***From the desk of***

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On December 5, 2012, the Sequoia Healthcare District Board of Directors approved an increase in the amount of reimbursement for health insurance benefits for Directors from $1,200 to $1,500. Whether that increase applied to current Directors was subject to legal review. That review came on December 6, 2012 in a memo from Mark Hudak, District Counsel, to CEO, Lee Michelson. When I became aware of it’s existence in mid-April, 2013, I requested and was provided a copy of that memo. After reading that memo, I advised President Shefren that: “It is my opinion that, if pursued, a Writ of Mandate would issue to remedy the situation by delaying the increased subsidy for board member health insurance until the next elected directors are seated”

Subsequently, District counsel, having been “...apprised that there might be some discomfort...” about the legality of paying benefits to “sitting” directors, placed an action item on the agenda of the June 5, 2013 meeting.

Here is a partial transcript of the [recording of that meeting](http://www.xshcd.com/SHCDmeetingaudio/)(6-5-13Clip.mp3. My comments in red.

**(President Shefren)** Mark can you give us an update on Director benefits?

**(Mark Hudak, District Counsel)** I can.

The Board will recall that when this item was presented last year, the concept was to adjust both employee and Board Health Insurance because traditionally those two expenses had been tied together and there was some rough equality in how Board and employees were being handled. And, the Board voted to approve that, but it’s application of that increase to Board members was subject to legal review, because there’s a proscription against Board members voting themselves new benefits. So following that meeting I did do some research, and, as is often the case in the law, there isn’t really some case or opinion that’s directly on point, as we say, and solves the issue with 100% certainty. And in something as arcane as this, it came as no surprise that there was very little published authority on the issue. But there was one AG Opinion that did consider whether Board compensation for health insurance premiums could go up during the term of a sitting Board member. And the AG reached a conclusion in that opinion that those benefits could go up if they were part of a general premium increase for everybody including employees.

So I wrote a little [memo](http://www.xshcd.com/Hudak6Dec2012Insurance.pdf) to that effect(Dec. 6, 2012 from Mark Hudak to Lee Michelson), and noted at the end of it, that although the AG approved that increase under those circumstances, our circumstances are a little bit different in that our employees and our directors don’t all participate in one unitary plan. So although health insurance premiums are going up generally, they’re not all going up at the same rate for everybody in the same way, and therefore I concluded, although I thought that the AG op was good authority to allow this increase to go into effect, it’s possible that somebody could reach a different conclusion. And, that’s often the case in the law when you have a little different facts compared to somebody’s opinion.

So I expressed that at the [next Board meeting](http://www.sequoiahealthcaredistrict.com/wp-content/uploads/2011/03/Feb-6-2013.pdf)(the minutes of that meeting do not reflect any such expression) and as I reflect back upon it, I have to ask whether I was clear enough with the Board that the position that I was taking in that memo was not the most conservative approach and that there could be board members who would be uncomfortable if there was any possibility, or anything other than a remote possibility, that this could be completely legal.

And so I was apprised that there might be some discomfort, I went back and thought about it again, and the conclusion was we should bring it back to the Board and see whether the level of discomfort is such that the board would just feel better about taking the more conservative approach, and deferring the application of that premium adjustment until the next election and then the next election after that.

So, again as your lawyer, I want to be able to give you 100% certainty, if and when I can, just like I want to give it to my private clients. But usually they ask me what’s the chance when we go to trial that we’re gonna win. Foolish lawyers say something better than 50/50. I’ve been known to say 70 or 80%, and in the real world and trials and private people gambling with their own money, that’s usually good enough for them to know what to do.

But here it’s a little bit different and if I had to tell you what the odds are that this would be upheld in court, it’s probably not more than 70%, just because of the uncertainty of it. And, for board members in the public eye, responsive to Grand Juries and the FPPC, 70% might not be good enough for you, and ultimately it’s your decision and your conscience. So with that in mind the board did leave it up to me, and I’m prepared to make a final recommendation, but I thought appropriate to bring it to your attention and see if anybody else had any other input now that you’ve heard my explanation and gotten a little bit more information from me.

**(Director Kane)** What is your recommendation, Mark?

**(Mark Hudak, District Counsel)** I think I’d like to hear the board members level of conservatism before I tell you what I really think we should do under the circumstances.

**(President Shefren)**

I think there are 2 or 3 points that I would make.

One is that there are sort of 2 issues here.

One relates to insurance premiums going up should the benefits go up with it.

And, along the same line, if we’re trying to keep the directors and staff aligned there is logic for that.

Even if it is 100% legal there’s a public perception issue that concerns me a great deal.

 As we may remember there was a district that basically bankrupted its district because of health insurance premiums for directors. The Diablo one I think was a major issue. And I just don’t see any reason we would want to put ourselves in the position of public criticism, over what is a relatively small amount of money.

The third point I would make is that we have required a 10% co-pay on the part of all of our staff but because we can’t reduce director benefits, Mark says we can’t actually voluntarily do that to reduce it. When you put the package together it just seems to me that the most logical thing and the most publicly oriented thing is to say that this benefit is only applicable to those who get re-elected along with the 10% co-pay.

**(Director Faro)**

So basically what we’re talking about is $1200 or $1500.

**(President Shefren) Note this disclaimer!**

Just for full disclosure, it doesn’t matter in my particular situation, either way. I have no dollars at stake.

**(Director Faro)**

And this would be effective July 1. Jerry?

**(Director Kane)**

It would go back to where it was before July1. It would be what it is. So there would be no change for us. Right?

Director Kane appeared to be unaware that a change was made on January 1, 2013. The Cash Disbursement Journal for January through April of 2013 shows that CalPers was paid $1,334.06 for health insurance premiums for Directors Kane and Faro, and $668.63 for Director Hickey. Directors Kane and Faro should have been billed for the $134.06 per month over the $1,200 cap for sitting Directors.

It is also notable that Director Faro was reimbursed an additional $165.94 per month in that period for Medicare supplement, bringing his total reimbursement to $1,500 per month. Director Kane did not submit her request for $165.94 per month Medicare reimbursement until the day after this meeting.

Director Griffin was reimbursed $6,000 on Jan. 30, 2013 for Blue Shield invoices covering January through April 2013.

**(CEO, Lee Michelson)**

Actually there would be a change because three or four months ago we did increase it to 1500. And so, this would basically, I guess, sort of revert it back to 1200.

**(Director Hickey)**

At the beginning of the year.

**(CEO, Lee Michelson)**

July 1st. July 1st.

**(Director Hickey)**

No we changed it in December

**(Director Faro)**

No, July 1st.

**(Mark Hudak, District Counsel)**

But effective July 1st. It was voted on in December but not to take effect until July 1st. (The July 1st effective date was established at the [April 3 meeting](http://www.sequoiahealthcaredistrict.com/wp-content/uploads/2011/03/April-4-2013.pdf) at which the subcommittee submitted it’s recommendation. The issue of “sitting“ directors was not discussed at that meeting)

**(Director Faro)?**

It was effective immediately.

(Director Griffin)

**(President Shefren)**

So, There’s a secondary issue of what as to if we were to agree not to raise it for current board members what to do about those who have received the $1,500 benefit. I think we should separate those so as not to confuse the issue.

**(Director Faro)**

I kind of agree with Jerry.

Number 1, I don’t have a problem with the $1,200.

Number 2, I think it should be effective July 1. Those who received and I have, I’m willing to give it back, but I think it would be a lot cleaner just July 1, go back to $1,200, and leave it at that.

**Faro acknowledges that he has a financial interest, yet fails to recuse himself.**

**(Mark Hudak, District Counsel)**

We have really two options here.

One is, the board did delegate to me to make an umpires ruling on it because it’s a legal issue. So you could just say to me, Mark, you know, make your own decision the board delegated that to you. And, if you think it needs to be corrected then correct it.

Or 2, the board did list it as an action item here. The board could make its own motion and direct that the amount be retained at $1,200 per month maximum for sitting board members until each of them had stood for election the next time through, and then the board then would have taken that decision back to itself and done what it thinks is best. And from a public perception standpoint that could be the best way to handle it and in essence correcting what may have been not the best legal advice that you could have gotten or perhaps not the clearest legal advice that you could have gotten. That’s probably the best way to handle it.

**(President Shefren)**

I will make a motion that we have the maximum benefit remain at $1,200 for sitting boardmembers and that for newly elected boardmembers going forward that it be $1,500

**(Director Faro)**

Effective date?

**(President Shefren)**

Effective..

**(Mark Hudak, District Counsel)**

it’s effective when people are

**(President Shefren)**

…January 1, of

**(Mark Hudak, District Counsel)**

it’s effective when people are newly elected

**(President Shefren)**

Well there’s two things. He’s talking about, you know, we raised it on Jan 1, 2013, I’m saying that as of January 1, 2013 it should be $1,200.

**(Director Faro)**

So you say, anybody who got it has to give money back

**(President Shefren)**

Correct. To make up the difference going forward.

**At this point, Directors Faro, Kane and Griffin, knowing that they had a financial interest at stake, should have declared their conflict of interest and excluded themselves from further discussion and voting. Had they done so, the Motion by Shefren with an effective date of Jan. 1, 2013 would have carried. Instead, they continued discussion and caused a bifurcation of the issue which resulted in no action being taken for the Jan. 1st to June 30th period.**

**It can be argued that a conflict of interest existed when the original vote was taken in Dec. 2012, and Directors Kane, Faro and Griffin should have recused themselves. However, the applicability of the increase for “sitting” Directors was subject to legal review by counsel. When that review included a “prima facie” exclusion rule of such applicability “It is well settled that changes in compensation may not be imposed during the current terms of the elected officials who vote on the adjustment.” the issue should have been brought back to the Board for an action to take exception to the rule. That did not happen. Instead, the subcommittee of Kane, Faro and Michelson waited till the April 3, 2013 meeting to bring back their recommendation, which obfuscated the issue, and failed to address the “sitting” Director question.**

**(Director Kane)**

I’ll tell you Jerry, I think you can’t put, the problem is that, and we can, this is probably not here appropriate now, but how it’s done, I think we can discuss it some other way, because you have, Janeene pays or the district pays a premium per month to PERs. So, you know, how it’s handled with board members from January to July I think has to be looked at separately.

**(President Shefren)**

Why don’t we vote on my motion that as of July 1, of 2013 it would remain at $1,200 until new board members are re-elected.

**(Director Faro)**

That’s what I was suggesting, too.

**(Director Griffin)**

Wait a minute

**(President Shefren)**

And then we can do secondarily about what we want to do between January and J

**(Director Griffin)**

I want to make sure I understand so that the $1,300 would just encompass the new members or does it encompass everyone.

**(CEO, Lee Michelson) :**

it would encompass all

**(Director Kane)**

Newly elected members, right?

**(CEO, Lee Michelson)**

or if someone would leave the board and someone be appointed to the board. The new board member would get the

**(President Shefren)**

1,500 and they’d have a mandatory 10% reduction.

**(Director Griffin)**

Sitting board members get reimbursed less?

**(CEO, Lee Michelson)**

Yes. The other board members would remain at 1,200 until they got re-elected.

**(President Shefren)**

Which is the same thing if we raised or any board raises the salary of the board it’s only effective as you’re re-elected. So you can have re-elected members at the new salary and old elected at the old salary, if that’s worded correctly. So that’s pretty

**(CEO, Lee Michelson)**

Would surmise what would happen 2 years from now or a year from now we would have some board members at the $1,500 level and some board members at the $1,200 level. No one, we wouldn’t get to the $1,500 level until two elections from now.

**(Director Griffin)**

 Isn’t that inequitable for people who are sitting for the remainder of their two years-and paying their health care premiums?

**(Director Kane)**

Life’s not fair, Kim!

**(Director Hickey)** I think, and Mark may correct me, but I think that the next election happens to be, for that 4 year seat or not, that it be effective for all of the board members.

**(Mark Hudak, District Counsel)**

No. It doesn’t work that way. It only goes into effect for the board members who stand for re-election and are re-elected at the next election. And then, others have to wait for their cycle to come up again and stand for it. So, in essence, if people didn’t like the increase in benefits, then they could vote against the sitting board members and put somebody else in.

**(President Shefren)**

The balance though, Kim is that for newly elected board members they would have a mandatory 10% reduction. For sitting board members there is no 10% mandatory reduction.

**(Director Griffin)**

Reduction in what?

**(President Shefren)**

When the benefit goes to 1500 we are responsible for 10% of that.What we decided in December of 2012, is that, Lee’s got the right timing, is that employees would have to pay 10% of their insurance cost. And we said that regarding, starting in July

**(Director Faro)**

Starting in July.

**(President Shefren)**

And what Mark said is that that could not be imposed on board members who were sitting because they were elected with a specific benefit, which is 1200. So you couldn’t impose the 10% reduction.

**(Director Faro)**

What the motion is doing is taking. It’s a takeaway motion retroactively, can that be done, Mark?

**(Mark Hudak, District Counsel)**

No.

**(President Shefren)** I think what we said is effective Jan 1st .

**(Director Faro)**

Of what year?

**(President Shefren)** I’m sorry, July 1st 2013 and then we can look at whether we want to vote for a callback or not, that’s a separate issue. I didn’t want to mix the two up.

**(Director Hickey)**

Does that still leave us a liability, a potential liability, if that’s let stand.

**(Mark Hudak, District Counsel)**

Well, this motion if it’s adopted does not have a liability attached to it. So that stands alone, as the chair has put it, let’s separate those two issues out. So if this motion passes, everything is clear going forward. The secondary issue is what to do about payments that have been received in that interim period. Should those be offset in some way after July 1, or because they were based on legal advice(contained in a memo which was never presented to the board) just let it sit and, you know, I can’t say they were illegal, because I believed them to have been legal. But the board, trying to bring this into more conservative alignment, may just vote to let, if things have been paid, let them be as they were paid, but going forward, clarify that it applies only to sitting board members. But it does not affect the validity of this motion. That’s a secondary issue.

**(CEO, Lee Michelson)**

I know from an administrative standpoint, it would be much easier for us to if we started this new policy as of July 1st, and, uhm.

**(Director Faro)**

Call for the question.

**(President Shefren)**

Let’s vote on this, uh, proposal. Can you read it back to me, so we are confident that we all understand.

**(Janeene)**

That, Effective 7/1/13 benefit to directors would return to $1,200 for sitting board members. For newly elected directors, it would become $1,500 with an effective mandatory 10% payback.

Previously, President Shefren said “Why don’t we vote on my motion that as of July 1, of 2013 it would **remain** at $1,200 until new board members are re-elected.”

**(President Shefren)**

Roll call on this motion.

**(Janeene)**

Director Faro aye, Director Griffin aye, Director Hickey aye, Director Kane aye, Director Shefren, aye

**(President Shefren)**

So, now we just have the secondary issue of whatever has been paid out between January 1 and June 45th . So, I invite anyone to comment.

**(Director Hickey)**

Some discussion on mechanics of the payback

**(President Shefren)**

I would make a comment that we voted on something we did it with information, people were paid based on the best available thoughts at that time, and I don’t have any need to look backwards dollar wise I feel that the public has not been served appropriately.

**(Director Hickey)**

I would argue that the minutes of the meeting in December when this was first approved, that it was supposed to come back to the board, instead the payments started on January 1st . It was supposed to come back to the board for discussion. A memorandum issued, yes, on December 6th , but that was not coming back to the board.

**(Director Kane)**

Considering the composition of the board, I don’t think it’s worth a discussion if it’s due.

**(CEO, Lee Michelson)** I’m pretty confident that we would not have begun paying the benefits had the decision been that it had to come back to the board.

**(Janeene)**

That it was to begin paying Jan 1st, but that the board would reconsider and reevaluate in February. I believe that the research was still continuing in February, and it went to April.

**(President Shefren)**

With the absence of a motion on this I think we can just move back to the budget.

[Minutes of the above meeting](http://staging.sequoiahealthcaredistrict.com/wp-content/uploads/2011/03/June-5-20131.pdf) were prepared by Board Secretary, Director Kane

She included the following statement which I challenged unsuccessfully:

“Directors who received additional benefits based on the increase between January-June 2013

will not be required to repay those amounts as the increase was voted on based on the best available information at the time.”