



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 10, 2024

CBCA 8053-FEMA

In the Matter of PARKER JEWISH INSTITUTE FOR HEALTH AND
REHABILITATION

David T. Luntz and David B. Morgan of Hinman Straub P.C., Albany, NY, counsel for Applicant.

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

Anthony Homer and Rebecca J. Otey, 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 **LESTER**, **KULLBERG**, and **VOLK**.

KULLBERG, Board Judge, writing for the Panel.

The applicant, Parker Jewish Institute for Health and Rehabilitation (PJI), seeks public assistance (PA) for the cost of paid sick leave for employees who were quarantined during the coronavirus (COVID-19) pandemic, which was a declared disaster. The Federal Emergency Management Agency (FEMA) contends that PJI cannot receive PA for the cost of sick leave for employees who were quarantined and performed no work in connection with a disaster. For the reasons stated below, the panel denies PJI's request for PA.

Background

PJI is a privately owned nonprofit (PNP) 527-bed nursing home located in New Hyde Park, New York, that provides both long-term care and short-term rehabilitation for its residents. PJI has approximately one thousand employees. On March 20, 2020, the President declared a major disaster effective January 20, 2020, due to the COVID-19 pandemic. In response to the COVID-19 pandemic, New York State enacted legislation on March 18, 2020, requiring employers to provide up to fourteen days of paid sick leave for any employee under a mandatory or precautionary quarantine due to COVID-19 exposure. Laws of New York of 2020, Chapter 25, §§ 1(d)–(e). Such leave was intended to be in addition to, and separate from, any sick leave already accrued by that employee. PJI, consequently, incurred the cost of providing paid sick leave for employees who were quarantined because of COVID-19 and unable to work.

On February 8, 2023, PJI submitted to FEMA its request for PA, which totaled \$1,900,059, for the cost of sick leave for employees quarantined because of COVID-19 in accordance with the legislation enacted by the state of New York. In its determination, which was dated August 14, 2023, FEMA denied PJI's request for PA for the cost of sick leave for quarantined employees. FEMA denied PJI's appeal of the August 2023 determination by letter dated January 26, 2024. Subsequently, PJI requested arbitration of this matter, which was docketed by the Board on March 27, 2024. A virtual hearing of this matter was held before the arbitration panel on August 20, 2024, and the parties submitted post-hearing briefs.

Discussion

The issue before the panel is whether the cost of sick leave for PJI's employees who were quarantined because of COVID-19 is an eligible cost for the receipt of PA. PJI contends that the cost of sick leave was due to the COVID-19 pandemic. However, FEMA argues that the cost of sick leave was not an eligible cost as it involved no work in response to a disaster or emergency.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), sets forth this panel's authority to conduct arbitrations. *Id.* § 5189a(d). FEMA is statutorily authorized to provide PA “essential to meeting immediate threats to life and property resulting from a major disaster.” *Id.* § 5170b(a). Eligibility for PA funding requires a showing that such work was “required as the result of the emergency or major disaster event.” 44 CFR 206.223(a)(1) (2023).

FEMA's Public Assistance Program and Policy Guide (Apr. 2018) (PAPPG) provides for payment of PA to an applicant for “emergency protective measures and debris removal”

and “restoration of damaged facilities.” *Id.* at 19. FEMA’s analysis of a request for PA utilizes an “eligibility pyramid” that requires a determination based upon “four basic components of eligibility,” which are, in ascending order, the applicant, facility, work, and cost. *Id.* at 9. The eligibility of a cost requires that it be “[d]irectly tied to the performance of eligible work.” *Id.* at 21. In the case of an applicant’s personnel, “FEMA reimburses force account labor based on actual hourly rates plus the cost of the employee’s actual fringe benefits.” *Id.* at 23. Additionally, FEMA reimburses certain extraordinary personnel costs (call-back pay, night-time and weekend differential pay, and hazardous duty pay), but “[a]dministrative leave or similar labor costs incurred for employees sent home or told not to report due to emergency conditions are not eligible.” *Id.* at 25.

In response to the pandemic, FEMA issued the Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance, FEMA Policy 104-21-0003, Version 2 (Sept. 8, 2021) (O&O), which applied retroactively to the COVID-19 disaster declaration. The O&O provides the following:

FEMA may provide assistance to all eligible PA Applicants, including [state, local, tribal, and territorial governments (SLTTs)] and eligible PNPs, for the following measures implemented to facilitate the safe opening and operation of all eligible facilities in response to COVID-19 declared events:

- i. Purchase and distribution of face masks, including cloth face coverings, and personal protective equipment (PPE).
- ii. Cleaning and disinfection, including the purchase and provision of necessary supplies and equipment in excess of the Applicant’s regularly budgeted costs.
- iii. COVID-19 diagnostic testing.
- iv. Screening and temperature scanning, including, but not limited to, the purchase and distribution of hand-held temperature measuring devices or temperature screening equipment.
- v. Acquisition and installation of temporary physical barriers, such as plexiglass barriers and screens/dividers, and signage to support social distancing, such as floor decals.
- vi. Purchase and storage of PPE and other supplies listed in this section should be based on projected needs for the safe opening and operation of the facility.

Id. at 5 (footnotes deleted).

The panel concludes that the cost of sick leave for PJI's quarantined employees was not an eligible cost for receipt of PA. Statute, regulation, the PAPPG, and the O&O limit the payment of PA to only certain costs, and sick leave for employees sent home because of a diagnosis of or exposure to COVID-19 is not one of those costs. The Stafford Act and its implementing regulations limit PA to work in response to an emergency or disaster. An eligible cost must be incurred for work that is eligible, but, as discussed above, the PAPPG excludes the cost of employees who are sent home and not working. The O&O allows reimbursement for the cost and installation of certain equipment barriers, PPE, and other measures to prevent the spread of COVID-19, but sick leave is not one of those measures.

Although PJI contends that the increased sick leave costs were due to the COVID-19 pandemic and that the quarantine was necessary to protect nursing home residents, such an argument does not establish eligibility of that cost. PJI's quarantine of employees was not work that dealt with an emergency or disaster. At most, PJI has shown that it incurred increased costs related to its operation during the pandemic, but such increased costs of operation are not eligible for PA. *See Tunica County Board of Supervisors*, CBCA 7907-FEMA, 24-1 BCA ¶ 38,546, at 187,355 (citing *Tri-County Electric Cooperative, Inc.*, CBCA 7719-FEMA, 23-1 BCA ¶ 38,385, at 186,514).

Decision

The request for PA is denied.

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Daniel B. Volk

DANIEL B. VOLK
Board Judge