



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 23, 2022

CBCA 7282-FEMA

In the Matter of FIRST PRESBYTERIAN CHURCH, PANAMA CITY, FLORIDA

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Sherin Joseph, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

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Before the Arbitration Panel consisting of Board Judges **GOODMAN, SULLIVAN, and CHADWICK.**

First Presbyterian Church (FPC) sought to arbitrate the determination by the Federal Emergency Management Agency (FEMA) that it could not receive public assistance funds to repair or replace one of its buildings because that building was used more for ineligible, rather than eligible, purposes. In response to FPC's request for arbitration, FEMA challenged FPC's eligibility for arbitration, arguing that FPC is not located in a rural area and the amount in dispute does not meet the required \$500,000 threshold. We conclude that FPC is eligible for arbitration and that its building was used for enough eligible services to qualify for public assistance funds.

Background

In October 2018, Hurricane Michael struck Panama City, Florida, and caused significant damage to FPC's buildings, including a building referred to as the "education building." FPC sought public assistance funding in the amount of \$350,000, for the repair

or replacement of the building that was used for youth group meetings, bible study, choir practice, and dance classes.¹ In addition to spaces for these activities, the building also contained offices and administrative spaces.

In evaluating FPC's request, FEMA found that the building's operating hours were forty hours a week and the only "non-critical essential social-type services" were the community dance studio and the youth meetings. FEMA Response, Exhibit B at 18-19. Because the time required for these activities was less than fifty percent of the week, FEMA determined that the building was not eligible. *Id.*

FPC appealed FEMA's determination, seeking to correct FEMA's analysis of the space and its uses. FPC Request for Arbitration, Exhibit 5. According to FPC, the useable 11,694 square feet was allocated to the following uses:

Use of space	Square footage
Offices/administrative support	4272
Childcare offices	455
Bible study and choir	2181
Dance classes	4786

Id. FPC agreed that the offices and administrative support spaces were ineligible but asked FEMA to consider the corrected identification of the spaces used for childcare, Bible study and choir practice, and dance classes. FPC explained that the childcare offices were used for the "daily business activities" of FPC's childcare facility, such as enrollment, collecting payments, and state-required postings regarding the facility. *Id.* FPC also explained that the teachers used one room as a "workroom for curriculum planning" and that children arriving late would be dropped off or sick children would be picked up from the other room. *Id.*

¹ In response to FEMA's challenge to its eligibility for arbitration, FPC asserted that its claim had grown to more than \$2 million. Because we decide that FPC is located in a rural area, we do not examine this issue. FEMA also introduced evidence that FPC has sold its education building since it sought funding. FPC responded that it planned to seek authorization for an alternative project. 42 U.S.C. § 5172(c)(2) (2018). Since FEMA has not received this request from FPC, it is premature for the panel to examine this issue.

FEMA reevaluated the use of the spaces in the building and determined that the dance class space and the childcare offices, in addition to the other office and administrative support, were ineligible uses. Key to FEMA's evaluation was the fact that the dance classes were offered by another entity, a firm called "An Audience of One."² Because dance classes were offered by this firm for twenty-four hours a week in eight of the twenty-one rooms of the education building, FEMA determined that the percentage of eligible use of the building was still less than the required fifty percent and denied the appeal. FEMA Response, Exhibit C.

In support of its request for arbitration, FPC submitted affidavits from the church pastor and the director of the dance studio, who explained that the dance studio was permitted to operate in the education building as an extension of the church's ministry. The pastor further stated that the "membership fees of the programs in the educational building were examined by the Church." FPC's Request for Arbitration, Exhibit 7. FPC also provided church meeting minutes from 2011, in which it was determined that an agreement would be drafted regarding "how the ballet program will function as a ministry of the church." *Id.* The agreement was not provided.

FEMA challenged FPC's eligibility for arbitration because the "Am I Rural" tool that it had used indicated that FPC was not in a rural location.³ The parties stipulated, based upon United States Census Bureau data from April 2020, that the population of Panama City was 32,929. Panama City is located in Bay County, Florida. *Panama City Demographics*, City of Panama City, Florida <https://www.pcgov.org/200/Panama-City-Demographics> (last visited Mar. 8, 2022). The Census data for April 2020 shows that the population of Bay County, Florida, was 175,206. *QuickFacts: Bay County, Florida*, United States Census Bureau <https://www.census.gov/quickfacts/baycountyflorida> (last visited Mar. 8, 2022).

