

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC.

CASE NO. 92-00860

Debtor

Chapter 11

APPEARANCES:

HINMAN, HOWARD & KATTELL, ESQS.
Attorneys for the Examiner
700 Security Mutual Building
80 Exchange Street
Binghamton, New York 13901-3490

M. ELIZABETH BRADLEY, ESQ.
Of Counsel

MENTER, RUDIN & TRIVELPIECE, P.C.
Attorneys for Debtor
500 South Salina Street
Syracuse, New York 13202

JEFFREY A. DOVE, ESQ.
Of Counsel

HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR, ESQS.
Attorneys for Federal Deposit
Insurance Corporation
Three City Square
Albany, New York 12207

DEBORAH L. KELLY, ESQ.
Of Counsel

BINGHAM, DANA & GOULD, ESQS.
Attorneys for Federal Deposit
Insurance Corporation
150 Federal Street
Boston, Massachusetts 02110

SABIN WILLETT, ESQ.
Of Counsel

BOND, SCHOENECK & KING, ESQS.
Attorneys for Hudson Engineering
One Lincoln Center
Syracuse, New York 13202

JAMES D. DATI, ESQ.
Of Counsel

HOUSE, GOLDEN, KINGSMILL,
& RIESS, ESQS.
Attorneys for Hudson Engineering
Suite 2100 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
HAROLD GOLDBERG, ESQ.
Attorney for Creditors' Committee
1408 West Genesee Street
Syracuse, New York 13204

MARGUERITE K. KINGSMILL, ESQ.
Of Counsel

RICHARD CROAK, ESQ.
Office of U.S. Trustee
10 Broad Street
Utica, New York 13501

STEPHEN D. GERLING, U. S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court again has before it for review the Application for Allowance of Interim Compensation ("Fee Application") of Robert E. Barton, P.E. and Bibb and Associates, Inc. ("Bibb") collectively, the Examiner in this Chapter 11 case.

The instant Fee Application is the fifth filed by the Examiner since its appointment by an Order dated April 3, 1992.

The Fee Application was duly noticed to creditors and appeared on this Court's motion calendar on March 16, 1993. Written objections to the Fee Application were filed by the Federal Deposit Insurance Corp. ("FDIC") and the Debtor.

At the hearing, appearances were noted by the Examiner and the two objectants, as well as the United States Trustee ("UST") and Hudson Engineering Co. ("Hudson") an unsecured creditor.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b) and 157(a), (b)(1) and (2)(A) and (B).

FACTS

Factually, little has changed from the perspective of this Court's consideration of the Examiner's fifth Fee Application since the Court issued its Memorandum-Decision on the Examiner's fourth Fee Application on December 28, 1992.

ARGUMENTS

The FDIC's objection to the fifth Fee Application contends that it has been made within the 120 days prohibition of Code §331, that the Examiner is utilizing half-hour increments in generating contemporaneous time records in violation of Local Rule 17(a)(4), thus leading to an excessive amount of

allegedly compensable time; that the Examiner increased its hourly rates on January 1, 1993 to include "overhead" contrary to the Court's Memorandum-Decision of December 28, 1992; that the Court should reconsider its allowance of the Examiner's travel time at the full hourly rate. Additionally the FDIC objects to certain of the Examiner's disbursements and asserts that the Examiner failed to heed this Court's warning contained in its December 28th Memorandum-Decision that this case may be unable "to absorb the Examiner's fees at the current levels".

The Debtor supports the objections of the FDIC generally, but contends further that the Examiner is acting beyond the scope of its authority and is guilty of incompetence with regard to the NOx water system which allegedly cost the Debtor a significant loss of revenue.

Finally, the Debtor contends that the Examiner has devoted a disproportionate number of hours to discussions with Hudson and its affiliates. Hudson is the holder of the largest disputed claim against the Debtor.

The Examiner's Response to the objections of the FDIC and the Debtor asserts that the volume of work performed by the Examiner in this case warrants fee applications more frequently than every four months; that within the period covered in the fifth Fee Application, the Examiner has negotiated a settlement with a previously terminated contracting firm that will net the estate at least \$200,000; that billing increments of one-half hour reflect time actually expended; that the increase in hourly rates as of January 1, 1993 was not an increase to compensate the Examiner for overhead; that the Examiner in fact utilizes travel time to perform actual services, a concept that was known to and approved by all of the parties at the time of the Examiner's appointment.

With regard to the critique of its expenses, the Examiner asserts that it has made every effort to limit those expenses by having a representative live at the site of Debtor's plant and arranging for air travel as cheaply as the case warrants, but that many matters occur on short notice precluding the purchase of guaranteed non-refundable airline tickets.

DISCUSSION

For the second time in less than six months the Court finds itself issuing a written decision on a fee application filed by the Examiner following objection by the Debtor and the FDIC.

While certain factual allegations, if established through competent proof in an evidentiary hearing, might induce the Court to limit compensation of the Examiner, no such hearing has been demanded by any of the parties and, thus, the Court is left with conflicting allegations as to the benefit derived by the Debtor from the Examiner's services.

Both the FDIC and the Debtor call the Court's attention to its Memorandum-Decision of December 28, 1992 which it is alleged contained a caveat from which the Examiner has failed to take direction in reducing the magnitude of the services it has continued to render to the Debtor.

A reading of the Court's December 28, 1992 Memorandum-Decision, however, should lead one to the conclusion that its caveat was prospective rather than retrospective, and a substantial portion of the services for which the Examiner seeks compensation herein, were rendered prior to December 28, 1992.

It is not apparent, to this Court, that the Examiner is continuously acting beyond the scope of its appointment and this Court finds repugnant a procedure by which a professional is permitted to render services which are apparently within scope of its existing authority only to have its fee request strenuously attacked because parties in interest assert, utilizing hindsight, that such services are questionably beyond the scope of that authority.

What the Court suggested to the parties, by way of its December 28, 1992 Memorandum-Decision, was that they might "wish to consider a modification of the ongoing role of the Examiner in this case". Attacking the fee applications of the Examiner after the services have been rendered is not an appropriate method of prospective modification.

The Court will note that the Examiner is continuing to charge duplicatively for internal conferences between Barton and Leinbach, which the Court finds inappropriate and thus, the Court will disallow the passive hours incurred by Barton in such conferences by denying compensation for 11.5 hours @ \$100.00 per hour and 19.5 hours @ \$110.00 per hour or a total of \$3,295.00. See In re Adventist Living Centers, Inc. 137 B.R. 692, 697 (Bankr. N.D.Ill. 1991).

As to the remainder of the criticisms, the Court will, for purposes of this fifth Fee Application, accept the Examiner's contention that its billing increments reflect actual time expended, and that the increase in its hourly rates as of January 1, 1993 while in part an overhead adjustment, did not require the prior approval of this Court.

The Court also notes that Barton's recap of his hours reflects a total of 405.50 while the contemporaneous time records support a total of 399 hours. Adjusting the difference @ \$100.00 per hour results in a further reduction of Barton's fee request of \$650.00.¹ With regard to Leinbach, his recap indicates total hours of 440 hours while the contemporaneous time records reflect a total of 430.50 hours. Adjusting that difference @ \$48.00 per hour results in a reduction of \$456.00.

Finally, the Court finds no merit to the objections to the Examiner's airfare or the "Resident Rent/Utilities" expense for which reimbursement is sought. The Court finds the Examiner's explanation for both items acceptable.

Thus, the Court will approve compensation to the Examiner of its fifth Fee Application in the sum of \$61,746.00 and will further approve reimbursements of expenses in the sum of \$9,619.65.

IT IS SO ORDERED.

Dated at Utica, New York
this day of May, 1993

STEPHEN D. GERLING
U. S. Bankruptcy Judge

¹ While the Court acknowledges that this adjustment might result in a disallowance of some Barton hours previously disallowed under the "conference" analysis, the Court has neither the time nor the inclination to conduct an "in depth" analysis in an effort to determine why the recap total is at odds with the contemporaneous time record total.