



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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February 7, 2023

CBCA 7530-FEMA

In the Matter of FRANCISCAN ALLIANCE, INC.

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX, counsel for Applicant.

Jonathan Lawrence Whitham and Hillary Christine Egan, General Counsel Office, Indiana Department of Homeland Security, Indianapolis, IN, counsel for Grantee.

Stanley Thompson, Jr., and Ramoncito DeBorja, 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 **DRUMMOND**, **KULLBERG**, and **SHERIDAN**.

**DRUMMOND**, Board Judge, writing for the panel.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), the applicant, Franciscan Alliance, Inc. (FAI), seeks public assistance (PA) funding in the amount of \$15,653,070 for straight-time labor expenses for budgeted employees who were reassigned from more typical work duties to perform tasks related to the coronavirus disease 2019 (COVID-19) pandemic.

FAI has made numerous arguments as to why its claimed costs should be eligible. FAI first argues that Presidential memoranda required the Federal Emergency Management Agency (FEMA) to accept FAI's PA funding application in spite of FEMA's policies. FAI then argues that, even without regard to the Presidential memoranda, its application for

straight-time labor costs fits within FEMA's policies because FAI's straight-time labor costs are unbudgeted or, alternatively, because they are funded from an external source. As detailed below, we find these costs to be ineligible.

### Background

FAI is a private, non-profit organization that operates eleven medical care facilities in Indiana. On March 15, 2020, in response to the COVID-19 pandemic, FAI closed certain non-essential departments in its medical facilities to reduce staffing. FAI did not terminate or formally furlough essential medical employees. Instead, it created new positions for COVID-19 work and reassigned employees. For the period from March 15 to 28, 2020, employees who had their hours reduced and had not yet been redeployed were directed to report their time, pursuant to FAI policy, as "low census time off," which is defined as "unpaid, excused, and unscheduled time off work due to reduced workload." Staff reassignments continued throughout 2020.

On April 3, 2020, the President issued a major disaster declaration for the State of Indiana (DR-4515-IN), finding that emergency conditions in Indiana "resulting from the Coronavirus Disease 19 (COVID-19) pandemic beginning on January 20, 2020, and continuing, [were] of sufficient severity and magnitude to warrant a major disaster declaration." 85 Fed. Reg. 26706 (May 5, 2020). Approximately one year later, on April 23, 2021, FAI submitted to FEMA an application for \$15,653,070 in PA funding for straight-time labor costs incurred from March through December 2020, which FAI argues were unbudgeted costs. FEMA issued an eligibility determination denying FAI's labor costs. In its decision denying those costs, FEMA explained that it viewed the reassigned employees as budgeted employees and that FEMA does not reimburse straight-time labor costs for budgeted employees who conducted emergency work. In response to its costs being denied, FAI timely submitted its first appeal to the Indiana Department of Health Services (IDHS), which forwarded that appeal to FEMA Region V. This appeal was denied. FAI subsequently filed its request for arbitration with the Board.

### Discussion

#### Presidential Memoranda

Section 403 of the Stafford Act gives the President, and therefore FEMA, broad discretion in their ability to reimburse entities for disaster relief. In distributing these funds, FEMA has set regulatory and policy guidance on how PA funding discretion will be used. *See* FEMA Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018). FAI argues that Presidential memoranda stripped FEMA of its discretion to set regulations and policies to deny costs for eligible COVID-19 work, citing Memorandum to Extend Federal Support

to Respond to COVID-19, 86 Fed. Reg. 7481 (Jan. 21, 2021), and Memorandum for Maximizing Assistance from FEMA to Respond to COVID-19, 86 Fed. Reg. 8281 (Feb. 2, 2021). It argues that FEMA's policy limiting PA funding to budgeted employees is contrary to those Presidential memoranda, which it argues require FEMA to provide assistance under Category B emergency protective measures.

We disagree that the Presidential memoranda stripped FEMA of its discretion to set regulations and policies for PA funding. FEMA's guidance for how it distributes PA funding is the PAPPG. The two Presidential memoranda direct FEMA to provide assistance under Category B of the PA program, *see* 86 Fed. Reg. at 7481 and 8281, but they do not delineate specifically what the Category B eligible costs actually are. That role is delegated to FEMA, *New York Society for the Relief of the Ruptured & Crippled Maintaining the Hospital for Special Surgery*, CBCA 7543-FEMA, slip op. at 5-6 (Jan. 31, 2023), and the Presidential memoranda do not indicate that the President intended to usurp that role. *See* 86 Fed. Reg. at 7482, 8281 ("Nothing in this memorandum shall be construed to impair or otherwise affect . . . the authority granted by law to an executive department or agency, or the head thereof."). To read the Presidential memoranda as overriding the PAPPG and commanding FEMA to accept anything that might possibly be construed as a Category B emergency protective measure is too far of an ask for this arbitration panel.

### Eligibility Determination

The impact of COVID-19 caused financial hardship for hospitals. However, as arbitrators, our job is not to make public policy but to follow the applicable regulations and policy. *New York Society*, slip op. at 6. Under FEMA's COVID-19 policy guidance, the following labor costs are eligible for funding under a COVID-19 major disaster declaration: (1) overtime for budgeted medical staff providing treatment to COVID-19 patients; (2) straight time and overtime for temporary medical staff providing treatment to COVID-19 patients; and (3) straight time, overtime, and other necessary costs for contract medical staff providing treatment to COVID-19 patients. FEMA Policy 104-10-04, Coronavirus (COVID-19) Pandemic: Medical Care Costs Eligible for Public Assistance at 3 (May 2020).

For emergency work labor eligibility, budgeted employees are defined as (1) permanent employees or (2) seasonal employees working during the normal season of employment. PAPPG at 24. Unbudgeted employees are defined as (1) essential employees called back from administrative leave, (2) permanent employees funded from an external source, (3) temporary employees hired to perform eligible work, or (4) seasonal employees working outside the normal season of employment. *Id.*

FAI's straight-line labor costs do not fit within any of the three categories that would make them eligible for PA funding. The labor costs claimed were for permanent employees

reassigned to cover COVID-19 patients. These employees had not been placed on administrative leave. Thus, under FEMA policy, FAI is only eligible for the overtime costs of these budgeted, medical staff. None of the labor costs in dispute are overtime costs.

FAI also claims that its employees were unbudgeted by arguing that the employees were funded from an external source, such as Medicaid or Medicare. Under FEMA policy, an external source is not defined, but the examples given are “a grant from a Federal agency or statutorily dedicated funds.” PAPPG at 24. FEMA disputes that payments from Medicaid and Medicare are external sources. We agree with FEMA. While payments from Medicaid are payments from a grant from a federal agency, and payments from Medicare are payments from a statutorily dedicated fund, these funds are not intended to fund budgeted employees’ straight-time labor costs. Instead, they pay for patients’ medical treatment. Therefore, FAI’s costs were not funded by an external source.

#### Decision

We find that the straight-time labor costs in dispute are ineligible for reimbursement.

*Jerome M. Drummond*  
JEROME M. DRUMMOND  
Board Judge

*H. Chuck Kullberg*  
H. CHUCK KULLBERG  
Board Judge

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge