

UNITED STATES OF AMERICA  
before the  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
Board of Contract Appeals

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In The Matter of:       :  
                              :  
JAMES SETON FOSTER,     : HUDBCA No. 93-C-119-D67  
                              :  
                  Respondent. : Docket No. 93-2075-DB(LDP)  
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JUDGE COOPER: We'll be on the record. I am now going to read into the record my decision in the matter of James Seton Foster, Respondent, HUDBCA No. 93-C-119-D67, Docket No. 93-2075-DB (LDP):

DETERMINATION

BY ADMINISTRATIVE JUDGE JEAN S. COOPER

January 14, 1994

STATEMENT OF THE CASE

By letter dated June 21, 1993, James Seton Foster, Respondent in this case, was notified that a Limited Denial of Participation (LDP) had been imposed on him by the manager of the Minneapolis - St. Paul Office of HUD. The LDP prevented Foster from participating in all housing programs of HUD under the control of the Assistant Secretary for Housing within the State of Minnesota

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1 for twelve months.

2                   The stated basis for the LDP was two-  
3 fold. First, the LDP was imposed because Foster  
4 received four unacceptable ratings on his  
5 performance as an appraiser of four separate  
6 appraisals during the prior twelve months. Second,  
7 the LDP was imposed because of alleged  
8 falsification by Foster of employment experience on  
9 his application to be approved as a HUD staff  
10 appraiser. Each of the two reasons was stated by  
11 HUD to be sufficient to justify the LDP, without  
12 reference to the other reason.

13                   Foster was given an opportunity to  
14 request an informal conference on the LDP, which  
15 became effective on June 21, 1993. Foster made a  
16 request for an informal conference at which he  
17 could present evidence that the LDP should be -  
18 terminated or modified. After the informal  
19 conference, which was conducted by John Buenger,  
20 Director of the Housing Development Division of  
21 HUD's Minneapolis office, Foster's LDP was  
22 modified. It was reduced to a period of six months  
23 from one year, to expire on December 21, 1993. The  
24 scope of the LDP was narrowed from all programs  
25 under the control of the Assistant Secretary for

1 Housing to Foster's participation as an appraiser  
2 in Departmental programs. The written decision  
3 modifying the LDP, dated August 16, 1993, upheld  
4 the imposition of the LDP based on four appraisals  
5 performed by Foster that received unacceptable  
6 review ratings, but found inadequate evidence to  
7 support the false statement ground for the  
8 sanction. The written decision, in upholding the  
9 LDP, rejected Foster's contentions that the four  
10 unacceptable ratings on appraisals performed by him  
11 was due to the personal animus of the reviewer, Joe  
12 Menke, that Foster was being singled out for  
13 punishment, or that the errors on the appraisals  
14 were either minor or caused in part by HUD's  
15 failure to clearly state Departmental guidelines  
16 and rules for appraisals.

17 Foster appealed from the modified  
18 decision, requesting a hearing pursuant to 24  
19 C.F.R. Section 24.713. That hearing was held in  
20 St. Paul, Minnesota on January 10 through 14, 1994.  
21 This determination is based on the record made at  
22 that hearing, together with the pre-hearing briefs  
23 filed on behalf of the parties. The parties have  
24 agreed to the issuance of a bench decision in this  
25 case pursuant to 24 C.F.R. Section 26.24 (d).

FINDINGS OF FACT

1  
2 James Seton Foster is a licensed real  
3 estate appraiser in the State of Minnesota.  
4 Starting in approximately January, 1992, he began  
5 working as an appraiser for Goldstar Mortgage as a  
6 HUD-approved staff appraiser. By September, 1992,  
7 Foster had left Goldstar and was working at Bell  
8 Mortgage, also as a HUD-approved staff appraiser,  
9 and continued in that employment until at least  
10 June, 1993. Bell Mortgage is a direct endorsement  
11 lender, D.E. lender, approved by HUD. Foster is  
12 currently working as an appraiser performing  
13 appraisals on properties that will be purchased  
14 with conventional mortgages only. He began his  
15 career as an appraiser assistant in 1987 or 1988,  
16 and became a licensed appraiser in Oregon in late  
17 1988. He had no experience with FHA-insured -  
18 mortgages or FHA appraisal requirements until he  
19 applied to be a HUD-approved staff appraiser for  
20 Goldstar Mortgage.

21 Foster received personalized training  
22 of approximately six hours before becoming a HUD-  
23 approved staff appraiser. That training was  
24 provided by Joseph Moses, a Senior Review Appraiser  
25 at HUD who has been conducting the appraiser

1 training program at HUD for many years. Moses has  
2 been a real estate appraiser since 1971, and is  
3 licensed in Minnesota. Foster was given copies of  
4 the necessary HUD handbooks, in particular, HUD  
5 handbook 4150.1-REV-1. He was also given a  
6 document entitled "Reject Reasons". The "Reject  
7 Reasons" was a one-page list of conditions that  
8 would require an appraiser to reject a property for  
9 an FHA-insured mortgage. Item V-44 on the list  
10 states, "One-lung furnace that is inadequate for  
11 size of dwelling."

12 Foster has no recollection of Moses  
13 explaining how to determine whether a one-lung  
14 furnace is inadequate for the size of the dwelling,  
15 or of stating any other HUD policies or program  
16 requirements concerning the rejection of properties  
17 with one-lung furnaces. Moses is positive that he  
18 informed Foster, as he does all new appraisers,  
19 that an appraiser must always reject a property  
20 with a one-lung furnace, except in a circumstance  
21 where the dwelling was very small, approximately  
22 500 square feet, and no room entry was more than 20  
23 feet from the central grate that emitted the heat  
24 for the dwelling. Moses also stated that a one-  
25 lung heating system, which is based on one central

1 grate emitting all heat with no additional duct  
2 work, is never acceptable for a two-story dwelling.  
3 Foster recalls being told none of this additional  
4 information.

5                   The "Reject Reasons" are not  
6 otherwise published, and no newsletters or other  
7 explanatory memoranda were issued by HUD on the  
8 subject of one-lung heating systems. HUD handbook  
9 4905.1 REV-1, at Paragraph 2-5 (A), requires only  
10 that heating be adequate for healthful and  
11 comfortable living conditions. HUD's Minneapolis  
12 office created the additional requirement that one-  
13 lung furnace heating systems must be rejected,  
14 except when the small size and proximity  
15 requirement of 20 feet are met. This is a local  
16 office requirement, and is not part of the  
17 requirements or training for a licensed appraiser  
18 in Minnesota, except when performing as a HUD-  
19 approved appraiser on a property to be purchased  
20 with a FHA-insured mortgage. The "requirement" or  
21 guideline is also unwritten, beyond the far more  
22 general statement in Item V-44 on the "Reject  
23 Reasons" list provided to new appraisers. Basis  
24 for this is Exhibit G-6(B); G-8(C); the testimony  
25 of Seton Foster, Joseph Moses, Joseph Menke and

1 George Mejia.

2                   On September 14, 1992, Foster was  
3 assigned to perform an appraisal of a single family  
4 property located at [REDACTED] 7 First Avenue East,  
5 Shakopee, Minnesota. He described the property as  
6 old, built around the turn of the century, and it  
7 was occupied by an elderly woman who had lived in  
8 it for about 30 years, with whom Foster spoke about  
9 the property during his inspection of it. The  
10 property was two stories, of about 1,500 square  
11 feet total. The heating system was a one-lung  
12 heating system, with a central grate in the dining  
13 room, located on the first floor. All of the  
14 bedrooms were located on the second floor. Foster  
15 did not reject the property, nor did he indicate on  
16 his appraisal that the heating system was a one-  
17 lung system. He described the heating as "grate"  
18 fueled by gas only. This description is not  
19 synonymous with a one-lung system, although a one-  
20 lung system is one type of gravity heating system  
21 using a grate; however, other types of gravity  
22 heating systems using additional vents and ducts  
23 also meet this description. I base this on  
24 Government's Exhibit 21 and the testimony of Mr.  
25 Foster and Mr. Moses.

1                    Appraisals are reviewed by HUD on a  
2 random basis, with a goal of reviewing 10 percent  
3 of all appraisals performed by each appraiser over  
4 a year period. The appraisals to be reviewed are  
5 selected by computer. Each appraisal is assigned  
6 to a HUD review appraiser for a desk or field  
7 review. Joe Menke was the HUD review appraiser who  
8 was assigned to do a field review on Foster's  
9 appraisal of the property located at [REDACTED] First  
10 Avenue East, Shakopee. Menke noted a number of  
11 deficiencies in Foster's appraisal, including the  
12 fact that the heating system "is not acceptable per  
13 Minneapolis/St. Paul requirements". Menke also  
14 noted that Foster failed to indicate that the  
15 electrical system was not acceptable, and the  
16 valuation of the site for single-family purposes  
17 was high, even if it was zoned commercial, as well,  
18 for future use. He also questioned the selection  
19 of the comparables chosen by Foster, noting that  
20 one's heating system was misdescribed. Menke found  
21 that, despite these deficiencies, Foster had made a  
22 reasonable determination of the property value.  
23 Menke recommended that the property be rejected for  
24 unacceptable heating, unless a heating update  
25 proposal was included. He also noted that updating



1 of the electrical system should have been required.

2                   Based upon Menke's review appraisal,  
3 and his recommendation concerning Foster's  
4 appraisal, George Mejia, the Chief Appraiser, rated  
5 Foster's appraisal of [REDACTED] First Avenue East as a  
6 "2", which is the second lowest rating that can be  
7 given. The number rating for the appraisal was  
8 determined by both Menke and Mejia by using the  
9 matrix in HUD handbook 4150.1-REV-1. If major  
10 repair conditions are overlooked, an appraisal is  
11 to be rated as a "2". A "2" rating is captioned  
12 "unacceptable, needs training" on the matrix. This  
13 is based on Exhibits G-18, G5JJ, and the testimony  
14 of George Mejia.

15                   I find the rating of "2" on Foster's  
16 appraisal of [REDACTED] First Avenue East to be within the  
17 matrix guidelines, and appropriate, even if he was  
18 unaware of HUD's local office fine distinctions  
19 concerning one-lung furnaces. I find this because  
20 he was given the reject list with the one-lung  
21 heating system inadequate for dwelling size listed,  
22 but yet gave no indication on the appraisal that  
23 although the heating system was a one-lung system,  
24 he considered the dwelling size and the condition  
25 of the heating system to be adequate to provide

1 healthful and comfortable living conditions. He  
2 failed to adequately describe the heating system so  
3 as to at least alert Bell Mortgage and HUD that  
4 this property might appear to pose some problems,  
5 but in Foster's considered opinion, it did not.  
6 This was a serious omission, not a minor one, and  
7 would rate a "2" on that basis.

8           It is a HUD program requirement that  
9 appraisers must use the cost approach valuation  
10 method, as well as the market approach, in doing an  
11 appraisal of new properties less than one-year-old.  
12 The calculations for the required cost approach for  
13 new properties is to be included on the appraisal  
14 form in the upper right-hand block of the second  
15 page of the Uniform Residential Appraisal Report,  
16 entitled "Estimated Reproduction Cost - New - Of  
17 Improvements". HUD does not require that this  
18 section of the appraisal report be filled out for  
19 existing properties of more than one year, but an  
20 estimate of site value, one of the line items of  
21 the cost approach, is to be filled out. Foster was  
22 aware of HUD's program requirement through his  
23 training, handbook 4150.1-REV-1, and directions he  
24 had received. He also stated that he had been  
25 educated to perform a cost approach analysis on all

1 properties that he appraised, whether new or  
2 existing for more than a year. This is based on  
3 Exhibits G-58, Paragraph 6-1 (E) and 6-16 for the  
4 requirement, Exhibit G-29 (C) and the testimony of  
5 Mr. Foster.

6           On the appraisal reports prepared and  
7 signed by Foster for properties located at [REDACTED] 11th  
8 Avenue East, Shakopee, Minnesota and [REDACTED] Sage  
9 Lane, Shakopee, Minnesota, he failed to fill out  
10 the block for the cost approach analysis, despite  
11 the fact that both were new properties, and the  
12 cost approach was required to be performed and  
13 entered on the appraisal. Foster stated that he  
14 actually did do the cost approach analysis for each  
15 of the new properties, but inadvertently failed to  
16 put it on the appraisal forms for both of the  
17 appraisals. He attributed this failure to being  
18 rushed. However, he signed the appraisals as being  
19 correct. The block where the cost approach should  
20 be fully calculated on each of the two appraisals  
21 contains an estimated site value and dwelling size,  
22 the information provided for existing properties,  
23 not new properties. Exhibits G-29, G-39 and G-60,  
24 and the testimony of Mr. Foster.

25           Menke was assigned to do a field

1 review of Foster's appraisals of [REDACTED] 11th Avenue  
2 East and [REDACTED] Sage Lane. He rated both appraisals  
3 as "2", stating that the required cost approach had  
4 not been completed. He also noted other  
5 deficiencies, including the failure to include  
6 photos of the comparables for the 11th Avenue  
7 property, and problems with the selection and  
8 valuation of the comparables. The matrix indicates  
9 that if the wrong valuation approach is used, a  
10 rating of "2" or "1" can be given. Menke found  
11 that the property value determination made by  
12 Foster was reasonable. The noted problems with the  
13 comparables fall within either a "2" or "3" rating  
14 on the matrix, I find. Mejia agreed with Menke's  
15 review recommendations on both appraisals, and  
16 signed both field review reports on May 7, 1993,  
17 giving each a "2" rating. Exhibit 27 (A), 37 (A),  
18 and Exhibit G5JJ.

19 I find that ratings of "2" on the  
20 appraisals of [REDACTED] 11th Avenue East and [REDACTED] Sage  
21 Lane were not only within the matrix guidelines,  
22 but could have been lower for Foster's failure to  
23 complete the cost approach analysis on the  
24 appraisal. It is immaterial whether Foster  
25 actually performed the cost approach analysis for

1 purposes of the review rating because it was not  
2 included on the appraisal reports, on which both  
3 Bell Mortgage and HUD were to rely.

4 Both of the appraisals missing the  
5 cost approach were logged in by HUD upon receipt,  
6 and not returned to him for correction. This  
7 occurred sometime around April, 1993. I find that  
8 HUD had no obligation to return either of the  
9 appraisals missing the cost approach analysis to  
10 Foster for correction. Mary Mouchet, Chief of the  
11 Single Family Processing Section of HUD, had a  
12 policy that appraisals were not to be returned for  
13 a missing cost approach, although they could be  
14 returned for a missing signature or certain other  
15 limited reasons. Mejia does not permit  
16 supplementing or correcting of an appraisal after  
17 it is reviewed. I disregard the somewhat confused  
18 testimony of Pamela Kugler, who was not in a  
19 position to set or change office policy, and who  
20 had no responsibilities concerning the logging of  
21 appraisals of HUD as of April of 1993, and whose  
22 supervisor was Mary Mouchet.

23 Foster performed an appraisal of a  
24 property located at [REDACTED] Nicollet Avenue,  
25 Bloomington, Minnesota, on or about April 14, 1993.

1 He made mathematical errors in adjusting the values  
2 of two of the three comparables he used to test the  
3 appraised value of the Nicollet property. The  
4 mathematical error, which concerned an adjustment  
5 for heavy traffic at the location, resulted in a  
6 \$4,000 differential on the estimated value of two  
7 of the comparables. Foster added 2,000 to each of  
8 the comparables, rather than subtracting it, which  
9 caused the error. He admits the error, but did not  
10 notice it when he reviewed the appraisal before  
11 signing it and submitting it. Exhibit G-34.

12 Menke was assigned to do a field  
13 review of Foster's appraisal of [REDACTED] Nicollet. He  
14 noted the error in the adjustment of the value of  
15 the comparables. He also noted that the selection  
16 of the comparables was questionable because the  
17 traffic condition was so significant, and two of  
18 the three comparables had no traffic problem.  
19 Menke also questioned Foster's evaluation of a  
20 breezeway being equal to a patio for purposes of  
21 adjusting a comparable, and other minor problems.  
22 Menke rated Foster's appraisal as a "3" based on  
23 the matrix. However, after Menke conferred with  
24 Mejia, Mejia determined that the appraisal only  
25 merited a "2" rating, and so rated it on May 7th,

1 1993. The matrix guideline states that if dollar  
2 adjustments are inaccurate on comparables which  
3 affect the adjusted value of the comparables, a "2"  
4 rating is appropriate.

5 I find, based on the matrix  
6 guidelines and the errors on the adjustments to two  
7 of the comparables that affected the adjusted value  
8 of the comparables, that a "2" rating on the  
9 appraisal of the Nicollet property was appropriate,  
10 if not mandated. I cannot find that Mejia wrongly  
11 rated the appraisal as a "2".

12 HUD handbook 4150.1-REV-1 states that  
13 each appraisal must be rated after a field review  
14 on its own merits, and not on the past performance  
15 of the appraiser. It states at Paragraph 9-7 (C)  
16 (1) that a "3" rating should be assigned if the  
17 appraiser has made errors or omissions, but such  
18 errors or omissions have a minimal effect on the  
19 final value. Errors which lead to value  
20 determinations should lead to a "2" or "1" rating,  
21 depending on the seriousness of the problem. That  
22 paragraph specifically references the matrix, which  
23 sets out stricter standards than the general  
24 guidelines in Paragraph 9-7 (C) (1). HUD handbook  
25 4150.1-REV-1 gives the Chief Appraiser the option

1 whether to require more training after an appraiser  
2 receives three or more "2" ratings, or to remove  
3 the individual from the fee appraiser panel by LDP  
4 or other appropriate means. However, the handbook  
5 that is applicable to field review requirements of  
6 direct endorsement staff appraisers such as Foster  
7 is handbook 4000.4-REV-1, Exhibit G5GG and HH and  
8 Exhibit G-3.

9                   For each field review for which an  
10 appraiser receives a rating of "3", which is  
11 satisfactory, or lower, they must respond in  
12 writing to the review. For a "2" rating, they are  
13 not only to respond, but to make an appointment to  
14 meet with the Chief Appraiser to discuss the  
15 problems found. Foster had a meeting with James  
16 Vonasek, Acting Chief Appraiser, on the review of  
17 the First Avenue East property for which he failed  
18 to note the one-lung heating system or reject the  
19 property. Menke also attended that meeting.  
20 Foster felt that he was not given fair  
21 consideration at that meeting, and that his  
22 explanations were ignored. When he received all  
23 three of the other "2" ratings dated the same date,  
24 and that would be May 7, 1993, he prepared a  
25 written response to be sent to HUD by Bell



1 Mortgage, and also called Mejia to schedule his  
2 appointment. Mejia told him no appointment was  
3 necessary. Bell Mortgage wrote a letter to HUD  
4 proposing that Bell provide training to Foster,  
5 reduce his workload and monitor him closely. Bell  
6 was aware that Foster could be removed as a HUD-  
7 approved appraiser for three or more ratings of  
8 less than "3", and proposed this plan as an  
9 alternative to removal or other sanctions. Bell's  
10 proposal was received by Mejia, but he can't  
11 remember if he seriously considered it. HUD had  
12 already written Bell Mortgage after the earlier "2"  
13 rating to provide the training and monitoring it  
14 was proposing six months after HUD had suggested  
15 it. Mejia may also have made a contra decision  
16 before he received Bell Mortgage's letter, which  
17 was dated May 22nd, 1993. This is based on -  
18 Exhibits R-11, G-59, the testimony of Menke, Mejia  
19 and Foster.

20                   Direct endorsement lenders and their  
21 employees are treated somewhat differently by HUD  
22 than others because of the significant  
23 responsibilities turned over by HUD to direct  
24 endorsement lenders. HUD handbook 4000.4-REV-1  
25 refers to level one, level two, and level three

1 deficiencies. However, those categories are most  
2 appropriate to evaluating what sanctions, if any,  
3 to impose on direct endorsement lenders rather than  
4 the employees of the direct endorsement lender,  
5 although individual employees are referred to in  
6 level three deficiencies, which include  
7 misrepresentation of the condition of the property.  
8 The examples given are generally far more serious  
9 than the deficiencies noted on the four appraisals  
10 for which Foster received a rating of "2".  
11 However, Paragraph 5-11 of handbook 4000.4-REV-1  
12 concerns the LDP as a sanction against individuals  
13 employed by direct endorsement lenders. Failure to  
14 adhere to handbook requirements and program  
15 requirements is specifically cited, as is the  
16 portion of 24 C.F.R. relevant to LDP's.

17           Mejia did not consider any option in  
18 regard to Foster other than removal. Mejia  
19 considered that the only option he had to effect an  
20 immediate removal of Foster as a HUD-approved staff  
21 appraiser for Bell Mortgage was to recommend an  
22 LDP. Training is not referred to as an appropriate  
23 course of conduct for direct endorsement staff  
24 appraisers whose work is found to be seriously  
25 lacking in handbook 4000.4-REV-1, that needed to be

1 consulted when the need for a sanction was being  
2 considered in this case.

3           Mejia notified Michael J. Ridge, the  
4 Quality Control Specialist who prepares documents  
5 for sanctions against HUD participants, that he had  
6 decided to recommend that Foster be LDP'd. Mejia  
7 apparently did not want to wait until Foster would  
8 be up for recertification in October, 1993. Mejia  
9 discussed the LDP with Ridge and Frances O'Neill.  
10 Ridge could not propose an alternative, he could  
11 only agree with Mejia's proposal or not. Ridge  
12 agreed with Mejia's recommendation after discussion  
13 and verification. He drafted the LDP notice letter  
14 for the manager's signature. The original LDP was  
15 based on alleged false statements by Foster as well  
16 as the deficient appraisals. No testimony was  
17 presented on the alleged false statements at this  
18 hearing because that charge is no longer an issue.

19           Ridge attended the informal  
20 conference conducted by Buenger, and also prepared  
21 a memo entitled "unwritten rule" at Buenger's  
22 request, on Foster's charge that HUD's detailed  
23 requirements concerning rejection of properties  
24 with a one-lung furnace were unwritten, and that  
25 he, meaning Foster, had no notice of them. Ridge

1 observed that although the details of the policy  
2 were unwritten, the "Reject Reason" list was  
3 sufficient to place an appraiser on notice of the  
4 general policy and the need to proceed with extreme  
5 caution and to check with HUD before failing to  
6 reject a property with such a heating system. This  
7 is Exhibit G-7 and the testimony of Mr. Ridge.

8 Ridge wrote the letter modifying the  
9 LDP for the manager's signature, after the informal  
10 hearing. The modifications were made because the  
11 false statement allegation was not proven and  
12 because other appraisers who had also been LDP'd  
13 had their terms reduced by three to six months  
14 after their informal hearings. The reason given  
15 for sustaining the "2" rating on the property at  
16 ■ 7 First Avenue East was because Foster should  
17 have found out the specifics of HUD's policy on the  
18 one-lung furnace inasmuch as it was listed on the  
19 "Reject Reasons" list, and because Foster valued  
20 the property based on a commercial use for which it  
21 was zoned in the future, as well as residential,  
22 which affected the maximum insurable mortgage. All  
23 of the "2" ratings were found to be supported and  
24 Foster's explanations did not change the ratings.  
25 The imposition of the LDP was upheld as supported

1 by adequate evidence because the four "2" ratings  
2 were justified. The decision did not consider  
3 whether four "2" ratings on appraisals, none of  
4 which affected the accuracy of the appraised value  
5 of the property, was adequate evidence to support a  
6 Limited Denial of Participation of a staff, as  
7 opposed to a fee appraiser.

8 DISCUSSION

9 The imposition of a Limited Denial of  
10 Participation is controlled by 24 C.F.R., Subpart  
11 G. An LDP, like a debarment or suspension, is only  
12 to be imposed to assure the Government that it's  
13 only doing business with responsible participants.  
14 Responsibility is a term of art, connoting both the  
15 ability to perform acceptably and the integrity of  
16 the participant. No sanction may be imposed for  
17 purposes of punishment, including an LDP. Only  
18 participants and principals, as defined in 24  
19 C.F.R. Section 24.105 (m) and (p) may be subject to  
20 an LDP.

21 I find that Foster is a participant  
22 and a principal, as defined in the regulation  
23 because he is a staff appraiser, specifically  
24 listed as a "principal" at 24 C.F.R. Section 24.105  
25 (p). He is therefore subject to sanction provided

1 that grounds for the sanction are established and  
2 it is necessary to protect the best interest of the  
3 Government and the public.

4           An LDP is a limited sanction, both as  
5 to duration and scope. Foster's LDP has already  
6 been modified to reduce the duration to six months,  
7 and the scope to his role as an appraiser in  
8 Departmental programs. The issue for me to  
9 determine is whether the LDP should have been  
10 imposed at all, and whether it should have been  
11 terminated after the informal conference.

12           The causes for an LDP do not  
13 expressly include receiving three ratings of "2" on  
14 appraisals performed within a one-year period.  
15 Rather, there must be adequate evidence that a  
16 cause for an LDP exists. One of the grounds for  
17 imposition of an LDP is irregularities in a  
18 participant's or contractor's past performance in a  
19 HUD program. 24 C.F.R. Section 24.705 (a) (2).  
20 Another ground is "violation of any law, regulation  
21 or procedure related to the application for  
22 financial assistance, insurance or guarantee..." at  
23 24 C.F.R. Section 24.705 (a) (9). These are the  
24 grounds most clearly relied on by the Government in  
25 this proceeding to justify the LDP imposed on

1 Foster. In addition, an LDP may be imposed for  
2 commission of an offense listed in Section 24.305,  
3 which is the section of the regulation applicable  
4 to causes for debarment. 24 C.F.R. Section 24.305  
5 (f) provides that "material violations of a  
6 statutory or regulatory provision or program  
7 requirement applicable to a public agreement or  
8 transaction," may be a cause for debarment. A  
9 participant need not pose an underwriting risk to  
10 be the subject of an LDP.

11 Originally, Foster's LDP was based on  
12 alleged false statements made to induce HUD to  
13 approve him as a staff appraiser. That is not only  
14 a ground for an LDP, but one for debarment and  
15 suspension. It's a most serious charge, and one  
16 wholly appropriate so long as supported by adequate  
17 evidence to merit an LDP. That charge was found to  
18 be unsupported by adequate evidence, and was  
19 essentially dismissed for lack of proof at the  
20 informal conference. It is noteworthy that the  
21 decision modifying the LDP does not address in any  
22 way whether four "2" ratings on appraisals falls  
23 within the regulatory causes for an LDP. A  
24 handbook may not add causes for an LDP that are not  
25 within the letter, scope, and purpose of the

1 regulation. Furthermore, even if cause for a  
2 sanction is established, the decision whether to  
3 impose an LDP is discretionary, and should be made  
4 in the best interest of the Government.

5                   Were the deficiencies in the four  
6 appraisals that received ratings of "2" tantamount  
7 to "irregularities in Foster's past performance"  
8 that are significant enough to merit an LDP? They  
9 in no way meet the suggested tests in HUD handbook  
10 4000.4-REV-1 that sets out the types of  
11 irregularities and the seriousness of  
12 irregularities that should result in the  
13 sanctioning of a direct endorsement lender or its  
14 employees. Inasmuch as Foster was a staff  
15 appraiser, not a fee appraiser, the appropriate  
16 guideline is to be found in this handbook for  
17 purposes of an LDP, not primarily in handbook  
18 4150.1-REV-1, because that handbook addresses  
19 itself to what course of conduct and procedure  
20 should be followed for fee appraisers when three or  
21 more ratings of "2" or lower are received by an  
22 appraiser. There does not appear to be a handbook  
23 provision requiring the imposition of an LDP on a  
24 direct endorsement staff appraiser for three or  
25 four ratings of "2". However, if those ratings are



1 based on serious deficiencies, such as those  
2 outlined in Paragraph 5-11 of handbook 4000.4-REV-  
3 1, they certainly fall within the stated and  
4 enumerated causes for an LDP at 24 C.F.R. Section  
5 24.705 (a).

6                   It is a HUD program requirement that  
7 a cost approach analysis be performed for new  
8 housing, and it is disingenuous to argue that it is  
9 not also a requirement that the cost approach  
10 analysis be put on the appraisal in the section  
11 provided for it. Not only must <sup>it</sup> be performed, it JAC  
12 must be recorded. Foster testified that he  
13 performed the cost appraisal analysis during his  
14 two appraisals with the information missing. This  
15 may or may not be true, but he certainly performed  
16 it by the time his response to the two appraisals  
17 with that deficiency were sent to HUD, because  
18 revised pages of the appraisals were sent to HUD  
19 with the response. I find it curious that the land  
20 values <sup>was</sup> recorded in each of the these appraisals, JAC  
21 meaning the original ones, in the block for cost  
22 assessment, indicating something more than a mere  
23 computer printout error. It is important to note,  
24 however, that the property value determination made  
25 by Foster was found to be reasonable in each case.

1 Therefore, even if Foster failed to fill out the  
2 cost approach box, as required, this did not have  
3 an effect on the validity of the appraisal which  
4 could place either Bell Mortgage or HUD at risk.  
5 It was, indeed, an error, and one that merited a  
6 "2" rating. However, a "2" rating on the matrix is  
7 entitled "needs more training". It is a "1" rating  
8 that requires removal of an appraiser.

9                   Foster received no "1" ratings, and  
10 two of the "2" ratings were given at the same time  
11 for the same reason. They were easily corrected,  
12 and the correction was timely provided in response  
13 to the rating. I do not find these errors to be a  
14 material violation of the HUD program requirement  
15 or irregularities of sufficient seriousness to  
16 merit a sanction so onerous as an LDP.

17                   Likewise, the mathematical errors  
18 made by Foster on the Nicollet appraisal may have  
19 merited "2" rating, on which there was differences  
20 of opinion even on the HUD staff, but it is  
21 difficult to see how that rating, based on the type  
22 of error made, could justify such an onerous  
23 sanction as an LDP. The appraised value of the  
24 property itself was found to be reasonable, and  
25 therefore, the underwriting risk to HUD and Bell

1 Mortgage were de minimis based on the appraisal.  
2 The problem was only with the comparables. An  
3 appropriate Government response would have been to  
4 make sure that Foster understood how to address  
5 comparables, not to deny him his employment. It  
6 was overkill to base an LDP on this appraisal,  
7 which was reviewed at the same time as the two  
8 missing the cost approach. This is not a  
9 sufficient pattern of serious and material errors  
10 to justify an LDP.

11           The one-lung furnace case comes the  
12 closest to a serious irregularity, because the  
13 property should have been rejected, according to  
14 HUD. Not only was it not rejected, no comments or  
15 specific descriptions were included on the  
16 appraisal to indicate that the heating system was  
17 one that HUD might consider inadequate, but that  
18 Foster determined was not.

19           Is there an "unwritten rule" that  
20 changes written "Reject Reason" V-44, so that  
21 Foster was not on notice that it did not matter how  
22 comfortable the occupant of the property was, no  
23 matter how excellent the condition of the one-lung  
24 heating system, it could not be approved? Foster  
25 applied "Reject Reason" V-44 as written, not as

1 amplified internally by HUD. The HUD office's  
2 interpretations of reason V-44 actually changed it,  
3 because of the rigid internal rules HUD used to  
4 determine whether the system was adequate to heat  
5 the structure. To sanction a participant based on  
6 his failure to apply an unwritten program  
7 requirement that may or may not have been  
8 communicated is to abuse discretion to impose the  
9 sanction. This imposition of the sanction is  
10 separate from the "2" rating, which was merited.

11                   However, Foster's irregularity or  
12 error on the appraisal was his utter failure to  
13 inquire, his failure to accurately note a very  
14 significant feature of this property. This was not  
15 responsible. Furthermore, it might have affected  
16 the value of the property more than Foster was  
17 willing to acknowledge. The computer printout,  
18 offered to show that one-lung heating systems were  
19 common in Minneapolis, was unusable because the *JSC*  
20 systems noted may or may not have been true one-  
21 lung systems. I suspect they were not, because  
22 Foster was unable to find a comparable with a like  
23 heating system for his appraisal, but if the  
24 computer printout actually illustrated the common  
25 nature of the one-lung system with no duct work to

1 upper floors, Foster would have had no trouble  
2 producing a better comparable, even if the age of  
3 the building was far less than that of the one  
4 being appraised. However, one instance of this  
5 nature, particularly because Foster apparently took  
6 great care with the appraisal, even if it turned  
7 out to be flawed in certain significant ways, does  
8 not warrant an LDP according to either handbook  
9 4000.4-REV-1 or 24 C.F.R. Section 24.705 (a).

10 An LDP is a serious sanction, not a  
11 slap on the wrist. It must be listed by the  
12 participant on previous participation forms for the  
13 foreseeable future. It may have to be noted when  
14 bidding on contracts with other federal agencies.  
15 This is a very different effect than not being  
16 recertified, although that too has a clear impact  
17 on employment.

18 This case, as presented in this  
19 hearing, is as noteworthy for what was not said as  
20 for what was said. Witnesses' scope of testimony  
21 was so restricted in certain instances that it was  
22 bizarre. The Government appeared reluctant to  
23 produce any witness who might have to tell what  
24 this was "really all about".

25 I am convinced that what this was

1 really about was the belief in the Minneapolis HUD  
2 office that Foster had made false statements on his  
3 application to be approved by HUD to be a staff  
4 appraiser. Despite how the LDP notice was written,  
5 I am sure that the four "2" ratings were used as  
6 make-weight evidence to get rid of Foster. This  
7 was what was unsaid at the hearing, because the  
8 false statement issue was rejected at the informal  
9 conference. I am sure that Mejia did not believe  
10 it necessary or productive to hold a meeting with  
11 Foster after the three "2" ratings of May 7, 1993,  
12 because Mejia was proceeding with an LDP based on  
13 his belief that Foster was dishonest and had  
14 deliberately misled HUD, not because the errors  
15 Foster made that rated a "2" on individual  
16 appraisals were so dreadful.

17                   There never seemed to be any  
18 consideration given at the informal conference to  
19 whether the nature of the errors that resulted in a  
20 "2" rating was the type of conduct warranting an  
21 LDP. There seems to be an assumption that this was  
22 so, based not on handbook 4000.4-REV-1 for  
23 sanctioning direct endorsement staff appraiser, but  
24 on handbook 4150.1-REV-1, as applicable to  
25 sanctioning or training fee appraisers. In both

1 cases, the seriousness of these errors is to be  
2 considered in deciding whether to take the most  
3 serious route of an LDP, rather than not  
4 recertifying, or requiring more training,  
5 monitoring, and reviewing. Thus, neither a fee  
6 appraiser who is self-employed, or a direct  
7 endorsement staff appraiser is treated disparately.  
8 Neither should be the subject of an LDP when a less  
9 stringent way of dealing with the problem exists  
10 and is appropriate.

11           The decision modifying the LDP was  
12 flawed for this reason. The LDP should have been  
13 lifted after the informal hearing because the types  
14 of errors made by Foster were not of the  
15 seriousness or materiality to the usefulness and  
16 reliability of the appraisals, except possibly in  
17 the case of the one-lung heating system, to warrant  
18 any continuation of the LDP. The learning  
19 experience was provided by the appraisal review.  
20 It is hard to believe that Foster would repeat such  
21 mistakes. The Government did not need the  
22 protection from Foster because of his appraisals,  
23 and it was determined that it did not need  
24 protection from him based on false statements,  
25 which it was found had not occurred.

1                   The appropriate response, once the  
2 false statement ground was removed, would have been  
3 to monitor Foster closely and not to recertify him  
4 when the time came for his recertification if his  
5 overall performance had not improved. His  
6 performance of appraisals was far from excellent,  
7 but to merit an LDP, more than the types of errors  
8 found would be necessary. Truly, they were the  
9 types of errors that indicated what the matrix  
10 subtitled them: indications of need for further  
11 training, whether by Bell Mortgage or HUD, not an  
12 LDP.

#### 13                   CONCLUSION

14                   For the foregoing reasons, the LDP  
15 should have been terminated after the informal  
16 hearing because the reasons underlying the ratings  
17 of "2" given for four appraisals were not serious  
18 and material enough to merit an LDP, and thus, were  
19 not "irregularities" within the meaning of 24  
20 C.F.R. Section 24.705 (a), and were not material  
21 violations of a program requirement. Inasmuch as  
22 the LDP has already terminated, there is no further  
23 action required.

24                   That is the decision in this case.  
25 We will be in adjournment. You will receive a



1 copy. The Government will receive a copy of the  
2 entire transcript because it has paid for it.  
3 Respondent may purchase a copy of the transcript.  
4 You will be provided with a copy of the decision  
5 when we receive the transcript, because you are  
6 entitled to that. This is the decision in your  
7 case.

8                   The time to request review is  
9 provided in the regulation, and inasmuch as I have  
10 essentially ruled in Respondent's favor, it would  
11 be the Government that would be, no doubt, asking  
12 for review in this case, if they determine it is  
13 appropriate. The time for requesting review, Mr.  
14 Caruso, if you so desire, will not run from today,  
15 but will run from when you receive a copy of the  
16 determination from my office. We will send that  
17 out to both parties by fax when we receive the  
18 transcript from the court reporter.

19                   We will be in adjournment.

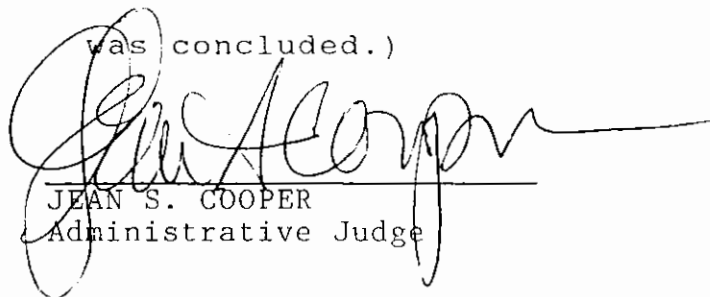
20                                   (Whereupon, the hearing  
21 was concluded.)

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JEAN S. COOPER  
Administrative Judge