



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 23, 2024

CBCA 8206-FEMA

In the Matter of HENRY FORD HEALTH SYSTEM

Robert Farr of Henry Ford Health System, Detroit, MI, counsel for Applicant.

Michele Sosinski, Assistant Division Commander, and Tiffany Vedder, Disaster Recovery Unit Manager, Emergency Management and Homeland Security Division, Michigan State Police, Dimondale, MI, 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 **LESTER**, **SULLIVAN**, and **NEWSOM**.

NEWSOM, Board Judge, writing for the Panel.

Henry Ford Health System (HFHS) sought to arbitrate the denial of its request for public assistance funds to reimburse premium pay expenses that it incurred during the COVID-19 pandemic. Because HFHS did not incur COVID-related premium pay expenses pursuant to a pre-disaster, non-discretionary labor policy, we deny the claim.

Background

In early March 2020, responding to the emerging COVID-19 pandemic, the Governor of Michigan declared a major disaster and state of emergency, and, on March 19, 2020, the President declared the COVID-19 pandemic a national emergency.

The applicant, HFHS, a private, non-profit healthcare organization operating in Michigan, responded to the emergency over the ensuing months and years. Among its efforts, HFHS resorted to paying premium pay to attract and retain staff. It refers to its premium pay as “critical pay.” Critical pay was a form of incentive pay, the purpose of which, according to HFHS, was to encourage employees to assume additional responsibilities and shifts in unusual circumstances when healthcare response was essential. HFHS Request for Arbitration (RFA) at 31.¹ HFHS asserts that it expended a total of \$26,305,615.50 in critical pay as a result of the pandemic, captured in three separate FEMA projects that spanned most of the period between March 1, 2020, and February 26, 2022.² RFA at 21-23.

Prior to the disaster, HFHS established a written premium pay labor policy dated December 2012 for the Respiratory Care Services Department (RFA, Exhibit E) and an undated, written procedure entitled Critical Pay Authorization Process (RFA, Exhibit K).³ Collectively, these documents authorized additional hourly pay, in certain circumstances, for specified direct patient care jobs. When the policies were activated, registered nurses (RNs) could earn an additional \$10 per hour; surgical technicians could earn an additional \$5 per hour; nurse assistants could earn an additional \$5 per hour; and respiratory care personnel could earn an additional \$5 per hour. RFA, Exhibits E, K.

Under these pre-disaster policy documents, critical pay could be activated if available work in a shift exceeds a certain minimum quantity or if there were a staffing deficit that would “adversely impact patient or employee safety and quality of care,” or if there were “higher than usual job vacancies and the need to fill open shifts [were] critical.” RFA, Exhibits E, K. Management approval was required to activate critical pay, and such pay would undergo periodic management review. *Id.*

¹ RFA citations are to Portable Document Format (PDF) file page numbers.

² HFHS seeks arbitration for portions of three different FEMA projects: (1) Project 139633, for force account labor expenses (including critical pay) from March 1 to April 30, 2020; (2) Project 697179, for critical pay from May 1, 2020, to February 26, 2022; and (3) Project 698926, for critical pay from September 1, 2020, to February 26, 2022. RFA, Exhibits X, Z, AA, AC, AD, AF. HFHS sought other forms of public assistance as well, but HFHS only seeks reimbursement of critical pay expenses in this arbitration. RFA at 21-23.

³ The HFHS Critical Pay Authorization Process, Appellant Exhibit K, is undated, but both parties treat it as pre-disaster. *See* RFA at 30 n.18; FEMA Exhibit 1. We thus infer that it is a pre-disaster procedure.

After the disaster declaration, HFHS changed its critical pay policy several times to deal with the pandemic. In November 2020, HFHS increased critical pay hourly amounts for RNs from \$10 to as much as \$25; for nurse assistants from \$5 to \$10; and for respiratory therapists from \$5 to \$15. RFA, Exhibit S. HFHS also expanded eligibility to include secretaries, emergency room technicians, transporters, laboratory technicians, and redeployed professional staff, among others. *Id.* HFHS added “trigger events” for special COVID-19 pay, including a 20 percent or higher staff vacancy rate, a 50 percent or higher COVID-positive census, and a 20 percent above normal emergency room patient population. *Id.*

In 2021 and in early 2023, HFHS increased the hourly rates again. RFA, Exhibits R, T. HFHS increased the RN critical pay rate to \$50, increased the critical pay rate for respiratory therapists to \$35 hourly, and increased the critical pay rate for other technicians to \$15 hourly. RFA, Exhibit R. HFHS expanded the positions that could earn critical pay to include, for example, dietary technicians and pharmacy personnel. RFA, Exhibit R. HFHS also modified the triggers for critical pay, creating tiers of vacancy rates partly tied to COVID-19 surges. RFA, Exhibit Q.

FEMA denied reimbursement of HFHS’s critical pay costs on two grounds. First, FEMA contends that, while HFHS had a pre-disaster, written labor policy governing critical pay, HFHS made significant changes to the policy after the disaster commenced. Second, FEMA contends that HFHS’s policies provide for payments based on discretionary criteria. *See* RFA, Exhibits X, Z, AA, AC, AD, AF. HFHS disputes both contentions.

Discussion

FEMA policy requires that, to be eligible for reimbursement, premium pay costs must be based on “the Applicant’s pre-disaster written labor policy.” Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 23. The labor policy must be “pre-disaster,” meaning that the policy was published and in effect prior to the incident start date identified in the major disaster declaration. *Ballad Health*, CBCA 7948-FEMA, 24-1 BCA ¶ 38,596, at 187,634. If the labor policy satisfies the “pre-disaster” requirement, it must also, among other things, “set non-discretionary criteria for when the Applicant activates various pay types.” PAPPG at 23.

The evidence shows that HFHS modified its premium pay policies in many ways after the disaster declaration. HFHS increased the rates of premium pay, expanded availability of critical pay to more positions, and altered the criteria for activating critical pay. FEMA policy does not permit reimbursement based on post-disaster policies. PAPPG at 23; *see Ballad Health*, 24-1 BCA at 187,634-35 (denying reimbursement for premium pay that differed significantly from the pre-disaster policy); *Baptist Healthcare System, Inc.*, CBCA

8011-FEMA, 24-1 BCA ¶ 38,583, at 187,532 (denying reimbursement for premium pay over and above pre-disaster program). HFHS seeks reimbursement amounts paid pursuant to its post-disaster modified policies, not based upon the pre-disaster policy. *See* RFA, Exhibit O. Accordingly, critical pay based on post-disaster policy changes are ineligible for public assistance.

HFHS's policies also incorporated discretionary criteria to determine whether to activate critical pay. We look to the language of the policy and HFHS's payment determinations to help determine whether the policy is non-discretionary. *See New York Society for the Relief of the Ruptured and Crippled Maintaining the Hospital for Special Surgery*, CBCA 7543-FEMA, 23-1 BCA ¶ 38,268, at 185,809-10; *see also New York–Presbyterian Hospital*, CBCA 7412-FEMA, 22-1 BCA ¶ 38,207, at 185,553.

HFHS's policies incorporated many subjective, judgmental standards for activating critical pay, such as "critical staffing shortage," "higher than usual job vacanc[y] rates," and "staffing deficit that would adversely impact patient or employee safety and quality of care." The policies contained no definition of key terms like "critical" or "higher than usual" nor did they provide standards for determining the impact on patients or staff. Because the policies incorporated subjective criteria for activating critical pay, we conclude that activation was discretionary. *See, e.g., Prisma Health*, CBCA 8198-FEMA, 24-1 BCA ¶ 38,696, at 188,130 (finding that eligibility based on subjective criteria is one of the "hallmarks" of a discretionary policy).

HFHS contends that it used non-discretionary criteria to determine the staffing levels needed to activate critical pay, such as federal and state regulations governing standards for direct patient care and industry publications from the American Nursing Association. RFA at 33; HFHS Surreply at 2-3. However, HFHS's critical pay policy documents do not mention any of these regulations or standards. Nor do HFHS's critical pay approval records. HFHS's approval records show that HFHS authorized critical pay at times based on generalized, judgmental statements such as "inpatient overflow/high surgical census" or simply "staffing shortage." *See generally* RFA, Exhibit N. The evidence supports FEMA's conclusion that HFHS activated critical pay based on subjective, discretionary criteria.

HFHS argues that its critical pay policies were necessary to mitigate staffing shortages during the pandemic. It urges us not to defer to FEMA but rather to require FEMA to adopt a more lenient policy for reimbursing premium pay. RFA at 30; HFHS Surreply at 2-3. In making this argument and asking us to modify FEMA policy, HFHS misreads our decision in *Prisma Health*. In *Prisma Health*, we declined to defer to one of FEMA's findings of *fact*; we did not modify FEMA *policy*. 24-1 BCA at 188,130. Indeed, as previous panels have stated, it is not our role as arbitrators to set FEMA policy. *E.g., New York Society*, 23-1 BCA at 185,810. Rather, we look to determine whether FEMA has properly applied its policies

in the factual circumstances presented. *Id.* Public assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), “is not necessarily intended to cover every single cost that a public entity might incur in every situation.” *Id.* (quoting *Vidor Independent School District*, CBCA 7260-FEMA, 22-1 BCA ¶ 38,087, at 184,974).

Decision

The request for public assistance is denied.

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge

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

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge