

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2005G086

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**FRED D. FINLEY,**

Complainant,

vs.

**DEPARTMENT OF REVENUE, MOTOR VEHICLES BUSINESS GROUP, DRIVER  
LICENSE SECTION**

Respondent.

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Administrative Law Judge Denise DeForest held the hearing in this matter on November 7 and December 11, 2006 at the State Personnel Board, 633 17<sup>th</sup> Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Eric W. Freund represented Respondent. Respondent's advisory witness was Ms. Veronica White, the appointing authority. Complainant appeared and represented himself. The record in this case was closed at the conclusion of the hearing on December 11, 2006.

**MATTER APPEALED**

Complainant, Fred D. Finley ("Complainant") appeals his termination by Respondent, Department of Revenue ("Respondent"). Complainant seeks reinstatement or settlement considering restitution for wages and damages.

For the reasons set forth below, Respondent's action is **affirmed.**

**PROTECTIVE ORDER**

At the commencement hearing in this matter, Respondent and Complainant agreed to Respondent's request that a protective order be issued in this case to prevent the use of the name and other identifying information of the Colorado resident who had been contacted by Complainant. A protective order was entered at that point that the resident will be referred to by the initials "A.M.," that her address will not be entered into the record, and that only the last four digits of her phone number would be used if reference to the phone number became necessary.

## **PROCEDURAL ORDER**

Complainant had originally filed discrimination claims based upon age, race/creed/color and religion as part of the Board's Consolidated Appeal form. Those claims were referred to the Colorado Civil Rights Division ("CCRD") for investigation. On March 22, 2006, Complainant was informed by letter from the Board that his discrimination claims had resulted in a finding of no probable cause by CCRD, and that Complainant had ten days to file an appeal with the Board on those discrimination claims. Complainant did not do so. Respondent later filed a motion to limit the hearing in this matter to a review of the disciplinary charges on the grounds that Complainant had failed to timely appeal the CCRD finding of no probable cause; that motion was granted. The hearing in this matter was limited to an evaluation of whether there was just cause for termination of Complainant's employment.

## **ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

## **FINDINGS OF FACT**

### **General Background**

1. Complainant was employed as an Administrative Assistant I for the Department of Revenue, Motor Vehicle Business Group, Driver License Section. As of February 9, 2005, Complainant had been employed by the state for slightly less than 12 months in that position. Complainant was employed by the Boulder Department of Motor Vehicles office ("Boulder DMV"). His direct supervisor was the manager of that office, Ms. Mary Nixon.
2. On February 9, 2005, Complainant was assigned to perform the cashier function at the Boulder DMV office. The cashier position handles the voter registration cards and payment for customers. On February 9, 2005, the cashier position handled approximately 160 customers; Complainant would have handled the majority of those customers except for those who were served while Complainant was on break.

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### **A.M.'s February 9, 2005, Visit to the Boulder DMV**

3. A.M. was a new Colorado resident in early 2005, and she needed to change over her old driver's license to a Colorado driver's license. In the afternoon of February 9, 2005, A.M. went to the Boulder DMV office to obtain her new license.
4. The first worker that handled A.M.'s request checked her birth certificate. The second worker who handled A.M.'s request took additional information from her.
5. A.M. then waited to be called to the cashier station where Complainant was working. Complainant called A.M. to the cashier desk by her given name, and A.M. told him that she went by her middle name.
6. A.M. had a short conversation with Complainant, during which Complainant asked her if she was related to another individual of the same last name. Complainant also asked her a few questions about the town in Boulder County in which she now lived. After providing Complainant with a check to pay for her new license, A.M. moved on to have her photo taken and then was issued a Colorado license. She left the building.
7. Complainant had cards out on his cashier desk from his church, Heritage Christian Center. He would strike up conversations about his church with interested individuals. A.M. did not express any interest in Complainant's church, and did not notice the cards. Complainant, however, decided that she would be a good individual to contact to see if she would be interested in attending one of the church support groups.

### **Complainant's Early Morning Call to A.M.**

8. Complainant left his house before 7:30 AM the next morning. While *en route* to work, he decided to call A.M. He remembered her name from the day before, and he provided that information to the telephone operator. A.M. had a listed phone number and the operator connected Complainant directly to A.M.'s home phone.
9. At or about 7:32 AM, A.M. received a phone call which the caller ID function identified as having a Nevada long distance exchange. A.M. noticed that fact and thought it was odd because she did not have friends or family in Nevada. Complainant's cell phone number, however, has a Nevada exchange and it was Complainant who was calling A.M.
10. Complainant started out the conversation by giving A.M.'s full name and then referencing that she went by her middle name. When the caller included that

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information, A.M. realized that it was the cashier from the Boulder DMV office from the day before who was calling her. The caller then identified himself as Fred, and told A.M. that he had enjoyed meeting her the day before.

11. Complainant told A.M. that he didn't often meet people who he clicked with but that she had been very friendly and upbeat, and that the person who had taken her photo for her license also thought she was a nice person. Complainant told A.M. that he liked her vibrancy and energy.
12. A.M. thought that Complainant was calling to ask her out, and she quickly told him that she was married and had no interest in him. She terminated the phone call shortly thereafter.
13. Complainant's phone call to A.M. alarmed and angered A.M. She was particularly concerned that, as a DMV employee, Complainant had access to quite a bit of her personal information. As a DMV employee, Complainant would have had access to A.M.'s home street address, date of birth, checking account information from the payment that A.M. had provided, and her social security number.

#### **A.M.'s Complaint to Respondent**

14. At 8 AM of the same morning as Complainant's call to A.M., A.M. contacted the Boulder DMV office to file a complaint against Complainant. She was directed to the help desk to process her complaint. Respondent's help desk is a function supplied by Colorado Correctional Industries, and A.M.'s call was routed to Arkansas Valley Correctional Center to handle. The help desk created a record of A.M.'s complaint.
15. The help desk faxed A.M.'s complaint to Ms. Idalee Davis, the Regional Director who has oversight of the Boulder DMV office. Ms. Davis sent the information along to Complainant's direct supervisor, Ms. Nixon, during the afternoon of February 10, 2006. Ms. Davis instructed Ms. Nixon to investigate the matter further and to talk with Complainant.
16. Ms. Davis also called A.M. for additional information, including the phone number which had appeared on A.M.'s caller ID, and asked A.M. to file a written statement with Respondent about the call. A.M. filed a written statement with Ms. Davis as of February 15, 2005, with additional information provided on the next date as well.
17. Ms. Nixon was able to tell Ms. Davis what departmental roster records showed as Complainant's cell phone number. Once it became clear to Ms. Davis that A.M. had Complainant's cell phone number on her home phone caller ID, Ms. Davis decided that Ms. Davis' supervisor, Ms. Veronica White, needed to be informed of the problem. Ms. White is the Operations Manager for the Driver License Section, and

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is the appointing authority for the approximately 190 employees in that section.

### **Respondent's Additional Investigation**

18. Ms. Nixon received information concerning A.M.'s complaint during the afternoon of February 10, 2005, and she asked Complainant to talk with her about the situation.
19. When Complainant was first asked by Ms. Nixon if he had called one of the female customers that morning, Complainant denied making such a phone call. Ms. Nixon then told him that A.M. was complaining that he had called her that morning. Complainant at that point acknowledged that he had called a woman that morning, but he said that she was someone who had been looking for a church support group and that she had given him her phone number.
20. Ms. Nixon observed that, when asked if he had called one of the female customers that morning, Complainant blushed while denying that he had done so.
21. Complainant finished his normal shift at the normal time on February 10, 2005.
22. The next day, Ms. Nixon completed an OE-3 form on the incident. This form provided Complainant with a description of the complaint that A.M. had filed with Respondent. Ms. Nixon also evaluated Complainant's behavior as unsatisfactory because Ms. Nixon's understanding of departmental policy was that employees were not to use their position in any way or for any purpose. Complainant and his supervisor signed the form on February 10, 2005 after discussing the contents of the form. During that discussion, Complainant did not offer a different version of events. He apologized to Ms. Nixon for causing a problem for her.
23. At the conclusion of the discussion of the OE-3 form, Complainant was placed on paid administrative leave. Complainant's leave began on February 11, 2005.
24. The Operations Director for the Driver License section, Veronica White, also conducted her own investigation of A.M.'s complaint. Ms. White was Complainant's appointing authority.
25. As part of her investigation, Ms. White contacted A.M. by phone and later met with A.M. in person. Ms. White also reviewed the documents that had been generated by her staff, including the OE-3 form authored by Ms. Nixon, the written explanation authored by A.M. on February 15, 2005, the complaint form generated by the help desk when A.M.'s call was first received, and a written statement by Ms. Nixon which detailed what she had learned and had discussed with Complainant.

## **6-10 Meeting and Disciplinary Decision**

26. At the same time as Complainant was placed on paid administrative leave, he was directed to attend an R-6-10 meeting with Ms. White on February 24, 2005.
27. At the R-6-10 meeting, Complainant was given the opportunity to explain what had occurred. Complainant hand-carried a written statement to Ms. White for this meeting. This statement said that Complainant had called A.M. because he thought she was another woman who had expressed interest in obtaining more information from him about Heritage Christian Center. He told Ms. White, both in writing and during the meeting, that he had received a phone call at home from a woman who hadn't left her name or number (or the message he received didn't include that information), that he thought this was the woman he had met the day before at the DMV office so he looked up the name he could recall to return the call.
28. Complainant's explanations of his actions to Ms. Nixon and Ms. White with regard to the phone call were not true. Complainant knew that the phone call at issue was the unsolicited call he had made to A.M.
29. Complainant also explained during the R-6-10 meeting with Ms. White that he agreed that his first error was in having his Heritage Christian Center cards at his work. He explained to Ms. White that he was in the lay ministry for the church and that he recruited people for the church.
30. In evaluating all of the information learned during the investigation, Ms. White was concerned that she did not see evidence that Respondent was willing to acknowledge of how inappropriate his actions had been in making an unsolicited call to A.M. Ms. White considered this lack of remorse to be evidence that Complainant lacked good judgment overall.
31. Ms. White concluded that Complainant had indeed used his on-the-job contact with A.M., and some of the information he learned during that contact, to call A.M. on the morning of February 10, 2005, for personal reasons.
32. By letter dated March 1, 2005, Ms. White terminated Complainant's employment effective February 28, 2006. At the time she authored the letter, Ms. White was under the impression that Complainant could still be considered to be a probationary employee, and the termination letter references Complainant's alleged probationary status.
33. Complainant was not a probationary employee at the time of the termination of his employment, but was outside of his probationary period and eligible to be formally certified to the position of at the time the decision was rendered.

34. Complainant filed a timely appeal of his termination with the Board.

## DISCUSSION

### I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. §§ 24-50-101, et seq.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). "Implicit in this protection for certified state employees is the principle that an appointing authority must establish a constitutionally authorized ground in order to discharge such an employee." *Kinchen*, 886 P.2d at 707.

The state constitution provides that a certified state employee may be disciplined "upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude..." Colo. Const. Art. 12. §13(8).

Such cause to discipline a certified employee is further defined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 708. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

### II. HEARING ISSUES

#### A. Complainant committed the acts for which he was disciplined.

By the time of hearing, Complainant did not dispute that he had called A.M. early in the morning of February 10, 2005, after having served as her cashier at the Boulder DMV office on the previous day and learning her name at that point. He also did not dispute that

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he had called A.M. for personal reasons, rather than any official reasons.

**B. Respondent's action was not arbitrary, capricious or contrary to rule or law.**

In determining whether an agency's decision is arbitrary or capricious, a tribunal court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d at 1252.

In this case, Respondent used its supervisory staff to perform a reasonable and prompt investigation into the complaint filed by A.M. Complainant was provided with both informal and more formal opportunities to explain what had occurred, and Respondent provided A.M. with similar opportunities to present the information she wished to present. There was no persuasive evidence provided from which the undersigned would conclude that Respondent had failed to use reasonable diligence and care to investigate the facts of this matter.

Similarly, there was no persuasive evidence provided from which to conclude that Respondent had failed to give candid and honest consideration of the information obtained during its investigation, or that the conclusions reached by the Respondent were unreasonable. Complainant argues that this incident represents only one off-duty action he had taken, and impliedly argues that it is unreasonable for Respondent to conclude that Complainant had violated departmental ethics and other confidentiality requirements by such off-duty activity. The information that Complainant used during that off-duty incident, however, was from his job. Moreover, A.M. correctly and immediately realized that the incident was directly connected to her visit to the Boulder DMV on the day prior to the phone call. Under such circumstances, it is not unreasonable for Respondent to draw the conclusion that Complainant's off-duty conduct implicated his employment with Respondent.

Board Rules require that appointing authorities make use of progressive discipline. See Board Rule R-6-2 ("A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper"), 4 CCR 801. It was undisputed in this case that there had been no similar incidents involving Complainant and, therefore, no progressive discipline employed in this matter. The question presented, then, is whether this matter meets the test for flagrant or serious action which does not require that there be a prior corrective action.

Complainant argued at hearing that A.M.'s interpretation that he was calling to ask

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her out was incorrect, that he was not calling A.M. for pecuniary gain, and that therefore the incident was not as serious as alleged by Respondent. Complainant's argument, however, does not address the core problem in this case: that is, that Complainant used the information gained in his work for personal reasons, whether those reasons were entirely social in nature or were related to his recruitment for his church.

Making unsolicited calls to clients of the DMV for personal reasons is the type of misbehavior which does not require implementation of prior corrective action. Respondent does not need to wait until this type of activity occurs twice before taking serious disciplinary action against an employee. The undersigned concludes that this incident -- including the phone call itself and Complainant's denials when asked about the incident -- was sufficiently serious and flagrant to exempt Respondent from the requirement of R-6-2 concerning the use of progressive discipline policies.

Complainant also objects to the fact that he was treated, at least at the point of his termination letter, as a probationary employee when he was a certified employee by the time of the termination of his employment. It is correct that Ms. White issued his termination letter as if Complainant was a probationary employee. The steps that led up to that decision, however, have met the requirements for disciplinary action against a certified employee. Complainant was, for example, given a Rule 6-10 meeting, and there was a reasonably full investigation into the allegations completed prior to the point when Ms. White decided to terminate Complainant's employment. The facts of this incident were also sufficiently defined by the complaint and the investigative steps that it was clear why Complainant had been terminated. Additionally, Complainant was notified that he had ten days to appeal the termination to the Board, and he made use of that access. Any error in interpreting Complainant's certified status at the time of his termination did not significantly affect the processing of this matter and does not present a reason to hold that Respondent had violated any of the applicable rules.

Complainant presented no other persuasive reason to believe that Respondent's action in terminating his employment has violated any law or rule. Accordingly, the undersigned concludes that Respondent's actions in this case were not arbitrary, capricious, or contrary to rule or law.

**C. The discipline imposed was within the reasonable range of alternatives available to Respondent.**

Respondent has taken Complainant's personal use of the information he gained as part of his cashier duties as an extremely serious disciplinary offense. Respondent points to the ethical implications of permitting DMV staff to use information gained in the course of their employment for personal reasons. See Executive Order D 001 -- 99, "Executive Code of Ethics," at ¶ 2.i ("All...employees of the Executive Department...shall not knowingly engage in any activity or business which creates a conflict of interest or has an adverse effect on the confidence of the public in the integrity of government"). Respondent also

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presented evidence that Complainant was, or should have been, well aware that the information obtained by a DMV office was covered by a variety of confidentiality provisions, such as C.R.S. §§ 42-2-121, 42-1-206, and 24-72-204. While Complainant did not use more than his recollection of A.M.'s identifying information, and did not actually go into the database to obtain information, his actions still reflect his unauthorized personal use of identifying information collected on the job.

Additionally, A.M.'s anger and distrust caused by having a state employee call her at 7:30 AM on a completely unsolicited social matter the day after she had provided her identifying information to the DMV is a reasonable and predicatable reaction to such a use of her information. Citizens provide the government with quite a bit of personal information in the course of transactions, such as obtaining a driver's license, and they rightfully expect government employees not to use that information as an opportunity for those employees to advance personal agendas, no matter what the agenda.

The persuasive evidence in this case demonstrates that the appointing authority pursued her decision after a thorough review of the circumstances of the situation as well as Complainant's individual circumstances. Board Rule R-6-9, 4 CCR 801. While it may have also been reasonable in this case to impose serious discipline which was less than termination, the choice of termination of employment was within the reasonable range of disciplinary alternatives under these circumstances.

**D. Attorney Fees are not warranted.**

Neither party has requested attorney fees in this matter.

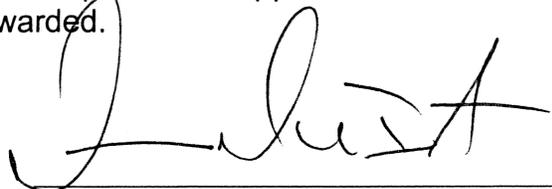
**CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was within the reasonable range of alternatives available to Respondent.
4. Attorney's fees are not warranted.

**ORDER**

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 25<sup>th</sup> day of January, 2007.



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Denise DeForest  
Administrative Law Judge  
633 – 17<sup>th</sup> Street, Suite 1320  
Denver, CO 80202  
303-866-3300

## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

### **RECORD ON APPEAL**

The cost to prepare the record on appeal in this case is **\$50.00**. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

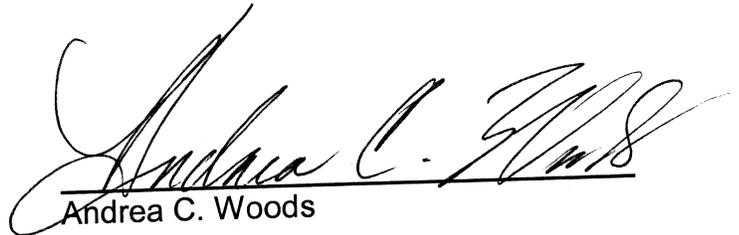
**CERTIFICATE OF SERVICE**

This is to certify that on the 26<sup>th</sup> day of Jan., 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Fred. D. Finley  
P.O. Box 211061  
560 West 78<sup>th</sup> Place  
Denver, CO 80221

and in the interagency mail, to:

Eric W. Freund  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

  
Andrea C. Woods