

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC.

CASE NO. 92-00860

Debtor

Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

The Court has before it the Application of Robert E. Barton P.E. and Bibb and Associates, Inc. ("Bibb"), the Examiner in this Chapter 11 case, seeking Interim Compensation ("Fee Application"), for the period September 1, 1992 through October 30, 1992. In addition, the Court considers the Application of the Examiner's Attorneys, Hinman, Howard & Kattell, Esqs. ("HH&K"), also seeking interim compensation ("Fee Application") for the period July 1, 1992 through

October 30, 1992. Both the Examiner and HH&K have been duly appointed pursuant to prior Orders of this Court.¹

Both Fee Applications were duly noticed to creditors and appeared on a motion calendar of this Court at Utica, New York on December 15, 1992.

Prior to the hearing date, an Objection to the Fee Application of HH&K was filed by the Federal Deposit Insurance Corporation ("FDIC").² Additionally, Debtor's counsel filed an Objection to the Fee Application of both Bibb and HH&K.

At the hearing, additional appearances were noted by 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

Bibb has continued to function as Examiner in this case at all times since approval of its appointment on April 3, 1992, and the current Fee Application is the fourth interim application filed by Bibb. Bibb has been previously awarded fees totalling \$220,309.50 by this Court.

HH&K has likewise served as counsel to Bibb at all times since its appointment pursuant to an Order dated April 3, 1992. This is HH&K's second interim application. Previously HH&K was awarded a fee of \$41,534.50.

It appears that the only objection interposed to a prior interim

¹ While there is no direct statutory authority which authorizes the retention of a professional to represent an examiner appointed pursuant to §1104 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"), bankruptcy courts have relied on their general authority found in Code §105 to award compensation to such professionals. See In re Tarkowski, 104 B.R. 828, 830 (Bankr. E.D.Mich. 1989).

² The FDIC Objection is entitled "Objections to Application for Allowance of Interim Compensation For Examiner and Examiner's Counsel", however, the focus of the Objection is the application of HH&K.

application was an objection by Debtor to Bibb's first interim application.

ARGUMENTS

The Objection of FDIC can be generally summarized as contending that HH&K exceeded its role as counsel to Bibb in that it actively participated or attempted to actively participate in matters involving the New York State Public Service Commission ("PSC"), which had threatened to terminate a "power purchase agreement" between the Debtor and its primary customer, Niagara Mohawk Power Corporation.

The FDIC contends that such participation by HH&K exceeded the scope of its representation of Bibb and that it was timely advised in that regard by the FDIC. Additionally, the FDIC objects to a specific number of hours for which HH&K seeks compensation expended in the preparation of HH&K's and Bibb's Fee Applications.

The Debtor's Objection appears to be focused on what it alleges to be the failure of Bibb to properly administer a construction contract which provided for certain work to be performed at the Debtor's co-generation facility in Canton, New York.

Debtor asserts that Bibb's alleged shortcomings led directly to the construction contract exceeding its estimated cost to the Debtor by approximately one million dollars and to the contractors's abrupt suspension of work on the project.

Both the UST and Hudson appear to defend HH&K and Bibb. The UST asserted that the contractor whose activities Bibb was to allegedly oversee was "forced" upon Bibb by the Debtor and the FDIC and that Bibb was concerned with the contractor's ability to perform from the outset. Hudson argues that were it not for HH&K's efforts, the PSC may very well have terminated the Debtor's power purchase agreement since neither Debtor nor its Special Counsel appeared to be actively opposing the PSC's threatened action.

HH&K, in its defense and that of Bibb, postures that with regard to the PSC, it acted out of necessity when it appeared that a noise abatement deadline imposed on the Debtor by the PSC was about to come and go unopposed,

which would indirectly result in the loss of Debtor's major source of revenue.

HH&K defends the fees incurred in the preparation of its Fee Application and that of Bibb by asserting that Bibb was unfamiliar with the proper procedure to be utilized in preparing its Fee Application and that a memorandum of law submitted in connection with the Bibb Application was intended to present the Examiner's position as to the proper standard of review by the Court.

As to Bibb's conduct in overseeing the construction contract, HH&K argues that cost estimates were increased due to the "crises" created by Debtor's lack of attention to the PSC matter and the fact that the contractor was constantly updating its repair estimates. HH&K contends that the contractor stopped work because it wasn't being paid by the Debtor.

Finally, HH&K and Bibb assert that their fees are entitled to a "priority" over the secured claim of the FDIC and the fees of Debtor's counsel. They point to an Order of this Court dated March 27, 1992, which provided "that the Examiner's fees and expenses, as ultimately allowed by the Court under 11 U.S.C. §330, shall be entitled to priority over Lender's security interest in the Debtor's assets pursuant to 11 U.S.C. §364(d)."

DISCUSSION

While Bibb was appointed as Examiner in this case, it must be kept in mind that it has never been the intention of the parties that Bibb's function be limited by strict adherence to Code §1104(b), which imposes upon an examiner the functions of investigating fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of a debtor's affairs.

Bibb's primary role in this case was to assume the operational control of the Debtor's co-generation facility and its appointment was as a compromise of the FDIC's motion seeking the appointment of a Code §1104 trustee and Debtor's strenuous opposition thereto. Thus, the parameters of Bibb's authority were extremely broad and somewhat atypical.

Unquestionably, Bibb was given the task of negotiating an "EPC" contract with United Engineers & Constructors, Inc. ("UE&C") for the purpose of causing the Debtor's co-generation facility to pass certain performance tests, "without the expenditure of funds in excess of such amount as Examiner believes are prudent under the circumstances." (See Stipulation between Debtor and FDIC as Receiver dated June 11, 1992, pg. 3).

The Debtor's Objection to Bibb's Fee Application apparently seeks to convince the Court that a fee award to Bibb should be gauged solely by the success or failure of the UE&C contract.

The Court is not convinced, however, that Bibb's duties as Examiner were limited solely to the negotiation and monitoring of the UE&C contract, nor was its fee entitlement somehow contingent upon the success or failure of that contract.

Debtor's Objection is conclusory in nature and absent specific allegations of incompetence or misconduct, the Court would be hard pressed to justify a denial of fees to Bibb after the fact.

A review of Bibb's contemporaneous time records indicates a significant amount of travel time, which the Court would normally allow at one-half the hourly rate, however, it appears that Bibb seeks to justify their full hourly rate by asserting that air travel time is utilized in reviewing documents and otherwise preparing for meetings. On that basis, the Court will allow the full hourly rate.

The Court will not compensate Bibb for purely clerical services, such as typing, faxing and copying, as those are components of normal overhead and are not separately compensable. See In Re Belknap, 103 B.R. 842, 844 (Bankr. W.D.Ky. 1989). Thus, the Court will reduce Bibb's fee request by \$537.50. With regard to disbursements, the Court will not compensate Bibb for the Resident Engineer's "Laundry" of \$180.82, nor his "Moving Expenses" of \$1,652.49.

Thus, as to Bibb, the Court will approve a fee of \$60,666.00 and reimbursement of expenses of \$12,886.69.

The Court cautions, however, that it is somewhat questionable if the Debtor's estate can continue to absorb the Examiner's fees at the current levels, and the parties may wish to consider a modification of the ongoing role of the

Examiner in this case.

Turning to the Fee Application of HH&K, the Court has considered the Objection of the FDIC which contends that HH&K acted beyond the scope of its authority and in contravention of directions from the FDIC that it was exceeding that authority.

Again, while no evidentiary hearing on the Fee Applications was requested and the Court sua sponte declined to take testimony on the Fee Applications, the Court is at a loss to understand why any of the parties in this case would have sought the exclusion of any other party in dealing with a matter so significant as the PSC's threatened termination of the Debtor's power purchase agreement.

HH&K asserts that as the result of conversations with the PSC's staff counsel, it became aware of the Debtor's inactivity in dealing with the PSC's threatened contract termination. It contends that having received that information, it moved forward on behalf of the Examiner to oppose the PSC's action.

The Court will not deny HH&K's request for fees expended in connection with the PSC matter because it believes that HH&K's involvement significantly contributed to the resolution of the PSC matter and was not duplicative of the efforts of the other parties, although HH&K may have technically acted outside the scope of its authority as counsel to the Examiner. The Court notes, however, that in the future, any professional in this case who relies upon the adage that "the end justifies the means" and fails to seek an expansion or clarification of the scope of its authority on appropriate notice, may well be denied compensation.

Upon a review of HH&K's time records, the Court agrees with the FDIC that the time expended in connection with the preparation of the Fee Applications is excessive to include the preparation of a memorandum of law. The Court will allow the 24.9 hours devoted to the preparation of the Fee Applications by HH&K's summer associate and award \$1,494. The balance of the hours devoted to the preparation of the Fee Applications are disallowed and the requested fees reduced by \$3,705.00 to \$44,704.50.

Finally, with regard to the Fee Application of HH&K, in a Response

To The Objections To The Fee Applications of the Examiner and His Counsel ("Response"), it seeks to increase retroactively its hourly rates for partners and associates. No explanation for the increase is provided. Because the Fee Application does not cover an extended period of time (all of the services were rendered within the previous six months) the Court will not adjust the hourly rates.

Turning to HH&K's request for reimbursement of expenses, the FDIC again objects to a number of disbursements to include a LEXIS expense of \$1,396.24. Neither the policy of this Court nor its Local Rules (L.R. 17(b)), authorize the reimbursement of LEXIS charges. See In re Belknap, supra 103 B.R. 844. Further, the Court will disallow telephone charges incurred in the amount of \$532.39 for two conference calls conducted on June 19, 1992 absent further explanation. This Court will approve reimbursement of expenses to HH&K in the sum of \$6,020.05.

The only remaining issue is the manner in which the Fee Applications are to be paid. Both HH&K and Bibb seek immediate payment of their fees and expenses. As indicated, HH&K asserts that both its fees and those of Bibb have been granted a priority over the secured claim of the FDIC and the collective fees of Debtor's counsel, and, therefore, should be paid prior to December 31, 1992.

Unquestionably, the Order of this Court dated March 27, 1992 based upon the consent of the FDIC, which was later memorialized in the Stipulation between the FDIC and the Debtor dated June 11, 1992, allows the fees of Bibb and HH&K to be paid from the collateral of the FDIC pursuant to Code §364(d), a so-called "carve out". To the extent that the fees of the Debtor's collective counsel do not benefit from a similar "carve out", it can be said that the fees and expenses of Bibb and HH&K enjoy a priority.

Based upon the Debtor's December 1992 gross revenue of approximately \$1,900,000 as set forth in Exhibit 1 attached to HH&K's Response, the Court will direct that the Fee Applications approved herein be paid within fifteen days of the Debtor's receipt of the December revenue.

IT IS SO ORDERED.

Dated at Utica, New York
this day of December, 1992

STEPHEN D. GERLING
U.S. Bankruptcy Judge