

The FMCS contribution to nonlabor dispute resolution

During the 1961–80 period, the Federal Mediation and Conciliation Service shared its expertise with parties outside the labor-relations arena; results demonstrate the promise of mediation for the speedy, low-cost resolution of many different types of economic and social conflicts

JEROME T. BARRETT

Four formal procedures—litigation, arbitration, negotiation, and mediation—are commonly used for the legitimate resolution of disputes between individuals or groups. In litigation and arbitration, a third party is empowered to decide the issue in question. Negotiation has the advantage of allowing the parties to participate fully in developing a solution with which each can live. Mediation blends the advantages of the other three methods, employing an objective third party, but leaving the decision on the outcome to those who must abide by it.

Since its establishment in 1947, the U.S. Federal Mediation and Conciliation Service (FMCS), the oldest and largest mediation agency in the world,¹ has acquired considerable expertise through the resolution of labor-management disputes. During the past two decades, the Service increasingly shared its skills by helping to resolve disputes outside the private-sector industrial relations arena. This article reviews the recent contributions of the Service to problem resolution in nontraditional areas. The discussion is based on FMCS documents, interviews with mediators and recipients of Service assistance, and the author's own experience as former head of the staff involved in the expanded scope.

Jerome T. Barrett is on leave from Northern Kentucky University while on assignment with the Bureau of Labor-Management and Cooperative Programs, U.S. Department of Labor.

Testing new waters

Prior to the appointment of William Simkin as director of the FMCS in 1961, the Service had not worked beyond its legislative mandate in private-sector labor-management relations. The emergence of public employee unionism in the 1960's changed this.

Although the Service lacked legislative authority to handle disputes between public employees and their employers, no other organization was available in most instances to provide assistance. In response to public pressure and the urgent requests of the parties, the Service began providing mediation on a case-by-case basis. Because many of these public employee disputes in large cities were civil rights disputes as well, the Service was drawn further afield from its usual work into new and unfamiliar areas.

J. Curtus Counts, who followed Simkin as FMCS director in 1969, continued the policy of *ad hoc* mediation of public employee disputes, but otherwise made no changes in the mission of the Service. However, the appointment of William Usery to the post in July 1973 ushered in what was to be a major growth period for the agency. By strongly urging an expanded role for the Service, Usery persuaded the Administration and the Congress to increase his staff and budget accordingly.

In 1973, Usery's plans for the Service led him to create the Office of Technical Services within the agency's national

office. This office was to coordinate and promote technical assistance cases, conduct an improved professional development program for the mediators, provide a technical information and research function to assist the field mediator, and experiment with new uses of mediation. During the 4 years of its existence, the office was the focal point of an increasing amount of non-labor-relations work within the Service.

In early 1974, Usery convened a 3-day meeting of all Service managers to discuss the agency's role. The major result was the adoption of a five-part mission statement. While four parts specifically referred to labor-management relations, the fifth envisioned an expanded role in "[d]eveloping the art, science and practice of dispute resolution." This mission statement remains in effect today.

During the oil crisis in 1974, Director Usery personally became involved in some non-labor-relations disputes between independent truckers and oil companies, and between independent gas station operators and the oil companies. In the same year, the Service undertook what is probably the most noteworthy example of nontraditional mediation, the settlement of a longstanding dispute between two Indian tribes.

The Hopi-Navajo dispute. Geographically the largest Indian reservation in the United States, covering 2½ million acres in northeastern Arizona, the Hopi-Navajo reservation had been created by executive order in 1882. There followed years of disagreement over land use by the two tribes, during which many traditional dispute-resolving procedures were used with only partial and temporary success. In 1974, Congress enacted a statute directing the FMCS to try to mediate the dispute.

Accordingly, the Service hired former Director Simkin as principal mediator for the project. Congress appropriated \$500,000 to finance the mediation, and \$50 million was made available to other Federal agencies to help implement the settlement by relocating fences, villages, families, burial grounds, and monuments. If settlement were not fully achieved within 6 months, the mediator was to make a report with recommendations to the Federal District Court.

After months of work by the mediation team, supported with information from other government agencies, agreement was reached in principle on most issues. The mediators' report and recommendations to the Federal Court were adopted and enforced by the terms of a March 1977 ruling. However, because many questions remained on the implementation, the court and the tribes requested that the mediation effort continue. For the next year, Simkin continued to help the parties on an as-needed basis.

The success of this mediation effort was praised by the court, the tribes, the Bureau of Indian Affairs of the Department of the Interior, and the media. The length of the dispute, the sacred nature of some issues, the uniqueness of the Indian culture and habits, and the failure of the nu-

merous prior efforts to settle the problem all had contributed to the difficulty of the mediation project. But unlike the earlier efforts—treaties, litigation, court orders, executive orders, and acts of Congress which produced answers to narrow questions—mediation allowed the parties to deal with their needs and desires, and in that way to develop solutions with which they both could live.

The Home Owners' Warranty program. Another extensive project begun during the Usery directorship involved the Home Owners' Warranty (HOW) program of the National Association of Home Builders. The HOW program was started in 1973 as a method of formally resolving disputes that arise between home builders and home buyers. The program, provided under a warranty, used mediation and arbitration to resolve differences. Before HOW was created, the National Association of Home Builders came to the FMCS for advice and assistance.

The Service provided numerous suggestions on how the program might work, and extensive help in preparing and conducting more than 20 training sessions for HOW staff throughout the country during 1973 and 1974. Once the program was operating, technical advice was offered to HOW conciliators who encountered mediation problems. And in 1976, when the Federal Trade Commission issued rules on warranties and guaranties under the newly passed Magnuson-Moss Bill, the Service assisted HOW in getting approval from the commission for the program to operate as an experiment under the new rules. Without this approval, HOW mediators trained by the FMCS would have become ineligible to participate in dispute resolution.

The Oglala Sioux election. Former Deputy Director James Scarce became Director of the FMCS in the spring of 1976. As Deputy, Scarce had acted as the liaison with the Bureau of Indian Affairs and other Federal agencies during the Hopi-Navajo mediation effort. As a result of these contacts, the Oglala Sioux Tribe of Pine Ridge Reservation in South Dakota contacted Scarce in 1975 to discuss its need for a neutral organization to oversee a tribal election. (The previous election had been hotly contested and the results controversial.) After considerable discussion—and an urgent request from the Bureau of Indian Affairs—the Service agreed to help.

The Pine Ridge reservation, geographically the second largest in the country, was home to 12,000 tribal members and 3,500 non-Indians. Twenty-one polling places were needed to cover its 2 million acres. The Service was to oversee the election conducted by the tribal election board by developing the election rules and procedures, training the election judges and observers, and providing a trained election adviser at each polling place during the primary and general elections. These advisers were FMCS mediators and retirees from the Department of Labor and the National

Labor Relations Board who were selected by and who worked under the direction of the Service.

Both elections were held without major problems during January 1976.²

Federal agencies. A number of Federal agencies also requested help from the Service during the tenure of Usery and Scarce. A few examples will illustrate both the types of requests and the Service's responses.

- *Community Relations Service (CRS).* The CRS is a branch of the U.S. Department of Justice charged with mediating civil rights disputes. During 1973–79, FMCS helped develop position descriptions for its mediators, conducted a number of training sessions for the mediators, developed an internship program, and arranged for liaison between field mediators of the two agencies in cases involving both civil rights and labor relations.
- *Federal Bureau of Investigation (FBI).* The FBI training facility in Quantico, VA, conducts training for State and local police officers. At the Bureau's request, the FMCS in 1975 critiqued training sessions and instructional materials intended to aid officers in dealing with domestic disputes and hostage taking. The Service also helped develop suggestions for nonviolent response to these explosive situations.
- *Department of Commerce.* Between 1976 and 1980, the Service helped the Science and Technology Division of the Commerce Department develop a system to resolve disputes over voluntary standards for manufactured products.
- *Law Enforcement Assistance Administration and Equal Employment Opportunity Commission.* The Service provided mediation training to the staff of both agencies.

The Washington Lab. During much of the 1973–77 period, the Service's Office of Technical Assistance responded to the many opportunities in the Washington, D.C., area to provide assistance in resolving nonlabor disputes. This was a mutually beneficial arrangement—the parties were guided toward long-term solutions for their problems, and the Service got the opportunity to experiment and apply its skills in new areas. The range of Service activities included: 1) mediating a racial dispute within the District of Columbia fire department; 2) setting up a procedure for settling disputes between landlords and tenants in the District, and mediating several cases to help get the system working; 3) mediating a racial dispute between custodians and teachers in the Arlington County, VA, schools; 4) working behind the scenes with the Environmental Protection Agency, the Steelworkers union, and an interested citizen group on a proposed District of Columbia City Council ordinance banning the sale of beverages in cans; and 5) training the staff of the Montgomery County, MD, Consumer Complaint Office in negotiation and mediation skills.

The later years

Wayne Horvitz, who became Director of the FMCS in April 1977, was acquainted with nontraditional mediation, having spent 2 years as a consultant to the National Center for Dispute Settlement during the late 1960's. During his tenure, the first continuing use of FMCS mediators in non-labor-management cases began with age discrimination disputes. Under the Age Discrimination Act of 1975, discrimination on the basis of age is prohibited in programs and activities that receive Federal funds. Responsibility for enforcing the Act was assigned to the Secretary of Health, Education, and Welfare (HEW). Following months of discussion and planning, the FMCS and HEW developed a system for handling these cases that featured mediation. The uniqueness of this system was emphasized by HEW Secretary Califano in a 1978 speech on aging:

We propose, for the first time in the history of civil rights enforcement, to enlist the Federal Mediation and Conciliation Service to review claims of discrimination and resolve them, within no more than 60 to 90 days. No other civil rights program in our government employs such a process of third party mediation. But perhaps, in time, every one of our civil rights programs should feature such a mediation process.³

FMCS used the introduction of this program to test a modified "assessment center" concept for recruiting, selection, and training.⁴ An evaluation phase was conducted using an innovative case handling system: In one-half of the Service's regional offices, the cases were mediated by specially trained FMCS mediators who also continued to handle their normal labor-management caseloads. In the other regions, individuals from outside the agency were selected to mediate on an as-needed basis. These persons, called community conciliators, were recruited and trained through various community-based mediation centers.⁵

During the first 18 months of the program, the Service handled a total of 94 age discrimination cases, with 55 percent requiring no further action after mediation.⁶

Helping other Federal agencies. The Horvitz directorship was characterized by an increase in the amount of non-labor-management work done by the Service for other Federal agencies. One such effort involved the Office of Environmental Planning of the Federal Highway Administration (FHA), which contacted FMCS in the spring of 1979 to discuss its need for training in negotiation skills. The employees of FHA and their State counterparts were involved in the condemnation of property and the exercise of eminent domain in the construction of highways, activities which often give rise to conflict. After discussions over several months, an agreement was reached between the two agencies providing for the detailing of two mediators to learn more about environmental disputes and the work of the FHA, and several week-long training programs by FMCS covering a variety of dispute-resolving methods such as negotiating, prioritizing, consensus building, and problem solving.⁷

The Service also received requests for training assistance from a number of other agencies which had concluded that their programs would be helped by having a staff more skilled in conflict resolution. Among these agencies were the Veterans' Reemployment Office of the Department of Labor, the Office of Civil Rights of the Department of Health and Human Services, and the Department of Housing and Urban Development. Some agencies simply sought advice on how to systematically deal with conflicts. Although staff time limited the number of requests which FMCS could satisfy, such help was given to the Division of Standards and Regulations of the Environmental Protection Agency, the Environmental Office of the Department of Energy, and the Council on Environmental Quality within the Executive Office of the President.

Non-Federal work. Although the emphasis during the Horvitz directorship was on helping Federal agencies, some assistance was given to other organizations. A few of these cases, discussed below, will demonstrate the nature of these Service efforts.

In 1979, FMCS and the Home Owners Warranty (HOW) program staff cooperated to create the National Academy of Conciliators to assume responsibility for administering the HOW program and to provide other dispute settlement services. Over the next 2 years, the Service gave extensive assistance to the Academy in developing its staff. Since its establishment, the Academy has served more than 30 clients in dispute settlement work, and continues to increase its role and impact in new areas of dispute settlement.

In 1978-79, the Service provided assistance to the Family Mediation Association, a nationwide organization of lawyers, psychologists, marriage counselors, social workers, and clergy. Since its establishment, the Association had typically employed a very formal and structured form of mediation in its sensitive and important work. At the request of some Association members, FMCS undertook a cooperative training and consultation program, which ultimately resulted in some modification of the formal mediation techniques.

In a 1980 case, the Attorney General of Alaska requested FMCS assistance in developing a dispute settlement system for land use problems. A new State law required local governments to clear their land use plans with the Alaska Coastal Management Council. The Council wanted to adopt a dispute settlement system that could resolve conflicts among local planners, natives, and land resource developers. A State Assistant Attorney General met with FMCS in Washington, D.C., to discuss a system that would include Service participation. A mediator then traveled to Alaska to meet with the Council and to discuss the system and the FMCS role in it. The Council adopted the system, which designated FMCS to select and assign mediators as disputes arose.

In a final example, the FMCS was asked to serve in an advisory capacity on a project funded by the Department of Education and administered by the National Association of

Social Workers. The intent of the project was to apply mediation techniques to conflicts arising from a law requiring the educational mainstreaming of handicapped children within public school systems. During 1979-80, the Service provided advice and suggestions to, and shared instructional materials and training strategies with, the director of the mainstreaming program.

Mediators carry on the tradition

Because of budget cuts in 1981 and 1982, all Service involvement with nonlabor work was stopped, except for a small program dealing with age discrimination mediation. However, interviews conducted by the author with FMCS field mediators during 1983 revealed that many of them continue to initiate their own work in the nonlabor field, motivated by personal interest, opportunity, community involvement, feelings of professional responsibility, or intellectual curiosity. The range of activities reported by these mediators includes providing general or specific information about mediation; providing training; helping to develop dispute settlement systems; and the actual mediation of cases. Examples of recent projects undertaken by interviewees provide evidence of the value of mediation to such diverse entities as governments, communities, universities, minority groups, troubled families, and even to the Nation's judicial system. It is noteworthy that most of the mediators who reported taking on nonlabor cases enjoyed the work and intend to continue their involvement in some capacity.

CERTAINLY, the use of nontraditional mediation has increased greatly during the past 10 years. Given the experience of FMCS in mediation, and its demonstrated willingness to share that expertise, there is no doubt that the Service contributed immeasurably to the evolution and spread of this highly effective, low-cost means of conflict resolution. □

—FOOTNOTES—

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¹Through its predecessor organization, the U.S. Conciliation Service, the FMCS can trace its history to the creation of the U.S. Department of Labor in 1913.

²Federal Mediation and Conciliation Service, "Report on the 1976 Primary and General Election of the Oglala Sioux Tribe, Pine Ridge Indian Reservation, South Dakota," February 1976.

³Joseph A. Califano, "Remarks to the National Journal Conference on the Economics of Aging," Nov. 30, 1978, Washington, D.C.

⁴Jerome T. Barrett and Lucretia Dewey Tanner, "The FMCS Role in Age Discrimination Complaints: New Uses of Mediation," *Labor Law Journal*, November 1981, pp. 749-50, describes more fully the assessment center concept, which relies heavily on training through case studies and role playing exercises.

⁵Because of budget cuts in 1981-82, the community conciliators were fired. Age discrimination mediation is now performed exclusively by FMCS mediators.

⁶See Barrett and Tanner, "The FMCS Role," pp. 745-54.

⁷Jerome T. Barrett, "Skilled Are the Peacemakers," *Northeast Training News*, June 1980, p. 19.