UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 23, 2019

CBCA 6513-FEMA

In the Matter of LIVINGSTON PARISH GOVERNMENT

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Before the Arbitration Panel consisting of Board Judges **BEARDSLEY**, **O'ROURKE**, and **CHADWICK**.

Livingston Parish timely sought arbitration under 42 U.S.C.A. § 5189a(d) (2018) as to the eligibility for public assistance of costs in project worksheet 4227-967 version 1. The panel convened a hearing under Board Rule 611 (48 CFR 6106.611 (2019)) on August 27, 2019, and closed the arbitration the next day. *See* Rule 613. This decision "is the final administrative action on the arbitrated dispute." *Id*.

Although this decision "is primarily for the parties, is not precedential, and [is intended to] concisely resolve the dispute," Rule 613, the panel members have elected to start with general principles, as we believe it may be useful for future applicants and the agency (FEMA) to understand how the members of this panel, at least, presently intend to approach decisions under the Board's new Stafford Act arbitration authority and our arbitration rules.

The panel benefitted from almost two hours of oral argument by counsel for the applicant and FEMA, focused mainly on the Board's role in the statutory scheme.

Arbitration of executive branch funding decisions, our task under 42 U.S.C. § 5189a(d), is rare. Indeed, the panel knows of no other tribunal performing it, whose example and guidance we might follow. Past arbitration decisions concerning Hurricanes Katrina and Rita provide limited guidance because, among other things, the statutory authorizing language was different and panel decisions rarely discussed it. The Stafford Act says only that "arbitration" timely requested by an eligible applicant in lieu of appeal "shall be conducted by [our Board] and the decision of such Board shall be binding." *Id.* § 5189a(d)(1). It provides no legal standards. As explained in the preamble to our arbitration rulemaking, "because an arbitration decision replaces final action by FEMA" and a panel is not a reviewing court, "the arbitrators must find facts and interpret the law independently on behalf of the Executive Branch." 84 Fed. Reg. 7861, 7862 (Mar. 5, 2019). We are comfortable "finding facts." But what does it mean to "interpret the law independently"? And what if an interpretation offered by FEMA rests on policy judgment?

A simple but recurring example illustrates the issue. FEMA's public assistance regulations state that "[t]o be eligible for financial assistance, an item of work must . . . [b]e required as a result of the . . . major disaster event." 44 CFR 206.223(a)(1) (2016). FEMA consistently cites this regulation to us (and does so here) to argue that work must be required as a "direct result" of a disaster. The regulation does not say that. It says, "as a result." A panel faced this issue in a Katrina/Rita arbitration, *St. Tammany Parish Government*, CBCA 3872-FEMA, 17-1 BCA ¶ 36,715, and adopted FEMA's reading of the regulation, inserting the term "direct," after applying *Auer* deference. Because administrative arbitration is not judicial review, the present panel members (one of whom wrote *St. Tammany*) do not intend to apply judicial doctrines of deference in Stafford Act arbitrations. *See* 84 Fed. Reg. at 7862; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) ("[*Courts*] give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of *courts and agencies*, that Congress would have *wanted* us to. . . . But the administrative realm is vast and varied, and . . . such a presumption cannot always hold.") (emphasis added).

At the same time, FEMA expresses rational policy grounds for limiting grants to remediating "direct" results of disasters. Even if arbitrators do not "defer" to FEMA's policy judgments, do the judgments deserve weight? If so, how much weight? Should each arbitration panel revisit this issue and "independently" interpret 44 CFR 206.223(a)(1) whenever the distinction between a "result" and a "direct result" makes a difference? There are no doctrines of intra-executive branch arbitration to guide us. Similar judgment calls pervade FEMA's implementation of the very general language of the Act and the regulations. "The heart of FEMA's mission is to distribute limited funds in response to national disasters. Distributing limited funds is inherently a discretionary responsibility. . . . FEMA ultimately

has discretion regarding which projects to fund." *City of San Bruno v. Federal Emergency Management Agency*, 181 F. Supp. 2d 1010, 1014–15 (N.D. Cal. 2001).

The Stafford Act gives arbitrators a role in this discretionary process but does not define the role, beyond arbitrating a dispute. The panel members are confident that Congress and the President did not intend for us to review FEMA's decisions for arbitrariness and capriciousness, as if under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 706. Two main reasons support this conclusion. First, as noted in the Board's 2019 preamble, the Stafford Act does not "suggest[] that the Board should review, sustain, or reverse FEMA's first appeal decision." 84 Fed. Reg. at 7862. The Act directs us to arbitrate a dispute. Second, the arbitration pilot program that came after the Katrina and Rita legislation and preceded the passage of 42 U.S.C. § 5189a(d) provided for APA-type review. *See id.* § 5189a note (2013 amendment). Legislators could have continued that approach in amending the Stafford Act, but did not.

This panel will be guided, instead, by our understanding of the remedy of arbitration: "the voluntary submission of a dispute to an impartial person or persons for final and binding determination." 84 Fed. Reg. at 7862 (quoting the American Arbitration Association). We see three potential benefits to applicants of electing arbitration over an agency appeal. First, applicants can provide the arbitrators new evidence, Rule 608, which we understand FEMA will not accept in a second appeal. *See* 44 CFR 206.206. Second, arbitration offers a predictable timetable. *See* Rules 607, 611, 613. Third, three impartial people make the final decision together. *See* Rules 603, 606, 609, 613.

With these features of arbitration in mind, the panel members intend to try to make decisions that we believe FEMA itself would have made upon fairly and impartially applying applicable law and FEMA policies to the evidence in the arbitration record. This general philosophy will not by any means answer every question or resolve every dispute, but it does help to channel our independent discretion and to indicate what the panel members intend *not* to do. We do not intend to reopen issues of statutory or regulatory interpretation that FEMA persuades us it has resolved on behalf of the Executive Branch, or to second-guess facially rational policy judgments or broad factual inferences about what typically happens in disaster situations. We will not disregard or purport to nullify written FEMA policies, as a court might under the APA. We will strive to be fair, impartial, timely, and clear.

Applying our approach to this dispute, we find the costs at issue not to be eligible.

FEMA should note that the panel is not persuaded that the Parish seeks "funding for the projected loss of useful service life of a facility." 2016 FEMA PAPPG ch. 2:V.R.2. Simply stated, payment for loss of useful life gives the owner money for future repairs but leaves the current useful life unchanged. *E.g.*, *Southern California Gas Co. v. City of Santa*

Ana, 336 F.3d 885, 891 (9th Cir. 2003) (per curiam) (distinguishing road "repairs" from "loss of useful life or future repaving costs" and noting that the latter category included "some harms that may not be realized for over a quarter-century"). The Parish wants to restore the useful life of its roads to what the Parish says the useful life was before the disaster. The Parish wants repairs now—not monetary compensation for the long-term effects of the flooding. We understand why FEMA objects to using the estimated loss of service life to support the application, but the project worksheet asks FEMA for current repair costs, not for a dollar value of future service life. Therefore, the panel does not think PAPPG ch. 2:V.R.2 applies by its own terms to this worksheet.

This record indicates, however, that the applicable FEMA policy is set forth in the September 2017 memorandum of the Assistant Administrator of the Recovery Directorate (Applicant's Exhibit 64). The memorandum says that FEMA will consider road repairs to be "required as the result of" a disaster only if the need for repair is "visible and quantifiable from a site inspection" following the disaster. This is a rational basis for distributing money to fix roads after a disaster, even if it is not the only possible, or the most generous standard. We need not decide what to call the September 2017 memorandum in APA terms because we are not conducting APA review.

The Parish offered no evidence, photographic or otherwise, that FEMA declined to fund repairs that FEMA should have funded upon fairly applying the September 2017 memorandum. Evidence, no matter how persuasive, that inundation generally tends to weaken roads does not satisfy the criteria stated in the memorandum. The panel saw no evidence of road closures, hazards, detours, or other indicia of roads not serving their pre-disaster function. Mr. Gaspard's study did not assess visible damage, but taken at face value, it revealed no difference in strength three-fifths of the time between areas of pavement that were underwater during the storm and areas that were not. We do not know whether, for the minority of roads where the testing found "statistically significant" average strength differences between inundated and non-inundated pavement, the areas that had been underwater were in worse, better, or about the same condition before the storm than were the areas that did not flood. As a result, we have no basis to rule out any number of alternative explanations for those average differences. In any event, statistical significance is a weak criterion to distinguish between the averages of test results for such samples. *See* Andrew Gelman & Hal Stern, *The Difference Between "Significant" and "Not Significant" is not Itself Statistically Significant*, 60 Am. Stat. 328 (2006).

The Parish did not show that FEMA has not consistently applied the September 2017 policy on road repairs since its issuance. The Parish's examples of other grants predate September 2017.

The panel considered all of the record evidence but finds the matters discussed above decisive.

Decision

The panel resolves the dispute by finding the costs at issue to be not eligible for FEMA public assistance.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge