

**Department of Justice
Executive Office for United States Trustees**

**Final Agency Action
Case No. 2010-01**

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

[] a chapter 7 panel trustee (“trustee”), seeks review of a decision by the United States Trustee^{1/} for Region [] to reappoint her for a shortened, six-month time period, at a reduced case load, to the panel of chapter 7 trustees for the [] District of [] [] Division. Based upon the record before me, I affirm the United States Trustee’s decision.

I. Course of this Proceeding

Since 1994, the trustee has served as a member of the panel of chapter 7 trustees for the [] District of []. On June 15, 2010, the United States Trustee issued a notice informing the trustee that she would be reappointed to the panel for a shortened period of six months at a reduced case load of one-half, commencing June 1, 2010. Notice at 1. The United States Trustee determined that the shortened appointment and suspension of case assignments was warranted under 28 C.F.R. § 58.6, due to the trustee’s continuing deficiencies in administering and closing cases expeditiously, as well as the trustee’s unprofessional and inappropriate behavior at Section 341(a) meetings. *Id.*

By letter dated June 28, 2010 (“Request for Review”), the trustee requested that I review the United States Trustee’s decision. On July 13, 2010, the United States Trustee responded to the trustee’s Request for Review (“Response”). On August 20, 2010, the trustee submitted a Reply to the United States Trustee’s Response, and on August 25, 2010,^{2/} the United States Trustee submitted a Sur-Reply. Accordingly, this administrative review is based on a record consisting of the Notice, the Request for Review, the Response, the Reply, the Sur-Reply, and their respective exhibits.

^{1/} United States Trustees are officials of the Department of Justice who are appointed by the Attorney General. 28 U.S.C. § 581(a), (c). The Director of the Executive Office for United States Trustees (“EOUST”) is a Department of Justice official who acts under authority delegated by the Attorney General.

^{2/} The Reply appears to be incorrectly dated. Page 1 bears the date June 28, 2010, and Pages 2-5 bear the date August 15, 2010. The Reply was received via overnight delivery on August 20, 2010.

II. Standard of Review

In conducting this review, I must consider two factors:

1. Whether the United States Trustee's decision is supported by the record; and
2. Whether the United States Trustee's decision constitutes an appropriate exercise of discretion.

See 28 C.F.R. § 58.6(i) (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 chapter 7 panel trustees, 28 U.S.C. § 586(a)(1), and appoint them to specific chapter 7 cases. 11 U.S.C. § 701. United States Trustees "carefully monitor the performance of panel members . . . in order to determine whether they should be continued in or removed from panel membership." H.R. Rep. No. 95-595, at 102 (1977). "The United States trustee is permitted to conduct his own investigation . . . to exercise effective supervision and make effective evaluation of the performance of the private trustees on the panel." Id. at 110.

Panel trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of 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 National 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.).

The goals of the United States Trustee Program include protecting the public interest by ensuring efficiency in the administration of cases and by protecting the integrity of the bankruptcy system. See United States Trustee Program's Mission Statement.^{3/} In striving to

^{3/} 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.

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

B. Grounds for the United States Trustee’s Decision to Shorten the Trustee’s Reappointment Period and Reduce the Trustee’s Case Assignments by Half.

According to the Notice, the United States Trustee shortened the trustee’s appointment period to six months and reduced the trustee’s caseload by one-half for two principal reasons: (1) the trustee’s deficiencies in administering and closing cases over time; and (2) the trustee’s inappropriate and unprofessional behavior at Section 341(a) meetings. Notice at 1-4, and 5.

Administering and Closing Cases. The United States Trustee’s Notice states that the trustee has delayed closing cases and paying creditors funds to which they are entitled, in breach of her responsibilities as trustee. The United States Trustee further argues that the trustee’s delay is contrary to 11 U.S.C. § 704(a)(1), which emphasizes that a bankruptcy trustee must close cases “expeditiously,” and also is contrary to guidance in the EOUST’s Handbook for Chapter 7 Trustees (the “Handbook”), which emphasizes that chapter 7 cases should be administered to “expedite dividends to creditors.” Notice at 1, Handbook at 6-1.

The Notice states that as of December 31, 2009, the end of the most recent performance review period, the trustee had 18 aged cases (*i.e.* cases over three years old) on her docket, representing 14.75% of her 122 asset cases. Notice at 1. The Notice further states that the number of aged cases on the trustee’s docket in the 2009 review period was up from 16 aged cases as of the 2008 review period, and almost doubled from 10 aged cases during the 2007 performance review period. *Id.* According to the Notice, the trustee’s own estimates of when she would be able to file final reports and close her aged cases, which she provided to the United States Trustee in response to monitoring requests from the United States Trustee’s office, proved unreliable with the passage of time. Notice at 2-3.

Specifically, the Notice states that the trustee prepared a “Statement of ‘Aged’ Cases with Ongoing Administration as of March 31, 2009” (the “Statement”), listing 10 cases which the trustee projected to be near closure or the filing of a final report.^{4/} Notice at 2. However, nearly a year later, as of March 31, 2010, the trustee had not submitted a final report in any one of those cases. *Id.*, see also Response at Exhibit 6. Moreover, after the trustee’s submission of the

^{4/} [Redacted]

The Statement also included one additional case, [Redacted] which both the United States Trustee and the trustee agreed justifiably remained open due to an appeal.

Statement, 7 new cases, 5 of which appeared to the United States Trustee to exhibit “significant delay,” were added to the United States Trustee’s list of aged cases.^{5/} Notice at 3.

Further, according to the Notice, the trustee’s difficulties in timely closing and administering cases did not begin in 2007, but were also noted by the United States Trustee in earlier performance review periods. The Notice states that in 2005 and 2006, the United States Trustee’s office filed 12 objections based upon the trustee’s delays in case administration, resulting in reduction of the trustee’s fees. Notice at 4.^{6/} Also, the trustee’s 2006 performance review noted that a failure to file timely final reports and close aged cases was “the primary issue with the trustee for several evaluation periods,” and that the trustee was placed on a voluntary shortened appointment with reduced caseload at that time as a result of the deficiencies, although without enduring ameliorative effect. Notice at 3-4.

Section 341(a) Meetings. With respect to Section 341(a) meetings, the United States Trustee’s Notice states that, contrary to the requirements of the Handbook, the trustee’s demeanor at Section 341(a) meetings was not “appropriate and professional,” as highlighted in her evaluation for the 2009 performance review period.^{7/} Notice at 5. In that evaluation, the trustee was rated as “Inadequate” for “Demeanor (appropriate and professional),” one of 8 items of evaluation criteria for the conduct of Section 341(a) meetings. Response at Exhibit 1.

Additionally, in the “Comments” section immediately following the trustee’s “Inadequate” rating, the United States Trustee indicates that an audio recording of the Section 341(a) meeting the trustee conducted in the [redacted] case, [redacted], demonstrated the trustee was “rude to debtors, engaged in grandstanding, and missed opportunities to learn additional information about several issues and develop facts[.]” The “Comments” section also states that the audio recording of the Section 341 meeting in the [redacted] case, [redacted], reflected “unwarranted rudeness by the trustee.” Response at Exhibit 1.

For all of the foregoing deficiencies, the United States Trustee determined that a suspension of case assignments under 28 C.F.R. § 58.6(b) was warranted, and notified the trustee of her rights to seek review of his action under that section. Notice at 5.

[redacted]

^{5/} [redacted]

[redacted]

^{6/} [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

^{7/} The trustee’s 2009 performance evaluation was included as an enclosure to the Notice, and is appended in Exhibit 1 to the Response. See Notice at 1, Response at Exhibit 1.

C. The Record Supports the United States Trustee's Decision to Shorten the Trustee's Appointment Period and Reduce the Trustee's Caseload.

1. The Trustee's Deficiencies in Closing and Administering Cases.

Based upon the trustee's case closing and administration deficiencies, the United States Trustee determined that the trustee's performance warranted a shortened appointment period of six months and a caseload reduced by half, in order to permit the trustee to "further evaluate [her] internal procedures, including case closing, case administration, staff supervision, asset identification, preparation for the meeting of creditors and case evaluation for fraud, abuse, and objection to discharge." Notice at 1.^{3/}

The trustee takes issue with the United States Trustee's determination that she failed to timely administer and close her cases. Request for Review at 1. The trustee generally alleges that the Notice is "replete with incorrect statements and accusations," is not supported by "sufficient evidence," and is "arbitrary and capricious." *Id.* The trustee requests that she be reappointed for a one-year period with a standard caseload.

Specifically, the trustee asserts that the delays with respect to "the vast majority" of cases cited in the Notice are the result of "the nature of the administration of the case, and in some cases due to unforeseen circumstances which were dealt with as expeditiously as possible." *Id.* at 2. Further, she asserts that the United States Trustee's determination to shorten her appointment period and reduce her caseload results not from her actual performance but from the United States Trustee's "lack of attention to detail in reviewing [her] performance record." *Id.*

a. Delays Attributable to Nature of the Case or Unforeseen Circumstances

The trustee acknowledges that she has 18 aged cases on her docket of 122 asset cases. *Id.* As a preliminary matter, the oldest of the 18 aged cases on the trustee's docket dates from 1990, meaning that it has been pending for approximately 20 years. *Id.* The next case oldest case,

^{3/} In addition, the United States Trustee's Notice specifically requires the trustee to take action over the next six months to reduce the number of her aged cases, and additionally to (1) read the Handbook; (2) attend new trustee training at the National Advocacy Center, if offered, at her own expense; (3) timely file TDRs (distribution reports) in cases where final reports are approved; (4) file TFRs (final reports) in cases by dates the trustee has projected, or explain any delay; (5) file TFRs in aged cases which should be closed, or explain any delay; (6) work with the office of the United States Trustee to develop strategies to assist in closing cases; and (7) provide the United States Trustee with a status report for each case over six months old, describing the progress of the investigation, the actions necessary to liquidate assets, and the projected case closing date. Notice at 4.

which was filed in 1999, has been pending for at least 10 years.^{9/} Id. The most recently filed cases on the aged case list date from 2006. Id. Although the trustee maintains that the delays with respect to “the vast majority” of these aged cases result from the “nature of the administration” of the case or from “unforeseen circumstances,” she fails to specify which cases were delayed due to administration and which to unforeseen circumstances. Id. The trustee offers only brief specific commentary on each case. Id. at 2-5.

With respect to the 10 aged cases on the trustee’s March 31, 2009 Statement, estimated to be near closure and the filing of a final report,^{10/} the record reflects that the United States Trustee is correct. Not a single case was closed or had a final report filed as of March 31, 2010, the end of the reporting period for the trustee’s performance evaluation. Response, Exhibits 7-11, 13-17. Indeed, the trustee notes that she submitted TFRs in 4 of them, not by the close of the March 31, 2010 reporting period, but by late April 2010.^{11/} Request for Review at 1-3. The trustee provides no explanation as to why submission of TFRs in these 4 cases was delayed. Id. In addition, the trustee asserts that TFRs will be filed shortly for the remaining 6 of these 10 aged cases, and attributes the delay to a variety of causes: her attorney’s slow pace in investigating the claim of an uncooperative creditor,^{12/} the need for additional claims review and an accountant’s preparation of tax returns,^{13/} the late discovery by the trustee of an objectionable claim,^{14/} the late discovery by the trustee of an unexecuted document supporting a compromise,^{15/} and the need for the debtor to negotiate a refund check.^{16/}

^{9/} Additionally, one case dates from 2002, two aged cases date from 2003, two from 2004, five from 2005, and six from 2006. Id.

^{10/} [Redacted]
[Redacted]
[Redacted] The
Notice reflects that one additional case on the United States Trustee’s aged cases list, [Redacted]
[Redacted] in which an appeal was filed, “appears to have adequate justification” for remaining open. Notice at 2.

^{11/} [Redacted]
[Redacted]

^{12/} [Redacted]

^{13/} [Redacted]

^{14/} [Redacted]

^{15/} [Redacted]

^{16/} [Redacted]

With respect to 5 out of 7 of the additional cases that became aged after the trustee's preparation of the March 31, 2009 Statement, and which were cited by the United States Trustee in the Notice as also exhibiting significant delay,^{17/} the trustee asserts that one of the cases is now closed.^{18/} The trustee further asserts that the delays in these cases resulted from complex, duplicate claims which could not be resolved by negotiation and will require objection,^{19/} from the departure of her accountant and the need to retain a new one,^{20/} from the need to resolve adversary proceedings and prepare claims objections,^{21/} and from her lack of awareness that a "No Asset Report" the trustee believed she had submitted to the bankruptcy court in February 2007 had not been received by the court.^{22/}

The United States Trustee asserts that the trustee's contentions concerning her failure to close cases "in most cases do not withstand scrutiny, and certainly do not excuse or justify the harm that she is doing to creditors in her bankruptcy case[s]." Response at 3. The United States Trustee further asserts that the trustee presents "no new information" justifying her evident delays, Sur-Reply at 5, and argues that the trustee fails to appreciate the harm to creditors and the integrity of the bankruptcy system that can ensue from keeping bankruptcy cases open for "undue and lengthy periods of time." Sur-Reply at 2.

^{17/} [redacted]

[redacted] The United States Trustee's Notice reflects that the additional two cases on the aged cases list, [redacted] [redacted] "did not appear to have significant delay." Notice at 3.

^{18/} [redacted]

^{19/} [redacted]

^{20/} [redacted]

^{21/} [redacted]

^{22/} [redacted] The trustee offers no explanation as to why it took three years to discover the reason why the court had not previously closed this case.

Having reviewed the evidence of record with respect to the aged cases and considering the arguments of the trustee and the United States Trustee, I find that the record as a whole supports the United States Trustee's determination that the trustee's delays in administering and closing her cases warrant corrective action. With respect to the trustee's argument that the delays in some cases are attributable to the "nature of administration of the case," I find that in at least 5 cases, the trustee offered no satisfactory explanation for the delay.^{23/} To the extent she offered explanations in the remaining cases in which no TFR had been filed, the trustee attributed delay to the action or inaction of her professionals, such as accountants and attorneys, to the claims objection and negotiation process, or the resolution of litigation and adversary proceedings.

These arguments are not persuasive. The trustee is a fiduciary of the estate charged with the duty of monitoring the professionals the court has permitted her to employ. See 11 U.S.C. § 327; Handbook at 8-24. Moreover, the review and resolution of claims is one of a trustee's chief responsibilities, attendant to every bankruptcy case. See 11 U.S.C. §§ 704 (a)(1), (a)(5). In sum, the trustee has not presented any circumstances peculiar to the administration of these particular cases which would justify the prolonged delays evidenced by the record.

With respect to the trustee's argument that "unforeseen circumstances" caused some of the delays, I find that the only such circumstances referenced by the trustee are the late discovery of pertinent documents or errors in filing. Because a careful review of pertinent documents would prevent the delayed discovery of objectionable claims, unexecuted settlement documents, or No Asset Reports, and thereby prevent unwarranted delay in administration and closing, I do not find that this argument mitigates the need for corrective action.

b. Attention to Detail in Reviewing Performance Record

With respect to the trustee's contention that the United States Trustee did not attend to detail in reviewing her performance record with respect to the administration and closing of cases, a review of the record shows the contrary. The United States Trustee issued detailed performance evaluations of the trustee over time, with particular ratings and descriptive narratives relating to the trustee's performance of various aspects of her trustee responsibilities, including those most relevant here: TFRs and TDRs, Legal Administration, Case Progress, Distributions to Creditors, and Retention and Compensation of Professionals. See Response, Exhibits 1, 3-5. As summarized briefly below, the trustee's written performance ratings reflect that the United States Trustee has paid particular attention to the quality of the trustee's performance of specific duties which may have contributed to delay in her cases, and on various occasions found it inadequate with respect to those duties.

2009 Performance Review. The record reflects that the United States Trustee conducted the trustee's most recent formal performance review in June 2010. Response at Exhibit 1. A

^{23/} [Redacted]

[Redacted]

[Redacted]

summary of that review, which covered the period January 1, 2009 to December 31, 2009, rated the trustee's performance as "Adequate" for nine out of fifteen performance review factors. The trustee's performance was rated "Inadequate" for two factors: "TFRs and TDRs" and "Case Progress." Her performance was rated "Adequate, Except For" (meaning that she had been rated inadequate for at least one or more of several evaluation criteria associated with that duty in the detailed portion of her performance review) for four factors, namely, "Section 341 Meetings," "Legal Administration," "Distributions to Creditors," and "Retention and Compensation of Professionals." *Id.* The review factors for which the trustee received "Inadequate" and "Adequate, Except For" ratings in the 2009 rating period (with the exception of the rating for "Section 341 Meetings") relate directly to the case administration and closing deficiencies identified in the Notice.

2008 Performance Review. The record also reflects that the United States Trustee conducted a performance review of the trustee in April 2009 for the period January 1, 2008 through December 31, 2008. Response at Exhibit 5. A summary of that review indicates that the trustee was rated "Adequate" for thirteen of fifteen performance review factors, was not rated "Inadequate" for any performance factors, but was rated "Adequate, Except For" with respect to "TFRs and TDRs," and "Case Progress." *Id.* Again, the two performance review factors for which the trustee received a less than adequate rating relate directly to delays in administering and closing cases.

2007 Performance Review. Similarly, the United States Trustee conducted a performance review of the trustee in April 2008 for the period January 1, 2007 through December 31, 2007. Response at Exhibit 4. A summary of that review indicates that the trustee was rated "Adequate" for fourteen of fifteen performance review factors, was not rated "Inadequate" for any performance factors, but received an "Adequate Except For" rating as to "TFRs and TDRs." *Id.* at 1. The two factors for which the trustee received an "Adequate, Except For" rating in the 2008 and 2007 rating periods relate directly to the trustee's alleged historic failure to administer and close cases expeditiously.

The detailed comments associated with the above performance reviews reflect that the United States Trustee called the deficiencies relating to delays in administration to the trustee's attention on several occasions. *See, e.g.,* 2008 Performance Review, Exhibit 5 at 2 ("□ needs to diligently and timely close cases. . . . she needs to seek assistance or a reduced caseload if she cannot timely administer and close cases."); 2007 Performance Review, Exhibit 4 at 4 ("The trustee had 10 aged cases by year end 2007. This is the same number of aged cases as in the previous year."). Indeed, even in her earlier May 2006 evaluation, for the period January 1, 2005, through December 31, 2005, the United States Trustee noted, "(o)ver the last 4 evaluation periods, there appears to be some sort of reason or excuse why the trustee is unable to administer and close her cases timely." 2006 Performance Review, Response at Exhibit 3. During the first 6 months of that review period, the trustee agreed to be placed on a voluntary shortened appointment due to those deficiencies. *Id.*

Finally, as discussed in the previous section, that the United States Trustee has attended to detail is borne out by the United States's Trustee's discussion and examination of particular aged cases in the trustee's 2009 performance review and in the Notice itself.

Having reviewed the evidence of record and considered the arguments of the trustee and the United States Trustee, I find that the record as a whole supports the United States Trustee's determination that the trustee is deficient in closing and administering her cases, that the United States Trustee has carefully and accurately chronicled the trustee's performance with respect to these duties over time, giving ample notice to the trustee of her need to improve her performance in this area through the performance review process. I also find that the aged case list speaks for itself with respect to the lengthy and undue period of time for which so many of the trustee's cases have remained, and still remain, open.

Given the length of the delays of record, and the absence of adequate justification for long-standing inaction, the United States Trustee's decision to reduce case assignments to the trustee by one-half in order to permit the trustee time to administer, bring to closure, and submit final reports for the aged cases on her docket is a reasonable corrective measure.

28 C.F.R. § 58.6(a)(2) specifically permits the United States Trustee to suspend or remove a trustee for failure to "perform duties in a timely and consistently satisfactory manner." Additionally, 28 C.F.R. § 58.6(a)(7) permits suspension or removal for the trustee's failure to "adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases," and 28 C.F.R. § 58.6(a)(8) permits suspension or removal for the trustee's failure "to file timely, accurate reports, including interim reports, final reports, and final accounts." Finally, 28 C.F.R. § 58.6 (a)(4) permits suspension or removal of a trustee for failure to "comply with . . . instructions and policies of the . . . United States Trustee." As set forth in the Handbook, chapter 7 cases should be administered to "expedite dividends to creditors." Handbook at 6-1.

For all of the reasons discussed above, I find that the record amply supports the United States Trustee's determination that the trustee has failed to timely administer and close cases and that the United States Trustee properly exercised his discretion to reappoint the trustee for a shortened six month period and to reduce her caseload by one-half.

2. The Trustee's Unprofessional and Inappropriate Behavior at Section 341(a) Meetings.

The United States Trustee's Notice is also based upon the trustee's alleged inappropriate and unprofessional demeanor in the and Section 341(a) meetings.^{24/} Notice at 5.

^{24/} A Section 341(a) meeting is a meeting of creditors held pursuant to 11 U.S.C. § 341(a), and is the official forum where the debtor must appear and answer under oath questions from the trustee, creditors, and other parties in interest, regarding the estate. See 11 U.S.C. § 341(a); Handbook at 7-1 to 7-9. The trustee is the presiding officer at the Section 341(a) meeting as designee of the United States Trustee; Handbook at 7-1.

The Notice requires the trustee to complete coursework during the appointment period, at her own expense, on effective questioning techniques in the context of creditor meetings. Notice at 5. Alternatively, if such specific training is not available, the Notice requires the trustee to complete general training in deposition techniques. Id.

The trustee takes issue with the conclusion that her demeanor was inappropriate or unprofessional in those two meetings, and instead contends that while “questioning may have been contentious at times,” she was “simply pursuing information from debtors whose actions were in clear violation of the Bankruptcy Code.” Request for Review at 5. She alleges that the audio recordings in the [] and [] cases attest to her proper and professional demeanor, and that several positive comments included in her 2009 performance review are further evidence that her demeanor is appropriate and professional. Id.

The [] Section 341(a) Meeting. The record includes an audio recording of the [] Section 341(a) meeting. Request for Review at Exhibit L. The recording shows that the trustee questioned the debtors concerning an \$8,279.97 certificate of deposit and a \$1,002.33 checking account that they failed to disclose in their bankruptcy petition and schedules. Id. The debtors, who do not appear to be native English speakers, attributed the omission to their lack of familiarity with bankruptcy procedures and to the instructions of their bankruptcy petition preparer. Id.

According to the United States Trustee, in the course of the questioning, the trustee publicly accused the debtors of engaging in fraud and criminal activity, failed to offer to utilize the United States Trustee’s language assistance program, and failed to follow up on information concerning the bankruptcy petition preparer -- resulting in an examination of little assistance to the debtors, who may have been trying to articulate a retirement or other exemption claim, and of little use to the United States Trustee, with respect to potential violations by the petition preparer. Response at 14.

The trustee asserts that her questioning in the [] case was not rude, grandstanding, or lacking in follow-up because “[a]t no time did debtors not appear to understand the questions presented to them or fail to be able to articulate responses, however untruthful,” and she did not need to inquire into matters concerning the petition preparer “because nothing about the petition indicated it was not competently prepared.” Reply at 4. According to the trustee, the debtors executed the bankruptcy petition and could have claimed the asset as exempt if listed, and the trustee “felt” that the petition preparer “would have known to list and exempt the asset had the petition preparer been aware of it.” Id. Moreover, the trustee asserts, “[i]n cases such as this, the debtors routinely blame petition preparers, or even attorneys, for advising them to conceal assets.” Id. In further explanation of her position, she states that “[d]uring the course of examining these debtors, it became apparent to me, the one conducting their examination and observing their demeanor, that the debtors were not being truthful.” Reply at 5.

The United States Trustee counters that these assertions “engender deep concerns” about the trustee’s professionalism and bankruptcy sophistication, because the bankruptcy petition actually reflected “glaring problems” and numerous deficiencies that should have alerted the trustee to issues requiring further meaningful examination. Sur-Reply at 8-9.

The [redacted] Section 341(a) Meeting. The record also includes an audio recording of the [redacted] Section 341(a) meeting. Request for Review at Exhibit L. The recording indicates that [redacted] filed a bankruptcy petition on behalf of a corporation with two shareholders, himself and a 50% shareholder who actually operated the business and held the vehicle which was its asset, without specific knowledge of whether his partner had received notice of the proposed bankruptcy or was agreeable to it. Id.

According to the United States Trustee, in the course of eliciting information concerning the [redacted] filing, the trustee “became agitated and appeared very upset.” Response at 14. Further, the United States Trustee contends that the trustee “asserted that the case should have been filed as an involuntary case . . . demanded tax returns . . . [and] appeared very upset that the business may have continued to operate after filing without her consent and/or a court order.” Id.

The trustee asserts that she did not become “agitated and upset” during her questioning in the [redacted] case, but rather that she was “concerned and somewhat incredulous that the debtor and his counsel had chosen to proceed in a manner that was so clearly in violation of the Code.” Reply at 5. According to the trustee, “the debtor had no tax returns, no books and records, and no information. It is nothing more than basic common sense that I would request that information[.]” Id. From the trustee’s perspective, “[t]he reality of the situation was the debtor was hoping to use the Bankruptcy Court as an investigative arm to locate the assets of their failed business.” Id. Moreover, she states, “[s]uch is not an appropriate use of the limited resources of the Bankruptcy Court.” Id.

In response, the United States Trustee notes that the debtor’s legal counsel provided “calm responses to the trustee’s agitated questions, and that the [d]ebtor’s attorney was attempting to find a method of obtaining a fresh start for his clients for an unknown liability confronting them - a core and valid purpose of the bankruptcy laws.” Sur-Reply at 9-10.

Positive Performance Comments. The trustee also defends the professionalism of her Section 341(a) demeanor by noting that other comments in Section 3 of her 2009 performance evaluation describe her conduct of Section 341(a) meetings as “efficient,” “punctual,” and “thorough,” that two complaints alleging that she was “rude” in her examinations were resolved in her favor, that she displays a “strong working knowledge of bankruptcy law and procedure,” that she effectively identifies and inventories estate assets; that she is professional and courteous in meetings with the United States Trustee staff, appropriately attends training and informal meetings, and assists the United States Trustee where appropriate to combat abuses within the bankruptcy system. Request for Review at 6.

Having reviewed the evidence of record, including the audio recordings, and having considered the foregoing arguments, I find that the record supports the United States Trustee’s determination that the trustee’s demeanor in these two Section 341(a) meetings was lacking in the propriety and professionalism required of a trustee in the federal bankruptcy system. As a fiduciary, a trustee occupies a significant position of trust and responsibility and is accountable for her actions not just to the United States Trustee, but also to creditors, debtors, and the public at large.

Indeed, 28 C.F.R. § 58.6(a)(6) specifically permits the United States Trustee to suspend or remove a trustee for failure to “display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public, and 28 C.F.R. § 58.6 (a)(10) permits suspension or removal of a trustee for failure to “appropriately conduct the 11 U.S.C. § 341(a) meeting of creditors.” Additionally, 28 C.F.R. § 58.6 (a)(4) permits suspension or removal of a trustee for failure to “comply with . . . instructions and policies of the . . . United States Trustee.” As set forth in the Handbook, “[t]he trustee’s demeanor toward all parties should be appropriate and professional.” Handbook at 7-3. Importantly, “[d]uring the 341(a) meeting the trustee . . . should avoid actions which would result in the perception that the trustee is a judge or has judicial power.” Handbook at 7-4.

A review of the audio recording in the [] case indicates that the trustee’s questioning at the outset was civil and professional, but quickly became inappropriately accusatory and inclusive of gratuitous, unconsidered remarks. Request for Review at Exhibit L. The recording shows that instead of asking questions, listening closely to answers, and following up with additional questions designed to elicit further information, the trustee made numerous inappropriate declarative statements of her own opinions and conclusions. Id. For example, the trustee made the following statements:

“You lied on your bankruptcy petition.”

“Well, I can tell you that you have now committed fraud.”

“Well, I can tell you that I am going to object to the discharge of your - to your discharge. . . . based on the fact that you lied on your bankruptcy, and now that money has been turned over to me and you will not get it back.”

“It’s hard to forget about an \$8,000 certificate of deposit.”

Id. The trustee’s assertions in her Request for Review and Reply concerning the reasons she conducted the examination in the way she did may explain her inner thought process, but they do not address the trustee’s inappropriate outward manner, which is the issue at hand.

A review of the audio recording in the [] case indicates that the trustee quickly drew the conclusion that a shareholders’ meeting had never been held and that bankruptcy was inappropriate. Request for Review at Exhibit L. The trustee interrupted the witness and counsel in the course of their repeated attempts to explain whether that was actually the case and to offer complete answers to the trustee’s questions. Because the trustee quickly and repeatedly cut off attempts by the debtor and counsel to answer her questions, the United States Trustee properly concluded that the trustee’s manner was less courteous than appropriate and more agitated than professional. Due to her manner, the examination yielded little by way of actual information and was quickly postponed to another day. Id. Accordingly, I find that the trustee’s demeanor was unnecessarily abrupt and discourteous and did not contribute to the development of information, the goal of the Section 341(a) meeting. See Handbook at 7-1.

While the trustee's 2009 performance review bears out the existence of the positive comments cited by the trustee, Response at Exhibit 1, these comments pertain not as much to demeanor as to other evaluation criteria set forth in Section 3, such as "[p]unctuality and efficiency of meetings," "[t]horoughness and appropriateness of questioning," and "[k]nowledge of bankruptcy laws and procedures." Response at Exhibit I. Moreover, that the trustee acknowledges that she was the subject of two complaints concerning her Section 341(a) demeanor does not weigh strongly in her favor. Although these complaints were ultimately favorably resolved, their very existence suggests that additional focus and polishing in this area will be beneficial in assisting the trustee to avoid such complaints altogether in the future.

In sum, the record supports the United States Trustee's determination that the trustee's demeanor in these two Section 341(a) meetings was inappropriate and unprofessional, warranting corrective action. The role of the trustee at a Section 341(a) examination is not to foreclose the witness from offering complete answers, or to publicly state what may be hastily formed and possibly incorrect deductions or rebuttable legal conclusions, but rather to "conduct the meeting in an orderly, yet flexible manner, and to provide for questioning of the debtors as to matters affecting the debtor's financial affairs and conduct," Handbook at 7-3, and to report cases suspected to involve fraudulent behavior or criminal activity to the United States Trustee and the United States Attorney for appropriate action, Handbook at 8-45, 8-47.

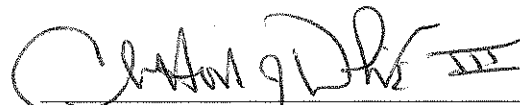
Based upon all of the foregoing, I find that the United States Trustee's administrative decision to re-appoint the trustee for a shortened period at a reduced one-half caseload and to require her to obtain additional training in appropriate debtor questioning during that time period is amply supported by the record and is an appropriate exercise of the United States Trustee's discretion under 28 C.F.R. § 58.6.

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 reappoint the trustee for a shortened period of six months at a reduced caseload of one-half.

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

Dated: November 5, 2010



Clifford J. White III

Director

Executive Office for United States Trustees