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# SYMPOSIUM WHISTLEBLOWER PROTECTION

## FULL AND FAIR RESOLUTION OF WHISTLEBLOWER ISSUES: THE HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, A PILOT ADR APPROACH

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### I. FINDING THE NECESSARY TOOLS

The patchwork of laws, regulations and programs available for whistleblower issues are seldom pathways to resolution. The outcomes, particularly in the more complex or polarized cases, reflect mutual defensiveness and conflict more than dialogue or denouement. While recent laws and regulations have strengthened the right to raise issues, and earlier statutes established the grounds for a lawsuit, they have not provided a set of tools necessary to resolve the basic issues that arise when someone decides to blow the whistle or raise allegations of retaliation. At the Hanford Nuclear Site in Washington State, a new system, based on alternative dispute resolution (ADR) principles, has been developed for contractor employees that can address, in a non-conflicting fashion, the entire spectrum of issues in and around whistleblower disputes.

#### A. Some Historical Highlights

The Federal nuclear complex of facilities for weapons production, storage sites and labs across the country has been a notable source of whistleblower cases, especially since the early 1980s when the focus at many sites

shifted to environmental clean-up. After leaving office, former Department of Energy (DOE) Secretary Hazel R. O'Leary observed how her first encounter with whistleblowers made "such a profound impression . . ." <sup>1</sup> Secretary O'Leary described discussions with whistleblowers, their families, security guards and others, at different DOE locations. These people described what she viewed as a highly unfortunate and unaddressed set of conflicts and misdirected resources. Hanford, in southeastern Washington State, during the late 1980s and 1990s was arguably one of the more active sources of whistleblowers in the complex. Aspects of the history and culture at Hanford seem to have made it especially fertile ground.

The typical nuclear whistleblower case, as it winds through the administrative process and the courts, often takes years to adjudicate. By that time the trail is cold on the safety issue and one career or several are already ended or in tatters. Thousands of hours of employee and management time have been spent in fruitless attempts at resolution, trying to understand, or, more commonly, proving the other side to be absolutely and completely wrong. Secretary O'Leary noted in her deposition that, "[t]here was already in the Department a structure which even the people who were running it admitted simply did not have either the muscle, the manpower, or[,] they believed[,] the perceived commitment to get things done." <sup>2</sup> Describing the beginnings of her efforts, she said, "we needed a system in place to both review the allegations raised, past and present, and try and find a way to avoid the hostile relationships existing between the so-called whistleblowers and the people within the DOE." <sup>3</sup>

Existing processes had left dozens of cases unresolved, regardless of the merits. A 1995 study by the National Academy of Public Administration, undertaken at the request of the DOE, estimated that there were over a hundred such unresolved cases by 1992. <sup>4</sup> Many of those cases were more than ten years old.

A substantial factor in everyone's frustration has been the costs to the government. According to records obtained through public disclosure reported by the Hanford Joint Council for Resolving Employee Concerns (the Council) in its 1997 Report, a sample of cases resolved through litigation or settlement in the late 1980s and early 1990s cost taxpayers an average of \$500,000 in contractor legal fees and \$60,000 to \$600,000 in settlements or

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1. Pretrial Deposition of Hazel R. O'Leary at 15, *Carson v. Department of Energy* (D.D.C. 1998) (No. 98-CV-00368).

2. *Id.* at 39.

3. *Id.* at 14.

4. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, DEPARTMENT OF ENERGY RETALIATION COMPLAINT STUDY, PHASE I 14 (1995).

awards.<sup>5</sup> In addition, there is a diversion of management and staff time away from program priorities preparing for and defending the cases. O'Leary recalled, "if we had spent that money to resolve the claim, we might have better spirit in the Department," and gain some improvement in "safety and health statistics . . ." as well.<sup>6</sup>

### B. Reforms in Available Tools

Following the tumultuous period of the late 1980s and early 1990s, a number of administrative reforms were wrought in the Energy Department and in some of the contractor programs; the most pervasive beginning with Secretary O'Leary and some pre-dating her. These reforms contributed to an environment more open to employees bringing forth issues and better internal programs for resolving problems, but there remained substantial obstacles to preventing and resolving the more sensitive and complex cases. In noting the depth of these obstacles, even as Secretary O'Leary took office, a 1992 University of Washington study concerning Hanford (1992 university study) noted that "even excellent, regulatory and management practices would not be adequate . . ." to resolve these more difficult cases.<sup>7</sup> These cases, which reflect massive misunderstandings and breakdowns in communication and workplace relationships, require a different approach, with a more diverse and flexible array of tools and resources, differently applied than in normal channels.<sup>8</sup>

Yet, the 1992 university study found agreement, even among knowledgeable managers at Hanford, that the "core technical or substantive issues brought forward by whistleblowers have been valid and with merit."<sup>9</sup> The study examined some tenets of conventional wisdom about whistleblowers at the site and found the following.

### C. Conventional Wisdom Blocked Real Dialogue and Problem Solving

Contrary to conventional wisdom, the study concluded that few, if any, of the employees in the well-known Hanford cases had poor performance reports in their files until after the incidents, and that money paid in settle-

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5. REPORT OF THE HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS 6 (Apr. 1997) (covering period from 1994 through 1996).

6. See Pretrial Deposition at 56, *Carson* (No. 98-CV-00368).

7. UNIVERSITY OF WASHINGTON, INSTITUTE FOR PUBLIC POLICY AND MANAGEMENT, EXTERNAL THIRD PARTY REVIEW OF SIGNIFICANT EMPLOYEE CONCERNS: THE JOINT COOPERATIVE COUNCIL FOR HANFORD DISPUTES 2 (1992) [1992 UNIVERSITY OF WASHINGTON study].

8. *Id.*

9. *Id.* at 33.

ments had rarely benefited in any substantial way those who had brought suit, particularly after paying legal bills. In fact, many had lost their jobs or even their careers. On the other side of the conventional wisdom, no pattern of sanctioned high level harassment or retaliation was found during the early 1990s, although rogue harassment, sometimes of a serious nature, was identified.<sup>10</sup> O'Leary echoed this view of harassment in her deposition stating: "I cannot say that this had been a plan."<sup>11</sup> In other words, it was not officially sanctioned, but it could be found across the Department's nuclear functions and in various forms — often isolation by peers, disbelief of the person if they brought forth further issues or employment discrimination, and by the revocation of security clearances as one of the more pernicious forms. This had the affect of severely limiting or eliminating employment prospects for those whose professions depended on clearance.<sup>12</sup>

The University of Washington study examined the record of negative personnel actions in the visible Hanford cases in the late 1980s and early 1990s and concluded that contrary to another common piece of conventional wisdom, "there is no evidence to suggest that employee concerns have been raised primarily to cover up adverse performance appraisals or personnel problems."<sup>13</sup>

Despite the after-the-fact acknowledged validity of the core concerns in these Hanford cases, the actions and reactions triggered by standard company and government systems ended up polarizing these disputes rather than solving them, and led to a set of myths about each side that interfered with seeing each case on the merits. Thus, lengthy lawsuits, negative newspaper coverage, congressional or state legislative hearings and other embarrassing exposure followed. These, in turn, seemed to undermine confidence in the government and contractor organizations responsible for site safety or environmental clean up, and at a substantial dollar cost. Normally, not only was the career of the employee ruined, managers' reputations were harmed and more than one senior executive dismissed or transferred. The family toll on many was reported to be substantial.<sup>14</sup>

#### D. Safety Issues Not Addressed

Perhaps most ironic in terms of our public policy is that rarely, if ever, was the safety issue that gave rise to the complaint resolved as part of any

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10. *Id.* at 24.

11. Pretrial Deposition at 23, *Carson* (No. 98-CV-00368).

12. 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 16-18, 20-25.

13. *Id.* at 33-34.

14. See generally MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* (1989) (recounting dramatic stories from government and industrial settings).

settlement at Hanford during this period. Most settlements and the judgments available through the U.S. Department of Labor under the Energy Reorganization Act<sup>15</sup> and tort claims in Washington state courts,<sup>16</sup> as well as the Department of Energy's Regulations for Protecting Whistleblowers,<sup>17</sup> can only address the retaliation and personnel dimensions of a whistleblower case. The formal processes, more recently available under the DOE's Office of Contractor Employee Protection, have had some success with safety questions as well as the personnel dimensions, as have the employee concerns programs established at the site both in DOE and in the contractor companies. However, the highly polarized cases that periodically arise are resistant to resolution even by these systems.

## II. A SUCCESSFUL PILOT PROGRAM

This Article reports on a mechanism developed voluntarily at the Hanford site which has had an unblemished, but recent, track record in resolving these more complex concerns. Since the system only addresses contractor employees, this discussion is appropriately restricted to that arena. The new system, put in place in late 1994 and early 1995 after years of debate and preparation, arose through a series of steps apparently initiated by the site contractor at the time, the Westinghouse Hanford Company, frustrated itself with the results of their experience up to that point. After publication of a study by the University of Washington's Institute for Public Management and Policy,<sup>18</sup> they were joined in substantive discussions by nuclear safety interest and advocacy groups, represented by two which were active on whistleblower issues, the Government Accountability Project and Heart of America Northwest; by the Richland Operations Office of the Department of Energy; and by the Washington State Department of Ecology. When the final mutual endorsement of the idea was brought forward in early 1994 as a result of agreement by this collection of interests, it benefited from the encouragement and blessing of Secretary O'Leary and then the support of her successors, as well as the direct and continuing support of John Wagoner, the DOE site manager at Hanford.

O'Leary publicly praised the Council at several junctures, but perhaps the most telling is what she said after leaving office: "I am especially proud of the work that has been done at Hanford where much thought and care had been given to establishing a regime that . . . stepped us outside of

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15. 42 U.S.C. § 5851 (1994 & Supp. II 1996).

16. See *Cagele v. Burns & Roe, Inc.*, 726 P.2d 434, 435 (Wash. 1986) (establishing public policy exception to employment-at-will doctrine).

17. 10 C.F.R. §§ 708.1-708.15 (1998).

18. See 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7.

the box where there is a plaintiff and there's a defendant and someone's bad and someone's good."<sup>19</sup>

*A. A Record of Cost-Effective, Time-Effective, and Full Resolution*

The Hanford Joint Council for Resolving Employee Concerns employs a structured yet flexible form of alternative dispute resolution. In its two full years of case operations it has handled over fifty contacts, about half of them cases that had the earmarks of, or already were, litigious or highly publicized and polarized. Notable is that the Council also rejects cases that, after examination, do not represent whistleblower type of activity, or which the Council believes can be better resolved in a different forum.

The average cost of a Council case resolution is about \$33,000, about one-sixteenth of the direct legal costs of the cases that gave rise to its creation, even if the other direct and indirect costs and settlement costs are excluded. An entire year of the Council's under-\$400,000 budget that, in a normal year, handles ten to twelve substantial cases (as well as others that are handled informally or precluded from escalation) is less than the cost of one case of the sort that led to the Council's creation. The average time to resolve a full case under the Council system is four to six months, in contrast to several years under almost any of the alternatives, and many of those that began outside the Council system are ongoing five or ten years later. Unlike litigation alternatives, the Council explicitly resolves the safety concerns as well as the interpersonal and work-place issues, and with increasing frequency returns the employee to productive work with full closure of the conflict.

As a direct result of Council recommendations, changes have been made in safety practices, storage and handling policies, work practices, and chains of communication, among other variables, sometimes even before the case is fully resolved. Unlike adversarial proceedings, without the need for either party to posture or prepare for a defense of reputation or practice, there is open exchange about the issues and how they can be solved, and there is a mandate for resolving safety issues.

In contrast to litigation, the Council's ADR system involves only a few hours of managers' time, and requires very little time of top management, corporate, or government attorneys. The employee ordinarily remains on the job, working productively, and usually, at the end of the case, a return or reintegration-to-the-workplace is part of the resolution. The Council system has the unique feature of being able to provide protection to employees while their case is before the Council and even after the case is resolved.

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19. Pretrial Deposition at 41, *Carson* (No. 98-CV-00368).



Since the Council's inception, no case within the Council's jurisdiction at the time of the incident or complaint has gone to litigation or been in the press or the political process. By the same token, the Council has also handled cases already filed or in the press, although they are more complicated and sometimes more costly to resolve.<sup>20</sup> The record represents such vast improvements in problem solving, fairness to all parties, and time and cost efficiencies that it merits review and consideration for why it works. In addition, the Council has moved from exclusively reacting as cases come up to doing preventive work.

*B. A Charter of Authority to Define an Unusual ADR Mechanism*

The special ADR system is carried out by a blend of eight regular Council member seats, drawn in specified combination from the corporate, interest group, and from neutral members of the community, all operating within a specific and agreed upon charter of authority to "seek full and fair resolution of significant employee concerns involving health, safety, quality, or environmental protection using an alternative mediation approach."<sup>21</sup>

In the charter "[s]ignificant employee concerns" are defined as "those which raise complex or controversial technical issues in the substantive areas defined . . . ; inappropriate management response to such technical issues (i.e. alleged harassment or retaliation); involve potential for injury to workers; and/or have potential onsite or offsite impacts (i.e., those which could exceed applicable radiological or chemical exposure or contamination limits)."<sup>22</sup> Excluded are several areas including personnel management issues that do not arise from the significant technical concern, classified matters, allegations of criminal misconduct, matters accepted for investigation by the Inspector General, matters in litigation except with the concurrence of the parties, or matters which do not involve the companies' activities as employers or DOE contractors.<sup>23</sup>

These specifications not only ensure the opportunity to intervene in significant concerns, but also ensure the DOE and the contractor that the Council does not have a "hunting license" for any site issue. The agreed-upon charter has no force of law, but has served as the successful guide and as a sort of "constitution" to the process. It has been "amended" only twice since the initial agreement.

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20. Recently, the Council handled a highly publicized situation that involved ten employees near a significant chemical explosion, but which was not begun as a result of a safety or harassment situation.

21. HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., CHARTER § 1.1 (July 1997) [hereinafter CHARTER].

22. *Id.* § 1.3.

23. *Id.* § 1.4.

The Council achieves its results by using the charter authorities with a carefully considered membership mix on an eight-member Council. This is composed of a neutral chair, two members from public interest community groups, two seats from the main Hanford contractors, a former whistleblower, and two neutral leaders from the business, academic or labor communities. Recently, the Council has added a number of "case-specific" members who are activated when cases arise involving their subcontractor company.<sup>24</sup> Unlike investigations, administrative procedures, or even mediation, this unusual blend produces an effective body for case resolution with a combination of knowledge, perspectives and influence that covers the full range of needs for assessing and resolving whistleblower cases. This blend allows the Council to apply tools and persons appropriate to the resolution of each situation, from an entirely fresh perspective, unbound or restricted to specified steps or tools, as is common in much of the administrative law and internal procedure available. The only restriction is that actions and recommendations must be by consensus and within the charter. Consensus by this membership mix virtually insulates the process from challenge by any of the usual adversaries.

### III. ORIGINS

#### A. *Mutual Frustrations Give Rise to a New Approach*

As with many conflict resolution mechanisms or mediated solutions, the Hanford Joint Council arose after years of conflict. In the end, the primary adversaries<sup>25</sup> and the primary public interest groups<sup>26</sup> confronting Westinghouse and DOE agreed on the system. So great was the historical mistrust, it took a year to complete a study that could lay the groundwork for change, another to yield a charter, and yet another to appoint members, set up the independent corporation, develop procedures, and take the first case.

At the table, in addition to company and interest groups, were representatives of the DOE Richland Operations Office, which would have to authorize the Council's activities, and the State Department of Ecology, which had become increasingly concerned over the continued volume of whistleblower cases and the implications for safety and confidence in the site operation. Even the state's Governor had been awakened in the night by phone calls about whistleblowers.

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24. *Id.* § 4.2.

25. The Westinghouse Hanford Company was the main DOE contractor at Hanford at the time.

26. The primary public interest groups were the Government Accountability Project and the Heart of America Northwest.

All of this was against a backdrop of conflict that had come to a crescendo in the early 1990s.<sup>27</sup> Westinghouse had been the recipient of a substantial amount of negative local and regional press, as well as pressure from the DOE and state regulatory officials. The predominant response by Westinghouse had been an aggressive litigation and public relations defense.

Interviews with key senior managers made it clear that most of the whistleblower cases that had become controversial represented systems breakdowns of communication or problem-solving mechanisms within the company. The 1992 university study reported that no unified or authoritative mechanism was available for dealing simultaneously with the full dispute.<sup>28</sup> It was common for the technical and interpersonal components to be handled separately and for sequential, but unconnected, reviews of one component or another to take place in different parts of the company.<sup>29</sup>

Top management of the Westinghouse Hanford Company, then under the leadership of Thomas Anderson, was already looking for a way to move the focus from litigation, and the related imperative to win and avoid liability, to an external third party review process which would allow the company to resolve the problem — win, lose or draw — and move on to the main tasks at hand. It was later learned that the interest groups were experiencing similar frustrations with the status quo. There is some evidence to suggest that the head of the public relations office, often pilloried by the interest groups for expenditures on corporate image polishing, was among those leading the charge for a new approach. As the study team discovered, the mutual frustration, encompassing also the government agencies, was such that there would be sufficient motivation and confluence of interests to focus attention on a promising new approach, if one could be developed.<sup>30</sup> Up to that time, the level of agreement on frustration with the status quo overshadowed, but did not yet override, the mutual suspicions and the ongoing legal and public relations battles.

### *B. A Cautious Development Process Involves Key Parties*

In 1991 Westinghouse approached the well-respected director of University of Washington's Institute for Public Policy and Management, Betty Jane Narver. Ms. Narver and the university team she assembled worked

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27. Numerous law suits had been filed by the Government Accountability Project, private attorneys and others on behalf of aggrieved employees.

28. 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 7-9.

29. *Id.*

30. See JONATHAN BROCK, *BARGAINING BEYOND IMPASSE* 218 (1982) (discussing ingredients of a successful dispute resolution mechanism).

from research on alternative dispute resolution systems, which suggested that a case review mechanism would only be successful if it had legitimacy in the eyes of the broad range of interested parties. This was confirmed when an over-anxious press relations person from the University of Westinghouse scheduled a press conference to announce the study. An interest group representative denounced the nascent study on the spot. Clearly, the neutrality of the University would not be sufficient on its own. The process of developing any new concept or mechanism would be as important as the design of the mechanism itself. In particular, the team was sensitive to unsuccessful mechanisms in other settings — drafted by scholars or legislative staff — which were not designed and agreed to by those who would use it or those with an important interest in the process or outcome.<sup>31</sup> The university team, recognizing the importance of a fully independent study and avoiding oversight by one of the parties at interest in the conflict, arranged that the work be done for the Washington State Department of Ecology, rather than Westinghouse or DOE. Interest group and company representatives later noted the importance of the substance and symbolism of that arrangement, and a senior Ecology official, Max Power, and also the then-director of the Ecology Department, Christine Gregoire, assisted in gaining invaluable access, information, and insight for the study.

Recognizing the particularly polarized climate at Hanford, the effort was divided by the study team into three sequential stages so that sufficient trust and involvement of the necessary parties might be built. Stage I was the feasibility study. The study team intended the development of the report and the report itself to be a consensus building exercise that could set the stage for a new approach. Thus, proceeding with caution, for the importance of taking sufficient time and effort to build a consensus on a system,<sup>32</sup> a study that spanned a year began with interviews of 120 persons on site, elsewhere in the state, on Capitol Hill and at DOE headquarters, including whistleblowers, managers, senior executives, other employees, Federal, state and local government officials, interest group representatives, and others. At the end of Stage I, all relevant direct and indirect parties were cautiously enthusiastic about the Council concept<sup>33</sup> and agreed with the main principles in the 1992 university study.<sup>34</sup>

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31. See Jonathan Brock, *Mandated Mediation, A Contradiction in Terms?* 1991 VILL. ENVTL. L.J. 57; Jonathan Brock & Gerald W. Cormick, *Can Negotiation be Institutionalized or Mandated? Lessons from Public Policy and Regulatory Conflicts in MEDIATION RESEARCH*, 138, 162, 164 (Kenneth Kressel et. al. eds, 1989).

32. See Brock & Cormick, *supra* note 31, at 162.

33. One supportive corporate officer declared: "Why didn't we think of that?" The response from interest group leaders was equally encouraging.

34. See 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7.

As a testament to the controversy whistleblower cases had generated, more than fifteen news outlets covered the release of the report to the Department of Ecology. A half dozen favorable editorials appeared, urging all parties to embrace the Council. The *Seattle Times* editorialized that "[e]mployee health and safety, and public confidence . . . could be advanced by a novel plan to give workers a forum to air the occupational and environmental concerns," and went on to note, "[w]hat is surprising and encouraging is the universal enthusiasm for the panel, and stated intentions to make it work."<sup>35</sup>

The report defined the overall concept for whistleblower dispute resolution and laid out a series of basic requirements: balanced membership; independence; operating authority delegated from the president of the main contractor; a multi-year commitment by the Department of Energy (DOE) and related budget independence; appointment procedures that would insulate appointments from political or economic influence, yet keep key Hanford players involved; and that the mechanism become a condition of the contractor's contract with the DOE for management of the site. This was still only a concept, and developing it into a practical and acceptable mechanism was the work of the next stage.

Stage II would be a focused exploration by those subsequently identified as key direct and indirect parties of the design and issues in establishing a system that would work and have their (companies, interest groups, government, others) mutual confidence. This stage became the negotiation over the charter, which defined the structure and authorities of the mechanism. A nationally known mediator, Gerald Cormick, consulted with the top leadership in each camp and then selected a working group with representatives from Westinghouse, environmental and nuclear safety interest groups, the Richland Operations office of the DOE, and the Washington State Department of Ecology.

Following ten joint meetings, and using a principled negotiation process,<sup>36</sup> the working group developed a charter for the Council. With the needed authorities defined, a formal request was made by Westinghouse, with the full concurrence of the working group of the DOE's Richland Operations office, to authorize the Council's establishment and operations. This authorization came from John Wagoner, the DOE's manager at Hanford in January of 1994.

Stage III, if it got that far, was to be the actual development of operating policies and selection of members that would run the mechanism, and

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35. *Provide a safehaven for wary whistleblowers*, SEATTLE TIMES, June 29, 1992, at A8.

36. *See generally* ROGER FISHER & WILLIAM URY, *GETTING TO YES*, chs. 1-5 (2d ed. 1991) (describing principled negotiations).

would segue into resolution of cases. Earlier research suggests that some continuity between those who formed and those who later operated a system was a potentially important ingredient to success,<sup>37</sup> and a successful attempt was made to involve some likely future members in Stage II and III planning. Some months after the charter was agreed to and authorizations received, the chair was appointed and began implementation work with the group Cormick had assembled, thus opening Stage III. Council members, including some from the work group, were appointed some six months later, in October of 1994.<sup>38</sup>

The staging lowered the risks to the erstwhile antagonists. The first stage required only the risk of being interviewed. Everyone could still shoot at or ignore the forthcoming report. The second stage required candid discussion, but now around a concept that had been embraced. No actual commitments were necessary until the end of Stage II, when parties would have to say "yes" or "no" to the charter and its features — a charter that they would be at the table to develop. Thus, the Joint Council process that later emerged was itself a site-specific agreement among the necessary direct and indirect parties, giving the system realism and credibility relative to the problems and audience it would subsequently address.<sup>39</sup> Any attempt to replicate the system elsewhere would require a similar local agreement, with an appropriately convened group of principals from among the key adversaries.<sup>40</sup>

#### IV. CASE HANDLING AND APPLICATION OF THE TOOLS NEEDED FOR FULL AND FAIR RESOLUTION

The 1992 study identified common patterns in handling whistleblower cases that accounted in substantial measure for the difficulty in resolution at Hanford. These factors are described in Table 1.<sup>41</sup>

*Table 1. Common Patterns in Complaint Handling*

- First line supervisor insufficiently prepared or responsive:
  - Misunderstood technical complaint
  - May have felt threatened or under opposing pressures
  - Did not possess necessary resources, authority or skills

37. See Brock & Cormick, *supra* note 31, at 162.

38. The Council members who came from the Stage II work group included: Thomas Carpenter of the Government Accountability Project; Gerald Pollett, Heart of America Northwest; Richard G. Slocum, Westinghouse Hanford Company. Ronald Lerch, Westinghouse Hanford Company, joined the Stage III work group and was also among those initially appointed to the Council.

39. See Brock, *supra* note 31, at 83.

40. See *id.*; see also Brock & Cormick, *supra* note 31, at 162-64.

41. See 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 38, tbl. 9.

- Escalating polarization between supervisor and complainant
- Peer or "rogue" harassment occurred
- Insufficient protections to prevent actual or perceived harassment
- Insufficient *authority* and *resources* applied in timely fashion
- Insufficient attention to perceptions of method (or approach) used to handle the complaint
- Approaches often didn't address underlying problem
- *Ad hoc* handling, insufficient continuity and case management
- Insufficient information flow to employee during and after reporting complaint
- Resulting and remaining tensions to workplace largely unaddressed
- Undue emphasis on both sides on proving right and wrong, defending actions
- Insufficient emphasis on problem solving
- General lack of closure
- Greater chance of resolution when problem reaches higher levels

The Council process was set up to deal with these barriers that seemed to be typical of the whistleblower cases of the 1980s and early 1990s at Hanford. The study also identified the features of a mechanism that could overcome these barriers, which were acknowledged as relevant by the key parties interviewed, and the Stage II discussions focused on building a system that took these into account. Table 2 of the report lists sixteen such features.

Table 2. *Necessary Features of a Successful Third Party Review Process*<sup>42</sup>

- Provide neutral forum for problem solving
- Possess authority to protect and intervene
- Identify problems and intervene constructively *before* escalation
- Flexibly apply tools to address both sets of problems:
  - technical
  - interpersonal/personnel
- Immediately apply proper authority and resources
- Have continuity and accountability for case management
- Provide feedback to employee during process; possible involvement
- Be fast, non-bureaucratic, non-defensive and without red tape
- Have mandate for action and problem solving; not demonstrating right or wrong
- Employ objective and effective final closure mechanism

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42. *See id.* at 3-4, tbl. 1.

- Retain and encourage management accountability and chain of command
- Preserve and respect all existing rights and regulatory requirements
- Intervene selectively, do not be overwhelmed by cases
- Possess sufficient capacity to ensure attention to major concerns
- Make more effective use of existing systems
- Encourage atmosphere where concerns can be brought forward and resolved

#### V. A TYPICAL CASE

The Council system contains features described below.

##### *A. Get the Case Early*

As part of getting cases early before they become unduly polarized, cases most often come to the Council through the interest group members, who refer cases that have come to their attention through their informal networks and advocacy reputation on site. The opportunity to use this informal network is an example of how the membership structure contributes new tools. Typically, the employee comes to the Council after successive attempts to go through the chain of command or established safety reporting channels. Believing that the issue was not heard or believed, and usually with a conflict well underway at the workplace, the employee is looking for a means to go outside the company to a lawyer, press, or elected officials to get the issue addressed. He or she is also usually frustrated with the Department of Energy. In all cases the Council has thus far formally accepted, at the core of the interpersonal and workplace strains is a safety issue that merited attention, most of which could have been resolved in a direct fashion had the necessary level of authority, judgment, and resources been more immediately applied.

##### *B. Preserve Rights of Parties So They Will Risk Mediation*

Various sets of established legal rights had become the only touchstones for whistleblowers and, indeed, for the companies. When working with the Council, no one gives up any rights they have under law. The security this feature provides is believed to be a strong attraction to employees. An employee and the company, however, are asked to put on hold any pending concerns processes, litigation, or complaints. Courts and other agencies have been cooperative in making the necessary arrangements to "stop the clock." Either party can reinstate the other proceedings, although no one has yet done so. Also, the retention of all other reporting requirements means that neither the employees, the public interest community nor man-



agers participate in a process that in any way interferes with nuclear safety regulatory and reporting obligations.

Keeping with the company's contractual obligations and rights to run the business operations, the Council's charter and practices identify the value of keeping accountability where it belongs for site safety and clean up and to maximize learning.

Recognizing the importance of a stable collective bargaining relationship and the rights of the parties, the Council, by charter, explicitly will not recommend resolutions or commence involvement that could interfere with established collective bargaining rights. Nonetheless, the Council has been successful in resolving concerns brought forth by bargaining unit employees without intrusion into collective bargaining relationships.

There are, of course, cases where the Council does not believe it has jurisdiction or can be helpful in resolution. These decisions also are on a consensus basis, and the employee is informed promptly so that he or she can decide whether or not to exercise other rights.

#### *C. Case Management, Continuity and Handling All Dimensions of a Case*

To begin the process, the staff, and then the chair, performs a preliminary intake interview sometimes accompanied by an interest group member, makes a basic determination of jurisdiction, and explains the process. With the employee's assent, the case is "triaged" by the full Council to determine the nature and status of any issues; urgency; any other, more appropriate channels for resolution; and whether or not there is jurisdiction and a likely Council ability to resolve the matter.

If the members believe there is a reasonable opportunity to expeditiously solve the situation through chain of command or other internal channels, and the employee agrees, the employee is "sponsored" back in to the process (usually to a concerns program) or to a manager, who can best help. The Council will then monitor the situation, able to re-engage. These referrals have been entirely successful, however. At the triage session, the Council will also consider possible conflicts of interest and exercise recusal as required.

#### *D. Protection to Prevent Escalation*

The Council also identifies any needs for immediate protection actions to forestall escalation of the conflict. Escalation of a whistleblower dispute is among the most damaging aspects of the cycle, putting the issues increasingly out of reach as emotions increase and positions harden. Protection minimizes the chances for escalation that might produce further retaliation actions or allegations, or the other workplace or interpersonal

strains that usually emerge. Protection is also important since anonymity is not practical once case assessment activity begins in a closed culture like a nuclear plant.

As a result, the Council charter provides the unusual authority to protect employees and managers.<sup>43</sup> The standard adopted in the policy and operations is to keep relationships and interactions as normal as possible during the period the case is being resolved, and to avoid additional misunderstandings and suspicion, while not interfering with business operations or normal performance expectations.<sup>44</sup> Usually, the most important protection activities happen in the early days of the case, where the workplace relationship has deteriorated to a flash point. Sometimes immediate actions or responses are taken to defuse potentially provocative events.

Actions may include seeking a voluntary temporary transfer or other means to separate antagonists, forestalling a moved office, or holding in abeyance performance evaluations and other personnel actions that could be sensitive or controversial. Such alterations in the workplace requires consensus and active work by the Council members from all seats. Late night and weekend calls are typical. After a week or so, the escalation is usually arrested and jockeying and accusations subside as everyone sees a productive channel in play. While the Council has the case it is expected that unnecessary or potentially provocative employment actions will be held in abeyance and other actions reviewed in an appropriately sensitized context.

The largest resistance to protective actions are from staff and managers who have been involved in the case earlier and who feel that any delay or modification in the circumstances somehow grants special privileges or interferes with building a case for hearing. The Council is careful to inform the parties that all normal expectations apply. Just as the employee is not barred from exercising rights, the employer does not yield the right to take actions necessary to run the business. This voluntary protection does not stem from regulation, thereby allowing sensitive actions to be handled in the context of the circumstances.

#### *E. The Use of Joint Subcommittees to Assess and Manage a Case*

After accepting a case, the Council chairperson forms a subcommittee comprised of a person from each of the seats: company, whistleblower or advocacy, and neutral. With no previous history in the case, this group will take a fresh look. The president of the affected company is notified by let-

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43. See CHARTER, *supra* note 21, § 1.1.

44. See HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., POLICY & OPERATIONS GUIDELINES 12-14 (1997).

ter suggesting that line supervisors and managers be informed that the Council has taken the case and that they can get assistance from company members. Almost immediately, then, the case comes to a neutral ground, where it will get a fresh look from the necessary level of authority in the company and in view of the senior leaders in the interest group community.

The multi-seat subcommittee convenes within a couple of weeks, meeting with the employee for a half day session. This meeting often ends with the employee observing, "this is the first time anyone in authority has heard my full story," or "this is the first time I really felt heard," reflecting the difficulty in using normal channels in these complex cases, and the depth of misunderstanding.

The subcommittee then determines what other information it needs, including who should be interviewed. Some allegations do not bear out and are simply part of the tension and suspicion in the situation; others require attention. Thus, it is critical to do a balanced assessment so that the real and most critical problems are addressed. Working to be non-bureaucratic, to avoid red tape, and to overcome scheduling challenges, the subcommittee merges schedules and the assessment process is usually completed in a few days of activity over the course of a month.

Overcoming another of the common problems in prior case handling, a member of the subcommittee is assigned to keep in touch with the individual. The full-time local Council staff maintains contact with the employee as well. This staff channel has proven to be a critical vehicle for ensuring that information is available to the employee so that suspicions or related uncertainties do not develop unnecessarily, as was often true in the cases that predated the Council. In these and other ways, the subcommittee and the staff become the main vehicle for case management and ensuring continuity and progress.

Usually the company representative arranges the interviews and the employee's release time. As the interest group member helped the employee in the initial interview, the company representative helps supervisors, managers and other employees become comfortable in the interview setting. The interviews are informal, confidential, and not on the record or under oath, leaving the sessions, usually, unobstructed by defensive concerns. In this setting, information critical to resolving a case has often been unearthed within hours. Council members who have been involved in litigation have marveled at the contrast between this situation and the dozens of hours of depositions, discovery and cross examinations it would take to get anywhere close to the same level of information, if at all.

Given the multi-seat composition, there is significant trust in the subcommittees' conclusions. Nevertheless, many useful ideas to improve or redirect the strategy emerge in full Council discussion. In forming a case

resolution strategy, where possible, the Council seeks the involvement and input of the employee and of key accountable managers on specific issues. The process is used to create heroes and helpers wherever possible in the normal chain of command and avoids creation of martyrs or victims.

#### *F. Restoring a Stable Employment Relationship*

Unusual for whistleblower case resolution is the capacity to restore the employee to productive work as part of a resolution. In litigation settlements, it is more common for the employee to leave the site, the workplace relationships being too strained and the mutual bitterness too great. Since the Council normally gets the case early, it can preclude much of the usual escalation; and because of the tools offered by the membership structure, it has been successful in developing a return-to-work plan in many cases, overseeing and smoothing the transition. Sometimes the employee returns to the same work site, though often to a different one, but always using the skills they have developed. One of the largest challenges, however, has been to fashion a restoration of career trajectory free of the conflicts that led to the case, but recognizing the inevitable sensitivities.

#### *G. Gaining Implementation*

Although the Council could simply make a recommendation to the company president, the preferred strategy is to involve those in the company who must implement the recommendation. This strategy promotes accountability and learning, can improve the atmosphere, and helps in the re-establishment of workplace relationships and trust. Normally, the Council gets helpful cooperation when such officials are approached by one of the Council's company representatives. Occasionally, the persons with the necessary authority and knowledge are in DOE, and when approached, they have provided assistance and information, even though the Department is not represented on the Council.

Once the final recommendations are ready, mutual agreements and commitments are usually detailed in a collective sit-down with the employee and relevant management personnel. The company president and the employee are separately briefed by the appropriate combination of Council members, a recommendation letter is sent to the president as the charter requires, and a similar letter goes to the employee. Although there are exceptions, by this time there are no surprises and rarely any significant naysayers in the company line. The employee is also prepared to accept the recommendation. If the recommendation is accepted, and all have been so far, the end of the dispute is memorialized in a "closure document." If

there is an extant claim, the parties normally sign a legal agreement settling the matter. Otherwise a simple letter or memo is used.

The consensus recommendation, as the charter describes, is to be "presumptively implemented,"<sup>45</sup> not negotiated further with either the employee or management. Negotiation at that point would defeat the credibility of the independent review, since the process is purposely designed to take a fresh look and keep the previous history from interfering. Sometimes there is resistance from managers or staff experts who earlier were part of the conflict or provided staff support to prepare for possible future litigation or administrative appeals. Partly for this reason, the Council is explicitly chartered to make the recommendation to the president, not to the line manager or other staff, although as described above, the responsible officials are constructively engaged whenever possible.

Most cases are resolved with the employee satisfied, with the tensions largely removed and with a restored career trajectory. Managers are glad to be out of the conflict and have the safety issue solved. The company presidents have been universally pleased to have the problem solved constructively.

## VI. PREVENTIVE ACTIONS

The Council more recently has been able to play a useful role with preventive activities. Such a role has been aided by a charter revision<sup>46</sup> emerging from the 1996-1997 Council renewal discussions with Fluor Daniel Hanford Company, the contractor that followed Westinghouse. This charter revision invites the Council to bring up outside of a case context items that might benefit from management attention. Thus, in 1998, responding to the lack of sufficient preparation of first line supervisors to deal effectively with incipient whistleblower situations, many middle managers and other key staff, the Council, and Fluor Daniel Hanford co-sponsored a four-hour training session attended in shifts by more than six hundred managers, supervisors, and human resources staff. Video tapes and summaries were distributed to dozens of others. This effort at providing skills and perspective for constructive response to potential whistleblower situations was widely praised throughout the company and in the interest group community as providing new tools to better deal with safety questions. The training was performed by a Council member who was once in a dramatic whistleblower situation.

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45. See CHARTER, *supra* note 21, § 2.6.

46. See *id.* § 1.7 (stating that Council will periodically summarize and analyze trends and issues encountered in its work).

## VII. WHY DOES IT WORK?

The primary factors in the Council's success are: the membership composition and the tools it brings, including the capacity to immediately bring the right level of authority and perspective to the case; independence and neutrality; the fact that the system's existence, features, and its operating authority are the product of agreement by all relevant direct and indirect parties; the rule of working and recommending by consensus; the agreement to presumptively implement consensus decisions; the stable and rapid availability of a multi-tool mechanism; and mutual risk-taking to let the process work.

*A. Membership Composition is the Key Variable*

Because of the combinations of technical and interpersonal issues and the complex organizational structure and politics at the site, neither a group of disinterested technical experts, nor a stable of excellent mediators would be able to make sufficiently realistic or complete recommendations. Nor could such groups ensure implementation and acceptance. Therefore, neutrality in this system had to be a "knowledgeable neutrality," accompanied by influence in the company and in the whistleblower public interest community. Furthermore, the system would not have credibility or survive the prevailing controversial environment unless the key antagonists felt their core interests were protected. The route to a knowledgeable and accepted neutrality was found by combining member seats that would possess the required balance of expertise, authority and constituent credibility. It is this combination of member characteristics that yields the range of tools available.

Initially, it was thought that the Council could deputize a stable of mediators to work out the issues once the Council took jurisdiction of a case. Experience suggests, however, that most of the cases the Council accepts require a more hands-on involvement by the multifaceted neutral representation of the Council membership. Standard mediation can be used to settle employment or financial issues, as is common in other venues of workplace conflict, even in contentious circumstances. Mediating safety issues, however, seems less likely to succeed and raises a number of questions on its own. The return-to-work, protection and other features also seem to require more than simply agreement. Rather, the special sort of ADR made possible by the combination, and the active involvement of Council members makes it necessary to put into practice and to "sell" the recommendation to key constituencies whose agreement or assent is important to full resolution.

*B. Member Characteristics*

Recognizing the importance of gaining the appropriate balance, the characteristics for members were discussed at each stage of development and were ultimately summarized during Stage III in a paper called the "membership document."<sup>47</sup> This document was developed through joint discussions to more closely define expected roles, characteristics, and behavior.

Beginning with the interest groups, it became evident that those seats would require individuals highly credible to individual whistleblowers, to the whistleblower community, as well as to the environmental interest group community. The belief that the interest group members are not "selling out" safety issues or individual rights is critical to the credibility of the system. Their outside standing and current knowledge of the site helps them to be taken seriously by company officials and allows them to make decisions and commitments without undue checking back with others in the environmental community. Such checking back causes delays, compromises confidentiality and allows entry of interests unrelated to the issue on the table. These members must also be able to help whistleblowers who have become impatient to work in the mediation framework.

The interest group members must also be prepared to work across the table with company officials. At Hanford, the nature and history of the conflicts were such that the twenty-three member interest group coalition on site nominated, and the chair appointed, representatives who had the most background and credibility on whistleblower issues, i.e., from the Government Accountability Project's West Coast Office and from Heart of America Northwest. Parallel to the appointments process for the company seats, the chair appoints from among individuals nominated by the safety and environmental interest group coalition following consultation with key leaders.

The company members must similarly be highly credible within their organization since they will be asking managers and staff to rethink or reverse positions based on new insights the Council process may uncover, and will have to act without checking back, also to avoid delays, confidentiality breaches or extraneous considerations. They must have the ear and full confidence as well as instant access to the president of the company, and be capable of working with interest group leaders who, in other settings, may be publicly critical of the company.

The temptation by many observers is to assume that this is an industrial relations, legal, human resources, or complaint department function. How-

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47. See HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., HANFORD JOINT COUNCIL MEMBERSHIP RESPONSIBILITIES & CHARACTERISTICS 3-11 (1999).

ever, the substantial proportion of the company representation must come from those who have the authority to change operating decisions and practices and work out needed human resource responses. A senior human resources official has often, but not always, been part of the company team, and such a position brings important judgment, creativity, and influence in addressing the issues. Currently, the most senior contractor personnel officer is on the Council, along with two of the most senior operating managers and a series of "case-specific" members, mostly with operating authority in their respective areas. This has been a useful combination. By charter, the company presidents and chair consult on the appointment of company seats, and normally after discussion and review of the key requirements, several are nominated for consideration and then left to the chair to select.

For both interest group and company representatives, the nature of the issues require members who can exercise creativity and go beyond typical boundaries. They must have the clout and self-confidence to resist already-established positions on cases that have previously engaged lower level officials, staff offices, concerns programs, or other interest groups. Because of lingering opposition in a particular case or because of history of the site, substantial authority is sometimes required to put a resolution into place, to gain acceptance for it, and particularly to take the necessary actions in a timely way.

The Council charter at Hanford also provides a seat for a "respected former employee or other individual familiar with whistleblower experience, or with raising and resolving employee concerns."<sup>48</sup> This additional "advocacy" seat has proven invaluable to help bridge the cultural gulf that exists in the understanding of cases. The Council has been fortunate to have a former whistleblower, Billie Pirner Garde, unrelated to Hanford issues and who later became a plaintiffs' attorney, fill this seat.<sup>49</sup>

The remaining seats are for "two respected neutral leaders with management, technical or labor experience in industry or government, and who have experience in collaborative problem solving or alternative dispute resolution."<sup>50</sup> These individuals are trusted with tasks by both sides that could not be undertaken by a company or interest group seat, such as holding or reviewing sensitive information, as well as often providing ideas that help move away from an impasse and towards consensus. Christine Speith, formerly secretary-treasurer of a local union and respected on both sides of the table for her objective problem-solving skills, was initially appointed and remains on the Council contributing these traits to the process.

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48. See CHARTER, *supra* note 21, § 4.2.

49. See GLAZER & GLAZER, *supra* note 14, at 217 (narrating the story of Billie Pirner Garde and her whistleblower experiences).

50. See CHARTER, *supra* note 21, § 4.2.



These latter three seats — two “neutral” and one “respected former employee” — are filled at the discretion of the chair, after consultation with the parties on necessary characteristics, but not on individual names.

Distrust, the need for neutrality, and assurance that the parties would have influence in the appointment of the Council chair, led to a two-stage process for appointment. First, the key stakeholders identify and nominate a chair they find mutually acceptable. Second, the president of the main contractor appoints the chair. While he or she can reject a nominee, he or she can only appoint someone who has been nominated by the stakeholders, including those represented on the Council and those involved in the Council’s formation.

Ensuring that each members’ main calling is in their regular employment, only a modest honorarium for Council meetings and days on case work is provided for non-company seats, as well as reimbursement under government rules for travel and related expenses. Company members perform their duties without additional compensation and are expected to perform their regular jobs without interruption. The chair, by charter, is not to be a full-time position and receives part-time compensation. This “volunteer” nature of the membership is important in maintaining the positive tensions in the knowledgeable neutrality of the membership structure, the members’ relationship to their constituencies, and a priority on full and fair settlements, rather than on self-perpetuation.<sup>51</sup>

### *C. The Application of Sufficient Authority, Judgment and Resources*

When a case comes to the Council, it skips all of the remaining stops along the way to the usual impasse. In these more complex cases, the authority and technical expertise to resolve a safety issue does not reside in the first line, the concerns program, or the legal office, nor does the authority to take a second look at the personnel aspects.

The company members are at a level where they have a broad view of the situation and possible solutions, and can get the attention of any senior official and affect the allocation of technical and other resources. They can get action quickly, including the application of protection or in quickly implementing resolution steps. Safety issues can be resolved in real time, and some have been addressed within hours. The interest group members add to the perspective of the company members in understanding the nature of the situation and the probable legal and cultural course of the conflict, and provide leadership in dealing with the employee and also on some site-wide

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51. See BROCK, *supra* note 31, at 233-34 (discussing the value of volunteer members in such resolution mechanisms). Membership criteria are detailed in the charter. See CHARTER, *supra* note 21, at §§ 3.0, 4.0.

policies. This level of combined insight overcomes the common pattern of attempting to handle these cases without sufficient tools or authority, a key problem in resolving complex whistleblower cases.

#### *D. Independence and Neutrality*

Neutrality is critical to the success of any ADR process. A system tied administratively or financially to any of the parties would fail for lack of credibility, if nothing else. Thus, the structure and administration of the Council strives for neutrality and independence. The membership structure is at the core of neutrality, as is the complex appointments process, which provides each side with confidence that neither side controls the process.

There are also administrative considerations. The Council is an independent non-profit organization, administered by the mutually nominated chair and the neutral staff. It is not an arm of the government or the contractor, but rather operates on a separate lease, separate budget and separate staff. Crucial is financial independence and the longevity of the system — here the DOE is critical. The Department has earmarked funds upward of \$500,000 annually (the Council has never spent that much, the most recent completed year saw expenditures of about \$390,000) for Council operations. The Department is the guarantor of the Council's existence, because its use is mandated in the main site management contract, and is set for an initial undisturbed period of five years, subject to renewal. DOE's willingness to budget the necessary amounts and allow reimbursement to the companies for settlements under the Council's jurisdiction is a key incentive, since contractors can be reimbursed for most litigation costs under current DOE policy. There must be an equivalent or better financial reason to engage in settlement.

The operating funds are controlled exclusively by the Council, administered by the chair and staff while no manner of pre-approval of expenditures by DOE or the companies is involved. Any party that could affect the flow of funds could also affect the Council's ability to intervene in cases and the timing or application of tools, thereby eviscerating the independence and neutrality. The independent authorities are formally documented to assure that actions can be taken without delay, yet are in compliance. The Council scrupulously follows federal procurement and related financial requirements in an effort to merit the independence necessary. A financial audit is carried out each year, and other operational audits occur periodically. The Council retains independent legal counsel from a respected regional firm. This degree of independence is essential to operations, confidentiality, and credibility. Implementing an independent structure within the DOE environment required careful arrangement of financial and administrative parameters.

The Council strives to have its staff arrangements and day-to-day administration merit the confidence of members, their constituents, and those who deal with the Council. Important in this mechanism and in those cited in the research above is the existence of neutral, unaffiliated staff, with no history working on the site. Council offices are in rented space away from any of the common company or government facilities. The staff (usually approximately one-and-one-half full-time employees at any given time), is careful to respect the confidentiality and rights of parties by ensuring that they receive information to which they are entitled in a timely and considerate way. Information about a case is shared on a need-to-know basis only, and strict procedures befitting a mediation forum are followed. Any appropriate courtesies are extended in an effort to have the Council office be safe ground for candid and creative discussion.<sup>52</sup>

#### *E. The System is the Product of Agreement*

The careful and thorough discussions that led to the formation of the Council, including the charter agreement, represent an easily forgotten yet critical element of the Council's success. In a controversial setting, the support and assent of the major direct and indirect parties using the system are especially necessary. The pressures on the disparate interests and innate suspicions outside of the Council, particularly in controversial cases, would overcome even a brilliantly designed system if there was not agreement both on its value and on a clear set of procedures. If the system was not jointly "owned" as a result of the initial, and then later, charter discussions and by successful experience, any number of cases would have been too controversial to resolve. Parties could easily have backed away from the Council's recommendations.<sup>53</sup>

#### *F. The Use of Consensus, Joint Practices and a Problem Solving Orientation*

All of the casework described above relies on the Council's practice of performing tasks in a joint fashion. Data collection, interviews, and initial development of recommendations are all done in work groups composed to bring all perspectives to bear and explore any suspicions or uncertainties. Interviews, for example, during a case assessment are done with a three or four person subcommittee. Final actions are by consensus of the full Council.

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52. See BROCK, *supra* note 31, at 239-41, 248-51 (discussing the importance of neutral administration and staff competence).

53. See *id.*; see also Brock & Cormick, *supra* note 31, at 162 (discussing the need for agreement among the key parties).

Joint work at each step of the process has helped to ease another barrier: the cultural chasm between the world of the whistleblower and that of the company manager. The managers, engineers and other officials enter the process often with limited understanding of the mind set and experience of a potential or active whistleblower. The whistleblower and the interest group community enter with a limited idea of corporate dynamics and decision making. The constant joint work allows respective insights to develop and assist case resolution, and many actions and positions have been reversed or modified as a result. Individual neutrals and administrative bodies would have more difficulty in providing this dimension of insight and change in actions, particularly in real time.

The use of a consensus rule for all case actions means there are no winners or losers, making it easier to begin the next case. All members are bound by consensus decisions, and the manner in which the Council pursues consensus ensures that all members' issues are dealt with in the resolution. A perceptive memo on how a group works with its individuals in achieving consensus was prepared by Gerald Cormick, and has been a key guide for the group.<sup>54</sup>

#### G. *The Certainty of Implementation*

The concept of "presumptive implementation" was painstakingly developed by the knowledgeable parties in the charter discussions.<sup>55</sup> It was needed to deal with the practical and legal question of how to ensure implementation of the Council's recommendation, without violating the company's legal responsibilities under its contract. By pairing a consensus requirement<sup>56</sup> with presumptive implementation, companies are protected since consensus requires the assent of the company representatives, and the interest groups can be assured of a real commitment to the process. The Charter's exceptions clause<sup>57</sup> allows the company president to reject recommendations that violate safety or fiduciary responsibilities under the contract with the government; however, the company president must justify any rejections in writing.<sup>58</sup> The company would be retaining its legal responsibilities yet permitting the Council a full scope of review and recommendation by agreeing in advance to accept consensus recommendations but still fulfilling its contractual obligations. The risks to either party of

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54. See HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., POLICY & OPERATING GUIDELINES 3-5 (1995) (reprinting July 1993 Cormick memorandum outlining consensus process).

55. See CHARTER, *supra* note 21, § 2.6.

56. See *id.* § 2.5.

57. *Id.* § 2.6.

58. *Id.* § 2.7.

providing impractical recommendations or rejecting a practical one were seen as too great, making likely the workability of this implementation-consensus nexus.

Thus far, all recommendations have been accepted, but many have required significant inside mediation work to ensure that the features merited and gained acceptance and were free of legal or regulatory barriers. The practical guarantor of implementation, however, is the fact that there is agreement among individuals with the clout to make the implementation happen. The Council also has the chartered power to request a status report on items it has recommended. In several instances, the Council has exercised that prerogative.

#### *H. Constant Availability and Rapid Action*

Whistleblower disputes arise in many different ways, with different technical issues, under different supervisory arrangements and organizational cultures. This process can work on almost any issue, no matter how it arises or how it is packaged. All of the issues can be immediately and comprehensively transformed from an escalating circumstance to one of resolution primarily because there is a stable presence available with the flexibility to respond. Even a skilled mediator would take time to be brought into the scene. Also, a mediator would not have these tools or authority available, but would have to assemble them, if that were even possible, at the risk of further escalation. The continuity offered by this stand-by capacity is central to resolving complex conflicts that are at a flash point, and allows knowledge to build concerning how to address and resolve these disputes.

#### *I. Willingness to Trust the Process*

Trite though it may sound, the willingness of the interest group and corporate representatives to trust the process is critical. As with other dispute resolution systems or mediations, the real value emerges when everyone comes to the table focused on solving the problem rather than trying to "control" or steer the discussion to a particular conclusion. The parties on the Council have shown a real willingness to do that, although the buffeting at Hanford on other issues presents a constant challenge to the atmosphere of trust that allows risk-taking to occur in the Council. Some very complicated issues have been sorted out and consensus quickly reached by members combining their experience and insight into a fresh look at the problem. The independence of the forum and presence of senior leaders from each side with no history in the case allows a totally new look, free of pre-

vious positions, helping to avoid the temptation to steer the outcome. But risk-taking is still required.

#### IX. BENEFITS

Compared to the obviously available alternatives, this somewhat unusual process seems to provide useful benefits. For the government, it solves a previously unsolvable type of conflict representing an important public policy concern, namely that whistleblowers be able to express their views and have issues addressed without retaliation. The government is also concerned that the contractor not be diverted. Prior to this system, the complex cases at Hanford normally ended up in the courts, the press and the political process. Now, the issues are being handled quickly, close to the source, and with a minimum of conflict and diversion.

The time and cost savings have been quite substantial. The Council has worked on perhaps ten to twelve significant cases a year, each costing on average about one-sixteenth of what the same cases would have cost had they gone on in the old ways. For the companies, the indirect costs in management time used to be measured in months, and the issue lingered for years. Now cumulative management time can be measured in days and the diversion from corporate obligations to site operations is negligible. The reputations of supervisors and managers — and public confidence in the company or the government — are no longer affected by motions, depositions, news stories, or periodic legislative queries.

The Council membership and process allows the problem to be walked back to a point where the company plays a central role in resolving it so that the employee's legitimate interests are served without interfering with the company's contractual responsibilities. The Council system almost automatically creates learning among the company managers involved about how to better handle such issues and usually involves the straightforward correction of some safety practice or problem. There is real pride when managers, employees, and interest group representatives participate together to resolve a safety practice that benefits the mission and improves the safety of co-workers and others.

For the company there is a strong desire for closure. Many of the older whistleblower cases, predating the Council, lasted for almost a decade. Some of the conflicts related to several of those cases continue today. The Council system provides greater closure, possibly because of the broader scale of resolution allowed by the array of available tools, the fact that it creates agreed-upon outcomes without winners and losers, and the fact that implementation is overseen by company officials who helped shape the arrangements and is supported by key interest groups.

Certainly, the employee and the interest groups also benefit from closure. For an employee who has felt disrespected, there is the opportunity to participate professionally in solving the safety issue. Some employees have participated in preparing reports or briefings for senior managers as part of the resolution. In this less formal process, whistleblowers' attorneys observed far less uncertainty and anxiety, and for a shorter period of time, perhaps because of the speed, minimization of escalation, and direct participation. All of these limit the degree of isolation otherwise experienced. Stability of the outcome is assisted for both parties by the inclusion, as necessary, of a plan for reentry or restoration to the workplace.

The interest groups also benefit. They have long been pursuing full and fair resolutions. Now, they spend less time on the conflicting aspects of whistleblower cases. Rather, in addition to participation in addressing aspects of site safety, interest group representatives participate in an activity which helps to protect and strengthen the right of employees to question established practices. Unlike litigation and related settlements, the safety issue is always addressed. Because of the recusal and related safeguards, the interest group representatives can play their normal role in the DOE complex. The training program referred to above is an example of the positive, prevention oriented activities that can be spawned with their involvement and which go to the center of their organizations' goals.

#### X. REPLICABILITY

There is periodic discussion about replicability and whether this could be used in other corporate settings, inside or outside the nuclear industry where whistleblowing is a factor. Dr. A. Lamar Trego, president of Westinghouse Hanford when the Council was established, said of the Council system: "[I] view it as a fundamentally new management technique that will surely become the approach of choice by forward-thinking organizations striving to achieve maximum productivity with due regard for the safety of their workers and the environment."<sup>59</sup> Whistleblower advocates also are impressed with the system, and would like to see it used elsewhere.

The system seems to hold promise, but success is not automatic and depends upon the application of features and principles to a specific setting and expected issues. However, there are probably some common success factors: Any successful adaptation at another site or type of workplace would have to be a product of agreement between the relevant direct and indirect local parties who are concerned with these issues. Just as the Hanford parties had a lengthy period of discussion and frank exploration of what could work, the same type of exploration and agreement would be

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59. See REPORT OF THE HANFORD JOINT COUNCIL, *supra* note 5, at 11.

necessary elsewhere. Just as at Hanford, the discussions cannot simply be among professors at a nearby university, among DOE and company staff, or just among the interest groups; nor can it be just among the people regarded as "reasonable." All relevant direct and indirect parties, representing the most senior levels have to be in the same room, with a skilled convener like Dr. Cormick, to explore the possibilities for agreement on a realistic system.

Even this early exploration process cannot be closely controlled by one of the parties, not even the government. To illustrate the sort of independence necessary, even at this stage, the work group that formed the Hanford charter was selected by Cormick — not by DOE, Westinghouse, or the interest group — after consulting with the interest groups, the company, and DOE. For a set of parties accustomed to trying to gain the upper hand, this degree of "letting go" is a risk that must be taken by everyone. The neutral has to work to lower those risks and build mutual confidence.

Any adaptation of the Council system would need to ensure that the new mechanism, its membership, and tools are congruent to the substantive, organizational, and political boundaries of the problems it will seek to resolve.<sup>60</sup> A proper membership structure possessing sufficient credibility and authority will be critical to provide the necessary tools, as will the quality of members chosen through a credible appointments process. The seats do not have to be exactly the same as at Hanford, but the seat composition must be agreed upon and relevant to the issues and implementation needs that will be encountered.

The system must be completely independent and have the necessary features to assure neutrality in practice and appearance. The specific features that assure neutrality can be different, but the assurance would be critical. There must be a clear grant of authority and operating funds, as well as mutually understood limits, regarding case handling and resolution, as in a charter. Without independence from governmental, corporate and interest group control, the system will not be trusted nor will it operate freely. Presumptive implementation or a similar guarantee of action would seem necessary, and consensus decision-making will prevent the system from breaking down and protect all parties.

Even at Hanford, when contractors changed, a significant period of discussion was required to develop renewed commitment and trust among a new set of players, and to make some adjustments in the charter to reflect relevant changes on the site. As one example, the feature of case-specific seats was added to provide for a representative from each of the major sub-

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60. See Brock, *supra* note 31, at 227-31; see also Brock & Cormick, *supra* note 31, at 163.



contractors. While the system at Hanford is designed and operated based on well-established dispute resolution principles, those principles are clearly adapted to the local circumstances and needs, and practices are periodically reviewed.

Since the format detailed in this Article has been established, any adaptation would not require the two years of "invention time" and preceding stages. However, the parties that will use the mechanism must be party to its creation, so there must be time to engage those individuals in substantive discussion and relationship building. Six to eighteen months would seem sufficient, rather than the three and a half years needed to start the first one of its kind.

Because the Council system does fill a need where most standard conflict resolution processes fail in safety-sensitive environments, the principles used here may well have value elsewhere. The system cannot be airlifted from Hanford to another site, but the materials and work done could be a starting point for joint discussions elsewhere. Such discussions will be productive if they yield a system that the parties are willing to trust sufficiently to allow its independence.<sup>61</sup>

#### XI. SUMMARY

By ensuring that the system itself is both a product of agreement, and a reflection of the key principles necessary, and by carefully forming the mechanism, the Council has worked successfully under three DOE Secretaries, two separate and differently structured contractor organizations, four CEOs, and several dozen cases. The Council has never failed to resolve a case in which it took jurisdiction, and can boast that no case within its jurisdiction at the time of occurrence has been the subject of litigation or controversy. It can also boast that it has resolved cases that were already in litigation or the newspapers. The Council has shown the ability to design special mediation processes for other kinds of cases and has sponsored preventive actions to contribute to site safety.

The Council system has been created without curtailing any rights or obligations held by employees or companies under current law or regulations. Company officials maintain their responsibilities for accomplishing the site mission, and interest group members are free to criticize site operations and related matters. All parties, however, are restricted from using information gained in Council work or from commenting to others or publicly on Council cases. Council generated information remains protected, yet all information regarding safety hazards is reported in the same manner

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61. See Brock & Cormick, *supra* note 31 at 164.

that is required under laws related to nuclear facilities, and any other violations of law must be reported.

The system allows a broader range of tools than other available mechanisms in this arena. The range of action is made possible by pooling and focusing knowledge, stature and authority of senior company officials, interest groups, and selected community leaders under an agreed-upon charter, preferably at an early point in the conflict.

After a decade of conflict and deadlock, headlines and lawsuits, and millions of dollars expended in legal fees and settlements, the Joint Council system now achieves by agreement and consensus what eluded litigators, nuclear safety advocates, policy makers, corporate officials, capable managers, and front line employees acting on their own in the more fragmented legal and organizational setting typical of these conflicts. By the use of an agreed-upon and flexible system, a unified approach allows all of the factors — whether technical, historical, interpersonal or otherwise — to be taken into account and any reasonable tool can be applied in combinations and sequences that no existing forum permits for complex whistleblower cases. The system is faster, cheaper, and more effective in resolving such cases by orders of magnitude over the alternatives. The use of consensus and a commitment to presumptive implementation gives the system integrity and reliability for the interests of all parties.

While not yet fully developed, the Joint Council system seems to offer a useful application of alternative dispute resolution to obtain full and fair solutions to whistleblower conflicts, without legislation or regulation. This is accomplished by offering a special mediation instrument to fit a complex, and often controversial, safety-sensitive work setting.