



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 6, 2024

CBCA 8198-FEMA

In the Matter of PRISMA HEALTH

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Before the Arbitration Panel consisting of Board Judges **SHERIDAN**, **SULLIVAN**, and, **NEWSOM**.

SULLIVAN, Board Judge, writing for the Panel.

Prisma Health (Prisma) sought to arbitrate its request for public assistance funds to reimburse premium pay expenses that it incurred during the COVID-19 pandemic. Because Prisma did not incur these premium pay expenses pursuant to a pre-disaster, non-discretionary labor policy that applies uniformly regardless of presidential declaration, we deny the claim.

Background

On March 13, 2020, President Trump declared the COVID-19 pandemic a national emergency. On the same day, the state of South Carolina declared a public health emergency due to the COVID-19 pandemic, with an incident period beginning on January 20, 2020. Prisma, a private, non-profit health company operating primarily in South Carolina, paid employees treating COVID-19 patients more than \$12 million in premium pay. Prisma argues that FEMA should reimburse these premium pay expenses, asserting that it paid such expenses pursuant to two internal documents: the “Extra Shift Incentive” (ESI) labor policy and the later-adopted “COVID Designated Incentive” (CDI) guidance.

Extra Shift Incentive

Prisma adopted the ESI policy in 2000. The ESI policy provides that “incentive pay (ESI) may be utilized on a short-term basis to incentivize nursing staff to work additional shifts beyond their normal commitment.” Request for Arbitration (RFA), Exhibit 5 at 1. A hospital unit is eligible for incentive pay under the ESI policy if it has a “[v]acancy rate of 20% or greater for direct care, registered nurses” or an “[u]nusually high patient census [which] will be considered on a case-by-case-basis.” *Id.* The ESI policy sets incentive pay rates for eleven eligible job titles within those units, including \$10/hour for Registered Nurses (RNs), \$8/hour for Licensed Practical Nurses (LPNs), and \$5/hour for Nurse Technicians (Nurse Techs). *Id.* These incentive pay rates apply “only after completion of [an employee’s] normal weekly or biweekly FTE shift commitments.” *Id.* at 2. The ESI policy requires approval of the Vice President/Chief Nursing Officer before incentive pay is offered to staff. *Id.* at 2.

COVID Designated Incentive

In July 2020, after the COVID-19 disaster period began, Prisma established what it calls “guidance” to implement the ESI policy. Prisma sent an email notifying employees that it would be “[o]ffering incentive pay to those working in COVID-19 designated units” but that the “COVID-19 incentive pay is a limited-time effort” and would end “[o]nce the COVID-19 census declines.” RFA, Exhibit 6 at 1-2. Prisma followed this email with a CDI guidance document, which set incentive pay rates and eligibility requirements for COVID-19 incentive pay. RFA, Exhibit 7 at 1-2. The CDI guidance designated several eligible hospital units, including those approved by the Senior Vice President/Chief Nursing Officer and certain respiratory therapy units to be “determined based on level of [Respiratory Therapist] intervention for a COVID patient assignment, includ[ing] acuity of the patient and amount of therapy.” *Id.* at 1. The CDI guidance set incentive pay rates for four positions: \$20/hour for RNs, \$14/hour for LPNs, \$10/hour for Nurse Techs, and \$20/hour for Respiratory

Therapists. *Id.* at 1-2. These incentive pay rates applied to all hours worked in eligible COVID-19 units. *Id.* at 1.

Prisma seeks FEMA public assistance reimbursement for incentive pay incurred pursuant to the ESI policy and CDI guidance. Although FEMA found that the ESI policy satisfies FEMA eligibility requirements,¹ FEMA denied Prisma's claim for payments made pursuant to the CDI guidance, finding that the CDI guidance was a new policy and did not satisfy FEMA eligibility requirements. RFA, Exhibit 1 at 3. Prisma argues that the CDI guidance satisfies FEMA eligibility requirements because it is only "implementing guidance" that activates the underlying ESI policy. RFA at 9.

Discussion

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. As an initial matter, 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, be "applied uniformly regardless of a Presidential declaration" and "set non-discretionary criteria for when the Applicant activates various pay types." PAPPG at 23.

Prisma's CDI guidance was established in late 2020 after the incident start date identified in the major disaster declaration. Thus, the CDI guidance can only satisfy the "pre-disaster" requirement if it relates back to the earlier "eligible" ESI policy. In *Ballad Health*, the panel found that a COVID-19 policy adopted after the incident start date could not satisfy the "pre-disaster" requirement by allegedly "activating" a pre-disaster policy because the two policies differed significantly in eligibility criteria. *Ballad Health*, 24-1 BCA at 187,634. There, the panel found it immaterial that the two policies shared a similar purpose. *Id.* The panel reasoned that, absent the later-adopted COVID-19 policy, the

¹ FEMA reasoned that the ESI policy: (1) was established prior to the disaster event; (2) does not contain a contingency clause; and (3) "set requirements for all nursing units when ESI activates." RFA, Exhibit 1 at 3. FEMA explained that the ESI policy satisfies the "non-discretionary" requirement because it provides that nursing units are eligible for ESI when there is a vacancy rate of 20 percent and there is an unusually high patient census. *Id.* at n.18. FEMA did not, however, address the requirement that "unusually high patient census" was to be evaluated on a "case-by-case basis." RFA, Exhibit 5 at 1.

hospital “would not have paid premium pay to the staff in the COVID-19 units” in question. *Id.*

We adopt similar reasoning here. Although the ESI policy and CDI guidance share a similar purpose of encouraging work in understaffed hospital units, the two differ significantly in eligibility criteria, incentive pay rates, and scope. For instance, the ESI policy enumerates eleven potentially eligible job titles for incentive pay, while the CDI guidance limits eligibility to only three of these job titles: RNs, LPNs, and Nurse Techs. The CDI guidance increases incentive pay rates for each of these three eligible job titles by \$10/hour, \$6/hour, and \$5/hour, respectively. The CDI guidance also adds a new job title, Respiratory Technician, which is not contemplated in the ESI policy. Moreover, the ESI policy only applies to hours worked above an employee’s typical full-time schedule, while the CDI guidance applies to all hours worked in COVID-19 units. Absent the later-adopted CDI guidance, Prisma would have paid lower incentive rates to RNs, LPNs, and Nurse Techs and would not have paid Respiratory Nurses incentive pay at all. The CDI guidance was a new, independent labor policy, adopted after the disaster incident start date, and fails to satisfy the “pre-disaster” requirement.

In addition to the “pre-disaster” requirement, the labor policy must be “applied uniformly regardless of a Presidential declaration.” PAPPG at 23. In its reply, Prisma argues that the ESI policy applies uniformly to all presidential declarations and, thus, the CDI guidance also satisfies the “applied uniformly” requirement because it merely implements the ESI policy in the context of the COVID-19 presidential disaster. Reply to FEMA’s Response at 4-5. Because we find that the CDI guidance was a new, independent labor policy, we look only to the CDI guidance in examining whether the “applied uniformly” requirement is satisfied. The CDI guidance was disaster-specific and only applied to the COVID-19 disaster. Indeed, Prisma clarified that CDI incentive pay is “a limited-time effort” and would end “[o]nce the COVID-19 census declines.” Therefore, the CDI guidance does not apply uniformly, regardless of presidential declaration.

Even if the CDI guidance could satisfy the “pre-disaster” and “applied uniformly” requirements by relating back to the ESI policy, neither policy satisfies a third, “non-discretionary” FEMA eligibility pre-requisite. Whether the policy is non-discretionary requires examination of the terms of the labor policy to determine how premium pay is authorized and paid. *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 (concluding that applicant’s labor policy was discretionary because “there [was] no language in [applicant’s] written compensation policy” that identified how or when applicant would be required to make payment); *see also New York-Presbyterian Hospital*, CBCA 7412-FEMA, 22-1 BCA ¶ 38,207, at 185,553 (listing a number of factors that indicated that

the “payment decisions” were discretionary). We have determined previously that “non-discretionary” means that “the policy takes effect without further management approval.” *Baptist Healthcare System, Inc.*, CBCA 8011-FEMA, 24-1 BCA ¶ 38,583, at 187,532 (concluding that applicant’s labor policy was discretionary because it required management approval to take effect).

While FEMA apparently concedes that the ESI policy satisfies eligibility requirements, this panel is not bound by a deferential standard of review but, instead, reviews FEMA eligibility decisions “de novo.” *Bay St. Louis-Waveland School District*, CBCA1739-FEMA, 10-1 BCA ¶ 34,335, at 169,579 (2009). We disagree with both Prisma and FEMA that the ESI policy satisfies the “non-discretionary” requirement. The ESI policy uses permissive language, stating that “incentive pay (ESI) *may* be utilized” in certain circumstances and then only takes effect upon approval from the Vice President/Chief Nursing Officer. And, in some instances, eligibility of hospital units under the ESI policy is based on subjective criteria that must be “considered on a case-to-case basis.” These features are hallmarks of a discretionary policy. The CDI guidance is similarly discretionary. The CDI guidance also requires approval from the Vice President/Chief Nursing Officer before certain hospital units are deemed eligible for premium pay. In other cases, CDI eligibility is based on subjective criteria like the level of Respiratory Technician intervention necessary to meet a hospital unit’s needs.

Decision

The request for public assistance is denied.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Elizabeth W. Newsom

ELIZABETH W. NEWSOM
Board Judge