² It appears that FEMA was aware in the initial evaluation that the dance classes were provided by Audience of One. The square footage analysis attached to FEMA's first determination identifies a storage closet used by Audience of One. FEMA Response, Exhibit B at 17. However, the rooms in which the dance classes were offered were included in the space devoted to eligible activities. *Id.*

³ The "Am I Rural" tool is maintained by the Rural Health Information Hub, Department of Health and Human Services, to aid in the identification of available rural health programs.

Discussion

I. FPC's Claim Is Eligible for Arbitration

Pursuant to the Stafford Act, an applicant “may request arbitration to dispute the eligibility for assistance or repayment of assistance provided for a dispute of more than \$500,000 for any disaster that occurred after January 1, 2016.” 42 U.S.C. § 5189(d) (2018). This threshold is lower for applicants located in rural areas. “For an applicant for assistance in a rural area under this subchapter, the assistance amount eligible for arbitration pursuant to this subsection shall be \$100,000.” *Id.* The Stafford Act defines “rural area” as “an area with a population of less than 200,000 outside an urbanized area.” *Id.* Applying this definition to Panama City and its environs, we find that FPC is located in a rural area.

FEMA urges the panel to find, based upon population data for Panama City available from before the disaster, as provided in the 2010 Census, that FPC is not located in a rural area.⁴ The eligibility provisions do not require that we look at the population before the disaster. Because Congress chose to define eligibility in terms of the amount in dispute, we are required to determine whether the applicant is located in a rural area at the time that the dispute arose. This provision contrasts with other provisions of the Stafford Act which require a focus upon the circumstances and conditions at the time of the disaster. *E.g.*, 42 U.S.C. § 5172(e)(1)(A)(i) (costs of repair to be estimated based upon the “design of the facility as the facility existed immediately before the major disaster”). Moreover, FEMA’s recent regulations, which were promulgated pursuant to direction in the Stafford Act, 42 U.S.C. § 5189a(c), do not state that the eligibility standard must be evaluated as of the date of the disaster. *See* 86 Fed. Reg. 45660, 45683 (Aug. 16, 2021) (to be codified at 44 CFR 206.206(b)(3)(i)).⁵ Instead, FEMA simply explained that an applicant is eligible for arbitration “provided the dispute is in excess of \$500,000, or \$100,000 in rural areas, and for disputes that arise from major disasters declared on or after January 1, 2016.” 86 Fed. Reg. at 45668. Therefore, we decline FEMA’s request that we look back to the population of

⁴ Judge Chadwick has opined that the Board is not authorized to arbitrate eligibility for arbitration, *see Town of Elizabethtown, North Carolina*, CBCA 7064-FEMA, 21-1 BCA ¶ 37,842 (Chadwick, Board Judge, writing separately), but concurs here because FEMA invited the panel to reach the issue.

⁵ In the policy statement that accompanied the issuance of these regulations, FEMA stated that, “[f]or arbitration, this policy applies to major disasters declared on or after January 1, 2016 and incorporates and supersedes the Fact Sheet *Public Assistance Appeals & Arbitration under the Disaster Reform Act* published in February 2020.” FEMA Policy: Public Assistance Appeals and Arbitration, FEMA Policy # 104-22-0001 (Feb. 24, 2022).

Panama City prior to the disaster and instead rely upon the population figures as of the time the dispute arose.⁶

II. More Than Fifty Percent of FPC's Building Was Used To Provide Eligible Services

The Stafford Act and FEMA's regulations provide that private, non-profit (PNP) entities may be eligible for public assistance funds if they provide a non-critical, essential service similar to those provided by state and local governments. 42 U.S.C. § 5172(a)(3); 44 CFR 206.221(e) (2020). A PNP may obtain public assistance funds for the repair or replacement of its facility if its facility was used, at the time of the disaster, for eligible purposes. Eligible purposes include those provided by community centers and other local government entities. 44 CFR 206.221(e)(7).

For buildings that are used for both eligible and ineligible purposes, eligibility "is dependent upon the *primary* use of the facility." FEMA Public Assistance and Program Policy Guide (Apr. 2018) (PAPPG) at 16. "Primary use" is defined as "the use for which more than fifty percent of the physical space in the facility is dedicated." *Id.* FEMA conducts a mixed-use analysis to determine the percentage of space that is used for eligible purposes. More than fifty percent of the space must be used for eligible purposes for the facility to be deemed eligible. *Id.* In addition, "[t]o be eligible, all private nonprofit facilities must be owned and operated by an organization meeting the definition of a private nonprofit organization." 44 CFR 206.223(b). For buildings in which an "Applicant shares use of a facility, in order to be eligible, the facility must be primarily owned by the PNP Applicant and meet the primary use requirement. FEMA prorates funding for these facilities based on the percentage of physical space that the Applicant owns and dedicates to eligible services." PAPPG at 16. "If the eligible PNP owns the entire facility and leases a portion of it to another entity, the facility is eligible provided that the PNP dedicates more than [fifty] percent of the facility for eligible services." *Id.*

It is undisputed that FPC is an eligible applicant and owns the building. We cannot find, as FPC urges, that the entire building is eligible and that the mixed-use analysis is not necessary solely because FPC is a church and all of the activities and space in the education building were dedicated to support of the church and its mission. FPC relies on an appeal decision by FEMA involving another Panama City church and on guidance provided by FEMA to church authorities in Puerto Rico. In the appeal of the other Panama City church, FEMA found that the facility at issue was the church building itself, a house of worship

⁶ We do not consider FEMA's use of the "Am I Rural" tool because this matter is resolved by the definition of rural in the Stafford Act. Moreover, FEMA has abandoned use of this tool in its recent regulations. *See* 86 Fed. Reg. at 45683.

(HOW). FPC Reply Brief, Exhibit 10 (*Appeal of Panama City Fellowship Church of Praise*, FEMA 4399 (Oct. 4, 2021) (FEMA decision granting second administrative appeal of Panama City church)). Because there was “no indication in the record that any of the services at issue are unrelated to the Facility’s function as a house of worship or are otherwise ineligible,” FEMA determined that “a mixed-use analysis was not necessary.” *Id.* Similarly, in letter guidance provided on August 19, 2021, to church authorities in Puerto Rico, FEMA “determined that space within an eligible HOW facility dedicated to administrative and support functions constitutes eligible space and no reduction in eligible [public assistance] funding will be made for the HOW.” FPC Request for Arbitration, Exhibit 6. However, FEMA further instructed in that letter that this determination did not address the eligibility of other support space that is “primarily dedicated to and used for another purpose such as a parish house, athletic activities, conferences, or recreational activities, including musical or theater performances.” *Id.* FEMA noted that it “distinguishes an administrative building that stands alone to support a HOW facility at another location from eligible administrative space within a HOW facility.” *Id.* Based upon this guidance, because the education building stands apart from the church building, it was properly subject to a mixed-use analysis.

We turn to the four uses of the space in the building—dance studios, offices for childcare facility, church offices and meeting space, and Bible study and youth choir practice. The use of the building for youth choir practice and dance lessons are eligible uses because they are akin to services provided at community centers. PAPPG at 13. The dance classes were provided in support of the church’s ministry by a member of the church and with the approval of the church’s governing body. FEMA denied eligibility because a separate entity provided the dance classes. FEMA argues this arrangement rendered the dance classes “ineligible services.” But regulation and PAPPG do not support this characterization. The dance classes are still eligible services, as FEMA found in its first review of the application. The issue is whether FPC owned or controlled less than fifty percent of the building. *See* PAPPG at 16. FPC owned and operated the entire building. There is no evidence of a lease by Audience of One. Instead, Audience of One was given permission to use the space for dance classes as an extension of the church’s mission.

Because we find that the spaces for dance classes are eligible, we must also evaluate the two rooms that FPC used in support of FPC’s childcare facilities. Based upon the descriptions of the uses of these rooms provided by FPC in the first appeal, we uphold FEMA’s determination that these rooms were administrative rooms not to be included in the determination of eligible spaces. Similarly, we do not disturb FEMA’s determination that the church offices and meeting space were not eligible spaces. Based upon the corrected square footage that FPC provided with its first appeal, it appears that more than fifty percent of the building was dedicated to eligible services (dance studios, bible study, and choir practice) and the building is eligible on that basis.

Decision

For the foregoing reasons, we find that FPC's education building is eligible for public assistance funds. We remand the request back to FEMA for further evaluation in accordance with this decision.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge