



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 13, 2025

CBCA 8135-FEMA

In the Matter of BON SECOURS CHARITY HEALTH SYSTEM

Craig Dickman, System Director, Quality Transformation and Patient Experience, and Michele Muldoon, Senior Vice President/Chief Clinical Officer, Bon Secours Charity Health System, Suffern, NY, appearing for Applicant.

Rayana Gonzales, Deputy Commissioner for Disaster Recovery Programs and Alternate Governor's Authorized Representative, New York State Division of Homeland Security and Emergency Services, Albany, NY; and Joseph Stinson, Section Chief of Recovery, New York State Division of Homeland Security and Emergency Services, Latham, NY, appearing for Grantee.

Rebecca J. Otey, 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 **BEARDSLEY** (Chair), **RUSSELL**, and **SHERIDAN**.

RUSSELL, Board Judge, writing for the Panel.

The applicant, Bon Secours Charity Health System (BSCHS), seeks arbitration of a denial by the Federal Emergency Management Agency (FEMA) of public assistance (PA) funding for paid sick leave that BSCHS provided employees exposed to or diagnosed with COVID-19. FEMA determined that paid sick leave is not an eligible emergency protective measure (EPM) and denied BSCHS's request. For the reasons stated below, the panel finds paid sick leave ineligible for PA funding.

Background

I. FEMA's COVID-19 Related Policies

On March 13, 2020, the President, under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), declared the COVID-19 pandemic a national emergency. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

FEMA subsequently issued COVID-related policies which set forth eligibility requirements for PA funding. In “Fact Sheet, Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures” (COVID-19 Fact Sheet), FEMA outlined COVID-19-specific PA-eligible EPMs. FEMA’s Exhibit 1. The fact sheet included a non-exhaustive list of EPMs that, if not already funded by “HHS/CDC or another federal agency,” might be eligible for reimbursement under FEMA’s PA funding program. *Id.*

On September 1, 2020, FEMA issued “Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim)” (COVID-19 Policy). FEMA’s Exhibit 2. The COVID-19 Policy superseded the COVID-19 Fact Sheet and “establish[ed] parameters for eligible work for COVID-19 declarations.” *Id.* at 3.

FEMA’s “Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance (Interim) (Version 2)” (O&O Policy) focused on EPMs related to safe opening and operating work. FEMA’s Exhibit 3. The O&O Policy did not supersede the COVID-19 Policy, and eligible work under the COVID-19 Policy remained eligible for assistance. *Id.* at 2-3.

Specific to reimbursable medical care costs, FEMA issued “Coronavirus (COVID-19) Pandemic: Medical Care Eligible for Public Assistance (Interim) (Version 2)” (COVID-19 Medical Policy). FEMA’s Exhibit 4. The COVID-19 Medical Policy “establish[ed] parameters for eligible medical care work and costs for COVID-19 declarations” and applied to “work performed on or after January 20, 2020.” *Id.* at 2-3.

II. BSCHS's Request for Funding

BSCHS is a health system headquartered in Suffern, New York. FEMA’s Exhibit 5 at 2. It manages Good Samaritan Hospital in Suffern, New York; Bon Secours Community Hospital in Port Jervis, New York; Saint Anthony Community Hospital in Warwick, New York; the Schervier Pavilion skilled nursing facility; and Mount Alverno assisted living facility. *Id.* Through Bon Secours Charity Health System Medical Group, BSCHS also provides primary and specialty care in a physician practice setting. *Id.* at 3.

On March 21, 2022, BSCHS submitted project number (PN) 667604 to FEMA, requesting \$4,413,515.01 in reimbursement for paid sick leave. FEMA's Exhibit 6 at 1. BSCHS "asserted that it enforced quarantine/isolation guidelines issued by the NYS Department of Health (NYS DOH) and by the Centers for Disease Control and Prevention (CDC) to protect staff and patients by reducing the spread of COVID-19." *Id.* On August 30, 2023, FEMA issued a determination memorandum finding the paid sick leave ineligible for PA reimbursement. *Id.* at 1-2; FEMA's Exhibit 7 at 3-4. By letter dated October 10, 2023, BSCHS filed a first level appeal. Applicant's Exhibit 4. BSCHS argued that the costs it incurred paying sick leave to its employees are eligible for PA funding "because the quarantine/isolation of [its] employees was essential to prevent further transmission of COVID-19 in compliance with CDC and NYS DOH guidelines." *Id.* BSCHS cited the Stafford Act and FEMA's Public Assistance Program and Policy Guide (PAPPG) in arguing that its costs are eligible for reimbursement if a determination is made that the underlying work and services "save[d] lives or reduce[d] immediate threats to life, property, or public health." *Id.* FEMA denied BSCHS's appeal, reiterating its position that sick leave is not "eligible emergency work." *Id.* at 3.

On June 27, 2024, BSCHS submitted a request for arbitration with the Board.

Discussion

I. Applicable Legal Provisions and Policies

The Stafford Act authorizes FEMA to provide PA funding for "work . . . essential to saving lives and protecting and preserving property or public health and safety." 42 U.S.C. § 5170b(a)(3). This does not mean that FEMA provides PA funding for any and all work related to disaster relief. *See* PAPPG (Apr. 2018) at 9-14 (explaining public assistance eligibility). Under the PAPPG, PA-eligible work is emergency work or permanent work. PAPPG at 19. If the work is emergency work, it must be category A (Debris Removal) or category B (EPMs). *Id.* Here, BSCHS seeks reimbursement under category B. FEMA's Exhibit 7 at 1.

The PAPPG provides a non-exhaustive list of PA-eligible category B EPMs and describes how FEMA determines PA eligibility. PAPPG at 9-14, 58. As outlined above, supplementing the PAPPG and specific to the COVID-19 pandemic, FEMA's COVID-19 Fact Sheet, COVID-19 Policy, O&O Policy, and COVID-19 Medical Policy all also list COVID-19-specific category B EPMs. *See generally* FEMA's Exhibits 1 through 4.

II. BSCHS's Sick Leave Reimbursement Claim

As FEMA points out in its response, the PAPPG and FEMA's COVID-19 Fact Sheet, COVID-19 Policy, O&O Policy, and COVID-19 Medical Policy do not list paid sick leave as a category B EPM. *See* FEMA Response at 16-21; FEMA's Exhibits 1-4; PAPPG at 58. Despite this, BSCHS argues that it should still receive payment for the cost of providing increased paid sick leave during the pandemic.

BSCHS's first argument relies on the general definition of a category B EPM. Applicant's Reply at 5. Under the PAPPG, category B EPM's "eliminate or lessen immediate threats to lives, public health, or safety." PAPPG at 57. BSCHS reasons that since paid sick leave allowed its COVID-19 infected healthcare workers to quarantine, the leave lessened the threat of the pandemic and therefore is a category B EPM. Applicant's Reply at 4.

Related to FEMA's specific COVID-19 policies, BSCHS tries to fit paid sick leave into the non-exhaustive list of eligible category B EPMs enumerated in the COVID-19 Fact Sheet. Applicant's Reply at 1. The COVID-19 Fact Sheet states that "FEMA may provide assistance for emergency protective measures including, but not limited to, the following" and then lists "[m]anagement, control and reduction of immediate threats to public health and safety" as one of the PA eligible categories. FEMA's Exhibit 1 at 2. The listed examples of EPMs within this category are: "[e]mergency Operation Center costs," "[t]raining specific to the declared event," "[d]isinfection of eligible public facilities," and "technical assistance to state, tribal territorial or local governments on emergency management and control of immediate threats to public health." *Id.* at 2. Accordingly, BSCHS contends that because paid sick leave was necessary to the "management, control and reduction" of COVID-19, it is PA-eligible. Applicant's Reply at 1.

BSCHS also argues that because the Stafford Act directs FEMA to assist state governments in "carrying out their responsibilities to alleviate the suffering and damage which result from disasters" and New York State's sick leave policy aimed to combat the COVID-19 pandemic, BSCHS's costs are reimbursable under the general charge of the Stafford Act. *Id.* at 3 (quoting 42 U.S.C. § 5121(b)).

BSCHS's final argument, first raised at the hearing before the Board, analogizes paid sick leave with stand-by time. Under the PAPPG, FEMA provides PA funding for stand-by time. PAPPG at 25. BSCHS argues that paid sick leave is like stand-by time because it allowed employees with COVID-19 to recover, isolate, and prepare to return to their jobs as healthcare providers.

III. Paid Sick Leave Is Ineligible for PA Funding

In response to BSCHS's argument that paid sick leave is eligible for reimbursement under the broad authority of the Stafford Act, the panel notes that the Stafford Act did not intend "to cover every single cost" associated with disaster relief. *Vidor Independent School District*, CBCA 7260-FEMA, 22-1 BCA ¶ 38,087, at 184,974. FEMA's funding decisions still must comply with relevant FEMA regulations and the PAPPG. *See id.* at 184,975.

Under the PAPPG, paid sick leave is not work. *See* PAPPG at 19-21 (explaining the types of work eligible for PA funding). The purpose of BSCHS's sick leave policy was to "allow front line health care workers the time to rest and recover." Applicant's Reply at 2. In other words, BSCHS employees on paid sick leave were off duty and not performing work.

Treating paid sick leave as "not work," and therefore ineligible for reimbursement, fits within the PAPPG's provisions on Force Account Labor (FAL) reimbursement. FAL is "an applicant's own labor forces and equipment," and, if eligible, FEMA reimburses these labor costs based on the applicant's hourly labor rates and the cost of the employee's associated fringe benefits. PAPPG at 23, 160. Under this formula, the PAPPG includes sick leave as an example of a potentially reimbursable fringe benefit. *Id.* at 23. This does not mean, however, that paid sick leave is, by itself, a PA-eligible EPM. For category B emergency work, only overtime labor costs are eligible for FAL reimbursement. *Id.* at 24. Here, since BSCHS's request for sick leave reimbursement is independent of a request for eligible overtime labor costs, the paid sick leave that BSCHS provided to its employees is ineligible for reimbursement. Significantly, the PAPPG states that "[a]dministrative leave or similar labor costs incurred for employees sent home or told not to report due to emergency conditions are not eligible" for PA reimbursement. PAPPG at 25.

The panel additionally declines to read any of FEMA's COVID-19 specific policies as allowing for paid sick leave reimbursement. FEMA's specific COVID-19 policies only list on-duty activities such as providing "medical care," "operation of emergency medical centers," "COVID-19 diagnostic testing," and "[o]vertime [pay] for budgeted medical staff" as category B emergency work. FEMA's Exhibits 1 at 2, 2 at 3, 3 at 5, 4 at 4.

Finally, paid sick leave is distinct from stand-by time. PA-eligible stand-by time must be "reasonable, necessary, and consistent with the Applicant's practice in non-federally declared incidents." PAPPG at 25. Stand-by time is reasonable and necessary if it meets two requirements. First, there must be "a contractual obligation to pay for stand-by time based on a labor agreement." *Id.* at 25. Second, "[t]he stand-by time occurred when it was necessary to have resources available to save lives and protect health and safety." *Id.* at 26.

Regardless of whether the first requirement is met, the sick leave at issue here does not meet the second requirement. The PAPPG lists, as an example of PA-eligible stand-by time, the cost of sending bus drivers and their buses to an evacuation site even if the bus is not used for evacuation. *Id.* at 25. Unlike a bus driver sent to an evacuation site, an employee on paid sick leave during the COVID-19 pandemic was not readily available to protect health and safety. Instead, in accordance with CDC and NYS DOH COVID-19 guidelines, employees on sick leave self-isolated and could not return to work until medically cleared. *See* Applicant's Exhibits 7 at 2-3, 15 at 1.

In summary, paid sick leave does not fall within the PAPPG's definition of category B emergency work. None of FEMA's COVID-19 specific policies allow for the reimbursement of paid sick leave, and paid sick leave is distinct from PA eligible stand-by time.

Decision

The sick leave costs at issue are ineligible for PA funding.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge