



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 15, 2019

CBCA 6457-FEMA

In the Matter of UNION FOR REFORM JUDAISM

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David Gillings, State Public Assistance Officer, Public Assistance Division, California Governor's Office of Emergency Services, Mather, CA, appearing for Grantee.

Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and John Dimos, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **DRUMMOND**, **LESTER**, and **RUSSELL**.

The Union for Reform Judaism (URJ) is a private non-profit organization that operates Camp Newman, a multi-building mixed-use property in Santa Rosa, California. The buildings at Camp Newman were severely damaged, and many destroyed, by wildfires that occurred across Northern California in October 2017. URJ seeks arbitration under section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C.A. § 5189a(d) (West 2019), after the Federal Emergency Management Agency (FEMA) denied its request for more than \$60 million in public assistance (PA) funding for Camp Newman. As permitted under Rule 611 of the Board's rules governing this arbitration (48 CFR 6106.611 (2019)), the parties have requested a decision on the written record, or

through a “paper hearing” without live testimony, and each party has supplemented its original written submission to the Board with additional briefing and evidentiary documents. In accordance with Board Rule 613, this decision is being issued within sixty calendar days after the submission of the last written brief in this arbitration, which was when the Board closed the arbitration.

Factual Background

URJ acquired the Santa Rosa property in 1997 and soon thereafter began operating a summer camp there for Jewish youth called Camp Newman, a camp that, in recent years, has served more than 1400 campers each summer. Before it was damaged by fire in October 2017, the Camp Newman complex included multiple large and small open meeting spaces, a dining hall for meals and large gatherings, a large amphitheater for live performances and outdoor meetings, several smaller amphitheaters, a pool, and numerous cottages and other buildings that were used for housing and overnight accommodations. URJ also owned and operated the associated utilities and other facilities necessary for operation of Camp Newman, including water, power, and wastewater treatment.

URJ utilized Camp Newman as a summer camp for only seventy-six days a year, leaving the property available for other uses over the course of the remaining 289 days of the year. URJ elected to make the property available for use by outside organizations during those 289 days. If an outside organization wanted to reserve either a portion or the entirety of the Camp Newman campus, it would enter into an agreement with URJ, titled “URJ Camp Newman License Agreement,” in which the licensee would agree to pay a guaranteed minimum license fee that URJ would calculate by reference to which part or parts of the campus were being rented, the number of days of the group’s rental, and the number of guests that the organization expected to bring to the campus. Under the license agreement, the licensee was responsible for supervising its group and the group’s behavior at all times and for providing trained individuals to supervise any specialized recreational activities areas while activities were in progress.

Although, on occasion, a group of students or other individuals would come to Camp Newman for a day trip, almost all of the license agreements involved overnight stays by an organization’s guests in Camp Newman’s overnight accommodations of anywhere from one night to eight nights. Licensees could have guests bring their own linens or, instead, could rent linens and towels from Camp Newman. Based upon the Board’s review of various licensing agreements and subsequent invoices that URF submitted as part of this arbitration, it appears that minimum guaranteed license fees for rentals involving overnight visits typically (with a few exceptions) ranged anywhere from \$4000 to \$60,000, depending on the size of the anticipated group and length of stay, with a per-night-per-person fee typically

breaking down to a rough average of somewhere between \$55 to \$80 per-night-per-person. Actual revenue for an eight-day rental could, and did, run as high as \$120,000. The organization signing the license agreement would be responsible for paying URJ for its group's use of the property and for each of its guest's overnight accommodations.

URJ has submitted documentation showing that, at times, it has allowed groups to use Camp Newman free of charge, as a donation from URJ. It has submitted letters from the Sonoma County Fire District, the Sonoma County Sheriff's Office, and Sonoma County's Fire Prevention Division indicating that URJ donated Camp Newman for their use, without charge, for various training and other activities over the course of several years, as well as copies of license agreements showing two groups that were recently allowed to use Camp Newman without charge.

In 2016, various organizations used the Camp Newman property, through rental agreements, for a total of 228 days, in addition to the seventy-six days that Camp Newman operated as a summer camp for Jewish youth. Before the camp was shut down in October 2017, the property had been in use in 2017 for a total of 182 days (beyond its seventy-six-day use as a summer camp) for fifty-two different programs with over 3500 participants. In its application for arbitration, URJ described the uses to which these outside organizations put the property as follows:

Multiple organizations, from tech companies to secular schools to college groups, have regularly used the Camp Newman Property for meetings and extended community outreach activities. Individuals and groups also use the facility for grief counseling meetings, family events, women's studies, and group meetings. . . . The data presented confirms that the Camp Newman facility was being used for more than 50% of the time for eligible community services at the time of the disaster.

Arbitration Application at 7. Based upon the license agreements and other materials that URJ submitted to the Board, it appears that the activities of the guests of organizations renting Camp Newman also included ziplining, hiking, kayaking, swimming, climbing and ropes activities, other field activities, children's art classes, yoga, dancing, and music rehearsals and programs.

On October 8, 2017, a wildfire that came to be known as the "Tubbs Fire" started near Tubbs Lane in Calistoga, California. Over the next several days, it and more than a dozen other wildfires spread across Northern California, with the greatest scope of damage from the Tubbs Fire occurring in Santa Rosa. The President issued a major disaster declaration,

DR-4344, on October 10, 2017, covering the California wildfires, with a recognized incident period of October 8 through 31, 2017.

The Tubbs Fire either totally destroyed or severely damaged most of Camp Newman's facilities. It severely damaged or destroyed foundations of buildings and both above-ground and in-the-ground infrastructure.

On November 28, 2017, URJ submitted a request for public assistance to FEMA through the California Governor's Office of Emergency Services (Cal OES), seeking funds to repair the Camp Newman property. URJ submitted a letter to FEMA on February 16, 2018, requesting approval of its application for PA grant funding as an eligible non-profit organization providing eligible community center services.

On May 25, 2018, the California Office of Emergency Services (Cal OES) provided URJ with a copy of FEMA's Public Assistance Eligibility Determination, dated May 16, 2018, in which FEMA denied URJ's request for PA funding for Camp Newman. In that determination, FEMA did not challenge URJ's description of Camp Newman as a community center, but cited URJ's failure "to satisfy the 'primary use' test" required of a mixed-use private non-profit facility establish that over fifty percent of the physical space for each facility on the Camp Newman property was dedicated to eligible services.

On July 23, 2018, URJ, in accordance with 44 CFR 206.206 (2017), timely submitted a first appeal of FEMA's denial to Cal OES, which, on September 21, 2018, Cal OES transmitted to FEMA. On May 1, 2019, after more than seven months without decision by FEMA on the first appeal, URJ submitted a request for arbitration to the Board pursuant to section 423 of the Stafford Act, as amended by section 1219 of the Disaster Recovery Reform Act of 2018 (DRRA), Pub. L. No. 115-254, 132 Stat. 3186. In its briefing to the Board, FEMA now argues that the Camp Newman property is not eligible for PA funding not only because Camp Newman does not satisfy the "primary use" test, but also because Camp Newman is not, contrary to URJ's description, the type of "community center" covered by the Stafford Act.

Discussion

Section 423 of the Stafford Act, as amended by section 1219 of the DRRA, allows an applicant for public assistance to submit a request for arbitration to the CBCA "to dispute the eligibility for assistance . . . for a dispute of more than \$500,000 for any disaster that occurred after January 1, 2016." 42 U.S.C.A. § 5189a(d)(1). Although an applicant can wait to receive a determination on its first appeal before submitting an arbitration request to the Board, it is entitled to submit an arbitration request beginning "180 days after the

Administrator's receipt of the [first] appeal if the Administrator has not provided the applicant with a final determination on the appeal" by that time. *Id.* § 5189a(d)(5)(B). URJ seeks in excess of \$500,000 in its request for assistance for damage that Camp Newman sustained as a result of the Tubbs Fire in October 2017. When URJ submitted its arbitration request to the Board, 222 days had passed since URJ had submitted its first appeal to FEMA, without a response from FEMA. URJ's submission is timely and is properly before us.

FEMA has raised two objections to eligibility here: it argues, first, that Camp Newman does not qualify as a "community center" under FEMA's regulations and guidelines, meaning that it is not an "eligible facility" for PA funding purposes; and, second, that URJ cannot show that more than fifty percent of Camp Newman's physical space was primarily dedicated to eligible services, meaning that it fails the "primary use" test that FEMA uses in evaluating PA funding eligibility of mixed-use facilities like community centers. Because, as discussed below, we agree with FEMA that Camp Newman is not a "community center" eligible for PA funding, we need not address FEMA's argument that Camp Newman does not satisfy the "primary use" test.

Although URJ has presented uncontroverted evidence that it is a PNP, FEMA is authorized to provide PA funding to a PNP applicant only if the applicant operates an eligible PNP facility. 42 U.S.C. § 5172(a)(1)(B) (2012 & Supp. III 2016); 44 CFR 206.222(b). Eligible facilities (or, as the term used in the Stafford Act and in FEMA's regulations, "private nonprofit facilities") are classified as either critical or non-critical. Critical eligible facilities are "private nonprofit educational (without regard to the religious character of the facility), center-based childcare, utility, irrigation, emergency, medical, rehabilitational, [or] temporary or permanent custodial care facilities (including those for the aged and disabled) and facilities on Indian reservations, as defined by the President," 42 U.S.C.A. § 5122(11)(A) (West 2019); *see* 44 CFR 206.221(e)(1-6). Non-critical facilities, which are viewed as "providing essential [social] services to the general public," 44 CFR 206.221(e),¹ are identified as "museums, zoos, [performing arts facilities, community arts centers,]

¹ FEMA's regulations actually refer to the provision of "essential governmental type services," rather than "essential social services," but section 20604 of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, enacted on February 9, 2018, amended the Stafford Act to require the reference to "social services." 132 Stat. at 85 (amending 42 U.S.C.A. § 5122(11)(B) (West 2019)). The change is retroactively applicable to any disaster or emergency declared on or after August 23, 2017. *See* 132 Stat. at 86. Because the wildfires at issue here occurred in October 2017, the change is applicable to URJ's application, even though FEMA has not yet modified its regulations to comport with the statutory change.

community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, [food banks, broadcasting facilities, houses of worship,] and facilities which provide health and safety services of a governmental nature,” provided that the facilities are “open to the general public.” *Id.* 206.221(e)(7) (bracketed language added to comport with statutory amendments to the Stafford Act made through the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, 85).

Through its “Public Assistance Program and Policy Guide” (PAPPG), FP 104-009-2 (Apr. 2017), which is available on FEMA’s website, FEMA has provided further guidance regarding which non-critical facilities are eligible for PA funding. 2017 PAPPG at 12; *see Dewees Island Property Owners Association*, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415, at 181,865 (discussing guidance regarding non-critical facilities). Because URJ contends that Camp Newman is a “community center,” we focus upon that categorization here. Pursuant to the 2017 PAPPG, community centers viewed as providing non-critical, but essential, governmental or social services are those that have been “established and primarily used for the purpose of offering” particular categories of services (or services similar to those categories) “to the community at large.” 2017 PAPPG at 14. Although URJ has not precisely specified which of the categories of services identified in the 2017 PAPPG upon which it is relying in this arbitration, the seemingly most likely candidates are the following: (1) “[e]ducational enrichment activities that are not vocational, academic, or professional training”; (2) “[s]ervices and activities intended to serve a specific group of individuals (e.g., women, African-Americans, or teenagers) provided the facility is otherwise available to the public on a non-discriminatory basis”; (3) “[s]ocial activities to pursue items of mutual interest or concern, such as” community board meetings, neighborhood barbecues, various social functions of community groups, and youth and senior citizen group meetings; and (4) “[c]ommunity centers operated by a religious institution that provides secular activities, such as fundraising, activities that help the community at large.” *Id.* The 2017 PAPPG makes clear, though, that certain community services—specifically, conferences and recreational activities—are ineligible for PA funding. *Id.* at 15.

The 2017 PAPPG also provides guidance as to the “open to the general public” requirement of the “eligible facility” definition. Under that guidance, a facility generally must meet “ALL of the following conditions” set forth below:

- Facility use is not limited to any of the following:
 - A certain number of individuals;
 - A defined group of individuals who have a financial interest in the facility, such as a condominium association;
 - Certain classes of individuals; or

- An unreasonably restrictive geographical area, such as a neighborhood within a community;
- Facility access is not prohibited with gates or other security systems; and
- Any membership fees meet all of the following criteria:
 - Are nominal;
 - Are waived when an individual can show inability to pay the fee;
 - Are not of such magnitude to preclude use by a significant portion of the community; and
 - Do not exceed what is appropriate based on other facilities used for similar services.

2017 PAPPG at 12. The policy guide adds an additional consideration specifically applicable to facilities identified as community centers:

In cases where the facility provides multiple services, such as a community center, FEMA reviews additional items to determine the primary service that facility provides, such as:

- U.S. Internal Revenue Service documentation
- Pre-disaster charter, bylaws, and amendments
- Evidence of longstanding, routine (day-to-day) use (e.g., a calendar of activities)

Id. The PAPPG then reiterates that “[f]acilities established or primarily used for political, athletic, religious, recreational, vocational, or academic training, conferences, or similar activities are not eligible.” *Id.*²

² The 2017 PAPPG does not reflect the recent retroactive amendments to the Stafford Act made through the Bipartisan Budget Act of 2018, relating to religious facilities or religious use of a facility. Because URJ has not characterized Camp Newman by reference to religious uses, we need not consider the effect of the Stafford Act amendments upon FEMA’s policy guidance here.

After reviewing all of the evidence submitted in this arbitration, we cannot find that Camp Newman fits within the category of “community center” under FEMA’s guidelines, for several reasons:

First, Camp Newman, with its emphasis on overnight accommodations and programs most of which run for more than a single day, does not easily fit into what is typically thought of as a “community center.” In a chart accompanying URJ’s initial submission to the Board, URJ repeatedly referred to numerous buildings on the campus as having “[r]egular use by rental groups for housing.” None of the “community center” examples to which URJ has cited indicate that a facility providing overnight accommodations for rent to groups at a market rate, or even a discounted rate, is a “community center” rather than a private rental camp.

Second, although some of the various organizations renting Camp Newman have run programs during their rental periods that appear to fit within the types of programs that a community center might host, those programs are not the sole or necessarily the primary emphasis of Camp Newman. Instead, Camp Newman is a rental property. URJ offers its property to whatever groups will pay their rental fees, and many of those groups then focus on recreational activities, business meetings, or conferences, activities that FEMA’s regulations identify as ineligible for PA funding.

Third, although the rental fees that Camp Newman charges organizations that rent its facilities may be a bargain compared to similar facilities or camps in the area, those fees are certainly not “nominal,” as that term is used in FEMA’s policy guidance. The word “nominal,” where price or fees are at issue, generally means “named as a mere matter of form, being trifling in comparison with the actual value; minimal.” Random House Webster’s Unabridged Dictionary 1305 (2d ed. 2001); *see* Black’s Law Dictionary 1210 (10th ed. 2014) (defining “nominal” as “trifling, esp. as compared to what would be expected <the lamp sold for a nominal price of ten cents>”). The rental structure underlying Camp Newman calls for an organization³ to rent the camp facilities, or a portion of them, and then to bring a large group numbering anywhere from twenty-five to several hundred individuals to the property for activities over the course of a day, an overnight, or several days. The individual group members do not pay Camp Newman directly; it is the organization that must

³ We recognize that, on occasion, an individual will execute a Camp Newman license agreement in his or her own name, rather than as a representative of an organization, and will serve as a host for a group of individuals that he or she has invited to join him or her at the camp. Our use of the word “organization” here encompasses that situation and does not affect the result.

pay for all of its guests, in a lump sum, in amounts totaling anywhere from \$4000 to \$120,000. Although a “community center,” as FEMA defines the term, can charge nominal fees to members of the public who want access to the center without losing its “community center” status, we cannot find that the rental charges for Camp Newman are merely “nominal.” Further, the fact that, on occasion, URJ donates Camp Newman for use by certain organizations, which do not have to pay a rental fee for it, does not change the essential nature of URJ’s regular fee structure or the non-nominal nature of those fees.

Fourth, here, the organization that rents the camp property controls who comes to the camp and who does not, and only organizations that can afford to pay URJ’s rental fees will be able to obtain that type of access and control. The record makes clear that URJ does not itself actively manage, oversee, or promote community activities once it has a licensing agreement in place, which FEMA policy guidance indicates is a factor in evaluating eligibility. *See* FEMA Second Appeal Analysis, FEMA-4022-DR-VT, *Neriga, Inc.* (Dec. 19, 2013) (“While the Applicant allows other groups to use the camp facilities during the offseason, simply making facility space available to community organizations does not make a facility a community center,” and “Applicant has not provided any information to demonstrate that the Applicant actively manages, oversees, or promotes community activities outside of the purposes necessary for conducting the camps.”), *available at* https://www.fema.gov/appeal/283592?appeal_page=analysis. In such circumstances, we cannot find that Camp Newman is open to the general public for purposes considered “eligible” for PA funding, as required by the Stafford Act and FEMA’s implementing regulations.

URJ complains that FEMA, by alleging that Camp Newman is more akin to an ineligible “conference center” than an eligible “community center,” is engaging in a game of semantics to avoid PA funding. Yet, by trying to pigeonhole Camp Newman into a “community center” category into which it does not easily fit, URJ is doing exactly the thing about which it is complaining. In the historical literature that URJ submitted to the Board, URJ has on several occasions in the past referred to Camp Newman as a conference center, and FEMA’s regulations expressly preclude PA funding for such centers. *See* 58 Fed. Reg. 47992, 47993 (Sept. 14, 1993) (“Examples of ineligible services or facilities are . . . conference facilities.”). We cannot ignore that, in the past, URJ has described Camp Newman as a conference center or that URJ’s recharacterization of Camp Newman as a community center came at a time when URJ needed to obtain PA funding.

URJ also suggests that the retroactive statutory amendments enacted through the Bipartisan Budget Act of 2018, which changed language in the definition of “private nonprofit facility” from requiring an eligible facility to provide “essential services of a governmental nature” to requiring it to provide “essential social services,” render prior

FEMA guidance obsolete and could make conferences and recreational activities eligible for PA funding. We disagree. As part of the referenced statutory language change, Congress also added to the Stafford Act a list of activities as examples of “essential social services” that were not previously a part of the Act’s “private nonprofit facility” definition—namely, performing arts facilities, community arts centers, food banks, broadcasting facilities, and houses of worship. Congress did not add either conferences or recreational activities to the list, and neither is similar to the activities currently listed in the statute. The amendment does not assist URJ in obtaining PA funding here.

By denying URJ’s PA funding request, we are not discounting the valuable benefits that Camp Newman has provided to those who have been able to rent or visit it. The record here is filled with accolades from prior renters and guests of the property who extol its benefits and value. Nevertheless, FEMA cannot fund restoration of every property damaged during a disaster, and Congress, through the Stafford Act, has provided FEMA with the roadmap for use in allocating scarce resources. The Act simply does not provide for PA funding for every project or property that might be worthwhile, including the property here.

Decision

We find that Camp Newman is not eligible for PA funding and deny URJ’s application.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Jerome M. Drummond

JEROME M. DRUMMOND
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge