

THE FOG OF BUREAUCRACY

A Case Study of Organizational Practices and the Diffusion of Responsibility in the Santa Barbara School District Offices

A Report to the Superintendent

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“The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” (The Brown Act, CA Government Code §54950)

Caveat

This report is the culmination of an investigation set in December, 2002. The investigation was undertaken at the author's initiative as an elected member of the governing board of the Santa Barbara Elementary and High School Districts. Its sources have been historical searches of public documents, memoranda from and conversations with district officials, guidance from legal researchers and a review of selected provisions of California law. Parts of the picture that emerged are based on reflection and connecting the dots. While the investigation benefited from the insights of many, the author alone is responsible for this report.

Summary and Suggestions

Narrative History

On October 1, 2002, a new medical insurance package for district employees was put into effect. This amounted to a \$500,000+ increase in the district's remuneration package without public discussion and without approval by the governing board. As a board member presented with this *fait accompli*, I have tried to understand how such a decision could have come about. In the process, a great many things have come to light.

It turns out that the Blue Cross contract was a result, not a decision. It resulted, not from malevolence, but from a conspiracy of routines. Here are what I believe to be the essential features of the organizational process that produced that result.

- a) An administrative unit, the *insurance committee*, was the venue for reviewing insurance options and for negotiating two agreements: one between the district and Blue Cross of California and another between the district and employee unions.
- b) Blue Cross was informed that an agreement had been reached in the *committee*. In the process, someone, perhaps the district's insurance broker, must have committed the district in order to bind the new policy. That was the moment of contract.
- c) Monthly Blue Cross premiums were paid routinely. The first premium payment under the new policy was no exception.
 - Although the district did not have a copy of the contract, the actual contract included language equating payment of the first month's premium with district approval.
 - A warrant was issued ordering payment to Blue Cross. The signature on that warrant constituted formal approval for purposes of contract law.
 - An authorized person—probably the District Disbursing Officer-- was supposed to have signed the warrant. I have been unable to learn who in fact signed it. There is a hint that a blank, pre-signed warrant form might have been used.
 - At some point, the warrant was submitted for board approval. As is customary, it was approved in a batch of hundreds of warrants without discussion.

d) The Blue Cross contract was never made part of the public record; it never appeared on a board agenda; and a vote was never taken on the contract *per se* before it was put into effect.

Issues and Suggestions

1. Automated approvals. A clause in the Blue Cross contract equated formal approval by the district with the act of paying the first month's premium. This was a contributing factor in the organization's failure to bring the contract to the governing board for public discussion, budgetary review and approval.

- Suggestion 1. That all district contracts be reviewed and the removal of any such provisions be negotiated in timely fashion.

2. Contract powers. In the absence of formal delegations of the power of contract, as per Government Code Section 17604, the sole authority to enter into agreements that have the force of contract would seem to rest with the governing board. In this case, that authority was usurped by organizational routines. In regard to contracts, the only standing board policy requires that they be reviewed by legal counsel (BP 3312). There is no indication that this was done in this case.

- Suggestion 2: That a Board Policy be adopted making explicit where the contract power lies within the organization, with an accompanying Administrative Regulation to ensure compliance with all aspects of relevant codes.
- Suggestion 3: That Board Policy 3312 (re. legal review of contracts) be revisited and brought into alignment with reforms of business office procedures.

3. Fiscal accountability. Internal controls should have caught the Blue Cross contract. But, it appears as though internal auditing structures and procedures required of "fiscal accountability" districts were not fully operative. The district had been warned about this by FCMAT and by external auditors. It could put the district at risk in regard to federal and state categorical funding.

- Suggestion 4: That, as a matter of some urgency, the board evaluate the pros and cons of abandoning "fiscal accountability" status and turning those functions over to the County Office of Education.
- Suggestion 5: That the board solicit the opinions of local experts in regard to law and business management.*
- Suggestion 6: That the board again enlist the services of FCMAT in regard to this and related issues of business management and that it fully implement FCMAT's recommendations.

4. The role of the insurance broker. The district's insurance broker sat on the *insurance committee*. It is possible that she in fact exercised the power of contract in binding the recommended option of the *insurance committee*. This may be routine in the private sector. But it cannot be a casual affair where contractual commitments by public agencies are concerned. They may not be made without formally delegated authority and certainly not by the representative of a private firm that may profit from the transaction.

- Suggestion 7: That, with advice of counsel, the board review the role of insurance broker(s) in district organizational practices with an eye toward:

* For example, Ralph Pachter (Goleta Union School District) and Tony Fischer.

- a) preserving essential brokerage functions;
- b) ensuring that brokerage functions do not become confounded with internal decision-making; and
- c) ensuring that brokerage functions are performed in such a way as to eliminate any appearance of impropriety.

5. The insurance committee. Membership on the *insurance committee* was representational, and the *committee* clearly saw itself as a labor-management negotiating unit. Indeed, union and management representatives on the *committee* even reached an “understanding” about a 1.7% salary increase. A labor-management negotiating unit is not the same thing as an administrative advisory committee. Advocacy and strategic interaction are the essence of the one, objective analysis and advice the duty of the other.

It seems that the *insurance committee* did not really advise. There is no evidence of written recommendations for the Superintendent and governing board to use in developing initial collective bargaining proposals and instructing the district’s negotiating team.

- Suggestion 8: That a Board Policy be adopted to the effect that collective bargaining negotiations shall be conducted exclusively by the district negotiating team.
- Suggestion 9: That the district’s insurance broker directly advise the business office. Eliminating the *insurance committee* would complement Suggestion 8, above.
- Suggestion 10: That any insurance advisory committee that continues shall submit to the Superintendent and the board in writing its analysis of insurance alternatives and of projected budgetary impacts.

6. Collective bargaining process. This case also revealed problems with the formal collective bargaining process itself. Organizational practices were not in compliance with key provisions of Government Code Section 3547. First, there was no public discussion and vote on the district’s initial bargaining proposals. It appears that this requirement has not been met in organizational memory. New negotiations for 2003-04 may also have begun without having met it. Until pressed by board members, financial impact projections have not been included in the reporting of the tentative agreements with the union, as required by §3547.5.

- Suggestion 11: See Suggestion 1 under #5, above.
- Suggestion 12: That a Board Policy and Administrative Regulations be adopted requiring:
 - a) advance public disclosure of the district’s initial collective bargaining proposals clearly indicating each item’s relationship to specific sections of the existing union contract;
 - b) agendized public consideration and adoption by the board of the district’s initial collective bargaining proposals; and
 - c) identification in the agenda of the particular district proposal that will be discussed in any closed session under the “Collective Bargaining” rubric [going beyond the minimum suggestions in Government Code Section 54954.5(f)].
- Suggestion 13: That a Board Policy and Administrative Regulations be adopted to ensure that all other aspects of the district’s participation in collective bargaining are fully aligned with state laws and regulatory requirements.

A theory has emerged to the effect that board approval of a collective bargaining agreement provides umbrella approval of anything new that is referenced in the agreement. Thus, the

argument goes, even though the union agreement does not explicitly incorporate its terms, the Blue Cross contract was approved vicariously upon board approval of the union contract.

One implication of this theory is that information about anything that is part of collective bargaining negotiations may be withheld from the public. Another implication is that the board may discuss and reach a consensus on such matters in closed session under the Brown Act rubric “Collective Bargaining; Conference with Labor Negotiator, Superintendent.” Thus the theory runs counter to the spirit of the Brown Act quoted on the cover page of this report. If put into practice, it could provide a rationale for concealing the public’s business from the public-- for secrecy instead of transparency.

- Suggestion 14: That a Board Policy be adopted:
 - a) declaring that the board’s closed sessions under the “Collective Bargaining” rubric “... shall be for the purpose of reviewing its position and instructing the ... designated representatives” and none other (Brown Act);*
 - b) stating that instructions to the negotiator regarding any given matter do not imply board approval of that matter on its merits;
 - c) requiring that any such matter shall be agendized for discussion and approval on its merits in public session upon publication of a tentative agreement with the union; and
 - d) providing sufficient time before final approval of the tentative agreement for members of the public to become informed about such matters and to express their views to the board.

7. Appearances of Conflicting interests. It appears as though the majority of *insurance committee* members, being district employees, stood to gain from the decision to increase expenditures for district-paid health insurance. The only person on the *committee* who was not a district employee was the insurance broker, and I believe that her firm stood to profit from the transaction itself.

- Suggestion 15: That membership on any insurance advisory committee shall include in equal numbers people who are and people who are not district employees, one of the latter to be recommended by a local taxpayer watchdog group.

8. Document management. As it turned out, a simple request to view a district contract—something that is anyone’s right—resulted in a major search of district files that ended in failure. The Blue Cross file was not to be found. Apparently also, in spite of repeated requests, Blue Cross of California was not forthcoming with a copy of the contract. A copy had to be obtained from the district’s insurance broker.

- Suggestion 16: That district office filing practices be reviewed and reformed to ensure that all documents are retained and readily accessible and that no documents are discarded except as provided by laws pertaining to the destruction of public records.

* The Brown Act further spells out limits on what may be discussed: “Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative. (emphasis added)

The Blue Cross Case in Greater Detail

Narrative

Early this year, pursuant to the oversight functions of elected board members, I made some inquiries about the school district's arrangements with Blue Cross of California. Three facts emerged straightaway.

- 1) A new Blue Cross package that went into effect on October 1, 2002, represented a \$557,220 increase in expenditures for district-paid premiums.
- 2) The governing board had not approved a new contract with Blue Cross or the expenditure of \$557,220.
- 3) This budget allocation was made outside of the budgetary process. It removed a half million dollars from the budgetary table well before the budget debate began.

That was \$557,220 in general, unrestricted funds-- money that might have been used for programs in music and the arts, for libraries, for special services for disadvantaged students, etc. The public had not been informed that such a decision was to be made; there had been no opportunity for public comments; and even the board did not know about it until it had become a *fait accompli*.

These findings came as a shock. Public policy decisions are supposed to be made in public, and substantial contracts (this one exceeded \$5,000,000) are supposed to be approved by the governing board. So, I pursued my inquiries. How was the decision made? By whom? Blue Cross of California surely would not conduct business without a contract. If the board did not approve the contract, who did?

Who approved the Blue Cross contract?

In late January, I asked to see the contract. Staff reported that they could not find it. Several weeks passed with nothing. Finally, in early April, I located a Blue Cross sales office that acknowledged having a copy of the contract and told me that the Districts' insurance broker also had one. However, Blue Cross would not let me have a copy. They said that I would have to ask the district.

In late April, three months after my original request, the Blue Cross contract was included in a packet of materials for board members. It was subsequently explained that:

- a) staff had searched everywhere and could not find a Blue Cross file;
- b) staff had been unable to obtain a copy from Blue Cross of California, despite numerous efforts; and
- c) public discussion of the district's business with Blue Cross had not appeared on a board agenda since 1982.

Did the contract itself reveal who approved it? Not at all. Instead of a signature line, the contract includes the provision:

"Payment of the monthly subscription charges indicates the Group's acceptance of this agreement."

Instead of providing answers, the text only raised more questions. I posed the obvious question to the Superintendent.

"Who authorized the payment of the monthly premiums or subscription charges for the various plans with Blue Cross covering October 2002? I don't know enough about the

accounting system to ask more precisely. But, I'd like to see documents. ... I am trying to learn if there was ever approval by someone other than a check-writing clerk."

This inquiry elicited a response written by the Assistant Superintendent for Business. It may be summarized as follows.

Back in the 1980s, the district was granted "fiscal accountability" status under Education Code Section 42650, which means that it assumed responsibility for maintaining internal auditing controls to ensure that all expenditures are properly authorized. That fiscal accountability system calls for a separate "District Disbursing Officer," but staffing has been insufficient. In effect, the fiscal accountability system has been all but inoperative for some time.

Interpreting the Assistant Superintendent's comments in light of my own findings, something like the following probably occurred in the Blue Cross case.

An *insurance committee* considered the medical insurance options. It was a mid-level administrative committee comprised of representatives of teacher, classified staff and administrator unions, three representatives of the district administration and the district's insurance broker. The broker was the *committee's* interface with Blue Cross of California. The *committee* recommended the new Blue Cross package. That recommendation was communicated in writing to the Superintendent. No documented approval of the recommendation is in evidence.

What happened next is unclear. But somehow, the *committee's* recommendation must have been communicated to Blue Cross as a district commitment sufficient for Blue Cross to bind the policy. Blue Cross then proceeded to issue new plan cards for all district employees and to put the new plan into effect on October 1, 2002. It was at that point, when someone gave Blue Cross a go-ahead, that a contract was made. Whether oral or written, by any other name, it was a contract-- this on the authority of two senior contract attorneys with whom I have consulted.

Who gave the go-ahead? Probably the insurance broker. That is typically a brokerage function in the private sector. Since this was probably the way business had been conducted in the past, Blue Cross had a contract it could take to court. For a public school district, however, that act was in effect an exercise of the power of contract. And it was unauthorized.

Sometime around October, something signaled staff that it was time to pay the monthly premium for October, 2002. It is doubtful that anyone asked about authorization, because Blue Cross bills were always paid routinely. Neither did anyone ask that the claim be legally examined, Blue Cross bills were always legitimate. And, it appears that no one checked to see if the governing board had approved the contract.

A warrant ordering the County Treasurer to pay Blue Cross was prepared. This should have been done by the person in charge of internal auditing-- the "District Disbursing Officer" at the time (EC §42650). In the absence of a Disbursing Officer, the warrant may have been issued by someone routinely completing a pre-signed form left over from a previous disbursing officer. In any event, the warrant was next included among a listing of hundreds of other warrants and attached to the governing board's agenda. Staff routinely recommends approval of warrants in batches, and the board routinely approves them without discussion.

Who, then, did approve the Blue Cross contract?

It turns out to depend upon one's perspective.

An administrative perspective: The board approved the contract indirectly.

Arguably, the board approved the contract, if not directly, indirectly. As noted above, the language of the contract equated approval with payment of the premium. Whomever approved the warrant to pay the premium approved the contract. Therefore, when the board approved a batch of warrants containing the Blue Cross warrant, the board approved the contract. It may not have been knowing approval—the district did not possess a copy at the time. And, 90-page listings of warrants are not uncommon. Nonetheless, it was *de jure* approval.

This theory may be seen in some comments by administrators in response to my inquiries.

“Because the Board approves all warrants prior to their distribution, it too assumes responsibility for disbursement.” (Assistant Superintendent for Business)

“... warrants for the Blue Cross premiums have been listed on consent agendas on an annual basis.” (Superintendent)

One can only assume that Blue Cross lawyers knew what they were doing, and that they believe indirect approval is binding as a matter of contract law. Questions of public law remain, however. District actions must comply with the requirements of the Education Code and the Government Code, among others.

Another administrative perspective: The board approved the contract vicariously.

Another theory that has surfaced in the course of my inquiries argues that the board approved the contract, because it approved a collective bargaining agreement in which the district agreed to pay for Blue Cross medical insurance. The following comments were included in responses to questions.

“the districts’ practice has been to negotiate health insurance benefits with the various unions and then to include these benefits as part of the tentative agreements which were approved by the board on an annual basis.” (Superintendent)

“It is common practice for health insurance benefits to be included in the tentative agreements reached with the unions.” (Counsel to the district, as paraphrased by the Superintendent)

It should be noted in this regard that the collective bargaining agreement did not explicitly incorporate any of the terms of the Blue Cross contract.

An organizational perspective: No one approved the Blue Cross contract.

Approval was a result, not a decision. The Blue Cross contract happened the way it did this time around, because it happened that way last time. It was routine. To understand organizational outputs, one must understand organizational routines. Working together year in and year out, staff evolve informal practices. Informal practices do not replace the formal structure of authority and delegated responsibilities. They supplement it. Responsible professionals could not stick strictly to book. They would not be able to get the job done. For one thing, the business section of “the

book” is out of date (largely unchanged since the 1970s and 1980s). Informal practices are necessary for the organization to adapt to today’s challenges.

At the same time, except for staff’s sense of professionalism, there are few internal pressures to ensure that the evolving organizational culture remains in compliance with formal laws and regulations. Pressure usually comes from outside—from state mandated compliance reviews, audits, etc. It also comes from citizen “watch dog” groups and the ever-present possibility that someone in the community might seek a court order to force the district to bring its practices into line with laws and regulations. Internally generated procedural reforms tend to take a back seat to the press of daily organizational life.

Here is the dilemma. Informal practices may be essential, but formal rules and guidelines are mandatory. Some informal practices can create legal difficulties. Further, a popular stereotype to the contrary, not all formal rules and guidelines were written by fools. Many of them reflect a great deal of accumulated wisdom in public administration. They are based on experience with what works and what does not, and with what serves the public interest and what does not. Drifting too far from them can risk dysfunction in a public organization.

A critical perspective: The amorphous expenditure of \$557,220 was a failure of transparency and accountability.

From this perspective, focused responsibility is a normative axiom in public administration. Who approved the Blue Cross contract? That is only one question. Equally important is the question: Why should it be so difficult to find out? Ultimate authority resides with the governing board. Unless the board delegated that authority, the answer should have been in the minutes of its public meetings. If the board delegated its contract power, the identity of the designated staff member should not be a mystery. Because the contract is a public record, the district is obligated to produce it within ten days of a request. It is against the law to discard public records.

Rules and regulations are about conducting the public’s business in public. They are about holding public servants accountable for the expenditure of public moneys. How the school district deals with increasing costs of medical insurance is public business. Whether or not to spend a half million dollars more of the public’s money for district-paid insurance premiums was a decision that belonged to the board alone. Board members alone are accountable through the electoral process to the people.

In short, the Blue Cross case revealed practices that undercut two pillars of public administration: transparency and accountability. The power of the people through their elected board was usurped by informal organizational practices. It was a conspiracy of routines.

Issues Arising from the Blue Cross Case

This section discusses some public policy and/or legal issues that came to light in the process of my inquiries.

1. **Automated approvals.** As shown above, a clause in the Blue Cross contract equated formal approval of the agreement by the district with the act of paying the first month’s premium. With all due respect to Blue Cross of California, this seems wholly inappropriate for public school

agencies, which are bound by state law and regulations regarding the approval of contracts. This routine was a contributing factor in the organization's failure to bring the contract to the governing board for fully informed budgetary review and explicit approval.

2. **Contract powers.** It is my understanding of public procurement that, unless formally delegated, the authority to enter into agreements and contracts is vested in the Governing Board. For anyone within the organization to have authority, it had to have been expressly delegated. Staff have searched for standing policies concerning delegation of the contract power. According to the Superintendent, they could find only one policy mentioning contracts, and it has been on the books unchanged for fifteen years.

BP 3312 (1988). *“ All contracts between the Santa Barbara School/High School Districts and outside agencies shall conform to standards required by law and shall be prepared by the Assistant Superintendent for Business under the supervision of the Superintendent of Schools.*

All contracts shall be submitted to the legal advisor of the Districts for review and approval.”

Based on the results of staff's search, there are no standing delegations of contract powers in the district. Board Policy 3312 seems to be more about legal standards and review than it is about delegation. Unless there is some other policy that has not been found, it appears that only the governing board has authority to sign/approve contracts.

It is difficult to believe that the Blue Cross contract was “submitted to the legal advisor,” as required by BP 3312. A legal advisor would have noted that it had not been authorized by the board.

The California Education Code addresses the delegation of contract powers. Section 17604 empowers governing boards to delegate.

“ ... the power may by a majority vote of the board be delegated to its district superintendent, or to any persons that he or she may designate The delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct.”

Even when the contract power has been delegated, board ratification is still required. The text of §17604 continues.

“However, no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted.”

The importance the Legislature attached to delegation and accountability is seen in the concluding text of EC 17604.

“In the event of malfeasance in office, the school district official invested by the governing board with the power of contract shall be personally liable to the school district employing him or her for any and all moneys of the district paid out as a result of the malfeasance.”

There are nuances in this text, and there is probably a body of relevant case law interpreting them. Therefore, the applicability of §17604 to the Blue Cross case it is not self-evident—not to me, in any case. However, on the face of it, the fit is close enough to cause concern. Could it be that the Blue Cross contract may be an “unenforceable obligation against the district?” Could it be that the staff member who caused issuance of the October 2002 warrant that “approved” the contract may be guilty of “malfeasance in office?” The implications are so far-reaching that one is staggered by the questions.

The question of competitive bidding is closely associated with the power of contract. It appears as though Blue Cross has been the sole source for district-paid medical insurance for a very long time. It also appears as though a sole-source arrangement with an insurance broker was in place for many years. The Education Code may not require competitive bidding for these kinds of services (that is not entirely clear to me). Nonetheless, competitive bidding usually serves the public interest.

3. **Fiscal accountability.** By the Assistant Superintendent for Business’ account, the district attained “fiscal accountability” legal status in the early 1980s. This means that the district assumed responsibility to perform internal audit functions covering, among other things, the disbursement of funds. Someone in the business office is supposed to be the “District Disbursing Officer” (Education Code Section 42650). To avoid conflicts, the person performing internal auditing functions may not perform other business office work that may be subject to internal audit.

Other school districts in Santa Barbara County have opted to have these internal auditing functions performed by the County Office of Education. Districts are charged for those services.

It appears as though a lack of personnel in the business office has contributed to a breakdown in “fiscal accountability.” That may account for the lax internal controls manifested in the Blue Cross case. The district was warned about this by Financial Crisis Management and Assistance Team in their report dated June 28, 2001.

“The concern of the district disbursing officer should be primarily related to legality and accuracy of check issuance, budget authority, and cash sufficiency. The 1998-00 and 1999-00 audit reports for both school districts indicated that expenditures were incurred that exceeded board-approved appropriations. ... District office procedures include the practice of mailing checks without their being submitted to the disbursing officer prior to release. This practice has not afforded the opportunity for review.”

It is my understanding that failure to have adequate internal controls in place, in accordance with relevant laws and regulations, could put the district at risk in regard to federal and state categorical funding.

4. **The role of the insurance broker.** A representative of Keenan and Associates, the district’s insurance brokers, was listed as a participant in the *insurance committee’s* work. Presumably, the broker performed interface functions between the district and Blue Cross of California. Presumably too, Keenan and Associates was paid for these services.

It is not known how the *insurance committee’s* preferred option for a medical plan was translated into action by Blue Cross. There is evidence of a recommendation by the *committee*, and Blue Cross proceeded to draft up a new plan for the district, to issue new insurance cards to district employees and to make the new plan effective October 1, 2002. What happened in

between is not clear. It is entirely possible that the insurance broker communicated the committee's preference in such a way as to give Blue Cross the assurance it needed to go ahead and put the pieces of the new plan together.

That, according to contract attorneys with whom I have consulted, was the moment of contract. It may have been by telephone, and it may have been called something else. But, by any other name, it was an enforceable agreement exchanging insurance services for money consideration. It would be backed later by the written document, which no one in the district could find. And the written document would receive formal approval when the district paid the October premium.

If the broker was the agent of this action, she could well have exercised the power of contract on behalf of the district. This may be routinely done in the private sector. But it cannot be so casual where contractual commitments by public agencies are concerned. Such commitments may not be made without formally delegated authority, certainly not by the representative of a private firm that profits from the transaction.

5. **The insurance committee**. Membership on the *insurance committee* was representational.

Composition of Insurance Committee

Rossanne Wetzel	Broker from Keenan and Associates, insurance brokers
Kristine Robertson	Classified Management Rep. (union)
Merebeth Rohrer	Classified Management Rep. (union)
Brian Tanguay	CA School Employees Association Rep. (union)
Margaret Saavedra	CA School Employees Association Rep. (union)
Pam Kinsley	SB Teachers Association Rep. (union)
John Muir	SB Teachers Association Rep. (union)
Jolene Reed	Personnel Director (Certificated), SB School Districts
Elaine Alvarado	Personnel Director (Classified), SB School Districts
Charlene Kirkman	District Consultant (retired chief financial officer, SB School Districts)

The *committee* clearly saw itself as a venue for labor-management negotiations. Indeed, there were reports that union representatives viewed agreements reached in the committee as binding on the district. An "understanding" about a 1.7% salary increase is an example. This self-image is reflected in language used in the memo to the Superintendent reporting the *committee's* recommendations.

"In negotiating the above changes to the health insurance program, a savings of 7% was made over the 23% that was budgeted. It was understood that the savings would be applied to a salary increase in the 2002-2003 school year." (emphasis added)

It should be clear that a labor-management negotiating venue and an administrative advisory committee are not the same thing. Advocacy and strategic interaction are what goes on in a negotiating venue. Administrative advisory committees are supposed to be about objective analysis and advice.

Also, the *insurance committee* involved the appearance of impropriety in that that the majority of its participants stood to benefit from its recommendations. Most were active employees. Legal questions aside, such appearances contribute to cynicism and the erosion of public trust.

Finally, the *insurance committee* failed to perform the main function of an advisory committee. It did not advise. Its recommendations were translated directly into action. The governing board needed its advice in order to formulate the district's initial proposals for collective bargaining. There is no record of written advice for the board. The *committee's* preferred insurance plan was not even adequately described in the text of the tentative agreement with the union.

6. Collective bargaining process.

The collective bargaining process between school districts and unions representing teachers and staff is highly regulated. The content of negotiations is granted confidential status by law. But, the law also requires that certain aspects of the process be public. The intent of the Legislature seems quite clear.

“... namely that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives.” [CA Government Code §3547(e)]

Here are some formal requirements about how collective bargaining negotiations are to begin (Government Code §3547 emphasis added).

§3547 (a) All initial proposals of exclusive representatives (i.e., unions) and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.

(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

(c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

(d) New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.

When collective bargaining produces an agreement, that agreement is tentative. Certain things have to happen before a tentative agreement is transformed into a written agreement.

§3547.5. Before a public school employer enters into a written agreement with an exclusive representative covering matters within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal

years, shall be disclosed at a public meeting of the public school employer in a format established for this purpose by the Superintendent of Public Instruction.

When all of this been done, action on the tentative agreement by the Governing Board must be by majority vote in a public meeting.

There has been some confusion about the publication requirement of §3547.5. I understand some staff to believe that publication need not occur until 45 days after the conclusion of a written agreement. Language on the formatted form provided by the County Education Office suggests before, not after, and the language of §3547.5 itself seems clearly to say before.

On the basis of my investigations, I believe that none of the collective bargaining procedures mandated by §3547 was followed in regard to the *insurance committee*. There were no public hearings on initial proposals; no initial proposals were adopted by the governing board; there was no public release of a tentative agreement; and no vote was taken by the board.

With respect to the formal collective bargaining process, the record of compliance is little better, in my opinion. It is true that the union's initial proposals were presented at a public hearing of the board, and a tentative agreement was made public. But, that is about all. In recent memory, the Districts' initial bargaining proposals have never been presented at a public meeting; they have never been adopted in a public meeting; nor have new subjects been made public within 24 hours. Finally, the costs that would be incurred under the agreement for the current and subsequent fiscal years were not been disclosed in the tentative agreement until board members demanded them.

Everyone seems to acknowledge that initial collective bargaining proposals must be the subject of public hearings [Ed Code Sections 3547(a) and 3547(c)]. Nonetheless, there are indications that negotiations with the union have begun toward a 2003-04 agreement without public hearings having been scheduled. In general, there has been no public venue for public discussion and debate about what is being proposed for collective bargaining.

Vicarious approval of contracts. A theory has emerged to the effect that board approval of a collective bargaining agreement provides umbrella approval of anything new that is referenced in the agreement. Thus, the argument goes, even though the union agreement does not explicitly incorporate its terms, the Blue Cross contract was approved vicariously upon board approval of the union contract.

As noted above, the union agreement did not in fact explicitly incorporate any of the terms of the Blue Cross contract. The only time the collective bargaining agreement mentions Blue Cross is when it states that that the Districts:

“shall contract for the Blue Cross Plus Program” and “shall pay ...\$6,095.20... annually for the premium cost” ... for medical, dental and vision insurance combined.

A rather sinister implication of this theory is that it sanctions two layers of secrecy. First, collective bargaining negotiations may legally be held in private. Second, the board may discuss and reach a consensus on such matters in closed session under the Brown Act rubric “Collective Bargaining; Conference with Labor Negotiator, Superintendent.”

7. **Appearances of Conflicting interests.** Conflict of interest law is complex, with numerous technical definitions and many precedent-setting cases. The unique facts of each particular case

are very important, and the legal standards can be quite specific. Conflict of interest policies, on the other hand, may go beyond the facts to deal with appearances. Even if they do not rise to the level of law violations, appearances of impropriety are bad public policy. They can erode public trust and sow the seeds of cynicism among district employees. The decisions of public servants at all levels must not appear to be influenced by considerations of personal benefit.

Appearances were not good in the Blue Cross case. Most *insurance committee* members were district employees (see #5, above). If most were covered by Blue Cross insurance, they stood to benefit from the \$557,220 increase in expenditures. It also appears as though the *committee* did not consider the option of charging employees for increased Blue Cross premiums via payroll deductions. Only one person on the *committee* was not a district employee. That was the insurance broker. I believe that her firm stood to profit from the transaction itself.

The *insurance committee* was an administrative committee. It's job was to make internal recommendations about health insurance policy. Those recommendations should have been channeled to the district's collective bargaining team with a stop at the governing board. The board is obligated to adopt initial proposals by the district for labor negotiations. They should also have been channeled to those whose responsibility it was to prepare the Blue Cross contract for board approval.

8. **Document management**. As it turned out, a simple request to view a district contract—something that is anyone's right—resulted in a major search of district files that ended in failure. The Blue Cross file was not to be found. Apparently also, in spite of repeated requests, Blue Cross of California was not forthcoming with a copy of the contract. It had to be obtained from the district's insurance broker.