

DEPARTMENT OF  
ATTORNEY GENERAL  
MEMORANDUM

November 9, 2010

TO: Carol L. Isaacs  
Chief Deputy Attorney General

FROM: Douglas J. Bramble, Director  
Office of Human Resources

Thomas C. Cameron, Bureau Chief  
Criminal Justice Bureau

RE: **Andrew Shirvell Report**

**I. Executive Summary of Findings**

On October 4, 2010, the Department of Attorney General (Department) opened an internal investigation into the conduct of Assistant Attorney General (AAG) Andrew Shirvell. The 586-page investigative report is now complete. It includes over 40 witness statements and interviews, a forensic computer examination, and videos of interviews of AAG Shirvell. During the course of the approximately month long investigation, the allegations of inappropriate conduct were examined. As the investigation progressed, additional evidence of inappropriate conduct were discovered and investigated. For instance, within the past eight months, AAG Shirvell has engaged in the following conduct:

- (1) Verbally assaulted his supervisor by screaming profanities for which he was disciplined.
- (2) Violated the Communications Policy governing media contacts policy for which he was disciplined.
- (3) Contacted a college student's out-of-state employer in an attempt to get him fired;
- (4) Improperly used state resources;
- (5) Appeared outside of a college student's home at 1:30 a.m and then called police, for the purpose of creating a newsworthy event. On another occasion, AAG Shirvell followed college students in downtown Ann Arbor, Michigan, that he escalated into a verbal confrontation with a female college student. While no prosecution resulted, this conduct is inappropriate from that which is expected from an Assistant Attorney General;
- (6) Engaged in a pattern of reckless conduct that exposes himself to civil liability;
- (7) Ignored the advice and counsel of his supervisors who advised him to alter his conduct—but he refused to do so. For instance when counseled to stop blogging, AAG Shirvell said "he did not care" and if they sued, he would just file for bankruptcy.
- (8) Provided evasive and untrue answers during his Disciplinary Conference.

This conduct, as well as AAG Shirvell's prior discipline, were incorporated into the investigative report to determine whether, under the totality of the circumstances, AAG Shirvell's conduct warranted discipline under Civil Service Rule 2-6.1.

The Civil Service Rules allow for discipline up to and including dismissal from the classified service.<sup>1</sup> The Civil Service Commission Rules provide that an employer may impose discipline for "just cause."<sup>2</sup> Just cause may be imposed for (1) failing to carry out the duties and obligations imposed by agency management, an agency work rule, or law, including the Civil Service Rules and Regulations, and (2) conduct unbecoming a state employee.

It is our judgment that the prior disciplinary actions taken against AAG Shirvell coupled with the totality of AAG Shirvell's conduct, meet the standards set forth in the above-referenced rule. We recommend AAG Shirvell's termination. While employees should not be fired solely exercising their protected First Amendment rights, irrespective of how popular or unpopular their speech might be, AAG Shirvell's conduct in violating office policy, harassing behavior, inappropriately using state resources, and evasive—sometimes false statements given at the Disciplinary Conference, are some of the factors which support our recommendation for his termination.

## **II. Summary—Supplemental Investigation**

On May 6, 2007, AAG Shirvell was hired by the Department as an attorney. Since this time, he has worked in the Appellate Division where he handles Habeas appeals. According to his performance evaluations and discussions with his supervisors, he was an average to above-average employee.

Despite his adequate reviews, a number of incidents, however, have been of concern. For instance:

### **(a) Drunk Driving Conviction**

On April 5, 2009, AAG Shirvell was arrested for Operating a Motor Vehicle Under the Influence of Liquor. The police stop was based on speeding. On June 8, 2009, he was sentenced to the reduced charge of Operating a Motor Vehicle While Visibly Impaired. He was sentenced to 6 months probation. During the November 5th Disciplinary Conference, AAG Shirvell stressed that he did not try to hide his arrest. He informed his supervisors when his drunk driving occurred and had provided various updates as his case progressed.

### **(b) Using State Computer for Political Commentary and Verbal Counseling**

On February 3, 2010, AAG Shirvell used his state computer for political commentary. Specifically, at 11:57 a.m., he sent an e-mail from his state computer to former State

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<sup>1</sup> Civil Service Rule 2-6.1(c).

<sup>2</sup> Rule 2-6.1.

Representative Leon Drolet and others who were planning a protest at the State Capital. In the e-mail, AAG Shirvell states:

You are all sick freaks. Absolutely [sic] shameful, Leon. Your e-mail is beyond offensive. The grassroots will NEVER let you and your [REDACTED] [REDACTED] hijack our pro-life, pro-family party in pursuit of your PERVERTED radical homosexual agenda.

P.S. Justin(e), a persistant [sic] rumor in D.C. circles is that you and Illinois Log Cabin "Republican" Congress"man" [REDACTED] hooked-up together. Sick. Sick. SICK!!!! Does your homosexual lover [REDACTED] know? Freak.

Andrew Shirvell, Esq.  
"Never Underestimate the Motivation of a True Believer"

Later that same day, AAG Shirvell's supervisor received a complaint from one of the recipients. His supervisors immediately confronted AAG Shirvell, who admitted that he sent the e-mail from his state computer, but said he was "on the lunch hour" and he sent it from his personal e-mail account. Both of his supervisors, Joel McGormley and Eric Restuccia, verbally counseled him that this was an unacceptable use of state resources and to never engage in this conduct again. AAG Shirvell promised he would not.

**(c) Continuing to Use State Resources for Political Commentary**

From April 26, 2010 through July 29, 2010, AAG Shirvell used his state computer to engage in political discussions by making posts on Facebook. These comments were posted on Facebook during various times of the work day and were made *after* AAG Shirvell was specifically told by his supervisor to "never engage in this conduct again."

During the Disciplinary Conference, however, AAG Shirvell denied using any state resources whatsoever in his efforts against Mr. Armstrong. He stated that all of his Facebook and blogging posts about Mr. Armstrong were made from his home computer. This is entirely inconsistent with the dates and times of several of his Facebook posts and his payroll records. Based on the evidence, we did not believe that AAG Shirvell was being truthful concerning this issue.

**(d) Following Students and Lying About It**

On May 1, 2010, AAG Shirvell followed a group of U of M students celebrating at birthday party and lied about it at the Disciplinary Conference. On this date, a group of U of M students were doing a "pub crawl" celebrating student ██████████'s birthday in downtown Ann Arbor. While at Good Time Charley's bar on South University Street, a member of the group, ██████████, noticed AAG Shirvell standing alone in the bar area. Afterwards she and approximately ten of her friends, including ██████████, left the bar. While walking away from the bar, she noticed AAG Shirvell following them at a close distance. Somewhere along Liberty Street, she confronted AAG Shirvell and asked him why he was following them. He stated that it was an open party invitation on Facebook and then pulled a guest list out of his pocket. The list was printed from the Facebook announcement of the party. AAG Shirvell then asked whether Chris Armstrong was going to attend. ██████████ told him that he would not and that he should leave and not follow them. The conversation was getting "loud" and AAG Shirvell then told her and her friends they had better not touch him, or he would call the police. ██████████ stated that if he touched her she would call the police and soon after AAG Shirvell ran away across the street. ██████████ gave a similar account of AAG following them to several different bars.

At the Disciplinary Conference, AAG Shirvell denied that he was following anyone on this date. He stated nothing happened at the bar. The only incident he said he could recall is when he was walking down the street, he was approached by a girl he thinks was named ██████████. She said she recognized him from the Westboro Baptist Church protest AAG Shirvell previously attended. AAG Shirvell stated he did not even know who she was or why she was confronting him. He further denied pulling out a Facebook page with names and pictures on it.

This account is in direct conflict with ██████████ and ██████████ statements. In our opinion, AAG Shirvell intentionally minimized his conduct and was untruthful about this encounter.

**(e) Contacting College Student's Employer to Get Him Fired**

On June 22, 2010, AAG Shirvell called Mr. Armstrong's employer in an attempt to get Mr. Armstrong fired or disciplined. At that time, Mr. Armstrong was working as an intern in Washington D.C. for Speaker of the House Nancy Pelosi. The internship supervisor, Tom Manatos, stated that Mr. Shirvell called him on Tuesday, June 22, 2010, between 3:00 p.m. and 3:30 p.m. Notably, AAG Shirvell's time reporting shows he worked a full eight hours on June 22, 2010.

According to Mr. Manatos, AAG Shirvell suggested that he was calling on behalf of U of M in some official capacity and asked him to confirm Mr. Armstrong's employment, which Mr. Manatos did. According to Mr. Manatos, AAG Shirvell then asked if he knew that his intern, Mr. Armstrong, was a racist and a militant homosexual. Mr. Manatos then hung up on

him and advised his staff not to take any more calls from Mr. Shirvell. Mr. Manatos alleges that AAG Shirvell made approximately eight more calls to him, none of which were returned.

During the Disciplinary Conference, AAG Shirvell admitted to making only three or four telephone calls to Mr. Manatos. Like Mr. Manatos, AAG Shirvell states that they spoke only once, but he characterized the conversation as "very amicable." According to AAG Shirvell, Mr. Manatos seemed genuinely concerned about his allegations, which AAG Shirvell said were only that Mr. Armstrong was a member of a racist organization known as "Order of Angell." AAG Shirvell said Mr. Manatos said he would call him back, and then did not do so. AAG Shirvell could not recall the specific date of this conversation. When asked whether this call was made on a workday, AAG Shirvell indicated that he believed that this conversation took place on a day while he was on sick leave. AAG Shirvell was confident he did not make this call on a day when he was at work. AAG Shirvell added that he never made any calls regarding Armstrong while at his work location in the Williams Building. He stated he did make some telephone calls concerning Mr. Armstrong while at work and during working hours, but the calls were from made from his personal cell phone outside of his office.

AAG Shirvell provided various accounts as to why he called Mr. Manatos. He first stated that the purpose of his call was as a concerned citizen and that he just wanted the Speaker "to be informed." However, considering Mr. Manatos is neither a resident of Michigan nor a U of M student or faculty/staff member able to affect Mr. Armstrong's position or activities as MSA President, this response seemed disingenuous and self-serving. Upon further questioning, AAG Shirvell admitted that the purpose of his call was to have Mr. Armstrong "fired, censured, or disciplined."

#### **(f) Verbal Assault on Supervisor**

On August 31, 2010, the Department disciplined AAG Shirvell for conduct unbecoming a State employee for verbally assaulting his supervisor. The source of the dispute was a division staff e-mail sent by his supervisor regarding an issue that arose in court involving a matter that AAG Shirvell handled. Although the e-mail did mention AAG Shirvell by name, it did not accuse him of wrongdoing. In response to this seemingly innocuous e-mail, AAG Shirvell stood in his supervisor's doorway and proceeded to scream at him repeatedly stating: "this is bullshit" and "fuck you." AAG Shirvell further screamed that he was not going to work any more "fucking overtime" or do anything for the "fucking division." His supervisor's attempts to calm him down were unsuccessful. Staff described AAG Shirvell as being "unhinged" and some staff believed that he was on "on the brink of physically assaulting" his supervisor. Several provided statements that they were concerned he was going to turn physically violent. AAG Shirvell was disciplined and put on unpaid suspension for two and a half days. During the Disciplinary Conference, AAG Shirvell admitted that he "lost his temper" and "did not handle himself appropriately." He said that he apologized to the entire division. However, he then added, "Brad pushed my buttons, and I probably pushed Brad's." Even giving every benefit to AAG Shirvell, it is difficult to understand how an innocuous e-mail from a supervisor "pushed his buttons" and elicited such extraordinary anger.



On Friday, September 3, 2010, AAG Shirvell returned to work.

**(g) Appearing at a Student's Home at 1:30 a.m.**

The very next day, September 4, 2010, AAG Shirvell went to student Chris Armstrong's off-campus home at 1:30 a.m. in the morning. After reviewing all of the evidence, it is clear that he went to Mr. Armstrong's home for the purpose of taking pictures of a party that AAG Shirvell had learned was to be held at Mr. Armstrong's home. During the Disciplinary Conference, AAG Shirvell admitted he was not there to protest or advocate any position. During the Disciplinary Conference, AAG Shirvell said he walked by the house party on two separate occasions, which occurred on September 4, 2010. The first time he passed the house, he was walking on the opposite side of the street from Mr. Armstrong's residence. He claimed that he was there to determine whether Mr. Armstrong was following the rules governing underage drinking that as the MSA president he espoused. When AAG Shirvell first walked past the house, he claims he saw well over 100 people at the house and claimed he saw a person urinating outside of the house. AAG Shirvell did not take any pictures at this time. Instead, AAG Shirvell said he called the police, walked down to the U of M Student Union, and then returned to the area of Armstrong's residence. By this time, police had arrived at the location. Only then did he take his photographs, thus capturing pictures and video of police on the scene. This "raid" was played up in AAG Shirvell's blog the following day as a "stunning turn of events" with "exclusive pictures and videos" of police "descending" on Mr. Armstrong's house.

**(h) Conduct Inviting Civil Litigation**

From April through September 23, 2010, AAG Shirvell is alleged to have made numerous false statements about Mr. Armstrong's friends, associates, and their parents that has invited civil litigation and undermined his ability to serve as an Assistant Attorney General. As AAG Shirvell's employer, the Department has received at least one complaint from a parent identified in the blog regarding false statements. Moreover, as you know, several U of M students were interviewed as part of the Department's investigation. These students allege AAG Shirvell expressly or implicitly stated in his blog that they were gay, when, in fact, they strongly assert they are not. In another situation, AAG Shirvell is alleged to have "outed" a student who is not publicly "out" as being gay, and AAG Shirvell states in his blog that he hopes that this information will result in the student's family and friends learning that he is gay.

At the Disciplinary Conference, AAG Shirvell said that he thought all of his blog posts were accurate. He stated he feels that there is nothing for which he has to apologize. Concerning the false statement complaints, AAG Shirvell stated that he only said that "sources" told him that people were gay. When questioned who the sources were, AAG Shirvell refused to disclose their identity.

However, as AAG Shirvell's conduct suggests, and his prior statements make clear, he does not care whether his conduct results in himself being embroiled in civil lawsuits. Solicitor General

Restuccia specifically recalls telling AAG Shirvell that he could be opening himself to civil liability for what he was saying, but AAG Shirvell responded, "he did not care and it would be better to be on the curb than not be true to his beliefs" and if "they" sued, he would just file for bankruptcy. At the Disciplinary Conference, the Department learned that several individuals plan on filing a civil lawsuit against AAG Shirvell. Indeed, the Department was provided a copy of a request for a retraction—typically the first step before the filing of a libel/slander lawsuit.

**(i) Ignoring the Advice of His Supervisors and Lying About It**

AAG Shirvell ignored advice from his supervisors to stop blogging because it was damaging his professional credibility. Pending a more thorough review of the evidence, the Department did not order AAG Shirvell to stop blogging. However, each of AAG Shirvell's supervisors and others gave AAG Shirvell repeated warnings about his blog and stated that it was in his best interest to stop blogging. For instance, Solicitor General Restuccia stated he specifically recalled counseling AAG Shirvell that the blog was undermining his professional credibility. He recalls telling AAG Shirvell that comparing Mr. Armstrong to a Nazi because he belonged to the Order of Angell was "absurd", negatively reflected on AAG Shirvell, and opened him up to potential civil liability. It was surprising that during the Disciplinary Conference, AAG Shirvell denied having been counseled that it was in his best interest not to blog. Instead, AAG Shirvell said that his supervisors were well aware of his blogging, as early as May of 2010, and that all his supervisors and others were aware that he was blogging. AAG Shirvell stated that the only concern ever expressed to him was whether any state resources were being used, which he advised that there were not. Remarkably, he even stated that Solicitor Eric Restuccia reviewed the *content* of the blog and commented, "it was well written." AAG Shirvell stated that the only time he recalled anyone from the office to "think it over" was when Solicitor Restuccia spoke to him "as a friend" discouraging him from appearing on CNN's show Anderson Cooper 360.

The follow-up interviews with Solicitor Restuccia and Division Chief McGormley strongly suggest AAG Shirvell's statements in this regard were untruthful. Each reiterated that they counseled AAG Shirvell to cease blogging, but he refused. Solicitor Restuccia was adamant that he never complimented AAG Shirvell's blog and found the blog's content inappropriate and offensive.

**(j) Trespass Citation**

On September 14, 2010, AAG Shirvell was issued a trespass warning by U of M police, prohibiting him from entering "all U of M property" due to his conduct toward Mr. Armstrong. During the Disciplinary Conference, AAG Shirvell and his attorney advised that since the warning was issued, it has been modified by the University to allow AAG Shirvell on campus provided he is not in the vicinity of Mr. Armstrong.

**(k) Violating the Department's Media Contacts Policy**

On September 20, 2010, progressive discipline continued for AAG Shirvell when he was again disciplined, this time for violating the Department's media contacts policy. Contrary to policy, AAG Shirvell failed to inform the Communication Office about a media contact to him, including an interview in which he participated on WXYZ, Channel 7.

**III. Discussion**

It is our opinion that based on the prior disciplinary actions, and his escalating conduct, including those described in this report, that discipline was warranted under 2-6.1. Further it is our opinion that AAG Shirvell has compromised his ability to perform his responsibilities as an Assistant Attorney General. We recommend Mr. Shirvell's termination.

During the Disciplinary Conference, AAG Shirvell attempted to justify much of his conduct as an exercise of First Amendment right to free speech.

It is therefore necessary to set forth the framework for analyzing First Amendment concerns in this workplace. As a general proposition, by accepting public employment, one does not forgo his or her right to freedom of speech.<sup>3</sup> A state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.<sup>4</sup> Public employees do not surrender all their First Amendment rights by reason of their employment. The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.<sup>5</sup> A public employee is entitled to First Amendment protections, which include the right to criticize and to comment upon matters touching the public service in which the employee is engaged.<sup>6</sup>

Matters of public concern that may form the basis for the protected speech of a public employee under the First Amendment are those that can be fairly considered as relating to any matter of political, social, or other concern to the community.<sup>7</sup> The First Amendment protects a public employee's right to speak as a citizen addressing matters of public concern so long as the employee's speech does not unduly impede the government's interest as an employer in the efficient performance of the public service it delivers through its employees.<sup>8</sup>

AAG Shirvell's prior discipline in using profane language towards his supervisor, and in failing to follow this Department's media contacts policy, does not implicate his right to speak as a

<sup>3</sup> *Belian v. Board of Public Ed.*, 357 U.S. 399 (1958).

<sup>4</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>5</sup> *Garcetti*, 547 U.S. at 410.

<sup>6</sup> *Pickering v. Board of Ed.*, 391 U.S. 563 (1968).

<sup>7</sup> *Cooper v. Town of Bar Nunn*, 257 F. Supp 2d 1363 (D: Wyo. 2003).

<sup>8</sup> *O'Connor v Steeves*, 994 F.2d 905 (1st Cir. 1993); *Belyeau v. Coosa County*, 998 F.2d 925 (11th Cir. 1993).



citizen addressing matters of public concern. Rather, AAG Shirvell was reprimanded and suspended without pay for violating the rules of this workplace, including engaging in disruptive conduct towards his supervisor. Similarly, AAG Shirvell's conduct in refusing to provide information during the course of the disciplinary hearing about the allegations that have been raised towards him, is not protected speech.

AAG Shirvell explained that his repeated calls to Mr. Armstrong's employer in Washington, D.C. were for the purpose of notifying that office that Mr. Armstrong belonged to a racist organization. When asked whether the June 22 phone call was made on a workday, AAG Shirvell indicated he believed that this conversation took place on a day he was on sick leave. However, AAG Shirvell's time records show that AAG Shirvell worked that entire day and did not take sick leave. AAG Shirvell's conduct was calculated to cause financial harm or embarrassment to Mr. Armstrong.

While AAG Shirvell's conduct in this respect is not protected speech, even if, for argument sake, it were considered to be protected, AAG Shirvell's conduct as a whole is such that the government employer in this case, the Department of Attorney General, has an adequate justification for treating this employee differently from any other member of the general public.<sup>9</sup>

Even where speech is protected, it is appropriate to engage in a *Pickering* balance of a public employee's First Amendment rights against a public employer's interest in promoting public efficiency. The courts have considered a number of factors, such as whether the speech in question: (1) impairs discipline by superiors; (2) impairs harmony among coworkers; (3) has a detrimental impact on close working relationships; (4) impedes the performance of the public employee's duties; (5) interferes with the operation of the agency; (6) undermines the mission of the agency; (7) is communicated to the public or to coworkers in private; (8) conflicts with the responsibilities of the employee within the agency; and (9) makes use of the authority and public accountability which the employee's role entails. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's ability to operate efficiently and effectively.<sup>10</sup> A government employer is not required, however, "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."<sup>11</sup> The totality of the circumstances establishes that AAG Shirvell's conduct has affected this Department's ability to operate efficiently and effectively.

Although not an extensive list, it is clear that AAG Shirvell's behavior impedes the Department's ability to operate efficiently and effectively.

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<sup>9</sup> *Garcetti*, 547 U.S. at 410.

<sup>10</sup> *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291 (2006); *Garcetti*, 547 U.S. at 410.

<sup>11</sup> *Connick v. Myers*, 461 U.S. 138, 152, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); *Locurto v. Guiliani*, 447 F. 3d 159 (2nd Cir. 2006).

For example, due to AAG Shirvell's conduct outlined in the investigation, office working relationships have been disrupted. Also, his behavior has interfered with the operation of this agency and undermined its mission. For instance, the Civil Rights Commission and the Governor, who are clients of this Department, have complained about the tactics of Mr. Shirvell and have called for his removal. Another public body, the Ann Arbor City Council, has complained about Mr. Shirvell's inappropriate conduct. This office interacts with local municipalities, such as the City of Ann Arbor, in carrying out its official responsibilities.

During the Disciplinary Conference, AAG Shirvell stated that he sincerely regretted the effect his interviews have had on the Department. Again, he did not regret the blog. He indicated that he never anticipated that there would be a four-day firestorm on Anderson Cooper. He added that the only reason he appeared on Anderson Cooper was to "improve his image" from his appearance on WXYZ and to "set the record straight."

As you know, the Department has received over 22,000 e-mails, over 150 letters, and 940 phone calls—nearly all criticizing AAG Shirvell's conduct. The office has been inundated with media calls, the office has since had to issue several press releases, and the Attorney General has had to appear on national news to defend the integrity of the office. This has caused considerable disruption.

During the Disciplinary Conference, AAG Shirvell questioned how many of the e-mails were even from Michigan citizens. He stated that he has reason to believe that many of the e-mails were from a gay association that had targeted him to be fired. When asked why it matters where the complaint came from, AAG Shirvell stated that the Department's venue and jurisdiction is limited to Michigan. He stated that the other complaints from non-Michigan residents "did not matter."

#### IV. Conclusion

Employees should not be fired solely for exercising their protected First Amendment rights, irrespective of how unpopular their speech might be. However, AAG Shirvell's conduct in violating office policy, borderline harassing behavior, inappropriately using state resources, and evasive—sometimes false statements given at the Disciplinary Conference, are factors which support our recommendation for his termination. His response to most of the allegations set forth in his notice of a Disciplinary Conference was that he has an unfettered First Amendment right to blog on any matter provided he was off-duty, and that the blog did not relate to the work of the office.

The totality of AAG Shirvell's conduct, as set forth in the Department's investigation, prior disciplinary actions taken and conduct deployed during the Disciplinary Conference, meet the standards set forth in the above-referenced Civil Service Commission rule. In addition to the suspension that was imposed on AAG Shirvell for verbally assaulting his supervisor, AAG Shirvell has been reprimanded for violating the Department's media contacts policy. We recommend Mr. Shirvell's termination.