



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

May 20, 2024

CBCA 8011-FEMA

In the Matter of BAPTIST HEALTHCARE SYSTEM, INC.

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Danielle M. Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant.

Mary Moran, Director of Emergency Management and Preparedness, Indiana Department of Homeland Security, Indianapolis, IN, appearing for Grantee; and Hillary Egan, Deputy General Counsel, Indiana Department of Homeland Security, Indianapolis, IN, counsel for Grantee.

Rebecca J. Otey and Shahnam Thompson, 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 **RUSSELL**, **SHERIDAN**, and **SULLIVAN**.

**SULLIVAN**, Board Judge, writing for the Panel.

Baptist Healthcare System, Inc. (Baptist) sought to arbitrate the denial of its request for public assistance funds to reimburse premium pay expenses that Baptist incurred during the COVID-19 pandemic. Because Baptist did not have a pre-pandemic non-discretionary policy that provided for the payment of the premium pay, we deny the claim.

### Background

Baptist is a private, non-profit health system with facilities throughout Indiana and Kentucky. During the pandemic, Baptist paid more than \$24 million in premium pay to retain its staff at its facilities in New Albany, Indiana. Baptist chose to pay these premiums rather than hire more expensive contract nurses.

Baptist maintains that its premium pay programs were “rooted in [pre-disaster] policies and practices.” Request for Arbitration (RFA) at 20. Baptist explains that, prior to the pandemic, it would review vacancy rates for a department, and, if the vacancy rate reached a specific percentage, Baptist would offer premium pay to individuals within the department to retain them. *Id.* at 41.

To explain its policies and the staffing issues that Baptist faced during the pandemic, Baptist included in the record an affidavit from the Vice President of Nursing, who explained why she authorized the payment of incentive pay:

During COVID, I considered vacancy to be more than an empty position but rather a reflection of available staff to perform required duties. With [COVID requirements for increased care], I felt confident that we had more than 25% less staff than needed to truly care for our patients in a safe and effective manner. The number of open positions was secondary to the number of positions needed. Based upon [COVID requirements], our need greatly exceeded our established thresholds of 25% vacancy rate which led me to the approval of the Tiered Incentive Program during the COVID incident period.

RFA, Exhibit 5, Affidavit of Kelly McMinoway (Aug, 17, 2023) ¶ 9.

Baptist provided three documents as evidence of its policies that were in place prior to the pandemic: the Baptist Physicians Lexington [BPL] Wage and Salary Policy and Procedures Manual, Baptist Health Employee Handbook, and a 2019 policy statement.<sup>1</sup> The BPL Wage and Salary Policy and Procedures Manual states that premium pay may be paid on a temporary basis when circumstances warrant:

---

<sup>1</sup> Baptist Physicians Lexington (BPL) appears to be a group of physicians “affiliated” with the Baptist entity here. Baptist does not explain how the BPL Wage and Salary Policy would apply to Baptist employees, but we assume for the purposes of our analysis that it does.

### Other Differentials and Premiums

From time to time, BPL may find a need to institute special differentials or premium pay on a temporary basis. These special differentials or premiums may be required to recognize employees who are required to work in unusual circumstances or excessive hours. These programs will be developed and recommended by Human Resources as needed. All recommendations will require cost analysis procedures for implementation, and specific time frames for application. The final approval of these special pay premiums rests with BPL Executive Management. Special differentials or premiums are described in special memorandums.

RFA, Exhibit 18 at 16. The manual also provides that any general increase in pay due to market considerations requires senior management approval. *Id.* at 23.

The Baptist Health Employee Handbook mentions the availability of premium pay: “Based on business and patient needs, Baptist Health may offer some employees other forms of premium pay to compensate for their willingness to be ‘on-call’ or be ‘call[ed]-back’ to meet patient needs.” RFA, Exhibit 19 at 69. The handbook also describes the availability of payment at a higher rate for employees willing “to commit to work evenings or nights as part of their regular schedule in order to meet patient needs. Such pay is generally determined by each facility or business entity to match competitive rates being paid in the local market.” *Id.* The handbook explains the option for employees to sell back to Baptist accrued but unused paid time-off (PTO) for seventy-five cents on the dollar. *Id.* at 88.

The third document is a Baptist Health Floyd policy statement issued in 2019 for tiered incentive pay to “address critical staffing needs in the Nursing Division.” RFA, Exhibit 26. To qualify for incentive pay, the policy requires that a department demonstrate a twenty-five percent vacancy rate for a specific shift and nursing discipline and obtain approval from the Vice President of Nursing at Baptist Health Floyd.

Baptist employed four types of premium pay:

Hourly incentive pay. The incentive pay is the largest cost among the types of premium pay and is comprised of what Baptist labels “regular incentive pay” and a program called “Helping Hands” in which employees were paid an additional \$20 to \$140 per hour. In its request for arbitration, Baptist provided a graph that showed the number of open positions over the pandemic and the “annualized turnover percentage” during the same time period. Baptist does not explain how the turnover percentage was derived or how it relates to vacancies that Baptist experienced in specific departments at its New Albany, Indiana

facilities. Baptist seeks public assistance funds to reimburse the monies it paid for both “regular incentive pay” and incentives paid under the Helping Hands program.

Buy back of Unused Personal Time Off (PTO). Under its policy before the pandemic, Baptist allowed employees to sell back to Baptist accrued but unused PTO at seventy-five cents per dollar; during the pandemic, Baptist increased the compensation rate to one hundred cents on the dollar and allowed employees to sell back up to seventy hours of time. Baptist seeks public assistance funds to reimburse the additional twenty-five cents it paid to employees.

PTO bonuses. At two different times during the pandemic, Baptist awarded PTO bonuses to employees; the first bonus was 250 hours for full-time employees, and the second bonus was a week of PTO. Baptist seeks public assistance funds to reimburse its costs for the employees either using this bonus time off or selling it back to Baptist.

Cash bonuses. Baptist paid employees two rounds of bonuses during the pandemic and seeks reimbursement of the amounts paid.

Baptist also provided several memoranda implementing the specific premium pay programs for which it seeks reimbursement, all of which were issued after the declaration of the COVID-19 pandemic as a major disaster in March 2020. RFA, Exhibits 40, 44, and 48.

The Federal Emergency Management Agency (FEMA) initially denied Baptist’s request for public assistance because Baptist had not established that the costs were tied to eligible work. RFA, Exhibit 4. Baptist appealed. FEMA denied the appeal, finding that Baptist had not established that the costs were tied to the performance of eligible work or associated with a pre-disaster written labor policy. RFA, Exhibit 1. On February 13, 2024, Baptist filed its request for arbitration. FEMA initially requested a hearing but withdrew that request and joined with Baptist to request that the panel decide the matter on the written record.

### Discussion

To qualify for reimbursement of its premium pay costs, Baptist must show that the costs were incurred to perform eligible work and were paid pursuant to policies that meet FEMA’s policy requirements for such pay. FEMA policy requires that, to be eligible for reimbursement, “overtime, premium pay, and compensatory time costs [be] based on the Applicant’s pre-disaster written labor policy.” Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 23. The pre-disaster written labor policy must, among other criteria, “set non-discretionary criteria for when the Applicant activates the various pay types.” *Id.* Because Baptist cannot meet these policy requirements, we do not decide the parties’

arguments regarding whether the employees who received the premium pay were performing eligible work.

The availability of public assistance funds to reimburse hospitals for premium pay costs incurred during the COVID-19 pandemic has been arbitrated before three different panels. *Holy Name Medical Center*, CBCA 7868-FEMA, 23-1 BCA ¶ 38,452; *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; *New York Presbyterian Hospital*, CBCA 7412-FEMA, 22-1 BCA ¶ 38,207. In each of those cases, the analysis turned on whether the applicant had established a policy prior to the pandemic that required the payment of the premium pay pursuant to non-discretionary criteria. In each of those cases, the panel found that the applicant's policy failed to meet these criteria.

Baptist's request for public assistance fails for the same reason. As noted, the PAPPG requires that a claimant's premium pay policy contain non-discretionary criteria that outline when premium pay will be paid to employees. "Non-discretionary" means that the policy takes effect without further management approval. *Holy Name Medical Center*, 23-1 BCA at 185,885. Baptist failed to provide such a policy. Its policy manual and employee handbook state that premium pay can be paid in a situation like the pandemic but that the details would be determined on a case-by-case basis and subject to management approval. The 2019 Baptist Health Floyd policy statement for tiered, incentive pay sets amounts of incentive pay and when these amounts will be paid (demonstrated vacancies by shift and discipline), but it still requires approval from the Vice President of Nursing before payment of this incentive pay.<sup>2</sup>

Finally, Baptist had a PTO buy-back program prior to the pandemic, but it only provided for buy-back at seventy-five cents on the dollar, not the one hundred cents on the dollar rate set during the pandemic. Baptist is not seeking the amount that it paid under the existing program; instead, it would like to be reimbursed the amount that it paid over and above the pre-pandemic program.

---

<sup>2</sup> It does not appear that Baptist was following this policy when it paid incentive pay during the pandemic. The rates paid in the Helping Hands program were much greater than the policy allowed (\$20 - \$140 per hour versus \$5-\$10 per hour). Baptist provides no analysis that the incentive pay was triggered by vacancies in particular departments. Instead, the Vice President of Nursing attests that she exercised her discretion to authorize the payment of incentive pay to address the conditions that the hospital faced.

Decision

The request for public assistance is denied.

*Marian E. Sullivan*

MARIAN E. SULLIVAN

Board Judge

*Beverly M. Russell*

BEVERLY M. RUSSELL

Board Judge

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge