



FEMA LAW ASSOCIATES, PLLC
Latest FEMA Law Developments At a Glance

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Message From the President

This newsletter provides a report on the developments in the new arbitration process for disputes arising from FEMA's public assistance program.

Previous issues of our Newsletter can be obtained on the FEMA Law website, www.fema-law.com (click on "e-Newsletters").

—Ernest Abbott

Developments – Arbitration Under the Public Assistance Program

We have previously reported (in our April and August newsletters this year) on the new Arbitration Process enacted for the Public Assistance Program in February, 2009. The law directed the President to establish arbitration panels "under the Federal Emergency Management Agency public assistance program" with "sufficient authority regarding the award or denial of disputed public assistance applications." The purpose of the panel was to "expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region." FEMA published final rules governing this new arbitration procedure at the end of August. While this arbitration option is available only for disputes "in the Gulf Coast Region" arising from Hurricanes Katrina and Rita, it is being watched closely: if successful, Congress could decide to expand the arbitration experiment.

More than a dozen applicants have elected arbitration, but no arbitration hearings have yet been held. However, the Arbitration Panel *has* ruled on a very important pre-hearing skirmish between FEMA and several applicants about the scope of the panel's authority to hear evidence and decide disputed public assistance applications.

FEMA contended in several pre-hearing conferences that the arbitration panel was not empowered to gather new evidence relevant to the dispute, or to make its own judgments "*de novo*" about the proper award of public assistance. FEMA argued, instead, that (1) arbitrators

should look only at the administrative record prepared by FEMA, without any live testimony or new information, (2) arbitrators must give deference to FEMA's interpretations of the law; and (3) arbitrators must uphold the FEMA decision unless it was arbitrary and capricious. Essentially, FEMA believed that the arbitrators must "review" the FEMA decision – which in some cases will have been made by field personnel without review in the FEMA Region or by Headquarters – in the same manner that a court would review final agency action under the Administrative Procedure Act.

Applicants, and the state emergency management agencies participating in these early prehearing conferences, contended that the arbitrators had full authority to resolve the dispute; they were not serving as a reviewing court under the Administrative Procedure Act.

The panel has now determined that Section 601 of the American Recovery and Reinvestment Act of 2009 (ARRA) provides the arbitrators "sufficient authority" to resolve disputed public assistance awards, without reservation or special deference to the FEMA decision on that award. The Panel stated: "The arbitration panel does not sit as a court reviewing the validity of agency regulations... nor does it engage in judicial review of a final agency action...we sit as an arbitration panel." The implementing regulatory scheme does not contemplate the arbitration panel's deferential review of FEMA's actions. To the contrary, FEMA's regulat-

FLASH Newsletter

Volume 4
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Page 2



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Arbitration Developments Cont'd

regulation contemplates that the panel will make independent determinations of the extent of the damage, taking into account the submissions of all parties to the arbitration. However, the burden of proving the claims by a preponderance of the evidence remains with the BSWSD and MEMA, since they are, respectively, the applicant and grantee.”

This is an important decision – and one which was clearly correct given the structure of the statute creating the arbitration process. That statute directed the President to establish an arbitration panel “under the Federal Emergency Management Agency public assistance program;” he delegated this authority to the Secretary of the Department of Homeland Security. (The public assistance program was originally within FEMA only by delegation by the President to FEMA of his authority under the Stafford Act.) With enactment of the ARRA, Congress directed the President to ensure that there were two ways to make decisions on disputed grants under the public assistance program: through the regular appeals process, or through the expedited arbitration process. Both procedures result in final agency determinations (the agency determination by arbitration is even more final since arbitration awards are virtually un-appealable). And while the quotation is taken from the arbitration panel’s decision, both procedures allow the decision makers to exercise their best judgment in determining the appropriate grant award, based on “all materials submitted by all parties to the arbitration [or appeal] as well as any independent material from technical and scientific experts that the panel [or the Assistant Administrator in appeals under FEMA’s regulations at 44 CFR 206.206] considers necessary to resolve the dispute.”

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FEMA Law Associates, PLLC
805 15th Street, N.W. Suite 1101
Washington, D.C. 20005
Phone: 202-326-9319 Fax: 202-326-9323
info@fema-law.com