

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

94 MSPR 571

ELIZABETH C. LOVOY,	DOCKET NUMBERS
PATRICIA ABELL,	DC-0752-01-0710-I-1
CHERYL M. NICHOLS,	DC-0752-01-0733-I-1
DANIEL L. DUPUIS,	DC-0752-01-0783-I-1
DONA LENKIN,	DC-0752-01-0802-I-1
CAROL A. FELD,	DC-0752-02-0047-I-1
Appellants,	DC-0752-02-0070-I-1

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DATE: September 30, 2003

William S. Aramony, Esquire, Alexandria, Virginia, for appellants Lovoy,
Abell, and Nichols.

Peter B. Broida, Esquire, Arlington, Virginia, for appellants Dupuis,
Lenkin, and Feld.

Constance L. Foster, Esquire, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review and appellant Feld has filed a cross petition for review in this case asking us to reconsider the initial decision issued by the administrative judge which reversed the agency’s actions canceling the appellants’ appointments to positions as “special experts” pursuant to various authorities set forth in Title 42, United States Code. We DENY appellant Feld’s cross petition for review for failure to meet the review requirements set forth at 5 C.F.R. § 1201.115. However, for the reasons set forth below, we GRANT the agency’s petition for review, VACATE the initial decision, and REMAND these appeals to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

Statutory provisions authorizing the appointment of experts and consultants in the Public Health Service.

¶2 Various provisions of the Public Health Service Act authorize the directors of the National Institutes of Health (NIH)¹ and the National Cancer Institute (NCI) to obtain the services of a particular number of experts or consultants with scientific or other professional qualifications. Specifically, 42 U.S.C. § 282(d)(1) provides:

The Director of NIH may obtain (in accordance with section 3109 of Title 5, but without regard to the limitation in such section on the period of service) the services of not more than 220 experts or consultants, with scientific or other professional qualifications, for the National Institutes of Health.

¹ NIH is an agency of the Public Health Service, and several national research institutes, including the National Cancer Institute and the National Institute of Diabetes and Digestive and Kidney Diseases, are agencies of NIH. *See* 42 U.S.C. § 281(a), (b). The Public Health Service is in the Department of Health & Human Services. *See* 42 U.S.C. § 202.

Another section, 42 U.S.C. § 285a-2(b)(5), provides similar authority to the Director of NCI:

(b) The Director of the [National Cancer] Institute in carrying out the National Cancer Program . . . (5) may obtain (after consultation with the advisory council for the Institute and in accordance with section 3109 of Title 5, but without regard to the limitation in such section on the period of service) the services of not more than one hundred and fifty-one experts or consultants who have scientific or professional qualifications.

Thus, both of these provisions require the directors to exercise their authority to obtain experts or consultants with scientific or other professional qualifications in accordance with 5 U.S.C. § 3109 but without regard to the limitation on the period of service set forth in that section.

¶3 With regard to the employment of experts and consultants, 5 U.S.C. § 3109(b) limits both the period of service and the pay rate for services provided by experts or consultants obtained in accordance with this section:

When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic services. Services procured under this section are without regard to-

- (1) the provisions of this title governing appointment in the competitive service;
- (2) chapter 51 [(classification)] and subchapter III of chapter 53 [(General Schedule pay rates)] of this title; and
- (3) section 5 of title 41[(advertisements for proposals for purchases and contracts for services for Government departments)], except in the case of stenographic reporting services by an organization.

However an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rates payable under section 5332 of this title only when specifically authorized by the

appropriation or other statute authorizing the procurement of the services.^[2]

Section 5332 concerns the rates of pay for employees subject to the General Schedule, and the highest rate of pay under this section is equivalent to the rate of pay for GS-15, step 10. 5 U.S.C. § 5332.

¶4 Prior to 1992, 5 U.S.C. § 3109 did not contain any provision specifically authorizing the Office of Personnel Management (OPM) to promulgate regulations to implement this section. However, in 1991, the General Accounting Office (GAO) issued a report in which it noted many problems with the appointment of experts or consultants pursuant to 5 U.S.C. § 3109, including: (1) improper appointments of such experts or consultants to duties that were appropriate for permanent employees; (2) appointees who were not qualified as experts or consultants; (3) misuse of the authority as a quick way to hire someone destined for another position or to fill in during staff shortages; (4) misreading guidance in the Federal Personnel Manual as allowing experts or consultants to perform regular, continuing work; (5) failure to follow OPM internal control procedures; and (6) lack of required documentation. *See* 59 Fed. Reg. 67232 (1994). In light of these problems, the GAO report recommended that Congress amend 5 U.S.C. § 3109 to authorize OPM to regulate the employment of experts and consultants.

OPM regulations governing the appointment and pay of experts and consultants.

¶5 Congress responded to this report by amending 5 U.S.C. § 3109 in 1992 to add subsections (d) and (e), which authorized OPM to regulate appointments under 5 U.S.C. § 3109 and to collect data regarding the number of days worked by experts or consultants and the amount paid for their services. *See* Technical

² As an executive agency, the Department of Health and Human Services is subject to chapter 51 and subchapter III of chapter 53, title 5, United States Code. *See* 5 U.S.C. §§ 101, 105, 5102(a)(1)(A), and 5331(a), (b).

and Miscellaneous Civil Service Amendments Act of 1992, Pub. L. No. 102-378, § 2(8), 106 Stat. 1346, 1347 (1992). Subsection (d) provides:

The Office of Personnel Management shall prescribe regulations necessary for the administration of this section. Such regulations shall include-

- (1) criteria governing the circumstances in which it is appropriate to employ an expert or consultant under the provisions of this section;
- (2) criteria for setting pay of experts and consultants under this section; and
- (3) provisions to ensure compliance with such regulations.

5 U.S.C. § 3109(d).

¶6 In accordance with the explicit grant of rulemaking authority set forth in subsection (d), OPM issued proposed regulations to regulate expert and consultant appointments on December 29, 1994. 59 Fed. Reg. 67,232 (1994). OPM proposed adding part 304 to title 5, Code of Federal Regulations, including 5 C.F.R. § 304.103(b), which provided, *inter alia*:

(b) Inappropriate use. An agency must not use 5 U.S.C. § 3109 to appoint an expert or consultant: . . .

- (3) To perform managerial or supervisory work, to make final decisions on substantive policies, or to otherwise function in the agency chain of command (e.g., to approve financial transactions, personnel actions, etc.).
- (4) To do work performed by the agency's regular employees.

59 Fed. Reg. 67,232, 67,234. After receiving and considering comments on the proposed rule, OPM adopted the final regulations on September 1, 1995, with an effective date of October 2, 1995. 60 Fed. Reg. 45,647 (1995). Although the Federal Register notice announcing the final rule did not indicate that OPM received any comments regarding the proposed subsection setting forth the inappropriate uses of the statutory authority, the final rule included a parenthetical in 5 C.F.R. § 304.103(b)(3) which provided that "an expert may act

as team leader or director of the specific project for which he/she is hired.” 60 Fed. Reg. 45,647, 45,649.

¶7 With respect to pay, the regulations provide that the rate of basic pay for experts or consultants is set by administrative action on the part of the head of the agency, or his or her designee, after considering the following factors: (1) the level and difficulty of the work to be performed; (2) the qualifications of the expert or consultant; (3) the pay rates of comparable individuals performing similar work in Federal or non-Federal sectors; and (4) the availability of qualified candidates. 5 C.F.R. § 304.104(a), (b). However, the rate of basic pay is subject to certain limitations. For example, unless specifically authorized by an appropriation or other statute, agencies subject to chapter 51 and subchapter III of chapter 53 may not pay for any 1 day an aggregate amount of pay (including basic pay, locality pay, and premium pay) that exceeds the daily rate for GS-15, step 10 (excluding locality pay or any other additional pay). 5 C.F.R. § 304.105(a). Unless specifically authorized by an appropriation or other statute, the pay of experts or consultants paid on a biweekly basis is limited to the biweekly rate of pay for GS-15, step 10 (excluding locality pay or any other additional pay). 5 C.F.R. § 304.105(b). Although the agency has the authority to adjust the pay of experts and consultants after initial appointment, such adjustments are also subject to the limitations set forth in 5 C.F.R. § 304.105. 5 C.F.R. § 304.106(a).

Provisions of the 1993 HHS Appropriations Act relating to rates payable for services authorized by 5 U.S.C. § 3109.

¶8 Thus, the pay of most experts or consultants appointed under 5 U.S.C. § 3109 is limited to an amount not in excess of the daily or biweekly rate of basic pay for GS-15, step 10. However, a few days after the enactment of the Technical and Miscellaneous Civil Service Amendments Act of 1992, Congress enacted the “Departments of Labor, Health and Human Services, and Education,

and Related Agencies Appropriations Act, 1993,” (hereinafter referred to as the 1993 HHS Appropriations Act) which included the following provision:

Appropriations contained in this Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts, available for salaries and expenses, shall be available for services as authorized by 5 U.S.C. § 3109 but at rates for individuals not to exceed the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376.

Pub. L. No. 102-394, § 503, 106 Stat. 1792, 1825 (1992) (codified at 5 U.S.C. § 3109 note). According to 5 U.S.C. § 5376, the maximum rate of basic pay for any position to which § 5376 applies “shall be- . . . (B) not greater than the rate of basic pay payable for level IV of the Executive Schedule.” Thus, despite the limitations in 5 C.F.R. § 304.105, it appears that the 1993 HHS Appropriations Act authorizes experts or consultants appointed under 5 U.S.C. § 3109, who are paid from appropriations contained in the 1993 act or subsequent HHS Appropriations Acts, to be paid at a rate not to exceed the basic pay for level IV of the Executive Schedule.

Factual and Procedural Background.

¶9 Having set forth the relevant statutory and regulatory background, we now address the relevant factual background in these consolidated appeals. According to the agency’s response file, Elizabeth Lovoy was first employed with NCI through a career-conditional appointment as a Technology Development Specialist, GS-0301-12, on June 25, 1996. Lovoy IAF, Tab 3, Subtab 4A. In October 1996, the agency promoted her to the position of Senior Technology Development Specialist, GS-0301-13, and, in October 1997, the agency promoted her to the position of Technology Development and Patent Specialist, GS-0301-14. *Id.*, Subtabs 4B, 4H. The Standard Form (SF) 50’s documenting these personnel actions indicated that each of the positions was in the competitive service. In December 1999, Lovoy received an offer of employment from a private sector law firm at an annual salary of \$100,000 with an increase to an

annual salary of \$120,000 within 1 year. *Id.*, Subtab 5D. In order to retain Lovoy's services, NCI paid her a retention allowance equal to 25 percent of her rate of basic pay.³ *Id.*, Subtab 4S. With the retention allowance and locality pay, Lovoy's total salary for the year 2000 was \$97,293. *Id.* However, on May 23, 2000, apparently concerned that NCI would be unable to match the \$120,000 annual salary the law firm offered Lovoy within a year of her acceptance of a position with the firm, Kathleen Sybert, Ph.D., Chief of NCI's Technology Development and Commercialization Branch, recommended that Richard Klausner, M.D., Director of NCI, approve Lovoy's appointment to a position as a special expert pursuant to 42 U.S.C. § 285a-2(b)(5) at an annual salary of \$109,148. *Id.*, Subtab 5A. Klausner approved Sybert's recommendation, and on June 18, 2000, NCI appointed Lovoy to an ungraded special expert position at an annual salary of \$127,293 for a term not to exceed June 17, 2005. *Id.*, Subtab 4W. The agency apparently adjusted this salary to \$109,148, the salary recommended by Sybert, after terminating Lovoy's retention allowance.⁴ *Id.*, Subtab 4U. NCI adjusted Lovoy's pay to an annual salary of \$113,300 effective January 14, 2001, and it adjusted her annual salary to \$120,261 effective February 11, 2001. *Id.*, Subtabs 5F, 6.

³ The Office of Personnel Management may authorize the head of an agency to pay a retention allowance to an employee under the General Schedule, not to exceed 25 percent of an employee's rate of basic pay, if the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee, and the agency determines that the employee would be likely to leave in the absence of a retention allowance. 5 U.S.C. § 5754(a)(1), (2), (b)(1). A retention allowance may not be considered to be part of the basic pay of an employee, but it is paid at the same time and in the same manner as the employee's basic pay. 5 U.S.C. § 5754(b)(2), (3). At the time, Lovoy's rate of basic pay as a GS-14, step 4 was \$72,580 per year, and the retention bonus amounted to \$18,145. Lovoy IAF, Tab 3, Subtab 4S.

⁴ The statute authorizing retention allowances states that the reduction or elimination of a retention allowance may not be appealed. 5 U.S.C. § 5754(b)(2).

¶10 In its narrative response to the appeal filed by Patricia Abell, the agency indicated that, prior to her appointment as a special expert, Abell served as the Director, Office of Management Assessment, Office of the Director, NIH, at an annual salary of \$100,897. Abell IAF, Tab 6, Subtab 1. Abell's official position title was Management Analysis Officer, GM-0343-15.⁵ *Id.*, Subtab 4H. In March 2000, MaryAnn Guerra, Director of Management, NCI, recommended that Klausner approve Abell's appointment as an NCI special expert pursuant to 42 U.S.C. § 285a-2(b)(5) at an annual salary of \$127,000. *Id.*, Subtab 4B. Klausner approved Guerra's recommendation, and, on March 12, 2000, NCI appointed Abell to an ungraded special expert position at the annual salary recommended by Guerra. *Id.* NCI adjusted Abell's pay to an annual salary of \$130,400 effective January 14, 2001. *Id.*

¶11 Prior to her appointment as a special expert, Cheryl M. Nichols was a Supervisory Program Analyst, GS-0343-15, step 9, with the NCI Office of Science Policy, Planning, Evaluation & Analysis Branch at a total annual salary of \$98,310. Nichols IAF, Tab 6, Subtab 4C. In May 2000, Alan Rabson, M.D., NCI Deputy Director, recommended that Klausner approve Nichols' appointment as an NCI special expert pursuant to 42 U.S.C. § 285a-2(b)(5) at an annual salary of \$126,000. *Id.* Klausner approved Rabson's recommendation, and, on May 21, 2000, NCI appointed Nichols to an ungraded special expert position at the annual salary recommended by Rabson. *Id.* NCI adjusted Nichols' pay to an annual salary of \$130,800 effective January 14, 2001. *Id.*

⁵ According to OPM regulations, a "GM employee" is an employee who was covered by the Performance Management and Recognition System under chapter 54 of title 5, United States Code, on October 31, 1993, and who continued thereafter to occupy a position as a supervisor or management official in the same grade of the General Schedule and in the same agency without a break in service of more than 3 calendar days. *See* 5 C.F.R. § 531.202.

¶12 Daniel Dupuis was a Supervisory Personnel Management Specialist, GS-0201-15, step 3, with NCI's Human Resources Management and Consulting Branch at a total annual salary of \$93,722. Dupuis IAF, Tab 8, Subtab 4A. In February 2001, Janis Mullaney, NCI Associate Director for Administrative Operations, recommended that Klausner approve Dupuis' appointment as an NCI special expert pursuant to 42 U.S.C. § 285a-2(b)(5) to serve as the NCI Director of Human Resources and Personnel Officer at an annual salary of \$115,000. *Id.*, Subtab 4C. Klausner approved Mullaney's recommendation, and on March 11, 2001, NCI appointed Dupuis to an ungraded special expert position at the annual salary recommended by Mullaney. *Id.*

¶13 Dona Lenkin was the Deputy Director, Office of Information Resources Management, Center for Information Technology (CIT), NIH. Lenkin IAF, Tab 1, Attachment 3. Prior to her appointment as a special expert, Lenkin was a GM-0343-15, with a total annual salary of \$99,711. *Id.* In April 2000, Diane Shartsis Wax, Deputy Director of CIT, requested that Alan S. Graeff, Director of CIT, approve Lenkin's conversion from a career appointment to a special expert appointment for an indefinite period at an annual salary of \$120,000. *Id.*, Attachment 2. Graeff approved Wax's recommendation, and effective April 23, 2000, NIH, pursuant to 42 U.S.C. § 282(d)(1), appointed Lenkin to an ungraded special expert position at the annual salary recommended by Wax for a term not to exceed April 22, 2005. *Id.*, Attachment 3.

¶14 Prior to her appointment as a special expert, Carol A. Feld was a Program Analysis Officer, GM-0343-15, and served as the Director, Office of Scientific Program and Policy Analysis, National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK) at an annual salary of \$100,897, Lovoy IAF, Tab 8, Attachment 1. NIDDK is an agency of NIH. *See* ¶ 2 n.1, *supra*. Effective December 31, 2000, the Director of NIDDK, under the authority of 42 U.S.C.

§ 282(d)(1),⁶ approved Feld's conversion to a position as a special expert at an annual salary of \$120,000. Lovoy IAF, Tab 8, Attachment 1.

¶15 Thus, it appears that immediately prior to their appointments as special experts pursuant to 42 U.S.C. §§ 282(d)(1) or 285a-2(b)(5), each of the appellants in these consolidated appeals occupied a permanent position in NIH or one of its sub-agencies. However, based on documents contained in the record, it appears that at least as early as mid-March 2001, Evelyn White, the Department of Health & Human Services (HHS) Deputy Assistant Secretary for Human Resources, expressed her concern to Stephen C. Benowitz, the NIH Director of Human Resources, regarding the use of the special expert appointment authority at NIH and its sub-agencies. Abell IAF, Tab 6, Subtab 4E. On April 12, 2001, Ed Sontag, HHS Deputy Chief of Staff for Operations, wrote a memo to Ruth L. Kirschstein, M.D., NIH Acting Director, which indicated that Sontag had several questions for Kirschstein concerning workforce and staffing issues at NIH, including NIH's use of title 42 appointment authorities for business and administrative management positions. Lovoy IAF, Tab 27, Exhibit D. Sontag indicated that he would send Kirschstein a set of several specific questions dealing with this issue. *Id.* The following day, Sontag sent another memorandum to Kirschstein in which he suggested that an initial review of NIH's use of the title 42 appointment authority may have violated the requirements of 5 U.S.C. § 3109 by: (1) paying consultants at a rate higher than that established in the "1994 Appropriations Act"; (2) hiring consultants into ongoing positions to perform the work of regular agency employees; and (3) allowing consultants to manage, supervise, or approve financial or personnel transactions. Abell IAF,

⁶ The SF-50 documenting Feld's conversion indicated that the legal authority for the conversion was 42 U.S.C. § 209(f), but the SF-50 also included a handwritten notation indicating that the correct code was 42 U.S.C. § 282(d)(1). Lovoy IAF, Tab 8, Attachment 1. In her appeal form, Feld also alleged that she was converted to a position as a special expert pursuant to 42 U.S.C. § 282(d)(1). Feld IAF, Tab 1.

Tab 6, Subtab 4G. Sontag also indicated that he was seeking answers to the following questions and would meet to discuss these issues with Kirschstein on the following Monday:

Does NIH have any additional information that may allow for any of the above exceptions to the requirements of Title 5, Section 3109?

Does NIH believe that 42 USC sections 402(d)(1), 413(b)(5), and 421(b)(1)⁷ were intended to include use of consultants to perform routine, day-to-day administrative and management activities?

The use of consultants in roles such as general administration, program management, personnel management, contracting, administrative officer, program analysis, public affairs, and technical writing seems to be recent. When did this practice first start? Who authorized it? What was the rationale for the authorization?

Id.

¶16 Sontag apparently met with Kirschstein in her office on April 16, 2001, and a few days after the meeting, White sent a letter to Benowitz advising him that the Office of General Counsel had confirmed that the use of the Title 42 special expert appointment authority had to conform with the requirements of 5 U.S.C. § 3109 with the exception of the 1-year time limit on appointments. Lovoy IAF, Tab 10, Exhibit A. White instructed Benowitz to provide her with a list of non-scientific employees appointed under the authorities in question along with information concerning the documents used to request and effect the appointments, an explanation as to why each such employee was converted to “title 42 status,” and all documentation relating to pay setting, cash awards, and pay increases. *Id.* White also instructed Benowitz to address steps that NIH intended to take to ensure that appointments of scientific personnel under the special title 42 authorities conform with the requirements of 5 U.S.C. § 3109. *Id.*

⁷ Sontag was apparently referring to the section numbers as they appeared in the Public Law which added 42 U.S.C. §§ 282 and 285 to the Public Health Service Act, rather than referring to the section numbers as they were codified in title 42 of the United States Code. *See* Health Research Extension Act of 1985, Pub. L. No. 99-158, 99 Stat. 820 (1985).

¶17 The following day, Benowitz forwarded White's request regarding non-scientific employees to the executive and personnel officers of the various NIH Institutes. Abell IAF, Tab 6, Subtab 4D. In response to White's instruction regarding the steps NIH intended to take with regard to scientific personnel appointed as special experts, Benowitz responded that NIH intended to initiate personnel actions to correct these appointments, where appropriate, to an appointment under 42 U.S.C. § 209(f) or (g).⁸ Lovoy IAF, Tab 27, Exhibit J. Benowitz also informed White that there may have been situations where the use of a special expert appointment was appropriate and consistent with 5 U.S.C. § 3109, and that his office would make the final determination of eligibility. *Id.*

¶18 Benowitz also included a memorandum in which he described the process NIH used to determine that the use of special expert authorities was appropriate for positions of a continuing nature and for salaries in excess of level IV of the Executive Schedule. Lovoy IAF, Tab 27, Exhibit G. Essentially, Benowitz claimed that the NIH staff reached a preliminary conclusion that, because special experts were appointed under the Public Health Service Act, and not under 5 U.S.C. § 3109, individuals appointed under the special expert authorities contained in title 42 were exempt from the regulatory provisions implementing

⁸ These subsections provide:

(f) Special consultants

In accordance with regulations, special consultants may be employed to assist and advise in the operations of the Service. Such consultants may be appointed without regard to the civil-service laws.

(g) Designation for fellowships; duties; pay

In accordance with regulations, individual scientists, other than commissioned officers of the Service, may be designated by the Surgeon General to receive fellowships, appointed for duty with the Service without regard to the civil-service laws, may hold their fellowships under conditions prescribed therein, and may be assigned for studies or investigations either in this country or abroad during the terms of their fellowship.

5 U.S.C. § 3109. *Id.* Benowitz claimed that NIH's interpretation was confirmed verbally by the Associate General Counsel for Business and Administrative Law. With regard to pay-setting for these positions, Benowitz claimed that Tom Dillon, an analyst with the NIH Office of Human Resources Management, after consulting with the Associate General Counsel for Business and Administrative Law and Evelyn Dandy, HHS Office of Human Resources, determined that special experts were not subject to a statutory pay cap but were subject to the pay cap established by HHS policy for scientists appointed under 42 U.S.C. § 209.

¶19 On May 4, 2001, Benowitz provided White with a list of 66 employees classified in traditionally "nonscientific" occupational series who had been appointed under one of the title 42 appointment authorities. Lovoy IAF, Tab 27, Exhibit K. Benowitz supplemented this list on May 8, 2001. Abell IAF, Tab 6, Subtab 4C. The name of each of the appellants appeared on one of these lists. However, in providing the lists, Benowitz also stated his belief that a number of the named individuals, including appellants Feld, Lovoy, and Nichols, despite being classified in traditionally non-scientific occupational series, were engaged in scientific activities and should be appointed under 5 U.S.C. § 209.

¶20 At a meeting conducted June 28, 2001, Dr. Kirschstein, along with Dr. Klausner, met with Sontag to discuss the actions that would be taken by NIH with regard to 43 employees, including each of the six appellants, "who were placed in the Title 42 category, in administrative positions." Lovoy IAF, Tab 27, Exhibit I. According to the memorandum Kirschstein prepared to memorialize this meeting, the 43 employees were divided into 2 units: Unit A consisted of employees from various job series, and Unit B consisted of five individuals, including appellant Dupuis, who held high level administrative positions with NIH or positions as personnel specialists. With regard to employees in Unit A, the memorandum indicated that NIH would cancel the special expert appointment of each individual retroactive to the date of the appointment, with the employee reverting back to his or her previous grade and pay level. *Id.* The memorandum also

indicated that the HHS Office of Payroll would audit the employees' payroll records and issue notices of overpayment which would include notice of each employee's right to request waiver of the overpayment from the HHS Office of General Counsel. *Id.*

¶21 With regard to employees in Unit B, the memorandum indicated that Kirschstein would explain to these employees that it was management's decision that, as persons at the highest level of administration within NIH or as personnel specialists, they knew or should have known that the personnel rules had been misinterpreted in allowing their appointments as special experts and, therefore, while they would be reinstated into the civil service, they would be given different positions and suffer other financial consequences, including a reduction in Senior Executive Service (SES) pay level or GS step level. *Id.* The memorandum also indicated that Unit B employees would receive overpayment letters and would be notified of their right to request waivers. *Id.* In a subsequent memorandum, Kirschstein indicated that Sontag had decided that NIH would not have to reduce the pay level for any of the individuals included in Unit B. *Id.* In response to Kirschstein's memoranda, White indicated that she agreed that the special expert appointments of the 43 identified employees must be cancelled and the employees restored to appropriate civil service appointments under either the General Schedule or the SES system. *Id.*, Exhibit H.

¶22 In accordance with the discussions between NIH and HHS regarding the resolution of the special expert appointments, in July and August 2001, the agency cancelled the special expert appointment of each of the appellants retroactive to the date on which such appointment was first effective. As a result of these cancellations, the pay of each appellant was reduced from the level he or she received as a special expert to the pay commensurate with his or her former grade and step level under the General Schedule. Nevertheless, in executing these actions, the agency did not provide the appellants with any of the rights required by 5 U.S.C. § 7513 when an agency takes an adverse action against an

individual who is an “employee” as defined by 5 U.S.C. § 7511(a). However, in a memorandum addressed to the executive and personnel officers of the various NIH institutes and centers, Benowitz instructed the officers taking these actions that the affected employees would be entitled to any within-grade increase for which these employees would have been eligible under title 5 during their title 42 appointments. Lovoy IAF, Tab 3, Subtab 7.⁹

¶23 Each of the appellants filed an appeal with the Board’s Washington Regional Office, claiming that the agency’s actions constituted appealable reductions in pay. The administrative judge consolidated these appeals. Lovoy IAF, Tab 5; Feld IAF, Tab 3; Dupuis IAF, Tab 3; *see* 5 C.F.R. § 1201.36(b) (an administrative judge may consolidate cases on her own motion if doing so would expedite processing of the cases and not adversely affect the interests of the parties). In its response to these appeals, the agency argued that the Board lacked jurisdiction over the cancellation of the appellants’ “Title 42” appointments. Lovoy IAF, Tab 3, Narrative Response. The agency also filed a motion to stay depositions pending the administrative judge’s ruling on jurisdiction. Lovoy IAF, Tab 7. On November 20, 2001, the administrative judge suspended all discovery until she determined whether the Board had jurisdiction over the appeals. Lovoy IAF, Tab 11. After the parties filed their pre-hearing submissions, the appellants amended their appeals to include an allegation that the cancellation of their respective special expert appointments constituted a reduction in force (RIF) conducted without providing the appellants the protections and rights to which they were entitled under RIF procedures. Lovoy IAF, Tab 13; Lenkin IAF, Tab 5.

¶24 On December 18, 2001, the administrative judge issued an order to show cause in which she found that each appellant suffered a reduction in pay when the

⁹ We note that the appellants have not alleged that the agency, in reinstating them to their former positions, denied them the within-grade increases they would have earned if they had been regular agency employees subject to the General Schedule during the period covered by their appointments as special experts.

agency cancelled his or her special expert appointment and that each of the appellants was an “employee” as defined by 5 U.S.C. § 7511(a)(1). Lovoy IAF, Tab 14. In the order, the administrative judge indicated that she planned on reversing the agency’s cancellation actions. *Id.* However, the administrative judge requested briefing and comment from the parties on the following issues: (1) whether there was an absolute statutory bar under Title 42 to the appointments of the appellants as special experts; (2) whether there was any objection to the administrative judge not addressing the appellants’ RIF claims; and (3) whether the appellants planned on going forward with their discrimination claims. The order also allowed the parties to resume discovery with regard to the RIF claims and the appellants’ affirmative defenses. *Id.*

¶25 The agency did not respond to the show-cause order. The administrative judge scheduled a hearing to address the affirmative defenses raised by the appellants and ordered the parties to file additional prehearing submissions. Lovoy IAF, Tab 19. However, with the exception of appellant Feld, the appellants indicated that they did not intend to pursue their discrimination affirmative defenses. Lovoy IAF, Tabs 23, 24. The appellants also indicated that they intended to pursue their RIF claims. *Id.* Appellant Feld indicated that she intended to pursue her discrimination claim. Lovoy IAF, Tab 23.

¶26 Following a hearing, the administrative judge issued an initial decision in which she found that it was undisputed that each appellant suffered a reduction in his or her rate of basic pay as a result of the cancellation of the special expert appointments, that the appellants were covered employees under 5 U.S.C. § 7511(a)(1), that there was no absolute statutory bar under Title 42 to the appointment of the appellants as special experts, and that the appellants failed to prove that the cancellation actions were a constructive reduction in force. Lovoy IAF, Tab 30, Initial Decision (ID). Accordingly, the administrative judge concluded that the appellants established that the Board had jurisdiction over their appeals, and, upon finding that the agency’s cancellation of the appellants’

special expert appointments constituted appealable adverse actions taken without the procedures required by 5 U.S.C. § 7513, she concluded that the agency violated the appellants' constitutional right to due process and reversed the actions. ID at 9. With respect to appellant Feld's discrimination claims, the administrative judge found that Feld failed to establish that the agency's actions had a disparate impact on the basis of sex or age. ID at 13. The administrative judge ordered the agency to retroactively restore each appellant to his or her special expert position, and, in the event that the agency filed a petition for review challenging the initial decision, the administrative judge ordered the agency to provide the appellants with interim relief in accordance with 5 U.S.C. § 7701(b)(2)(A). ID at 14-15.

¶27 The agency has filed a petition for review in which it argues that the administrative judge erred in finding that the Board has jurisdiction over these appeals. Petition for Review File (PFRF), Tab 1. The appellants have filed responses to the agency's petition, and appellant Feld has filed a cross-petition for review in which she argues that the administrative judge erred in finding that she failed to prove her affirmative defense of age-based discrimination based on disparate impact. PFRF, Tabs 15, 18, 19. In addition, the appellants have filed motions to dismiss the agency's petition for review due to the agency's alleged failure to provide the appellants with interim relief. PFRF, Tabs 5, 10.

ANALYSIS

The appellants' motions to dismiss the agency's petition for review for failure to provide interim relief are denied.

¶28 The appellants argue that the agency failed to comply with the interim relief order by failing to adjust their pay in accordance with the pay increase or "COLA" the Director of NIH authorized for special experts in January 2002. PFRF, Tabs 5, 10. Although the agency certified that it provided the appellants with interim relief when it filed its petition for review, it did not file a response

to the arguments the appellants raised in their motions to dismiss the agency's petition. However, the Board did not order the agency to submit additional evidence of compliance with the interim relief order. *See* 5 C.F.R. § 1201.115(b)(3). In any event, for the reasons set forth below, it is not clear that the Board has jurisdiction over these appeals, and it is not clear that the agency properly exercised its authority with respect to setting the appellants' pay in their positions as special experts. Under these circumstances, even if the agency has failed to fully comply with the administrative judge's interim relief order, the Board exercises its discretion not to dismiss the agency's petition for review on that basis. *See* 5 C.F.R. § 1201.115(b)(4); *Byers v. Department of Veterans Affairs*, 89 M.S.P.R. 655, ¶ 13 (2001) (the Board may exercise its discretion and not dismiss an agency's petition for review even if the agency is in noncompliance with an interim relief order).

Because they implicate the Board's jurisdiction over these appeals, the Board will consider arguments the agency raised for the first time in its petition for review.

¶29 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). However, even in situations where it might appear that the Board has been given jurisdiction over a particular matter by law, rule, or regulation, an exception might exist that would preclude the Board from exercising jurisdiction over the matter. *See, e.g., Todd v. Merit Systems Protection Board*, 55 F.3d 1574, 1577-78 (Fed. Cir. 1995) (the Board properly dismissed an appeal for lack of jurisdiction where the employee was hired under a specific statutory authority that allowed the agency to employ particular personnel without the protections provided by 5 U.S.C. §§ 7511, 7512, and 7701). For example, the Board generally finds that an individual who shows that he was otherwise entitled to adverse action procedures does not lose that protection merely because the agency's action was based on an unlawful

appointment, but the Board has recognized an exception to this rule where the appointment was made in violation of an absolute statutory prohibition so that the appointee was not qualified for appointment in the civil service. *See Travaglini v. Department of Education*, 23 M.S.P.R. 417, 419 (1984). In addition, although the Board may generally exercise jurisdiction over a reduction in pay when the agency takes such an action against an individual who is an “employee” within the meaning of 5 U.S.C. § 7511(a)(1), *see* 5 U.S.C. § 7513(d), the OPM regulations implementing chapter 75 of title 5, United States Code, provide that 5 C.F.R. part 752, subpart D, does not apply to the reduction of an employee’s rate of basic pay from a rate that is contrary to law or regulation. 5 C.F.R. § 752.401(b)(15). In accordance with this regulation, the Board has determined that such actions are not appealable. *See Lomax v. Department of Defense*, 78 M.S.P.R. 553, 556 (1998) (citing *Hall v. Department of the Navy*, 73 M.S.P.R. 251, 254 (1997)); *Warren v. Department of Transportation*, 19 M.S.P.R. 560, 565 (1984) (an agency action which corrected the appellant’s pay from one contrary to law or regulation to one permitted by law or regulation was specifically excluded from the Board’s jurisdiction under the OPM regulations).

¶30 In its petition for review, the agency argues that the appellants’ appointments as special experts violated the OPM regulations that preclude agencies from using 5 U.S.C. § 3109 to appoint experts or consultants to perform managerial or supervisory work or to perform work performed by the agency’s regular employees. PFRF, Tab 1 at 12-13; *see* 5 C.F.R. § 304.103(b)(3), (4). The agency also argues that, with respect to appellants Lovoy, Abell, and Nichols, the exception set forth at 5 C.F.R. § 752.401(b)(15) applies to render their reductions in pay non-appealable, because the agency’s actions in retroactively canceling their special expert appointments merely reduced their rate of basic pay from a rate that was contrary to law or regulation to a rate that was permissible under law or regulation. The agency did not raise these arguments in either of the prehearing submissions it submitted to the

administrative judge. In fact, in its first prehearing submission, the agency specifically stated that it was not contending that the appellants should have been paid less than the amounts they received in their special expert appointments. Lovoy IAF, Tab 10 at 18. Generally, the Board will not consider arguments raised for the first time in a petition for review absent a showing that they are based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). However, because these arguments implicate the Board's jurisdiction over these appeals, and the issue of jurisdiction is always before the Board and may be raised by any party or sua sponte by the Board at any time during a Board proceeding, we will consider these arguments. *See Covington v. Department of the Army*, 85 M.S.P.R. 612, ¶ 9 (2000).

If the appellants' appointments violated the OPM regulations governing the appointment of experts and consultants, the Board may lack jurisdiction over the cancellation of those appointments.

¶31 In the initial decision, the administrative judge specifically found nothing in either 5 U.S.C. § 3109 or 42 U.S.C. § 285a-2(b)(5) which operated as an absolute statutory bar to the appellants' appointments as special experts. ID at 7. However, when the Board originally adopted the rule that an individual otherwise entitled to adverse action procedures does not lose that protection merely because of an unlawful appointment unless the appointment was made in violation of an absolute statutory bar, one of the bases for that rule was the presumption that OPM had certified the appointee as eligible for the appointment. *See Travaglini v. Department of Education*, 18 M.S.P.R. 127, 132-138 (1983), *aff'd as modified on recons.*, 23 M.S.P.R. 417 (1984). The Board, however, declined to extend the rule to a case in which OPM had not certified the individual as eligible:

[A] mistake in certification by an appointing officer of a Federal department or agency will not ordinarily validate an otherwise unlawful appointment which OPM has not certified, even after the

appointment has been offered and accepted without any fraud, misrepresentation or concealment of a material matter by the appointee.

Travaglini, 18 M.S.P.R. at 138 (footnote omitted).

¶32 We note that 42 U.S.C. §§ 282(d)(1) and 285a-2(b)(5) authorize the directors of NIH and NCI to appoint experts or consultants in accordance with 5 U.S.C. § 3109, and appointments made under this section are made “without regard to – (1) the provisions of [title 5] governing appointment in the competitive service.” 5 U.S.C. § 3109(b)(1). Thus, positions filled in accordance with 5 U.S.C. § 3109, such as the appointment of experts and consultants pursuant to 42 U.S.C. §§ 282(d)(1) and 285a-2(b)(5), are in the excepted service. *See* 5 C.F.R. § 213.3102(1) (positions requiring the temporary or intermittent employment of professional, scientific, or technical experts for consultation purposes fall within Schedule A of the excepted service); *Briggs v. National Council on Disability*, 60 M.S.P.R. 331, 334 (1994) (“Excluding a position from the appointing requirements applicable to the competitive service . . . means only that the position is in the excepted service.”), *aff’d sub nom. King v. Briggs*, 83 F.3d 1384 (Fed. Cir. 1996). The OPM regulations applicable to positions in the excepted service provide as follows:

The Office of Personnel Management will decide whether the duties and requirements of *any particular position* justify exception from the competitive service. Upon favorable determination, OPM will authorize the position to be filled by excepted appointment under Schedule A, B, or C. Unless otherwise specified in a particular appointing authority, an agency may make Schedule A, B, or C appointments on either a permanent or nonpermanent basis, with any appropriate work schedule (i.e., full-time, part-time, seasonal, on-call, or intermittent).

5 C.F.R. § 213.102(a) (emphasis added). In this case, there is no indication in the record that OPM determined that the particular positions to which the appellants were assigned as special experts justified exception from the competitive service, nor that OPM authorized the agency to fill these positions

under the excepted schedules. Accordingly, the extent to which the rule announced in *Travaglini* should apply in this case is an open question.

¶33 In addition, although the administrative judge found that the parties failed to identify an absolute statutory bar that precluded the appellants' appointments, the administrative judge did not determine whether these appointments violated the OPM regulations implementing 5 U.S.C. § 3109. Although the appellants argue that these regulations did not apply to limit the agency's authority to appoint the appellants as special experts pursuant to 42 U.S.C. §§ 282(d)(1) and 285a-2(b)(5), PFRF, Tab 15 at 44, Tab 18 at 18-19, the appellants have not provided a basis for finding that the OPM regulations implementing 5 U.S.C. § 3109, other than those regulations related to the period of service, should not apply to the appointments at issue in these appeals. Each of the title 42 sections which authorized the appointments at issue in these appeals specifically stated that the directors could obtain the services of experts or consultants "in accordance with section 3109 of Title 5," with the only exception being the limitation in § 3109 regarding the limitation on the period of service. Standing alone, 5 U.S.C. § 3109 is not an appointment authority; rather, by its own terms it applies to services procured "[w]hen authorized by an appropriation or other statute." In addition, while we recognize that 42 U.S.C. §§ 282(d)(1) and 285a-2(b)(5) were both in existence prior to 1992¹⁰ when Congress amended 5 U.S.C. § 3109 to specifically authorize OPM to issue substantive regulations implementing that section, the appellants have pointed to no authority to support the proposition that Congress did not intend the regulations to apply to appointments made after the amendment but pursuant to appropriations or other statutes that pre-dated the 1992 amendment.

¹⁰ These two sections were first added to the Public Health Service Act by § 2 of the Health Research Extension Act of 1985, Pub. L. No. 99-158, 99 Stat. 820 (1985).

¶34 Furthermore, even if the “illegal appointment” rule announced in *Travaglini* applies to these appeals, the Board has not limited the application of this rule solely to statutory violations. In *Daneshpayeh v. Department of the Air Force*, 57 M.S.P.R. 672, 682 (1993), *aff’d*, 17 F.3d 1444 (Fed. Cir. 1994) (Table), the Board applied the rule to find that it lacked jurisdiction over an appeal in which the appellant was removed from a position for which he did not qualify under the provisions of a treaty. The treaty provided that citizens who were “ordinarily resident” in the host country could not be part of the “civilian component” employed by the United States in the host country. Although the Board cited the *Travaglini* rule, it noted that an Article II treaty ratified by the United States Senate has the force and effect of a statutory enactment. *Daneshpayeh*, 57 M.S.P.R. at 676. In addition, although the Board did not find that the appellant was not qualified for an appointment to any position in the civil service, it determined that he was appointed to the position from which he was removed in violation of the treaty, and it relied on this determination to conclude that it lacked jurisdiction over the appellant’s termination from this position. *Daneshpayeh*, 57 M.S.P.R. at 676, 682. Thus, the Board’s decision in *Daneshpayeh*, which was affirmed by the Federal Circuit, is relevant to these appeals for two reasons: (1) it established that the Board does not have jurisdiction over an appointment that was prohibited by a law that has the “force and effect of a statutory enactment”; and (2) it established that the relevant question is not whether there was an absolute prohibition which rendered the appellant unqualified for *any* appointment in the civil service, but whether there was an absolute prohibition which rendered the appellant unqualified for appointment to the particular position in the civil service.

¶35 In *Chrysler Corporation v. Brown*, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979), the U.S. Supreme Court discussed the situations in which agency-issued regulations have the “force and effect of law.” Under the *Chrysler* test, agency regulations have the force and effect of law when they prescribe

substantive, as opposed to interpretive, rules, and they are promulgated pursuant to a specific statutory grant of authority and conform with any procedural requirements imposed by Congress. *Chrysler Corporation*, 441 U.S. at 301-303; *see also Horner v. Jeffrey*, 823 F.2d 1521, 1529 (Fed. Cir. 1987). We find that the OPM regulations at issue in these appeals have the force and effect of law. As set forth above in the background section, the 1992 amendment to 5 U.S.C. § 3109 authorized OPM to issue regulations necessary for the administration of this section, including regulations setting forth the circumstances in which it is appropriate to employ an expert or consultant under the provisions of this section. *See* ¶ 5, *supra*. OPM promulgated the regulations at issue in accordance with the notice and comment provisions of the Administrative Procedures Act (APA), 5 U.S.C. § 553, and the regulations OPM implemented had substantive legal effect by limiting the discretion of agency officials with regard to the appropriate use of experts and consultants appointed in accordance with 5 U.S.C. § 3109. Thus, the regulations set forth at 5 C.F.R. § 304.103 meet both requirements under the *Chrysler* test, i.e., they prescribe substantive rules, and they were promulgated pursuant to a specific grant of authority in conformance with the procedural requirements imposed by Congress. *See Chrysler Corp.*, 441 U.S. at 303 (the pertinent procedural limitations on agency rulemaking are those found in the APA). Accordingly, while the limitations set forth at 5 C.F.R. § 304.103(b) on the use of experts and consultants appointed in accordance with 5 U.S.C. § 3109 may not constitute statutory prohibitions, these regulations have the force and effect of law, and, to the extent that they operated to prohibit the agency from appointing the appellants to the particular positions they occupied as special experts, the Board may lack jurisdiction to consider actions that result from an agency's cancellation of appointments made in violation of these regulations. *See Atchison, Topeka, & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471, 474, 57 S.Ct. 541, 543, 81 L. Ed. 748 (1937) (a regulation promulgated by an agency pursuant to statutory authority has the same force as though prescribed by the statute). We

note, however, that the administrative judge did not determine whether the appointments at issue in these appeals, in fact, violated the OPM regulations implementing 5 U.S.C. § 3109.

The Board does not have jurisdiction over a reduction in pay if such reduction is from a rate that is contrary to law or regulation to a rate that is permitted by law or regulation.

¶36 With respect to the agency's argument that the Board does not have jurisdiction over the reductions in pay suffered by appellants Lovoy, Abell, and Nichols because the agency's actions in retroactively canceling their special expert appointments merely reduced their rate of basic pay from a rate that was contrary to law or regulation to a rate that was permissible under law or regulation, we note that it appears that the agency did not assign grades to the positions to which it appointed the appellants. *See* 5 U.S.C. § 3109(b)(2) (experts or consultants may be procured without regard to the classification requirements of chapter 51). Because the special expert positions were at a higher rate of pay than the rate of pay the appellants' received in their previous positions, the appellants' appointments to the special expert positions could be characterized as "promotions." *See* 5 C.F.R. § 210.102(b)(11) ("*Promotion* means a change of an employee, while serving continuously within the same agency: . . . (ii) To a position with a higher rate of pay when both the old and the new positions are . . . in different pay method categories."). However, because the positions were ungraded, the cancellation of the appellants' appointments to these positions and their reassignment to the positions they previously held did not constitute appealable reductions in grade. *See Peele v. Department of Health & Human Services*, 6 M.S.P.R. 296, 299 (1981) (the appellant's assignment to an ungraded position was not a reduction in grade since he was no longer under a position classification system).

¶37 Because the agency did not raise the argument that Lovoy, Nichols, and Abell were paid at a rate contrary to law or regulations before the administrative judge, she made no finding regarding appropriate pay for special experts appointed pursuant to 42 U.S.C. §§ 282(d)(1) and 285a-2(b)(5) in accordance with 5 U.S.C. § 3109. However, as set forth in the background section, unless specifically authorized by an appropriation or other statute, the OPM regulations generally limit the pay of experts or consultants appointed in accordance with 5 U.S.C. § 3109 to an amount not in excess of the rate of basic pay for GS-15, step 10. See ¶¶ 7-8, *supra*. The Board takes official notice of the fact that the rate of basic pay for GS-15, step 10 (excluding locality pay or any other additional pay) for 2000 and 2001, the years during which the appellants served in their appointments as special experts, was, respectively, \$100,897 and \$103,623. OPM, 2000 and 2001 General Schedule Pay Tables (available online at <http://www.opm.gov/oca/2000tbls/GSannual/INDEX.HTM> and <http://www.opm.gov/oca/01tables/GSannual/html/2001gs.htm>); see 5 C.F.R. § 1201.64 (the Board may take official notice of matters of common knowledge or matters that can be verified). The appellants have not identified any appropriation or other statute that authorized the agency to pay experts or consultants in excess of the limitations set forth at 5 C.F.R. § 304.105.

¶38 The agency asserts, however, that § 503 of the 1993 HHS Appropriations Act authorized the agency to pay experts or consultants at a rate not greater than the rate of basic pay for level IV of the Executive Schedule. See ¶ 8, *supra*. The Board takes official notice of the fact that the basic pay for level IV of the Executive Schedule for 2000 and 2001 was, respectively, \$122,400 and \$125,700. OPM, 2000 and 2001 Executive Schedule Pay Tables (available online at <http://www.opm.gov/oca/2000tbls/Execses/html/execsched.htm> and <http://www.opm.gov/oca/01tables/execses/html/01execsc.htm>).

¶39 As set forth in the background section, evidence in the record indicates that, in June 2000, NCI originally set Lovoy's annual salary as a special expert at

\$127,293, and that it later adjusted the salary to \$109,148 after apparently eliminating the retention allowance NCI had previously approved in an attempt to retain Lovoy's services. *See* ¶ 9, *supra*. In early 2001, NCI adjusted Lovoy's annual salary to \$113,300 and, shortly thereafter, to \$120,261. *Id.* In March 2000, NCI appointed Abell to a special expert position at an annual salary of \$127,000, and it adjusted her pay to an annual salary of \$130,400 effective January 14, 2001. *See* ¶ 10, *supra*. NCI appointed Nichols to a special expert position at an annual salary of \$126,000 in May 2000, and it adjusted her pay to an annual salary of \$130,800 effective January 14, 2001. *See* ¶ 11, *supra*. Therefore, because 5 C.F.R. § 304.105 generally limits the amount an agency may pay to an expert or consultant appointed under 5 U.S.C. § 3109 to the rate of pay for GS-15, step 10, under the General Schedule (excluding locality pay or any other additional pay), in the absence of an appropriation or other statute authorizing additional pay, the annual salary of each of these appellants exceeded the rate allowable under 5 C.F.R. § 304.105.¹¹ On the other hand, if the agency is correct in arguing that § 503 of the 1993 HHS Appropriations Act applied to the appellants' appointments, then the annual salaries that Nichols and Abell received as special experts, which was, for both years, in excess of the basic pay of level IV of the Executive Schedule, were contrary to this law. However, if the agency eliminated Lovoy's retention allowance after she was appointed as a special expert, it does not appear that Lovoy's annual salary exceeded the basic pay of level IV of the Executive Schedule for either of the years at issue.

¹¹ In fact, unless an appropriation or other statute authorized greater pay, the annual salary of the other three appellants also exceeded the rate of pay allowable under 5 C.F.R. § 304.105 because their salaries as special experts each exceeded the rate of pay of GS-15, step 10 (excluding locality pay or any other additional pay) under the General Schedule. NCI appointed Dupuis to his position as a special expert in February 2001 at an annual salary of \$115,000, NIH appointed Lenkin to her position as a special expert in April 2000 at an annual salary of \$120,000, and NIDDK appointed Feld to her position as a special expert in December 2000 at an annual salary of \$120,000. *See* ¶¶ 12-14, *supra*.

¶40 In their response to the agency’s petition for review, appellants Lovoy, Nichols, and Abell argue that the 1993 HHS Appropriations Act does not apply to these appeals because the appellants’ title 42 appointments were made and cancelled in later fiscal years. PFRF, Tab 18 at 14. However, we note that, by its terms, § 503 of the 1993 act applies to “[a]ppropriations contained in this Act or subsequent . . . Appropriations Acts.” Therefore, if the appellants’ pay as special experts was funded through the appropriations acts for the fiscal years in which the appellants served as special experts, the fact that they were not funded through the 1993 HHS Appropriations Act would not render § 503 of that act inapplicable.

¶41 Nevertheless, these appellants argue in the alternative that, even if the 1993 act applied to subsequent fiscal years, the HHS appropriations acts are inapplicable because NCI personnel appropriations are directly approved by Congress and are not derived from HHS appropriations. In support of this argument, the appellants cite 42 U.S.C. §§ 285a-2 and 285a-8 and allege that, through these sections, Congress budgeted NCI’s research and other activities for the period from 1994 through 2004. PFRF, Tab 18 at 14-15. Section 285a-2 authorizes the NCI Director to obtain 151 experts and consultants and to pay or reimburse such experts or consultants for their travel to and from their place of service and for other expenses under certain conditions. 42 U.S.C. § 285a-2(b)(5). This section also authorizes the Director to prepare and submit an annual budget estimate for the National Cancer Program directly to the President for review and transmittal to Congress after reasonable opportunity for comment (but without change) by the Secretary of HHS, the Director of NIH, and NCI’s advisory council. 42 U.S.C. § 285a-2(b)(9). We note, however, that 42 U.S.C. § 285a-2 does not appropriate any funds, and, despite the fact that it authorizes the payment of certain expenses incurred by experts or consultants associated with their assignments, it does not specify the rate at which such experts or consultants may be paid. By the same token, 42 U.S.C. § 285a-8 authorizes

appropriations for particular purposes with regard to the activities of NCI, but this section does not actually appropriate funds nor address the salary at which experts or consultants appointed by the Director of NCI may be paid. *See, e.g., Train v. City of New York*, 420 U.S. 35, 39 n.2, 95 S. Ct. 839, 842 n.2, 43 L. Ed. 2d 1, (1975) (describing the normal system of funding as program approval and authorization of appropriation followed by separate annual appropriation acts and noting that it is not until the actual appropriation that the government funds can be deemed firmly committed). Furthermore, we note that it appears Congress appropriated the funds for fiscal year 2000 and fiscal year 2001 necessary to carry out title IV of the Public Health Service Act, which is the title in which both 42 U.S.C. §§ 282(d)(1) and 285a-2(b)(5) appear, in the HHS appropriations acts for the respective years. *See* Department of Health and Human Services Appropriations Act, 2001, Pub. L. No. 106-554, Title II, 114 Stat. 2763 (2000); Department of Health and Human Services Appropriations Act, 2000, Pub. L. No. 106-113, Title II, 113 Stat. 1501 (1999). Therefore, on the basis of the current record, the agency appears correct in arguing that the pay of special experts appointed pursuant to 42 U.S.C. §§ 282(d)(1) and 285a-2(b)(5) in fiscal years 2000 and 2001 was subject to the limitation contained in § 503 of the 1993 HHS Appropriations Act.

¶42 Based on the analysis set forth above, we find that there are several outstanding issues that must be resolved to determine whether the appellants have met their burden of proving that the Board has jurisdiction over these appeals. Because several of these issues were not raised before the administrative judge and may require fact-finding in order to be resolved, we find that it is appropriate to remand this appeal to the regional office to afford the parties an opportunity to offer additional evidence and argument, and, if necessary, to engage in further discovery concerning these issues.

ORDER

¶43 Accordingly, we vacate the initial decision and remand this appeal to the regional office for further adjudication consistent with this Opinion and Order. Following the remand, the administrative judge shall permit the parties to offer additional evidence and argument and, upon the request of either party, to engage in additional discovery regarding any of the jurisdictional issues identified above. In addition, if the appellants so request, the administrative judge shall conduct a supplemental jurisdictional hearing. However, the administrative judge need not conduct additional proceedings concerning issues, such as the RIF issue and appellant Feld's affirmative defenses of age and sex discrimination on the basis of disparate impact, that were heard and fully adjudicated prior to the issuance of the March 6, 2002 initial decision. To the extent that it is necessary to address these issues in a new initial decision, the administrative judge may choose to adopt her previous findings and conclusions regarding these issues.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.