s nomination to serve as Chairman of the [Redacted] Endowment Fund Investment Board. Notice at 3-6

The United State Trustee noted that all parties in a bankruptcy case have a basic right to be confident that their “trustee will be unbiased and will not fail to fulfill his or her fiduciary obligations whether through prejudice, ignorance or lack of judgment.” *Id.* at 3. The United States Trustee noted that debtors and their creditors rely upon the United States Trustee to assign “disinterested and unbiased trustees.” *Id.* The United States Trustee explained it would be “fundamentally unfair” to force debtors and creditors to accept a trustee who could “reasonably perceived to be prejudiced, or who lacks sound judgment.” *Id.*

Based upon the record before him, the United States Trustee concluded that this trustee’s conduct before the State Senate reasonably could cause debtors and creditors who are members of minority groups to question this trustee’s impartiality. *Id.* at 3-5. The United States Trustee explained that the words the trustee chose to repeat in an open forum were “dehumanizing” and “were charged with bigotry.” *Id.* at 3. The United States Trustee explained that one of the terms repeated by the trustee “is universally recognized as a term of degradation and oppression.” *Id.* at 4. The United States Trustee noted that the trustee’s “gratuitous language was powerful enough that even the non-minority members of the committee were moved to act.” *Id.* The United States Trustee noted that the trustee’s statement had been reported in the local press and those reports identified him as a “federal bankruptcy trustee.” *Id.* at 2-4.

The United States Trustee specifically concluded that some form of sensitivity training would not resolve the problems caused by the trustee’s testimony. *Id.* at 3-4. The United States Trustee explained that the problem was not solely that the trustee would repeat such conduct; “[t]he problem is that from this point on, minority debtors will have genuine and legitimate concerns about your prejudices.” *Id.* at 4.

The United States Trustee also concluded termination was necessary

because the trustee's statement before a State Senate Committee "demonstrate[d] an astonishing lack of judgment." Id. The United States Trustee noted that the subject before the Committee was not bigotry, but rather the trustee's qualifications to be Chairman of the State Endowment Fund Investment Board. Id. The hearing had nothing to do with prejudice or racism and the United States Trustee noted that the trustee's gratuitous use of a derogatory racial term "was not necessary." Id. The United States Trustee concluded that "[w]hen language like that is used in public discourse, the message to minority communities is that similar things, and worse, are being said in private." Id.

The United States Trustee found this conduct interfered with the trustee's ability to function effectively because debtors and creditors are compelled to use the trustee assigned to their case. Id. at 2-5. The United States Trustee noted that "[i]f [the trustee] were in a private business, a member of a minority could (and many undoubtedly would) choose not to deal with [him]. However, [he is] a bankruptcy trustee, and parties are not able to select their own Chapter 13 trustee. An African-American, Native-American, or other minority member, involved in a bankruptcy must deal with [him] as trustee" in every case in which he is appointed. Id. at 4.

Based upon the record before him, the United States Trustee concluded it would not be appropriate to retain a trustee "whose own actions will cause parties to have substantial and legitimate concerns about his lack of prejudice or lack of judgment." Id. at 4-5. Indeed, the United States Trustee concluded the trustee's "retention [c]ould be a chilling factor for minority debtors weighing filing Chapter 13." Id. at 5.

The trustee acknowledged in his Request for Review that he repeated the phrase "N_____ and Indians" before the State Senate Committee and that certain members were offended by his statement.^{9/} Request for Review at 4, and Ex. 1 at

^{9/} One of the members of the Senate Committee informed the Office of the United States Trustee during the United States Trustee's investigation that this trustee previously had made the same statement at a private club in the state capital. Notice at 2, and at report attached thereto. By letter dated March 6, 2000, I asked the trustee to inform me whether he had made such a statement at a private club or elsewhere. In his subsequent affidavit, the trustee said it was "possible" he made that statement at a private club but could not recall for sure; he said if he made such a statement it was to show how he

4. In his affidavit accompanying his Request for Review, the trustee refused to admit his statement before the Committee was “misconduct or serious poor judgment.” Request for Review at Ex 1 at 4. Instead, he blamed others:

My fault was not to realize that some, including politicians, will claim racism and offense even when the N word is quoted from the 30's to 50's in a personal life history setting to show one's disagreement with the term.

Request for Review at Ex. 1 at 4-5. See also Request for Review at 8 (trustee maintains he had not “committed any serious error”).

The trustee contends the United States Trustee's decision to stop assigning cases to him in the future amounts to “‘politically correct’ McCarthyism” (Request for Review at 18), and constitutes a “vicious and offensive smear” of the trustee (Request for Review at 19). The trustee alleges there are five reasons why the termination should not be upheld: (1) the trustee is not a racist (Request for Review at 9-14); (2) the trustee was repeating a statement made by his father rather than one he made personally (*id.* at 9-19); (3) an employee who worked for the United States Trustee had a vendetta against the trustee and the United States Trustee used the trustee's statement as a pretext for removing him (Request for Review at 3-4, and Ex. 1 at 1-2); (4) the trustee actually was terminated because he was the oldest trustee in the area and the United States Trustee seized on the statement to terminate the trustee due to his age (Request for Review at 19-21); and, (5) the trustee was terminated in violation of his constitutionally protected right to use the term “N_____ and Indians” (Request for Review at 21-22).

I find these arguments unpersuasive. The trustee, a former state senator^{10/}, produced many affidavits from fellow politicians, personal friends, long- time acquaintances, members of the bankruptcy community, and debtors, who stated they had no reason to believe the trustee is a racist. Request for Review at Ex. 1-70. The United States Trustee did not, however, take action against the trustee

disagreed with it. Request for Review at Ex. 1 at 7.

^{10/} See Request for Review at Ex. 3 at 2; and 2000 WL [Redacted] (noting the trustee served “in the Senate in the mid-1980s”).

because of the trustee's subjective views about African-Americans, Native-Americans or others. Notice at 2-5. Rather, the United States Trustee concluded, based upon his supervisory expertise, that the newspaper and other public accounts of the trustee's gratuitous use of the term "N_____ and Indians" at a formal hearing before a Committee of the State Senate reasonably could cause minority debtors and creditors assigned to the trustee to doubt the trustee's impartiality and to question whether their trustee held racist views. The United States Trustee also concluded such a statement would cause a reasonable person to question the trustee's judgment. Id.

The affidavits the trustee submitted in support of his Request for Review underscore that a member of the general public reasonably could question whether this trustee is a racist and whether he would fairly represent the interests of minority Americans. One of the trustee's long-time acquaintances, State Senator [Redacted], stated in his affidavit that he was "caught off guard by the story that [the trustee] told." Request for Review at Ex. 3 at 2. This Senator does not believe this trustee truly holds racist views but he reached that conclusion despite the trustee's testimony, which the Senator found to be "inconsistent" with the person he had known "for many years" and with whom he had "served on many committees" while the trustee was a State Senator. Id.; see also Request for Review at Ex. 4 at 2 (another Senator vouching for the trustee because the Senator had "served on the Endowment Board" with the trustee, and "served in the Legislature with" him).^{11/}

Unfortunately, the debtors and creditors who would have been compelled to use this trustee's services would not have had the benefit of years of personal dealings with this trustee. Rather, they would know him by his conduct before the [Redacted] Commerce and Human Resources Committee, by the fact that the Chairman of that Committee condemned this trustee's actions before that committee, by the fact that State Senators admonished the trustee for his statement at the hearing, and by the fact that his conduct before the Committee was sufficient for the Governor of the State to withdraw his nomination for reappointment as Chairman of the [Redacted] Endowment Fund Investment Board.

The trustee next contends he should not be sanctioned for repeating a racist

^{11/} The only members of the Senate Committee that the trustee chose to obtain affidavits from were long-time personal acquaintances.

remark originally uttered by his father. Request for Review at 4. At his reappointment hearing, a State Senator asked the trustee why the trustee had moved to [Redacted] many years before. Request for Review at 4. The contemporaneous record, as set out in the newspaper accounts, indicates the trustee said his father asked why he wanted to move to a state full of “N_____ and Indians.” See, e.g., [Redacted], Feb. 5, 2000 “Legislative Notebook,” available on WESTLAW, 2000 WL [Redacted]. Subsequently, the trustee stated he relayed that anecdote to the Committee to explain that he opposed racism (Request for Review at 4-6), and at least two members of the committee who were long-time associates of the trustee understood it in that way, although one of them also stated he was troubled by the statement and made that known at the hearing. Request for Review at Ex. 3 and 4; [Redacted], Feb. 5, 2000 “Legislative Notebook,” available on WESTLAW, 2000 WL [Redacted].

I do not find this a persuasive justification for using the term “N_____ and Indians” at the Senate confirmation hearing. That hearing had absolutely nothing to do with race, and no one asked the trustee his views on any issue relating to race. The trustee attended the hearing to obtain a personal benefit, reappointment as Chairman of a prestigious State Board. In response to a mundane question why the trustee moved to the state, the trustee gratuitously used words that any reasonable person would find offensive. Indeed, the use of those words resulted in the Governor of the State withdrawing his nomination and caused state senators to condemn the trustee’s remarks - at the hearing, thereafter to a reporter, and then to the staff of the United States Trustee.

This trustee easily could have relayed the same story without using offensive remarks. There was absolutely no need to repeat the objectionable term. Although the trustee still may not accept it, see Request for Review at 21 (describing the United States Trustee’s action as “extremely politically correct”), the United States Trustee properly concluded the trustee’s words were “dehumanizing” and “were charged with bigotry.” Notice at 3. See also Notice at 4 (noting one of the words that the trustee casually used is hurtful to many Americans and is “universally recognized as a term of degradation and oppression”).

While the trustee was certainly free to recount any recollection he chose, he should have recognized that such a historically inflammatory statement would be controversial and would call his judgment into question, especially when he chose

to utter it in such a public forum. This is one of the things that is so perplexing about this matter - it was so predictable and avoidable. Thus, it is the trustee's own acts, not political correctness or "McCarthyism" that has brought us here.

The trustee next contends his removal was a pretext: the United States Trustee really wanted to fire him because he was the "oldest standing chapter 13 trustee in [the] southwest portion of the state." Request for Review at 19-21. There is a short answer to this claim. The three trustees in this part of the state are virtually the same age, all having been born within a few months of each other.^{12/}

This argument does not wash for a second reason. The record reveals this trustee was willing to resign his position - if that resignation could have been made effective June 1, 2000, rather than March 1. Request for Review at Ex. 1 at 5-6; Notice at 5. If the United States Trustee really wanted the trustee out of the way due to his age, all the United States Trustee had to do was accept the resignation. Although the United States Trustee carefully considered that option, indeed perhaps pressed it for a period of time, he ultimately concluded it would be unfair to debtors and creditors to give this trustee new cases for an additional period of time. Response at 15 (noting that the United States Trustee "decided in favor of immediate termination after concluding that such action was the only viable remedy to ensure that no minority debtors need have any concerns about their trustee's lack of prejudice or lack of judgment, regardless when they file their petitions").

The claim of personal vendetta fails for the same reason. The trustee contends the United States Trustee terminated his eligibility to receive future cases because an employee of the United States Trustee's office had unsuccessfully tried to remove the trustee in 1993 and finally succeeded in 2000. Request for Review at 3-4, 19, 20-21, and Ex. 1 at 1-2. The United States Trustee was not an employee of the Department of Justice in 1993 and had no involvement in the prior attempt to remove this trustee; and, as the United States Trustee explains, the decision to terminate case assignments was his own. Response at Ex. 1 at 3-4. Indeed, as I discuss below, the United States Trustee had valid reasons for terminating this

^{12/} To test the trustee's claim, I asked the Office of Review and Oversight, Executive Office for United States Trustees, to inform me of the age of the standing chapter 13 trustees in this state. Its report, which I hereby include in the formal administrative record in this matter, establishes that these three trustees are essentially the same age.

trustee, given the chilling effect this trustee's use of the term "N_____ and Indians" could have on minority debtors and creditors who do not know this trustee personally. If the United States Trustee merely had a vendetta against the trustee, he would have accepted the trustee's offer to resign effective June 1, which he declined to do.

Finally, the trustee contends he was terminated because he exercised his First Amendment right to speak out against racism. Request for Review at 21-22. This is incorrect. In reaching my decision to uphold this termination I specifically find that the content of the trustee's speech plays no role in my decision. Instead, I conclude the trustee's decision to blithely use the term "N_____ and Indians," reasonably could lead third parties who do not know this trustee to believe he may dislike, or holds prejudiced views toward, at least two groups of Americans. The trustee's gratuitous use of a hurtful language, language which was wholly unnecessary to establish any point he reasonably could have been trying to make, reasonably could lead not only minority, but all debtors and creditors to question his impartiality.^{13/} Accordingly, I conclude it is appropriate to stop assigning cases to this trustee because his conduct calls his judgment into question and impairs his ability to represent debtors and creditors free of these concerns, not because of the trustee's views on race, or any other matter of public concern. Cf. Bd of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) (discussing the First Amendment rights of independent contractors of the government); Rankin v. McPherson, 483 U.S. 378 (1986) and Connick v. Myers, 461 U.S. 138 (1983) (both discussing the First Amendment rights of public sector employees).

The First Amendment also is not implicated here because the trustee made his statement regarding "N_____ and Indians" in the context of promoting his own economic self interest - reappointment - not as the public advocate of a public issue at a public forum convened to discuss that subject. Id. The point of the trustee's use of this term was not to oppose racism but to get reappointed. This is not a case where someone has suffered some sort of retribution for expressing an opinion on a public issue in a public forum. Cf. Dambrot v. Central Michigan University, 55 F.3d 1177, 1185-88 (6th Cir. 1995) (college basketball coach's use of

^{13/} Indeed, as the United States Trustee has noted, one prominent columnist has lumped this trustee in with the pitcher John Rocker of the Atlanta Braves and with others who have made statements that are widely perceived to be racist in nature. Notice at 2-3.

the word “N_____” to motivate his players is not the type of public speech that is protected by the First Amendment).

Based upon the record before me, I conclude the United States Trustee’s decision to terminate this trustee’s eligibility to receive future case assignments constituted an appropriate exercise of discretion and was supported by the record. It is the fair thing to do because it will assure debtors and creditors that the trustee assigned to their case will represent them fairly and impartially. As the commentary to the Department’s final rule discusses, a trustee frequently is the only representative of the Bankruptcy System that a debtor encounters. 62 Fed. Reg. at 51748. Bankruptcy can be a daunting process for debtors. In a chapter 13 case, they must propose a plan that the trustee can oppose if the trustee is not satisfied with it. 11 U.S.C. 1325(b)(1). If the plan is approved, the debtor must make periodic payments to the trustee so the trustee can, in turn, make payments to the debtor’s creditors. 11 U.S.C. 1322(a)(1) (putting the “future earnings” and “future income” of debtors under “the supervision and control of the trustee” for distribution under the debtor’s repayment plan). Similarly, creditors must look to the trustee to protect their interests and facilitate the payment of their claims. 11 U.S.C. 1322, 1325, and 1326. For these reasons, it is imperative that debtors and creditors believe their trustee harbors no bias against them. Indeed, the integrity of the system demands that trustees be free from the appearance of partiality or bias.

The United States Trustee carefully reviewed the trustee’s conduct and concluded, based upon his knowledge of the trustee and the Bankruptcy System in this region, that creditors reasonably could have concerns about this trustee’s partiality. The United States Trustee determined that fairness to debtors and creditors mandate that this trustee no longer receive future case assignments.

I find this was an appropriate exercise of discretion. Indeed, it parallels the one made by the Governor of [Redacted], who withdrew this trustee’s nomination to reappointment as the Chairman of the State Endowment Fund Investment Board. As the newspapers reported, the Chairman of the Committee publically told the press that he and the Governor agreed the trustee’s statement was so inappropriate that his nomination had to be withdrawn.^{14/}

^{14/} The trustee’s Request for Review does not challenge the accuracy of this statement.

I also find, based upon the record before me, that the trustee's use of the phrase "N_____ and Indians" before a Senate Committee (and perhaps at a private club) was utterly without justification. No one asked this trustee about his views on race. No one asked this trustee about the social or cultural milieu in which he was raised. The trustee was neither tricked nor lured into gratuitously using an ugly racial term that, as the United States Trustee correctly found, is "universally recognized as a term of degradation and oppression." Notice at 4. Indeed, even if the trustee wanted to relate this anecdote in that forum he easily could have paraphrased or otherwise modified his statement to obviate the reference to such an obviously historically offensive noun. He either chose not to do so or failed to recognize that his behavior would be problematic. Given these facts, it is entirely appropriate for minority debtors and creditors to wonder what this trustee really believes about them and how diligently he would represent their interests. Notice at 4. I agree with the United States Trustee's observation that "[w]hen language like that is used in public discourse, the message to minority communities is that similar things, and worse, are being said in private." Id.

The trustee's Request for Review and his affidavit buttress my decision to affirm this termination. Although both acknowledge the trustee now wishes he had not made the offensive statement - they seem to do so at least as much because of the consequences they have brought as from any recognition that the flippant use of such words is hurtful and offensive to many Americans, regardless of their race, color or creed. Both documents are oddly defiant. Rather than recognizing that the United States Trustee had a valid concern, given the trustee's actions, the trustee instead raises specious charges of age discrimination, vendetta, "political correctness," and "McCarthyism."

This might be a different case if this trustee understood why it is inappropriate to casually use such terms, or why his lapse in judgment in this regard cost him not one but two positions. He apparently does not, however. He blames others and continues to press the argument that vulgar terms like "N_____ and Indians" bear repeating so long as the words originally were not his own. Indeed, the trustee points to the use of this term by certain minority celebrities in an attempt to justify his conduct. Request for Review at 15-18. Celebrities and entertainers are not, however, fiduciaries from whom a higher standard of conduct is expected. A trustee is the legal representative of a debtor's estate and has a fiduciary duty to protect the interests of an estate's creditors. I fully agree with the United States

Trustee's determination that it would be unfair to minority debtors and creditors to compel them to cede control of their assets, and their claims, to this trustee in order to take advantage of their rights under the Bankruptcy Code.

To those who might question the seriousness of the trustee's conduct, the following syllogism underscores the depth of the trustee's error in judgment: the trustee, unsolicited and voluntarily used a hurtful racial epithet in a neutral setting without any need to do so. Almost immediately the trustee was admonished by those present for doing so, in essence acknowledging the trustee's bad judgment. The trustee's nomination was withdrawn and the trustee withdrew his request for renomination, again, recognizing poor judgment exercised by the trustee, and, consequently, the inappropriateness of his continued service on behalf of the state. In short, no one seriously argues that the trustee did not display poor judgment by his actions. Indeed, a reasonable person is compelled to conclude that it was clearly bad judgment.

As a fiduciary, a standing 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. He cannot make gratuitous statements of this nature in a public venue and reasonably expect them to be disregarded in terms of evaluating his judgment and ability to properly administer the position that he holds. Certainly, the State of [Redacted] did not disregard these comments, deciding instead to withdraw the trustee's nomination. The United States Trustee reached the same conclusion, based upon his investigation, and his supervisory expertise. I find that the United States Trustee's administrative action was an appropriate response to the trustee's misconduct.

IV. Conclusion

The decision to terminate this trustee's receipt of new cases is an appropriate exercise of the United States Trustee's discretion and is supported by the record. Accordingly, based upon my review of the record, including the written submissions of the United States Trustee and the trustee, I affirm the United States Trustee's decision to terminate the trustee's eligibility for assignment of new cases.

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

Dated: April 28, 2000

Kevyn D. Orr
Director
Executive Office for
United States Trustees