



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 31, 2023

CBCA 7543-FEMA

In the Matter of NEW YORK SOCIETY FOR THE RELIEF OF THE RUPTURED
AND CRIPPLED MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY

Deborah K. Gardner and Joshua M. Balk of Ropes & Gray LLP, Boston, MA, counsel for Applicant.

Rayana Gonzales, Deputy Commissioner for Disaster Recovery Programs and Alternate Governor's Authorized Representative, and Joseph Stinson, Deputy Section Chief of Recovery, New York State Division of Homeland Security and Emergency Services, Albany, NY, appearing for Grantee.

Charles Schexnaildre, 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 **LESTER**, **KULLBERG**, and **SULLIVAN**.

LESTER, Board Judge, writing for the panel.

The New York Society for the Relief of the Ruptured and Crippled Maintaining the Hospital for Special Surgery (HSS) seeks public assistance (PA) funding pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), in the amount of \$5,436,250. In April and May 2020, HSS paid monetary bonuses to HSS hospital workers who had provided in-hospital services working with patients during early stages of the coronavirus 2019 (COVID-19) pandemic in New York City, and it believes that these bonuses should be viewed as “hazard pay” eligible for PA funding. After the Federal Emergency Management Agency (FEMA) issued a first appeal decision denying HSS’s PA funding request, HSS filed a request for arbitration with

the Board. For the following reasons, HSS's payments to its employees are not eligible for PA funding.

Background

HSS is a private, non-profit hospital that historically has focused on treating patients with musculoskeletal conditions. In March 2020, in response to the severe impact of COVID-19 on medical resources in New York City and at the direction of the Governor of New York, HSS transformed into a full-service hospital to treat COVID-19 patients and other patients with complex medical conditions.

On March 13, 2020, the President declared the COVID-19 pandemic of sufficient magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia under section 501(b) of the Stafford Act, entitling eligible entities to apply for PA funding. The next day, FEMA released its own COVID-19 Emergency Declaration, HQ-20-01-FactSheet (Mar. 14, 2020) (available at <https://www.fema.gov/press-release/20210318/covid-19-emergency-declaration>), providing that, for entities with a FEMA-State/Tribal/Territory Agreement, "eligible emergency protective measures [EPMs] taken to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B of the agency's [PA] program." On March 20, 2020, the President issued a major disaster declaration (FEMA-4480-DR-NY) targeted to New York State and expressly authorizing PA funding for "Category B" EPMS throughout New York to deal with what, by then, was a pandemic.

In early April 2020, HSS announced that it would issue payments of \$1250, which it described as "bonus[es] of appreciation," to non-management HSS staff who had worked in frontline, patient-facing areas for at least one week between March 15 and April 14, 2020. HSS paid those bonuses on April 24, 2020. HSS issued a second set of \$1250 payments on May 22, 2020, to employees who provided patient-facing services for at least one week between April 19 and May 16, 2020. In deciding to authorize the bonus payments, HSS considered its human resources policy and procedure guide, which provided as follows under the heading "Compensation Review":

The compensation section of the Human Resources Department shall periodically review the wage rates of job classifications to ensure market competitiveness in pay rates, and maintain any non-discriminatory effects of such rates to any protected class.

HSS Exhibit 1 at 2. HSS's written policy did not contain any further guidance about or identify any specific triggers that would require increased pay.

On September 17, 2020, HSS submitted to FEMA a project application seeking PA funding for the bonuses that it had paid its employees, which totaled \$5,436,250. FEMA issued its eligibility determination on August 25, 2021, finding that the bonuses were not eligible for funding. FEMA reported that, under its Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018), “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” has, among other things, “set non-discretionary criteria for when the Applicant activates various pay types.” HSS Exhibit 7 at 104. FEMA determined that, in this case, “nothing in the Applicant’s submitted pre-disaster pay policy establishes the criteria upon which these compensatory time bonuses are based” and that the bonuses were instead “paid at the sole discretion of the Applicant and not pursuant to a pre-disaster labor policy.” *Id.* Accordingly, FEMA denied HSS’s funding request.

HSS submitted a first-level appeal of the eligibility determination to the New York State Department of Homeland Security and Emergency Services (NYDHSES) on October 22, 2021, which NYDHSES timely forwarded to FEMA on December 17, 2021. FEMA denied the first appeal by decision dated August 18, 2022, relying on the same rationale that supported its eligibility determination.

On October 14, 2022, HSS submitted a request for arbitration to the Board in lieu of filing a second-level appeal with FEMA. After FEMA and NYDHSES submitted responses to HSS’s arbitration request, the Board conducted a hearing on January 24, 2023. The only witness to testify was HSS’s Vice President of Human Resources, who explained that, based upon HSS’s written compensation policy, HSS felt compelled to make the \$1250 bonus payments to its employees (1) because HSS wanted to recognize the serious risks that HSS’s employees had undertaken during March, April, and May 2020 when working on-site during the pandemic and (2) because HSS would not remain competitive in the market unless it matched the similar bonus payments that other hospitals in New York City were paying their hospital workers.

Discussion

FEMA raises three arguments in support of its denial of HSS’s request for PA funding: (1) that the costs which HSS seeks are not allowable under FEMA’s force account labor (FAL) policies because they were “bonuses,” not hazard pay; (2) that, even if HSS’s bonuses were a form of hazard pay, they are still ineligible because they were discretionary payments and were not required under HSS’s pre-existing pay policy; and (3) that at least some of the bonuses are not allocable to the federal disaster because there is no evidence that all workers who received bonuses were working directly with COVID-19 patients. FEMA also argues, in response to HSS’s position that FEMA’s policies regarding PA funding for

hazard pay during a pandemic are inconsistent with the Stafford Act, that the Board lacks arbitration authority to consider that issue.

We quickly dispose of FEMA's first and third arguments. FEMA's complaint that HSS called its payments "bonuses" rather than "hazard pay" seems a game of semantics rather than an attempt to define the true nature of the costs. The U.S. Department of Labor defines hazard pay on its website (<https://www.dol.gov/general/topic/wages/hazardpay>) as "additional pay for performing hazardous duty or work involving physical hardship." Plainly, these payments were intended to address the hazardous situation in which HSS's employees had voluntarily placed themselves to assist in addressing a deadly pandemic. We disagree with FEMA that these bonuses are dissimilar from hazard pay. Similarly, we reject FEMA's position that some of the hazard pay may not be allocable to the pandemic, given that the bonuses were limited to employees who had physically worked in frontline, patient-facing areas early in New York City's COVID-19 pandemic response.

Nevertheless, we agree with FEMA that, applying the PAPPG, the discretionary nature of the bonuses renders them ineligible for PA funding. Under FEMA policy, FEMA determines the eligibility of FAL costs "based on an applicant's pre-disaster written labor policy." *Joint Meeting of Essex & Union Counties, New Jersey*, CBCA 7407-FEMA, 22-1 BCA ¶ 38,223, at 185,644. That pre-disaster labor policy must "set non-discretionary criteria for when an applicant activates various pay types." *Id.* (citing PAPPG at 23). Despite HSS's attempts to convince the panel that circumstances compelled it to pay these bonuses, there is no language in HSS's written compensation policy that requires the bonuses, that identifies how or when HSS would have to pay bonuses, or that would be sufficiently definitive to allow an employee to claim that HSS breached the compensation policy by *failing* to pay a bonus.

The situation here is for all intents and purposes the same as in *New York-Presbyterian Hospital*, CBCA 7412-FEMA, 22-1 BCA ¶ 38,207. In that case, the applicant hospital, like HSS, decided in April 2020 to provide a \$1250 bonus to any employee who physically worked on-site for at least one week's time in March or April 2020. The applicant argued that it was compelled to make these payments to establish internal equity, to maintain market competitiveness, and to recognize individuals' contributions to the hospital's mission in difficult circumstances. The panel determined that, regardless of the reasonableness of the applicant's actions in addressing the pandemic, the ultimate decision to award its employees an after-the-fact bonus was discretionary and that, under the PAPPG, such costs are ineligible for recovery:

Here, the applicant's decisions regarding whom to pay the extra amounts, when to pay, how much to pay, and on what basis were not dictated by its policy and involved significant discretion. Indications that the payment

decisions were discretionary include, without limitation: (1) the decisions were made by the applicant's chief executive officer (rather than at a lower administrative level under automatic criteria); (2) according to the applicant's witness, the applicant had to consider "the [compensation] policy in total" and the "totality of the circumstances"; (3) the requirements that employees have worked one week at a facility during each period could have been set differently without obviously violating the policy; and (4) the applicant's policy did not dictate either a specific payment amount or equal payments to all recipients regardless of their salaries or wages. The payments were not made on the basis of non-discretionary criteria.

Id. at 185,553.

HSS argues not so much that its factual situation differs from that in *New York-Presbyterian Hospital* than that the prior panel did not comprehend the manner in which circumstances realistically forced HSS to make its bonus payments. HSS's argument is not persuasive. Under the PAPPG, FEMA looks at the applicant's pre-pandemic written compensation policy to determine whether the applicant was required to make the payments for which it seeks PA funding. Here, the pre-pandemic policy did not require the payments. Accordingly, the bonuses are not eligible for PA funding.

HSS argues that FEMA's policy cannot fairly and realistically be applied to the type of pandemic disaster at issue here and that, as a result, it conflicts with the Stafford Act. Yet, "Stafford Act funding is not necessarily intended to cover every single cost that a public entity might incur in every situation." *Vidor Independent School District*, CBCA 7260-FEMA, 22-1 BCA ¶ 38,087, at 184,974. Because "FEMA's resources are not limitless, . . . FEMA has necessarily developed rules and policies to assist it in determining fairly and equitably how to distribute the available resources." *Id.* at 184,974-75 (citing 44 CFR 206.200-.229). FEMA's discretionary allocation of scarce resources is consistent with the authority that Congress provided to FEMA in the Stafford Act. *Id.*; see *City of San Bruno v. Federal Emergency Management Agency*, 181 F. Supp. 2d 1010, 1014 (N.D. Calif. 2001) ("The heart of FEMA's mission is to distribute limited funds in response to national disasters. Distributing limited funds is inherently a discretionary responsibility.").

HSS finally argues that, because it would be fair and equitable to fund hazard pay during a pandemic, we should direct FEMA to change its policies, at least as they apply to COVID-19. HSS presents a February 2022 position paper from the Greater New York Hospital Association (GNYHA) that describes FEMA's requirement that a hospital have "a preexisting [pre-pandemic] 'non-discretionary' pay policy that specified the payment of [hazard pay] bonuses" before allowing for PA funding as "outdated and unreasonable in the context of the COVID-19 pandemic" and sets forth policy reasons for providing PA funding

for such costs. Some state emergency management agencies agree with the GNYHA's view, creating funding mechanisms at the state level that encompass COVID-19 hazard pay. *See, e.g., Pennsylvania COVID-19 PA Hazard Pay Grant Program Guidelines (July 2020), <https://dced.pa.gov/download/covid-19-pa-hazard-pay-grant-guidelines-2020/?wpdmdl=95560>; Vermont Front-Line Employees Hazard Pay Grant Program Guidance (Oct. 2020), <https://dvha.vermont.gov/sites/dvha/files/documents/News/Hazard%20Pay%20Grant%20Program%20Guidance%20v1.pdf>.* But we cannot require FEMA to adopt any particular policy. In our role as arbitrators, we look to determine whether FEMA has properly applied its policies in the factual circumstances presented to us. We do not set policy for FEMA. *Livingston Parish Government, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436, at 181,939.* Any requests for changes in FEMA policy must be directed elsewhere.

Decision

For the foregoing reasons, we deny HSS's request for PA funding.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge