



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 16, 2024

CBCA 8141-FEMA

In the Matter of MARIETTA MEMORIAL HOSPITAL

Matthew D. Gurbach and Roula Allouch of Bricker Graydon LLP, Columbus, OH; and Paul G. Westbrook, Vice President and General Counsel of Marietta Memorial Hospital, Marietta, OH, counsel for Applicant.

Sima S. Merick, Executive Director, and Laura Adcock, Disaster Recovery Branch Chief, Ohio Emergency Management Agency, Ohio Department of Public Safety, Columbus, OH, appearing for Grantee.

Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR; and Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **VERGILIO**, **ZISCHKAU**, and **CHADWICK**.

VERGILIO, Board Judge, writing for the Panel.

The panel is to resolve a request for arbitration brought by the applicant (Marietta Memorial Hospital) under 42 U.S.C. § 5189a(d) (2018), arising from the President's declaration of a disaster concerning COVID-19. The Federal Emergency Management Agency (FEMA) denied a first appeal in which the applicant sought public assistance of \$3,868,665 for hazard pay commitment bonuses paid to employees during the declared event. At issue is the eligibility of the payments for public assistance. Because payments were discretionary and could not be objectively determined, they do not qualify for public assistance under FEMA guidelines. No written, pre-disaster criteria have been presented. The panel concludes that the incentive pay amounts are not eligible for reimbursement by FEMA.

Background

The applicant, a private non-profit hospital, prior to and during the declared disaster, and presently, implements a hazard pay commitment bonus system under which the applicant pays employees bonuses. Despite expectations of employees, a policy is not written. The amounts and parameters for the payments are discretionary; they are not triggered by specific events or dictated by position, actions, or non-discretionary attributes. The disaster was declared, ultimately with an incident period for Ohio of January 21, 2020, through May 11, 2023. Within this period, the applicant paid medical staff the amount in dispute said to be for bonuses to recognize efforts and prevent an exodus of personnel in providing treatment to patients diagnosed with or presumed to have COVID-19. The applicant has not identified any pre-disaster written labor policy mandating such compensation or objective criteria that dictate the amount of a bonus for personnel.

Applicable FEMA policy permits reimbursement of disaster-related incentive labor costs only when, among other things, a pre-disaster written labor policy that sets non-discretionary criteria for when the applicant activates various pay types. Public Assistance Program and Policy Guide (Apr. 2018) (PAPPG) at 23. FEMA denied public assistance, based upon the facts and this policy; the applicant failed to identify a pre-disaster written policy and non-discretionary (among other) elements for payment.

Discussion

In seeking public assistance, the applicant focuses on a regulatory provision pertaining to grants and incentive compensation. Specifically, incentive compensation is allowable:

to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the non-Federal entity and the employees before the services were rendered, or pursuant to an established plan followed by the non-Federal entity so consistently as to imply, in effect, an agreement to make such payment.

2 CFR 200.430(f) (2024). Allowability is but one element FEMA considers when providing public assistance. We need not determine whether allowability or eligibility comes first in the analysis because ultimately the question of eligibility resolves this case. FEMA specifically limits funding, that is, what payments are compensable in its eligibility determination. The PAPPG, as noted above, specifies that

FEMA determines the eligibility of overtime, premium pay, and compensatory time costs based on the Applicant's pre-disaster written labor policy, provided the policy:

- Does not include a contingency clause that payment is subject to Federal funding;
- Is applied uniformly regardless of a Presidential declaration; and
- Has set non-discretionary criteria for when the Applicant activates various pay types.

If these requirements are not met, FEMA limits [public assistance] funding to the Applicant's non-discretionary, uniformly applied pay rates.

PAPPG at 23. The applicant asserts that it could not anticipate COVID and its effects and therefore could not have had a policy for COVID prior to the pandemic. A specific policy for COVID was not required, but rather a prior, non-discretionary, written policy providing incentive pay under predetermined circumstances was required. FEMA has consistently applied these requirements in arbitration matters concerning COVID brought to this Board. The language of the 2 CFR provision does not establish a basis to deviate from, or make inapplicable, the PAPPG requirements regarding eligibility. Allowability and eligibility are different matters.

The applicant did not make payments in a manner that complies with the PAPPG to receive public assistance. The applicant utilized subjective criteria – at odds with FEMA policy. No pre-disaster written policy supports the position of the applicant. The question has been adequately addressed by another panel (one member of which is on this panel). *New York–Presbyterian Hospital*, CBCA 7412-FEMA, 22-1 BCA ¶ 38,207. We adopt the rationale. Arbitration is not an avenue to deviate from FEMA policy and guidelines.

Decision

The panel concludes that the applicant's requested incentive pay amounts are not eligible for public assistance reimbursement by FEMA.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge