United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 5, 2006

TO : Ronald K. Hooks, Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Amega Personnel Services, Inc.; Service Pro., Inc.; & A & G Commercial Trucking, Inc.; a Single Employer
Case 26-CA-22103

177-1650
177-2414-0100
177-2414-1100
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177-2484-5000
177-2484-5033
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The Region submitted this Section 8(a)(1) and (3) case for advice concerning whether owner-operators who work for the Employer are Section 2(3) employees or independent contractors, and whether the owner-operators and the Employer's company drivers are supervisors or joint employers.

We conclude that the owner-operators are not independent contractors, but that both owner-operators and company drivers are supervisors. Therefore, absent withdrawal, the Region should dismiss the instant charge.

FACTS

A. Overview and Background Concerning the Unfair Labor Practice Allegations

Amega Personnel Services, Inc., A&G Commercial Trucking, Inc., and ServicePro, Inc. (collectively, the Employer) are commonly owned businesses that deliver prefabricated homes from manufacturers to retailers.[1] Amega employs drivers who operate company trucks (company drivers); A&G contracts with owner-operators to drive for the Employer; and ServicePro employs business managers.

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[1] The charge alleges, and Region has found, that these companies constitute a single employer, a matter about which the Region does not seek advice.

The Employer maintains an office in Crump, Tennessee, from which Southeast Regional Manager Tim Stanfill directs operations at seven dispatch terminals, including the Savannah, Tennessee terminal at issue. Stanfill oversees roughly 169 drivers, including 140 owner-operators and 29 company drivers, who transport homes manufactured by Clayton Homes. As set forth more fully below, the Employer requires both company drivers and owner-operators to use escort drivers to travel ahead of their trucks.

In the spring of 2005, company driver Terry Kyle, owner-operator Jerry Wadkins, and escort driver Sherry Wadkins (Jerry Wadkins' wife) organized two driver meetings to discuss how best to approach the Employer about increasing the escorts' pay rate in the face of rising fuel prices.[2] Stanfill attended the first meeting, held March 26, and told the drivers that he understood their concern about escort pay and would speak to the Employer's owner, Greg Deline, about securing a raise for them. On April 4, Stanfill spoke with Deline, who agreed to increase escorts' pay by $.03 a mile, to $.58 a mile.

About this time, Stanfill learned that Kyle was organizing a second drivers meeting. In response, Stanfill issued an April 5 memo to drivers stating that if another meeting took place, any company driver, owner operator, or escort who attempted to hold up a delivery would be terminated, and would be barred from working for any company that delivers homes for Clayton.

Attendees at the second meeting, held April 9, decided that Kyle, Sherry Wadkins, and another apparent company driver would approach Stanfill about their concerns on April 11. However, the trio did not meet with Stanfill because as they neared his office, Kyle overheard Stanfill providing his name and social security number to someone and asserting that Kyle had threatened drivers to ensure they attended a meeting.

Stanfill terminated Kyle and Wadkins on April 14, providing each with a separation notice. Kyle's notice stated that he had threatened other drivers to force them to attend a meeting and had been insubordinate. Wadkins' notice stated that he was fired for holding escort meetings in an attempt to disrupt the Employer's and Clayton's daily operations.

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[2] Kyle had worked for the Employer since May 2000, and Jerry Wadkins since 1996.

After Kyle's discharge, he obtained an escort position with a driver for one of the Employer's competitors, ATH. On April 19, Kyle's first day as an ATH escort, Stanfill called Kyle and said he would inform Clayton that he had terminated Kyle and Wadkins. The ATH driver did not use Kyle's services after that first day.

On April 26, Stanfill e-mailed Clayton regarding Kyle and Wadkins, the March 26 drivers meeting they had arranged, and Stanfill's understanding that they had planned another meeting, which had prompted his April 5 employee memo. Stanfill claimed that "many drivers and escorts" had advised him they had been threatened with adverse consequences if they did not attend the second meeting, and that Stanfill felt he had no choice but to fire them. Stanfill thereafter gave Kyle and Wadkins poor references to employers with which they applied for work.

Kyle filed the instant Section 8(a)(1) and (3) charge alleging that the Employer surveilled employees, threatened them with reprisals for engaging in protected concerted activity, threatened to prevent Kyle from working for ATH, fired Kyle and Wadkins, and later attempted to cause and did cause them to lose employment with other employers. [*FOIA Exemption 5*

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B. <u>Terms and Conditions of Employment for Company Drivers, Owner-Operators, and Escorts</u>

1. Common Employment Terms for Company Drivers and Owner-operators

Company driver and owner-operator daily routines and responsibilities are identical. Every driver is assigned to a specific dispatch office, which he must call daily to receive his assignment. Any driver who refuses an assignment may be disciplined. Each driver must obtain a bill of lading and permitted travel route[3] from his dispatcher and report to the Clayton facility by 7 a.m. The Employer requires drivers to report any issues that arise while en route to their dispatcher, who then instructs them on how to proceed. In addition to disciplining drivers for refusing assignments, the Employer has issued written warnings to both company drivers and owner-operators who have, e.g., failed to contact or take calls from their

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[3] Since drivers transport oversized loads, states issue permits designating permissible travel routes. According to Stanfill, drivers must follow these designated routes.

dispatcher, or failed to follow a prescribed delivery route. Repeat problems result in a driver's termination; Stanfill estimated that he fires roughly ten company drivers and/or owner-operators a year. Drivers use Employer-provided data cards to report the wages they are owed for a given pay period, based on which the Employer issues them paychecks. Neither company drivers nor owner-operators are permitted to work for other companies. All trucks, including those owner-operators drive, must bear the Employer's logo.

In accordance with applicable state laws, the Employer requires both company drivers and owner-operators to have escort drivers who travel ahead of them.[4] The Employer currently provides both company drivers and owner-operators with a $.58 per mile allowance on behalf of their escorts, whose services the drivers arrange for themselves. Except for a few escorts whom the Employer pays directly, the Employer tenders an escort's mileage allowance to the driver who, in turn, pays his escort. The Employer does not dictate how much of the mileage allowance a driver pays his escort, nor does the Employer cover expenses that an escort incurs, such as license fees or vehicle maintenance, repair, and insurance costs.

In addition to hiring escorts, both company drivers and owner-operators direct them and decide whether to retain their services. Many drivers own escort vehicles and pay someone to drive them. For example, company driver Kyle owns an escort vehicle and pays an escort $.25 to $.30 per mile to drive it, applying the remainder of the Employer's escort mileage allowance to expenses. Other drivers hire escorts who own escort vehicles. In addition to owner-operator Wadkins' wife serving as his escort driver, as noted above, other drivers apparently use their spouses as escort drivers.

2. Differing Employment Terms for Company Drivers

Company drivers operate Employer-owned trucks for which the Employer pays all fuel, maintenance, repair, and insurance costs. Company drivers receive $.58 per mile and up to $50 per night for lodging, when necessary. Company drivers' wages are subject to withholding for taxes, social security, health insurance, and disability and workers' compensation benefits, and they receive paid vacation. The Employer reports company drivers' annual wages on W-2 forms,

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[4] Most states require only "front-end" escorts. The Employer will provide drivers with a "tail-end" escort in those states that require one.

and reports payments made on behalf of their escorts on 1099 forms.

3. Differing Terms for Owner-Operators

Owner-operators must sign a service contract that the Employer promulgates unilaterally. The service contract identifies the owner-operator as an independent contractor who leases his truck to the Employer for the Employer's exclusive possession, control, and use. Owner-operators are responsible for all of their operating expenses, such as fuel, tolls, permits, licenses, tags, and base plates, and they must also maintain automotive liability, bodily injury, and property damage insurance. The service contract provides that the Employer will furnish public liability, property damage, and cargo insurance effective when a home is being loaded and transported, but the Employer charges the cost of such coverage back to the owner-operator. The Employer pays owner-operators between $1.25 and $1.40 per mile, depending on the width of the home they are transporting. The Employer does not make any withholdings from owner-operators' pay and does not provide them with either health insurance or paid vacation. The Employer does not provide owner-operators or their escorts with any lodging allowance, and reports owner-operators' and escorts' earnings on 1099 forms.

4. Escort Drivers

The financial remuneration of escort drivers has been described above. Additionally, the Employer promulgates certain policies that significantly affect escort driver terms and conditions of employment. For example, the owner-operator must submit a "qualification file" to the Employer that, among other things, lists the escort's previous employment, accident and moving violation history, and includes copies of the escort's commercial driver's license, road test report, and drug test results, all of which must be acceptable to the Employer. Moreover, the service contract provides that the Employer has no right to control the hiring or discharge of any escort an owner-operator engages, but the Employer in fact has disciplined and fired escorts working for both company drivers and owner-operators. In situations where the Employer fires a company driver or owner-operator, his escort is also terminated.[5]

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[5] In a December 14 position statement, the Employer's attorney denied that the Employer employs escorts, contending that they are solely employed by the drivers with whom they work.

ACTION

We conclude that the owner-operators are not independent contractors. However, because we find that the owner-operators and company drivers supervise their escort drivers in the Employer's interest, we conclude that they are statutory supervisors.

A. The owner-operators are not independent contractors.

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." To determine whether an individual is an employee or an independent contractor, the Board applies the common law agency test.[6] The Restatement (Second) of Agency, §220(2), lists numerous relevant factors to be examined.[7] However, the Board has cautioned that this list is neither exhaustive nor exclusive and that it considers "all the incidents of the individual's relationship to the employing entity."[8] Determining whether an individual is an independent contractor is fact intensive,[9] and the party asserting independent contractor status bears the burden of proving it.[10]

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[6] See, e.g., Argix Direct, Inc., 343 NLRB No. 108, slip op. at 4 (2004).

[7] They are: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

[8] See Slay Transportation Co., 331 NLRB 1292, 1293 (2000), quoting Roadway Package System, Inc., 326 NLRB 842, 850 (1998).

[9] Argix Direct, slip op. at 4, citing NLRB v. United Insurance Co., 390 U.S. 254, 258 (1968).

[10] Id., citing BKN, Inc., 333 NLRB 143, 144 (2001).

We conclude, in agreement with the Region, that the Employer cannot establish that the owner-operators are independent contractors. First, the Employer unilaterally promulgates the service agreement which it requires owner-operators to sign.[11] Second, this service contract expressly forbids owner-operators from working for any other company, greatly limiting the entrepreneurial opportunities they might otherwise enjoy.[12] Owner-operators must display the Employer's logo on their vehicles.[13] Owner-operators cannot refuse assignments[14] and their employment is essentially indefinite, as Wadkins' nearly ten-year tenure with the Employer attests.[15] Moreover, the Employer's work assignment, daily reporting, and on-the-road reporting requirements are the same for owner-operators and company drivers.[16] Owner-operators are also subject to Employer

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[11] See, e.g., Argix Direct, slip op. at 6 (fact that employer unilaterally promulgated contract setting forth owner-operators' terms and conditions of employment favored finding them to be statutory employees).

[12] See, e.g., Roadway, 326 NLRB at 851, quoting NLRB v. Amber Delivery Service, Inc., 651 F.2d 57, 63 (1st Cir. 1981) (owner-operators found to be employees where, inter alia, constraints on their off-hours vehicle use stifled entrepreneurial initiative and minimized extent to which truck ownership offered them entrepreneurial independence); Corporate Express Delivery Systems, 332 NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002) (owner-operators, found employees, were not permitted to deliver for anyone other than employer).

[13] See, e.g., Slay Transportation, 331 NLRB at 1294 (owner-operators required to display employer's logo on their vehicles).

[14] Cf. Argix Direct, slip op. at 5 (drivers, found independent contractors, were not penalized in any manner for electing not to work, so long as they had not previously agreed to work on a given day).

[15] See, e.g., St. Joseph News-Press, 345 NLRB No. 31, slip op. at 6 (2005) (fact that carriers were hired for an indefinite period militated in favor of employee status); Argix Direct, slip op. at 6 (same).

[16] See BKN, 333 NLRB at 145 (employer's freelance artists and designers, found employees, worked side-by-side and shared common terms and conditions of employment with other

discipline and discharge just like company drivers[17] and their escorts.[18] Finally, owner-operators perform the same tasks as company drivers, and this work comprises the core of the Employer's business.[19]

We recognize that certain incidents of the owner-operators' relationship with the Employer favor finding independent contractor status. For example, they own their vehicles and are responsible for all associated operating, maintenance, and repair costs;[20] their pay is not subject to withholding, and the Employer does not offer them health benefits or paid vacation;[21] the Employer remits money to the owner-operators, who in turn pay their escorts;[22] and

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artists and designers whom the employer classified as regular employees).

[17] See, e.g., Slay Transportation, 331 NLRB at 1294 (owner-operators, found employees, were subject to the same disciplinary actions as company drivers). Cf. St. Joseph News-Press, slip op. at 6 (carriers, found independent contractors, were subject neither to discipline nor to employer's handbook or other work rules).

[18] See, e.g., Community Bus Lines, 341 NLRB No. 61, slip op. at 2, n.7 (2004) (absent contrary evidence, employer's imposition of discipline over owner-operators and their substitute drivers, in addition to its acknowledged employees, indicated that it treated all drivers as employees).

[19] See, e.g., Corporate Express, 332 NLRB at 1522 (owner-operators' work embodied the essential functions of employer's package-delivery business); Slay Transportation, 331 NLRB at 1294 (owner-operators performed functions at the very core of the employer's business). Cf. St. Joseph News-Press, slip op. at 6, n.6.

[20] See, e.g., St. Joseph News-Press, slip op. at 6 (fact that carriers owned their vehicles and were responsible for maintenance weighed in favor of independent contractor status); Argix Direct, slip op. at 4 (requirement that owner-operators own or lease their trucks supported finding independent contractor status).

[21] See, e.g., Argix Direct, slip op. at 5 (employer did not deduct for taxes, social security, state disability, health benefits, or vacations, nor did it provide owner-operators with workers' compensation benefits).

[22] Ibid. (employer paid owner-operators who, in turn, paid their drivers an agreed-upon salary).

the service agreement identifies the owner-operators as independent contractors.[23] However, how the Employer pays these individuals, what benefits are excluded, and how the Employer labels them are not strong indicia of their status.[24] We conclude that the contrary evidence showing an employer-employee relationship, including pervasive Employer control of their work and their lack of any meaningful entrepreneurial opportunity, greatly outweighs the comparatively few indications suggesting independent contractor status.

B. The company drivers and owner-operators are Section 2(11) supervisors.

Someone is a statutory supervisor under Section 2(11) if (i) the individual possess authority to engage in any one of the 12 enumerated supervisory functions; (ii) the individual's exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment; and (iii) the individual holds such authority "in the interest of the employer."[25] The Region notes that both company drivers and owner-operators possess primary indicia of Section 2(11) supervisory status because they possess, and use independent judgment in exercising, the authority to hire and discharge their escort drivers. We agree but further conclude, contrary to the Region, that company drivers and owner-operators exercise such authority in the Employer's interest.

The Board recently analyzed the meaning of Section 2(11)'s "in the interest of the employer" requirement in

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[23] See, e.g., St. Joseph News-Press, slip op. at 6 (contract specified parties were creating an independent contractor relationship). In this regard, owner-operator Wadkins [*FOIA Exemptions 6 and 7(c)*] when he signed the Employer's service agreement, he considered it a lease of his truck and his services.

[24] See, e.g., Community Bus Lines, 341 NLRB No. 61, slip op. at 1, 3 (owner-operators found to be employees, despite not collecting wages or benefits like employer's employee drivers); Slay Transportation, 331 NLRB at 1292, 1293 (owner-operators, found statutory employees, were generally paid on the same basis as company drivers but did not receive vacation, sick pay, medical benefits, or gas cards, like company drivers).

[25] See, e.g., NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001) (internal citation omitted).

Allstate Insurance Co.,[26] which involved a "Neighborhood Office Agent" (NOA) who sold the employer's insurance policies from a storefront office. The NOA received an allowance which she could apply toward hiring clerical and solicitor assistants over whom she would exercise supervisory authority. In analyzing whether the NOA would exercise that authority in her own interest or in her employer's interest, the Board noted that the NOA had "complete discretion whether to work alone" and that "[h]er choice would be informed by her own determination whether adding assistants would enhance...her sales commissions." 332 NLRB at 761. Noting that the NOA's "day to day supervision of the assistants, as well as her decision to raise or lower their pay, would be driven by this same motive," the Board concluded that the NOA "would not be acting in the interest of her employer with respect to assistants employed in her office...." Id. (Emphasis added.) In contrast, the company drivers and owner-operators here have no discretion regarding the use of escort drivers, but rather are required by the Employer and state law to hire them. The drivers' supervision of these Employer-required escorts is thus driven by this factor and is in the Employer's interest.

The Board in Allstate also noted that the Supreme Court indicated that Section 2(11)'s "in the interest of the employer" requirement is satisfied where the supervisory duties at issue "are a necessary incident to the production of goods or provision of services."[27] The Board found this was not the case in Allstate. Because the NOA was free to serve customers with or without hiring an assistant, the Board found that she would not alter any essential component of the employer's business if she elected to work alone.[28] We must reach the contrary result here because the Employer requires company drivers and owner-operators to use escort drivers, who clearly are a necessary incident to the Employer's business. In sum, the factors the Board relied on in Allstate to find that the NOA would not exercise her supervisory authority in the employer's interest are absent here. We find the instant case more similar to Deaton Truck

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[26] Allstate Insurance Co., 332 NLRB 759 (2000).

[27] Id. at 761, quoting NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 580 (1994).

[28] Id. at 761.

Lines v. NLRB,[29] distinguished in Allstate, where the court held that multiple-owner-drivers were Section 2(11) supervisors who exercised authority in the interest of the employer that leased their trucks.

The Board in Deaton found that all of the drivers at issue, including multiple-owner-drivers (i.e., drivers who owned more than one truck leased to employer Deaton), were employees of the Employer and not independent contractors, but further concluded that the multiple-owner drivers were supervisors because they possessed authority to hire and fire the drivers of their leased trucks.[30] On appeal, the union argued that this supervisory authority was exercised in the interest of the multiple-owner-drivers and not in the interest of employer Deaton. The court noted that multiple-owner-drivers were free to accept or reject any driver who was in Deaton's driver pool, and thus they exercised their supervisory authority over the drivers in their own interest. However, the court further found that the multiple-owner-drivers' interest was "so intertwined with the interest of Deaton in the successful and efficient operation of the trucks...[as to be] in the interest of both Deaton and of the multiple-owner." 337 F.2d at 699.

The Board, addressing the court's Deaton holding in Allstate, specifically noted that the "drivers were, in effect, paid for by Deaton and performed functions essential to its business," so that the multiple-owner-drivers' authority over the drivers was "reasonably viewed as authority exercised in the interest of Deaton." Allstate, supra, 332 NLRB at 761.[31] The company driver and owner-

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[29] 337 F.2d 697, 699 (5th Cir. 1964), cert. denied 381 U.S. 903 (1965), affg. 143 NLRB 1372 (1963).

[30] 143 NLRB at 1377-1378. Accord: Florida-Texas Freight, Inc., 197 NLRB 976, 978 (1972); Checker Cab Company, 180 NLRB 737, 737-738 (1970); S & W Motor Lines, 179 NLRB 784, 785-786 (1969); Steel City Transport, 166 NLRB 685, 690 (1967), enfd. 389 F.2d 735 (3d Cir. 1968); Supreme, Victory & Deluxe Cab Cos., 160 NLRB 140, 147 (1966); Indiana Refrigerator Lines, Inc., 157 NLRB 539, 549-550 (1966); National Freight, Inc., 153 NLRB 1536, 1540-1541 (1965); Chemical Leaman Tank Lines, Inc., 146 NLRB 148, 151 (1964); and National Freight, Inc., 146 NLRB 144, 146-147 (1964).

[31] See also Florida-Texas Freight, Inc., 197 NLRB at 978 (finding it apparent that the multiple-owner-drivers and owner-non-drivers found to be supervisors exercised their authority not only to protect their own equipment but also in the interest of the Employer and as an integral part of the employer's operations); S & W Motor Lines, 179 NLRB at

operator supervision over the escorts here is substantially the same. The escorts are, in effect, paid for by the Employer and perform a function essential to its business. Accordingly, we conclude that as in Deaton and its progeny, to the extent company drivers and owner-operators exercise supervisory authority over their escorts, they are reasonably viewed as doing so in the Employer's interest, even if they also do so in their own interest. Company drivers and owner-operators are therefore Section 2(11) supervisors.

We note that the Employer's Section 2(11) defense remains viable, but for different reasons, as to company drivers and owner-operators like alleged discriminatee Jerry Wadkins, whose spouses serve as their escort drivers. As a general matter, we find that the Employer at least jointly employs the escort drivers, because the Employer at a minimum shares or codetermines essential terms and conditions of their employment.[32] Thus, the evidence reveals that that the Employer not only plays a meaningful role in hiring escorts,[33] but also disciplines and discharges escorts for failing to adhere to the Employer's rules and policies,[34] and influences their pay by setting a mileage reimbursement rate.

However, Section 2(3) of the Act expressly exempts "any individual employed by his...spouse" from the definition of employee. Since it follows that Jerry Wadkins could not jointly employ his wife with the Employer, the Employer solely employed her. Nevertheless, for the reasons set forth above (possession of authority to hire and fire escorts), we conclude that Jerry Wadkins acted as the

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785-786 (same); Indiana Refrigerator Lines, Inc., 157 NLRB at 550 (same); and National Freight, 153 NLRB at 1541 (same).

[32] See, e.g., Mayfield Holiday Inn, 335 NLRB 38, 38 (2001), enfd. 333 F.3d 646 (6th Cir. 2003) (establishing joint employer status requires a showing that a party meaningfully affects matters such as hiring, firing, discipline, supervision, and direction).

[33] For example, the service agreement requires that owner-operators submit a "qualification file" for any prospective escort driver, whose fitness the Employer must approve before she or he may work as an escort.

[34] In this regard, we note that consistent with the Employer's practice, Sherry Wadkins was herself fired as a consequence of Jerry Wadkins' discharge.

Employer's supervisor vis-à-vis his wife in her capacity as its employee.[35]

For the foregoing reasons, we find that although the owner-operators are not independent contractors, both owner-operators and company drivers qualify as Section 2(11) supervisors. Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

[35] [*FOIA Exemption 5*

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