

# PUBLICATION

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## Filing a FEMA Public Assistance Appeal: The Real-Life Saga of Goldilocks and the Three Bears

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Many of us can recall the famous tale of "Goldilocks and the Three Bears": A girl wanders into a home and tries multiple things, rejecting them until she finds the one that is *just right*. Appealing an unfavorable FEMA Public Assistance determination can make an applicant feel much the same way as Goldilocks treated the porridge. An applicant may appeal any FEMA determination related to an application for, or the provision of, assistance under the Public Assistance Program, but recent appeal decisions demonstrate the importance of filing appeals *just right*: filing with the proper state recipient within the acceptable filing window.

### The Law

Section 423(a) of the Stafford Act provides that any decision regarding eligibility for assistance may be appealed within 60 days after the date on which the applicant is notified of the award or denial of assistance. By regulation at 44 C.F.R. § 206.206, FEMA created a two-step appeal process (a first and a second appeal) and requires applicants to file their appeals with their state recipients within the 60-day statutory deadline. This 60-day deadline begins from receipt of the decision (for events declared before 2022) or from date of transmission (for events declared in or after 2022). The regulation further requires the state recipient to forward the appeal to FEMA within either 60 days from the date it received the appeal (for events declared before 2022) or within 120 days from the date that FEMA issued the determination being appealed (for events declared in and after 2022).

FEMA strictly construes these deadlines as a recent agency final rule change warns, "If the applicant or the recipient do not meet their respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal." (44 C.F.R. § 206.206(b).)

### Don't File Too Late

Applicants must file a timely appeal. A recent example of a denial resulting from an applicant's delay in filing their appeal with the state recipient comes in the form of a second appeal decision to Seminole County. The county received a Determination Memorandum on January 27, 2020, but did not file its first appeal until June 4, 2021 – 128 days later. FEMA denied the appeal for the applicant's failure to file it within the 60-day deadline without considering the matter on the merits. This second appeal decision is available [here](#).

FEMA also rejected a recent second appeal attempt from the St. Thomas Bureau of Corrections for untimeliness. In that decision, the second appeal was filed on July 12, 2022 – 119 days after the applicant received FEMA's first appeal response on March 15, 2022. This second appeal decision is available [here](#).

### Don't Forward Too Late

An applicant has zero control over the state recipient's action in forwarding its appeal to FEMA in a timely manner, as the recent second appeal decision issued to the County of Hawaii Department of Water Supply demonstrates, but even if an applicant files its appeal with the state recipient in time, its appeal is still at risk of being denied for untimeliness. In the Water Supply decision, the applicant filed its first appeal with the state recipient on September 24, 2020, setting the state's deadline to forward the appeal to FEMA as November 23,

2020. Unfortunately, the state did not forward the appeal to FEMA until December 14, 2020. Even though the applicant satisfied all requirements imposed by Congress to avail itself of its Right of Appeal, and has neither any control over nor recourse against the state recipient for the state's untimely action, FEMA summarily denied the appeal without considering the merits because of the state recipient's failure to timely forward it to FEMA. This second appeal decision is available [here](#).

### **File Through the State Recipient**

In what appears to be an attempt to mitigate the risk of the state recipient failing to timely forward an appeal to FEMA, the Butler Area School District in Butler County, Pennsylvania, filed its appeal directly with the FEMA Region III regional administrator. In that case, FEMA issued a Determination Memorandum that was transmitted and viewed by the applicant via Grants Manager on December 13, 2021. Butler Schools then filed its first appeal January 26, 2022, with the FEMA regional administrator. The January 26 filing was within the applicant's 60-day appeal window, but FEMA denied the appeal because it was filed directly to FEMA and not via the state recipient. At some point, the appeal was submitted to the state recipient, because the state recipient did transmit the first appeal to the Regional administrator on April 21, 2022. Presuming that Butler Schools filed the appeal simultaneously with the state recipient and FEMA on January 26, the state recipient's regulatory deadline to forward the appeal to FEMA would have expired on Monday, March 28, 2022 (when the 60 days fall on a Sunday, it pushes the deadline to the next business day). However, the decision letter is not clear about the date on which the state recipient received the appeal. Ultimately, FEMA denied the appeal because the applicant did not comply with the appeal filing procedures required by FEMA regulations.

The agency also denied this appeal because the cost of school-age children's meals is not an eligible emergency protective measure in response to COVID-19. The second appeal decision is available [here](#).

### **Don't File Too Soon**

FEMA will even deny an appeal if it is filed too soon. In a May 2020 second appeal, FEMA Headquarters reversed a first appeal denial that had taken the position that the applicant appealed too early. On first appeal, FEMA found that the matter was not ripe for appeal because the appealed deobligations had not yet occurred. On second appeal, FEMA acknowledged that the applicant *resubmitted* the first appeal after receiving notice of FEMA's deobligation. FEMA explained that it could "find no provision of statute, regulation, or policy, nor any prior second appeal decisions, which would prohibit or otherwise limit an applicant from filing a first appeal using documents submitted prior to the appealable action occurring, but that address the same substantive matter." The second appeal decision is available [here](#).

### **Use the Right Date**

As these decisions demonstrate, you can't file too soon, can't file too late, can't file directly with FEMA – you have to make sure you file *just right*. But even that can be tricky.

Frequently, FEMA Determination Memoranda received by applicants contain multiple dates, and those dates do not align with Grants Manager. For example, I received a recent Determination Memorandum that was signed by the preparer after it was signed by the approving official, and was transmitted with a cover letter that was dated nearly a month before both the electronic signatures on the cover letter and the Determination Memorandum. The dates were perplexing in that typically, one would presume a document would be prepared before it is approved, and that the cover letter transmitting the decision to the state recipient and applicant would be prepared and sent after the Determination Memorandum was complete and approved.

Meanwhile, none of the dates on the memo or cover letter matched the date the letter was transmitted to the applicant via Grants Manager. With the increased use of the Grants Manager system that date – the date the applicant viewed the decision in Grants Manager (for events declared before 2022) or the date FEMA

transmitted the decision in Grants Manager (for events declared in 2022 and beyond) – is now most often cited by FEMA as the start of the appeal period.

### **Appeal the Right Decision**

Applicants may also be faced with making sure they appeal the right decision. In a recent arbitration case *In the Matter of Board of Trustees of Bay Medical Center (CBCA 7418-FEMA)*, the applicant argued that its 60-day appeal period commenced when the applicant received notice of FEMA's obligation of funding in the form of an approved Project Worksheet, while FEMA argued that it commenced when FEMA issued its Determination Memorandum.

Had the applicant taken this matter to FEMA on second appeal, it probably would have lost, given the agency's arguments to the Civilian Board of Contract Appeals (CBCA). However, the CBCA agreed with the applicant, noting that both the Determination Memo and Project Worksheet, which the applicant received at different times, included a notice of appeal rights. The arbitration decision is available [here](#).

### **A Recommended Solution**

Although most of these deadlines and processes are contained solely in FEMA regulation and policy, and therefore can be changed by the agency without statutory change, unfortunately, without FEMA's independent willingness to change its regulatory requirements or legislative direction, stories of rejected appeals that failed to follow the rules *just right* are bound to continue.

FEMA is currently taking much-needed action to simplify its Public Assistance procedures. Perhaps it is time for the agency to revisit the appeal process to be more accommodating to applicants, rather than make changes that emphasize that the agency will deny late-filed appeals. As a start, if the agency values the state applicant's appeal recommendations, it could retain the requirement that applicants file appeals with the state but remove the state's forwarding deadline. FEMA could, instead, direct the applicant to file its appeal simultaneously with the recipient and FEMA. This could theoretically be done easily in the Grants Management system, which is used by applicants, state recipients, and FEMA.

This small process change, which can be made independently by FEMA without the need for a change to the Stafford Act, would allow the applicant to exercise its statutory right of appeal, keep the exercise of that right within the applicant's control, and allow FEMA to still accept feedback from the state recipient, but not threaten the life of the appeal should the state recipient fail to timely share its recommendation.

With FEMA's willingness to change its regulatory requirements, perhaps we could stop reading about Goldilocks and move on to stories of gallant rescues and escape from financial distress caused by disaster.

If you have questions or concerns related to Public Assistance procedures or eligibility, or would like to learn more about FEMA assistance, please contact [Erin Greten](#), [Wendy Huff Ellard](#), or any member of [Baker Donelson's Disaster Recovery and Government Services Team](#).