



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 14, 2024

CBCA 7948-FEMA

In the Matter of BALLAD HEALTH

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant; and Chris Bomhoff, Disaster Policy Specialist, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Fort Lauderdale, FL, appearing for Applicant.

John D. Cressman, General Counsel, and Dawn D. Cummings, Deputy General Counsel, Tennessee Emergency Management Agency, Nashville, TN, counsel for Grantee; and Patrick C. Sheehan, Director, Tennessee Emergency Management Agency, Nashville, TN, appearing for Grantee.

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

Before the Arbitration Panel consisting of Board Judges **BEARDSLEY** (Chair), **LESTER**, and **ZISCHKAU**.

BEARDSLEY, Board Judge, writing for the Panel.

Pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), Ballad Health (Ballad or applicant) seeks public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) for: (1) \$482,374.36 in incentive pay that was paid to employees working in COVID-19 units who were required to continuously wear masks and (2) \$19,118.75 in differential pay provided to a physician who acted as the medical director of the COVID-19 unit. Because Ballad did not issue the claimed incentive or differential payments pursuant to a pre-disaster,

written labor policy or tie the pay to overtime hours, the panel denies the applicant's claims for PA funding.

Background

Ballad is a Tennessee private non-profit (PNP) corporation that operates twenty-one “hospitals and post-acute care facilities, outpatient care sites, ambulatory surgery centers, and physician practices” in northeast Tennessee and southwest Virginia. Applicant’s Request for Arbitration (RFA) at 4. In October 2019, Ballad issued a “Compensation Methods/Premium Pay” policy (pre-disaster policy) to “define guidelines for pay compensation for team members providing flexible staffing resource availability in facility departments that require someone to be available when called for varied patient care/department needs.” Applicant’s Exhibit 6 at 1. The policy covers all employees except those “covered by a collective bargaining agreement” and lists the categories in which employees are entitled to “be compensated for assigned/voluntary work scheduled in addition to the team members employed FTE [full-time equivalent] status schedule.” *Id.* These categories include (1) overtime premium, (2) on-call premium, (3) excess call-back premium, (4) holiday premium, and (5) shift premium. *Id.* at 2-6. The applicant points to the “shift premium” section of the pre-disaster policy as relevant here; this section allows for a premium to be paid for work during overnight shifts from 7:00 p.m. to 7:00 a.m., as long as the employee worked the shift for at least three hours. *Id.* at 6. The applicant describes the work covered by the “shift premium” section of the pre-disaster policy as “undesirable overnight shifts . . . when additional medical providers are needed to ensure necessary medical care is provided.” RFA at 7. The pre-disaster policy does not include guidelines or premium pay for an emergency (such as a global pandemic) or for the continuous wearing of masks. *Id.* at 12.

On March 13, 2020, the President of the United States declared the COVID-19 pandemic of sufficient severity and magnitude to warrant an emergency declaration (national emergency declaration) for all states under section 501(b) of the Stafford Act. Declaration of Eva Wilson¹ ¶ 7; FEMA Exhibits 9, 10. On that same date, a formal presidential emergency declaration was issued for Tennessee (Tennessee emergency declaration) and identified the beginning of the COVID-19 incident period as January 20, 2020. Wilson Declaration ¶¶ 8, 9; FEMA Exhibit 11. The Tennessee emergency declaration for COVID-19 allowed PNPs, such as Ballad, to seek reimbursement under the PA program for Category B emergency protective measures (EPMs) provided after January 20, 2020, that were directly related to COVID-19. Wilson Declaration ¶¶ 9, 14, 15; Exhibit 11.

¹ Eva Wilson is the Program Administration Section Chief for FEMA’s PA Regulations and Policy Branch. Wilson Declaration ¶ 1.

On March 29, 2020, the governor of Tennessee requested that COVID-19 be declared a “major disaster” in the state of Tennessee so that the state would have an easier path to FEMA grants not otherwise available under emergency declarations. FEMA Exhibit 13; *see* Wilson Declaration ¶¶ 11-12. Consequently, on April 2, 2020, the President declared COVID-19 a “major disaster” in Tennessee (major disaster declaration). FEMA Exhibit 13 at 1. The major disaster declaration also identified the beginning of the incident period as January 20, 2020. *Id.* The national emergency declaration, the Tennessee emergency declaration, and the major disaster declaration allowed for federal funding for eligible emergency measures taken in response to the COVID-19 pandemic. *See* FEMA Exhibits 12 at 1, 13 at 1. FEMA issued its first version of the Coronavirus (COVID-19) Pandemic: Medical Care Eligible for Public Assistance (Interim), FEMA Policy #104-21-0004 (medical care policy), on May 9, 2020. Wilson Declaration ¶ 6. FEMA issued its second version of the medical care policy, superseding the first version, on March 15, 2021. FEMA Exhibit 4. The second version of the medical care policy applied to “[a]ll Presidential emergency and major disaster declarations” under the Stafford Act and was “applicable to work performed on or after January 20, 2020.” *Id.* at 2. This policy indicated that “[c]ertain labor costs associated with medical staff providing treatment to COVID-19 patients may be eligible” for PA reimbursement, including “[o]vertime for budgeted medical staff providing treatment to COVID-19 patients.” *Id.* at 4. Only “temporary medical staff” and “contract medical staff” providing treatment to COVID-19 patients were eligible for “straight time” labor costs. *Id.*

To prevent staffing shortages, Ballad issued the “Ballad Health COVID-19 Incentive” (Ballad COVID-19 policy) to provide incentives “for team members on designated units who spend the majority of their worked shift in continuous PPE [personal protective equipment] for patient care.” Applicant’s Exhibit 5 at 1. The incentive rates established in the Ballad COVID-19 policy were different depending on the employee’s position:

Registered nurse [RN]: \$12.50/hour
Respiratory therapist: \$5/hour
Licensed practical nurse [LPN]: \$5/hour
CNA/NA [Unlicensed (UL) staff]: \$3/hour

Id. Ballad’s policy did not mention differential pay for a physician serving as the medical director of the COVID-19 unit. Ballad developed a COVID-19 Pay Code Usage presentation as of March 20, 2020, and discussed it as of March 30, 2020. Declaration of Greg Wilgocki² ¶¶ 7, 11. Ballad sent the presentation on March 31, 2020, to the editors of Ballad’s payroll system to describe the system changes needed to effectuate the COVID-19 premium pay

² Greg Wilgocki is the Senior Vice President of Accounting, Reimbursement, and Tax at Ballad and oversees its payroll department. Wilgocki Declaration ¶ 1.

codes. *Id.* ¶ 10. Ballad issued its COVID-19 policy to all employees on April 9, 2020. *Id.*; Applicant’s Exhibit 5.

Between March 15 and August 15, 2020, Ballad made \$482,374.36 in incentive payments to eligible employees pursuant to its COVID-19 policy. Applicant’s First Appeal at 2. Specifically, the applicant disbursed \$416,770.74 in incentive pay to RNs, \$39,826.45 in incentive pay to LPNs, and \$25,777.17 in incentive pay to UL staff. *Id.* Ballad also paid \$19,118.75 in differential pay to the physician who acted as the medical director of the COVID-19 unit. *Id.* Ballad seeks PA funding for all of these premium payments, which totaled \$501,493.11. RFA at 1.

FEMA issued a determination memorandum (DM) on April 6, 2022, finding Ballad’s incentive and differential pay to be ineligible for PA funding. Applicant’s Exhibit 1. FEMA denied the applicant’s claim for incentive pay because “the premium pay was not paid in accordance with [Ballad’s] pre-disaster policy.” *Id.* at 4. FEMA also determined that the differential pay was ineligible because “the [a]pplicant [did] not provide sufficient information and documentation to substantiate its claim.” *Id.* at 4-5.

On June 3, 2022, the applicant filed a first appeal of FEMA’s denial. Applicant’s Exhibit 2 at 1. FEMA denied this appeal on September 28, 2023. Applicant’s Exhibit 4 at 2. In addition to the reasons set forth in the DM, FEMA determined that the requested funds were ineligible because “the [a]pplicant did not provide sufficient documentation to substantiate that the requested premium pay is tied to overtime hours, and that it used discretionary criteria to provide the premium pay.” *Id.* at 7. On November 28, 2023, the applicant filed its RFA with the Board.

Discussion

FEMA may fund incentive pay and differential pay (premium pay) for eligible work performed as a result of a disaster. Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 23, 25. FEMA determines the eligibility for premium pay “based on the [a]pplicant’s pre-disaster written labor policy.” *Id.* at 23; see *Joint Meeting of Essex & Union Counties, New Jersey*, CBCA 7407-FEMA, 22-1 BCA ¶ 38,223, at 185,644. “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.” *New York Society for the Relief of the Ruptured & Crippled Maintaining the Hospital for Special Surgery*, CBCA 7543-FEMA, 23-1 BCA ¶ 38,268, at 185,810.

Ballad contends that as long as its incentive-based COVID-19 policy was “based on,” “activated by,” or had a “rational connection” to its pre-disaster “shift premium” pay policy, the incentive pay is eligible for PA reimbursement. Ballad’s description of its policy as a

“slight[] modification [of] its pre-disaster pay policy to account for the unique needs of responding to COVID-19” in order to stay “within the spirit and intent of its pre-disaster policy,” however, overstates the similarities between the policies. The COVID-19 policy’s criteria for incentive pay (different hourly rates paid to specific categories of employees working COVID-19 shifts while wearing continuous PPE) differed significantly from the shift premium pay policy (shift differential paid for actual time worked by any employee working at least three hours of an evening or overnight shift). *Cf. Joint Meeting*, 22-1 BCA at 185,644 (finding eligibility when applicant’s overtime COVID-19 policy mirrored the applicant’s pre-disaster policy). Moreover, the similarity of purpose between the two policies “to ensure that Ballard had adequate staffing levels to provide necessary medical treatment during” undesirable shifts does not support a determination that the claimed costs are eligible for PA funding. Premium pay is, by definition, paid to incentivize employees to work undesirable shifts or under undesirable conditions. Absent its COVID-19 policy, Ballard would not have paid premium pay to the staff in the COVID-19 units wearing continuous PPE because they did not meet the pre-disaster “shift premium” pay policy criteria. We therefore find that Ballard’s COVID-19 policy was an entirely new incentive pay policy and not based on its pre-disaster “shift premium” pay policy.

Ballad asserts that its COVID-19 policy qualifies as a pre-disaster labor policy for purposes of PA funding because it was developed prior to the issuance of the major disaster declaration. The PAPPG, however, requires that a pre-disaster policy be in written form. PAPPG at 23. Ballard’s COVID-19 policy was not published until April 9, 2020, a week after the President issued the major disaster declaration for Tennessee (April 2, 2020) and almost a month after the President issued the national emergency declaration (March 13, 2020). While the applicant points to a presentation that was discussed as early as March 30, 2020, and shown to payroll staff on March 31, 2020, we do not find that a presentation to administrative staff equates to a written labor policy.

Nonetheless, even if the presentation to administrative staff could be considered a written labor policy, in order to be considered pre-disaster, the policy had to be in effect prior to the incident start date. Wilson Declaration ¶ 21; *see* Second Appeal Decision, FEMA-4486-DR-FL, *Florida Christian Homes Senior Housing* (Jan. 2, 2024) (FEMA determination that applicant’s policy not considered pre-disaster because it was not in effect prior to the start of the declared incident period). The PAPPG defines the “incident period” as “the span of time during which the federally declared disaster occurs.” PAPPG at 2. For purposes of PA funding, the Tennessee emergency declaration and the major disaster declaration identified the incident start date as January 20, 2020. Ballard cannot pick and choose when the incident start date is relevant to PA funding by ignoring the start date for purposes of PA reimbursement of premium pay but accepting PA reimbursement for EPMs put in place after January 20, 2020. Consequently, because Ballard’s COVID-19 policy was neither in effect

nor in written form as of January 20, 2020, it cannot be considered pre-disaster, and because the policy is not pre-disaster, it does not meet the requirements to be eligible for PA funding.

Ballad argues that FEMA has not consistently used the incident start date to determine if a labor policy is pre-disaster. Ballad points to the first appeal analysis in *Baptist Healthcare System, Inc.*, FEMA-4497-DR-KY (Mar. 5, 2024), in which FEMA used the major disaster declaration date to determine that the policy was not pre-disaster. In that case, however, there was no need to go back to the earlier incident start date to determine eligibility because the applicant's policy was issued months after the major disaster declaration.

FEMA further asserts that the applicant has failed to tie the incentive pay to overtime work and, therefore, the incentive pay is not eligible for PA funding. Ballad argues that the incentive pay is an "incremental disaster related cost," a cost in addition to Ballad's straight time costs, that is eligible for PA reimbursement. The PAPPG states that "[f]or Emergency Work, only overtime labor is eligible for budgeted employees." PAPPG at 24. Consistently, FEMA's COVID-19 medical care policy, version 2, only allowed reimbursement for straight time labor costs if the medical staff were temporary or contract employees. As such, the incentive pay for budgeted employees had to be tied to overtime work to be eligible for PA. Despite providing time sheets and other documentation, Ballad failed to demonstrate that the claimed incentive pay was for overtime work by budgeted employees on COVID-19 units.

Ballad's reimbursement request for the COVID-19 medical director's differential pay is not eligible for PA funding because the applicant has failed to point to any written policy, either pre- or post-disaster, that required this differential pay to be paid for taking on extra work. Without a pre-disaster, written labor policy requiring differential pay, the payments are ineligible for PA funding.

Decision

The panel denies the applicant's request for PA funding.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge