STATE OF MICHIGAN
CIVIL SERVICE COMMISSION
HEARINGS OFFICE

ANDREW SHIRVELL

v.

DEPARTMENT OF ATTORNEY GENERAL

CSHO 2012-022
ERB 2011-036
CSHO 2011-034
CSHO 2011-026
Mailing Date: **March 21, 2012**
Ref. No.: **2011-00627**

GRIEVANCE DECISION

Hearing Officer: William P. Hutchens

Representatives:
Grievant: Philip J. Thomas, Attorney at Law

Respondent: Jeanmarie Miller, Assistant Attorney General

CASE SUMMARY

KEY WORDS: **Discipline, Dismissal**

The grievant is determined to have engaged in a substantial course of conduct that brought disrepute to his employer. He made a media spectacle of himself and the Department of Attorney General. The pattern of conduct in which he engaged constituted hate speech, physical and mental harassment of citizens of this state and a nexus was established between that conduct and his position as an Assistant Attorney General by the employer. The discharge is found to have been for just cause. The grievance is denied.

This CASE SUMMARY is not an official part of the decision.

A grievance hearing was held on October 19 and October 20, 2011, at the Capitol Commons Center, 400 South Pine Street, Lansing, Michigan. The parties were given full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and present oral argument. Closing briefs were submitted by December 8, 2011, at which point the record was closed.

THE ISSUE

Was grievant's dismissal for just cause?

THE FACTS

The grievant, Andrew Shirvell, was employed by the Department of Attorney General (DAG) as an Assistant Attorney General in the Appellate Division. He was discharged from that employment on November 8, 2010, through the issuance of a CS-301 Employee Departure Report and an attached letter that listed the specific reasons for his termination (Joint Exhibit #5). The charges contained in the letter

all fall within the ambit of what the department believed to be "conduct unbecoming a state employee" and were specifically enumerated as follows:

- Engaging in inappropriate conduct by targeting individual members of the public, both in person and through electronic media, which could reasonably be construed to be an invasion of privacy, slanderous, libelous, and tantamount to stalking behavior unbecoming an Assistant Attorney General.
- Engaging in conduct which resulted in filing of a request for a personal protection order against you for alleged stalking behavior.
- Conduct which has caused, or has the potential to cause, disruption to the Department's working relationships with its clients, the courts, and local governments.
- Conduct that has caused, or has the potential to cause, disruption among members of the Department workforce and could have a negative impact on attracting and retaining the most qualified employment candidates.
- Conduct that has damaged, or has the potential to damage, the public's perception of the Department's ability to conduct its operations and mission.
- Conduct that compromises your ability to perform your responsibilities as an Assistant Attorney General.
- Inappropriate, unprofessional behavior toward your supervisors and co-workers.
- Ignoring the advice and counsel of your supervisors.
- Conduct which has resulted in a variety of offenses, a criminal violation, and a civil warning regarding various statutes or ordnances (sic) including, but not limited to:
  - Driving under the influence
  - Trespass

⊥3The above list of charges were introduced in the letter in a header paragraph in pertinent part as follows:

> . . . the disciplinary charges against you include, but are not limited to:

The portion of the sentence introducing the disciplinary charges is incorrect as it concerns the phrase, ". . . but are not limited to . . . ." The charges set forth on the CS-301 and the attached charge letter put the grievant on notice of the reasons for his dismissal. It is against those charges that he must defend himself, recognizing that the department bears the burden of proof by a preponderance of the evidence. There cannot be any nebulous ". . . but . . . not limited to" charges floating around somewhere that the department can spring on the grievant at its leisure. The above statements of charge, the hearing officer believes, are sufficiently broad that they cover all of the issues raised against the grievant at this hearing.

The grievant began his employment with the DAG while in college. He testified that he began working on former Attorney General Mike Cox's first campaign for that office in July 2002 as a campaign scheduler. He indicated that it was a very small campaign staff. He began working for the Department of Attorney General in a paid position in February 2003 as a non-attorney research assistant for Carol Isaacs, at the time the chief deputy attorney general. He testified that he fairly evenly split his time between research for Isaacs and research on child support issues for Attorney General Cox.

Once he had passed the Michigan Bar examination, the grievant was hired as a legal assistant in November 2006 within the Public Service Division. ⊖Shirvell⊖ stated that he had graduated from the

Ave Maria Law School in May 2006 and took the July 2006 bar examination. He was then hired in August 2006 as the Attorney General's deputy campaign manager, working on his re-election bid. He indicated that the Attorney General was someone he looked up to and whose political beliefs he shared. He testified that he developed a personal relationship with Cox and his family through the years, that he babysat the Cox children during the first campaign, that he had been to the Attorney General's home for dinner "a couple of times" and that he knew Cox's brothers and parents. He indicated that he knew many of the Attorney General's supporters very well.

It was after the November 2006 election that Shirvell was hired to work as a legal assistant in the Public Service Division. Then, in May 2007, he was hired as an Assistant Attorney General. He testified that Cox had him transferred from the Public Service Division to the Appellate Division, at which point he became the Attorney General's personal research assistant for a period of several months (Tr., Vol II, p. 344). The grievant stated that in the middle of August 2007 he began working full-time in the Appellate Division. His immediate supervisor at the time was Eric Restuccia, at the time the head of the Appellate Division. When the previous Solicitor General retired, Restuccia became the Solicitor General and Joel McGormley became the chief of the Appellate Division. As Solicitor General, Restuccia supervised both the ⊥4Appellate Division and the Opinion Division. At the time of this hearing, Restuccia functioned as the Deputy Solicitor General, functioning as the chief of the Solicitor General Division. The testimony in this record indicates that from a technical standpoint, the grievant was an excellent employee.

Apparent difficulties began to surface in February 2010 when the grievant sent an email to a former State representative, Leon Drolet, at the time the head of a Michigan Taxpayer's advocacy group. Drolet's group had sent an email notification regarding a planned protest at the state capitol regarding issues of concern to the gay-lesbian-transgender community. That email was forwarded to the grievant. The grievant responded, he stated, on his lunch hour utilizing his personal email account accessed from his state computer. The email to Drolet (Joint Exhibit #3, Tab 24) reads as follows:

> You are all sick freaks. Absolutely shameful, Leon. Your e-mail is beyond offensive. The grassroots will NEVER let you and your butt-buddies (names deleted in this quote) hijack our pro-life, pro-family party in pursuit of your PERVERTED radical homosexual agenda.

The grievant added the following postscript to the individual who sent the email, whose first name was Justin:

> P.S. Justin(e), a persistent rumor in D.C. circles is that you and Illinois Log Cabin "Republican" Congress"man" (name deleted) hooked-up together. Sick. Sick. SICK!!!!! Does your homosexual lover Steve know? Freak.
>
> Andrew Shirvell, Esq.
>
> "Never Underestimate the Motivation of a True Believer"

Joel McGormley testified that shortly after the grievant sent the above email, his office received a complaint about it. The complaint noted that it appeared to have been sent on state time. McGormley stated that he took the complaint to Restuccia, and the two of them then met with the grievant. McGormley testified that while they did not reprimand the grievant formally over the incident, he communicated to the grievant his belief that intemperate comments such as this were not things that would be helpful to the grievant nor to the division in which he worked. When the grievant stated that he had taken an early lunch that day (the email to Drolet is time-stamped 11:57 a.m.) and sent it from his personal email account, McGormley informed him that the use of state time and state equipment for such activity was inappropriate. Restuccia testified that he told the grievant in that meeting that if he was using his state computer for political activity, that was a problem. He told him that any such

activity, if he chose to engage in it, needed to be done on his own time. He stated that the incident raised a concern with him as to how the grievant was comporting himself. Restuccia testified that he told the grievant that such activity was not helping him in the office and reflected badly on him (Tr., pp. 294-295). He recalled verbatim the grievant's response to him as, "You should have seen the email I got. I'm ⊥5responding in kind" (Tr. p. 295). Review of the email that was forwarded to the grievant does not set forth language that is anything less than professional in nature, whether or not one agrees with the agenda of the drafter (Joint Exhibit #3, Tab 24, p. 2). Restuccia repeated to him that such an email did not help him and did not help the office in which he worked. He testified, as did McGormley, that the grievant said that he understood that he was not to engage in political activity on work time.

Restuccia testified that the next issue coming to his attention regarding the grievant's activity outside the workplace was in May 2010 when an email intended for John Selleck, the DAG director of communications. Restuccia stated that he was copied on the email and that the email included a link to a weblog, or "blog" that had been started by the grievant. The "blog" targeted a Chris Armstrong, at the time the president of the student body at the University of Michigan.

Restuccia indicated that the complaint told him of a photo of Armstrong with a swastika superimposed on his image and contained criticism of Armstrong for being a homosexual. Restuccia stated that he took the complaint, informed McGormley of it, and he went down and met with the grievant to discuss it. He stated that it reminded him of the Drolet email and he wanted to make sure that the grievant was not engaging in political activity on state time or utilizing state resources. He testified that he was uncertain as to the DAG policy, if any, about "blogging," but was aware of a policy that prevents assistant attorney generals from identifying themselves as such when engaging in private matters.

When Restuccia discussed the matter with the grievant, he had not seen the "blog." The grievant told him that he was writing this "blog" on his own time and without utilizing state resources. He demonstrated to Restuccia that he had not identified himself by name anywhere in the "blog," nor had he identified himself as an assistant attorney general (Tr., p. 297). He stated that the grievant explained that he had placed the swastika over Armstrong's face because he was a member of a campus organization that he believed either excluded or disparaged minority groups.

Restuccia stated that he did raise the issue of the "blog" with the DAG ethics officer, Frank Monticello, who told him that "blogging" was a permissible activity. He did share that information in a second meeting with the grievant and, again, told him that it was not to be done on state time or with state resources, nor was he to represent himself as an assistant attorney general. He testified that he did suggest to the grievant at that time that he should take down the "blog," because it reminded him of something similar that the grievant did a couple of years prior to this incident. The grievant at that time was writing a "blog" entitled "Right Michigan." Restuccia stated that he talked to the grievant about it at the time (2007 or 2008, as he recalled it) and told him that it was not helpful to the grievant or to the office. He testified that the grievant has very sharp analytical skills, but that he can be abrasive in his interactions and also described ⊥6the grievant's interactions with others as sometimes being "over the top" (Tr., p. 299). He suggested to the grievant at the time that he discontinue the "blog." He stated that the grievant did discontinue the "Right Michigan" "blog" in 2008.

Restuccia stated that the grievant's current "blog" next came to his attention in August 2010. He was contacted by someone from the DAG communications office and was told that the grievant had done an interview with WXYZ television, the ABC affiliate in Detroit. He was told that the interview had been about the grievant's "blog," and that reporters were now asking questions about the Attorney General's cyber-bullying initiative, which he testified was intended to promote greater civility in electronic discourse. It was at this point that Restuccia actually looked at the grievant's "blog." He stated that it had been his assumption that the grievant in his "blog" was writing about a number of different topics,

as he did in the Right Michigan "blog." He was surprised to see that in this "blog," every column was about a 21-year old student at the University of Michigan, Chris Armstrong.

Restuccia testified that since the grievant's division manager, McGormley, was on vacation at the time, he and Appellate Division First Assistant Attorney General Laura Moody met with the grievant to conduct a forensic interview. He described that as a formal interview intended to be utilized in the disciplinary process. He stated that when he looked at the grievant's "blog," he found it very disheartening due to its "angry, caustic" nature. He described it as something that may have been intended to be persuasive, but was more of an attack on Armstrong.

In the interview with the grievant, Restuccia stated that he told the grievant that as his supervisor, he could not require him to take down the "blog," but that it was not helpful to him at the office, undermined his professional credibility, and he encouraged him to take it down. To that, he stated, the grievant replied that he had regretted taking down the "Right Michigan" "blog" two years previously and that he would not give up his rights under the First Amendment. Restuccia made it clear to the grievant that the press was interested in comparing the "blog," created by an assistant attorney general, and the Attorney General's anti cyber-bullying initiative.

As to his interview by WXYZ, the grievant told Restuccia that he had not known that they were going to ask him about work-related issues at the time he participated in the interview. Subsequently, in the forensic interview, he told Restuccia that the Michigan Daily had asked him for an interview and he indicated that he was going to do it. Then, in late August or early September, he told Restuccia that he had been contacted by staff from Anderson Cooper's CNN talk show and that they wanted to interview him. Restuccia initially forbade the grievant from doing so. He tried to explain to the grievant that the contents of his "blog" were indefensible and that he would be made to look absurd if he appeared on the program. He explained that the organization to which Armstrong belonged that resulted in the grievant putting a swastika over his face on the "blog" was one whose membership has included former President Gerald Ford, ⊥7Wayne County Executive L. Brooks Patterson, and former Michigan Senate Majority Leader Mike Bishop. The grievant, according to Restuccia, disagreed, and believed that he could demonstrate that Armstrong, who knew of the organization's history, could be shown to be a hypocrite.

When Restuccia discussed the impending interview(s) with then-Attorney General Mike Cox, Cox told him that he had to countermand his directive to the grievant and allow him to proceed with the interview (s) due to his First Amendment right of free speech. Restuccia did so, but explained to the grievant that he might be subject to civil liability. The grievant responded, he testified, by stating that he hadn't many assets to lose and that he would rather "live in the street than lose my ability to express these things" (Tr., p. 310). Restuccia stated that at that point he realized that the grievant's entire focus was on his own political crusade and that he had lost all sense of proportion for his role in the office. He testified that the WXYZ interview humiliated the grievant and he was the talk of the office at the time. He stated that the grievant's reaction was to the effect of, "Well, I think that interview went badly but Anderson Cooper I think I can be more effective." (Ibid.) Restuccia testified that he told the grievant in response that Anderson Cooper was a national program and the only reason the grievant was asked to be on it was so that he could be made to look foolish (Tr., p. 310).

The grievant testified that he never sought approval to conduct the interview with WXYZ-TV because he had read the DAG media contact policy and it was his understanding that as long as the interview did not relate to his job or a case he was working on as an assistant attorney general, then he did not have to notify the office. His other stated reason was that the
WXYZ-TV reporter, Ross Jones, told him on the telephone that there would never be any questions about his role as an assistant attorney general. He testified that he would never have conducted the interview had he known that the reporter would not live up to his end of the agreement.

The testimony of Restuccia and the grievant is in agreement that as a result of the August 18, 2010, interview with WXYZ-TV, the grievant was given a formal reprimand for violation of the DAG's policy regarding media contacts. The written reprimand and media contact policy are set forth at Tab 18 of Joint Exhibit #3. The media contact policy, dated August 31, 2007, states in pertinent part as follows:

> **C. Duty to Notify Communications Office.** All staff shall inform the Communications Office immediately when contacted by the media and provide the name of the person making the inquiry, the organization they are affiliated with, and the nature of their request. Unless otherwise approved by the Attorney General, the Chief Deputy Attorney General, or the Communications Director, notification shall take place before the department staff member engages in any ⊥8interaction with the media representative. The Communications Office will then determine how the matter will be handled.

The next issue of significance, for purposes of this decision, was a verbal altercation between the grievant and his supervisor, first assistant Brad Beaver. As first assistant, Beaver was the assistant to the Appellate Division director, Joel McGormley. The documents and testimony in the record indicate that on August 24, 2010, the grievant lost his temper with Beaver and screamed obscenities at him following an email that Beaver sent to all Appellate Division staff.

In the email, Beaver described a situation in Federal Court in which the grievant had been involved, and advised staff as to how the situation should have been handled. The hearing officer will not get into the specifics of the situation addressed in the memo, but the grievant seemed to resent being identified in the memo as having done something wrong. According to the documentation set forth at Tab 14 of Joint Exhibit #3, the grievant confronted Beaver, began to shout at him, shouting, "this is bullshit! This is fucking bullshit!" and acting in a manner that caused some clerical staff to be afraid of what might happen next. McGormley, who heard part of the yelling and file-cabinet slamming from his office, went to Beaver's office and defused the situation by requiring the grievant to come with him. He accepted written statements from staff who overheard the exchange within a half hour of the event. The grievant was suspended for two and one-half days as a result of this outburst. The suspension was not grieved and is therefore assumed to have been issued for just cause. The incident, however, is listed in the charge letter (Joint Exhibit #5) imposing this discipline, as "Inappropriate, unprofessional behavior toward your supervisors and co-workers." For the purpose of clarity, the suspension could only be considered when the DAG chose to terminate the grievant from the standpoint of being a factor causing them to aggravate the disciplinary penalty. The conduct underlying the suspension was already addressed through the issuance of the suspension and cannot form a factual basis for subsequent discipline.

The grievant was suspended from duty from 1:00 p.m. on August 31, 2010, until the end of the workday on September 2, 2010. He returned to work on September 3, 2010. On September 4, 2010, a Saturday, the grievant appeared outside the home of a Chris Armstrong in Ann Arbor, Michigan. Armstrong was at the time the elected president of the student government at the University of Michigan, the grievant's alma mater.

Since April 2010 the grievant had been publishing his "blog." The sole focus of which was his extreme displeasure with Armstrong, an apparently open homosexual. The "blog" posts submitted by the grievant are set forth at several points in the record, but for purposes of this section of the findings of fact, the hearing officer will be referring to those set forth in Joint Exhibit #21. The hearing officer will not in this decision go into great detail regarding these "blog" postings, but review of them makes it clear that the grievant was obsessed with Armstrong, his homosexuality, the fact that he came from a monied background, and the fact that ⊥9he had political connections with individuals (such as Speaker of the House Nancy Pelosi, for whom he worked as an intern) whose politics were diametrically

opposed to those of the grievant. Review of the "blog" postings reveals that the grievant engaged in some of the most hateful speech imaginable. He sought to and in fact did "out" individuals whose homosexuality had been their private concern until his intervention.

On the night of September 4, 2010, when he appeared outside the home of Armstrong, there was a party going on in the house. The grievant, by his own admission, called the police regarding the goings-on at the party. He then, the very next day, published a "blog" posting entitled "Bombshell: Ann Arbor Police Raid Chris Armstrong's Out-of-Control 'Gay Rush' Welcome Week Party." So, the grievant participated in creating the "news" and then pretended to report it on his "blog." Parts of his "report" are set forth below:

> In a **STUNNING** turn of events, the Ann Arbor Police Department raided the so-called "gay rush" party that took place this weekend at the home of Chris Armstrong, the first openly homosexual president of the Michigan Student Assembly (MSA). This watch site has obtained EXCLUSIVE photos and video of this raid.

(The grievant took the photos when the police arrived after he had called them. The photos show nothing more than police officers standing at the front door of the home, talking to a friend of Armstrong.)

> At 1:30 a.m. this morning, police descended on 306 E. Madison St. At the time of their arrival, an out-of-control crowd of drunken homosexual "party-goers" were amassed all over the residence's front and back lawns, freely walking around with open containers of alcohol while loud music blared from inside the house. Earlier in the evening, several party attendees were seen urinating outside.
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> ***
>
> It is not clear whether the police issued Minor In Possession (MIP) citations, but what is known is that booze freely flowed to all who wanted it, as none of the party "hosts," including Armstrong, were checking identifications. And, apparently, even high school students were admitted with no questions asked.
>
> The Ann Arbor police officers on the scene went-up (sic) to the residence's entrance and apparently inquired as to who lived there. Armstrong cowardly remained inside and sent out his personal footstool (and housemate), Alex Serwer. Fresh off a three-week European vacation, MSA Business Representative Serwer, pictured above with police, was asked to produce identification, which he eventually complied with only after he went back inside the house to find it. (Joint Exhibit #21, "blog" post of September 5, 2010, submitted by "Concerned Michigan Alumnus," i.e., Andrew Shirvell.)

⊥10It was the type of posts set forth above that attracted the attention of WXYZ-TV news. Once their interview with the grievant aired, the matter came to the attention of the Cable News Network (CNN). It was at that point that the grievant was contacted to appear on the Anderson Cooper program. The grievant's supervisor, as previously noted, tried to talk him out of this appearance. The Attorney General, however, would not allow such a prior restraint on speech and told Restuccia that he could not prevent the grievant from pursuing the appearance if he wished to proceed with it. The grievant testified that he was misled by the producer of the Cooper program as to what would be discussed in the interview. He testified that it was his belief that only the subject matter of the "blog" (from his perspective, Chris Armstrong) would be discussed. He was surprised when the questioning turned to address his employment with the Michigan Department of Attorney General.

Having made his appearance on the Anderson Cooper program, the grievant also felt that it would be a good idea for him to accept an invitation the next day from The Daily Show with John Stewart, a satirical "news" program on the cable network Comedy Central.

The grievant's appearance on the Cooper program caused Michigan Attorney General Mike Cox to be interviewed on the Cooper program on the same program on September 29, 2010. Cox was put in a position of answering why an assistant attorney general who would engage in such conduct would still be employed with his office. Cox responded that while balancing the grievant's right to freedom of speech against his rights under the Civil Service system, the conduct was being investigated and that the matter was being investigated while preserving the rights of the grievant. Cox also appeared on WWJ Radio in Detroit to answer many of the same questions (Joint Exhibit #7 and Joint Exhibit #8).

The appearance on the Cooper show and the notoriety that it brought to the grievant as well as the department triggered an investigation into the grievant's activities on the part of the DAG. The individual who conducted the investigation, Special Agent Michael Ondejko of the DAG Criminal Division, testified that he was given the assignment to investigate the grievant on October 1, 2010. Ondejko, a retired detective sergeant with the City of Romulus, indicated that he had conducted three such investigations since his employment with the DAG in 2002. He received the assignment from Tom Cameron, the DAG Bureau Chief in charge of the Criminal Division. Ondejko's investigation is Joint Exhibit #3. The investigatory report is at the front of the volume, which consists of well over 500 pages, while the tabs referenced at various points in this decision begin at Tab 1 directly behind the investigatory report.

Among many issues raised by the DAG in its charge letter, there was a claim that the grievant had utilized state resources to engage in inappropriate conduct toward others. For purposes of clarity, the hearing officer makes the specific finding that based upon the cross-examination of Ondejko and the times of the "blog" postings, the grievant did not post to the "blog" during ⊥ıworking hours. Those posts were made on his personal time. Ondejko did find that the grievant had visited the Facebook website as well as others, when he conducted a forensic examination of an image of the grievant's computer hard drive prepared for him by the Department of Technology, Management and Budget. Ondejko is a certified computer forensic examiner. Based upon the testimony of Ondejko and the forensics report (Joint Exhibit #3, Tab 13) the hearing officer makes no finding of an unusual amount of computer usage on the part of the grievant.

Ondejko's report consisted of his interviews of over 40 witnesses, re-interviews with some of them, and extensive compilation of documents which, as noted above, constitute the large exhibit binder entered into this record as Joint Exhibit #3. Other than the forensic examination of the hard drive on the grievant's computer, Ondejko had no personal knowledge of the events leading to the termination of the grievant from his employment. That information is primarily set forth in the testimony of the grievant's division chief, McGormley, and his bureau director, Restuccia.

At one point, the Washtenaw County Prosecutor's Office made an evaluation as to whether the grievant should have been prosecuted criminally for stalking Armstrong and his friends. Their report determining that prosecution was not appropriate is set forth in the record as Tab 30 of Joint Exhibit #3. First Assistant Prosecuting Attorney Konrad Siller wrote a Denial of Request for Prosecution memorandum to the investigating detective from the University of Michigan, Department of Public Safety denying their request to prosecute the grievant. In pertinent part, his memo reads as follows:

> Subsequent to Christopher Armstrong's election as president of the Michigan Student Assembly in March 2010, Mr. ⊖Shirvell⊖ has authored a blog regarding Mr. Armstrong's role as president. Additionally, Mr. ⊖Shirvell⊖ has appeared in public places protesting Mr. Armstrong's presidency. The only fair review of Mr. ⊖Shirvell⊖'s statements is that they are offensive and mean spirited. However, Mr. ⊖Shirvell⊖'s statements criticizing Mr. Armstrong's presidency are not considered harassment under

> the Stalking statute (see Michigan Compiled Law 750.411h(1)(c) which states "*Harassment does not include constitutionally protected activity*....."). In short, Mr. ⊖Shirvell⊖'s statements, although at times childish and disingenuous, are protected speech as he has a right to criticize the qualifications, campaign promises, or public views of the student body president. For these reasons I cannot authorize a Stalking charge against Mr. ⊖Shirvell⊖.
>
> (Joint Exhibit #3, Tab 30, p.1)

Former Michigan Attorney General Michael A. Cox, whose ultimate decision it was to terminate the grievant, testified on under examination from the grievant's attorney that while the Washtenaw County Prosecutor chose not to criminally prosecute the grievant for stalking, he believed that the facts of the case presented a case that could well have proceeded to the warrant ⊥12stage and been prosecuted as a violation of the statute cited above. He based this opinion on his many years of experience as a prosecuting attorney and upon his eight years of experience as the chief law enforcement officer for the State of Michigan. He testified as follows:

> (Referencing his knowledge that counsel for the grievant had worked as a prosecuting attorney) . . . you probably had the same experience I did when you would go to other counties, they would view cases that we would think is very prosecutable and they wouldn't because they were in a slower county and a county that could avoid things. I'm not saying that's what happened here, but -- actually I -- I was a prosecutor actually for 22 years, because my eight years as attorney general I was also the chief law enforcement officer and on the PAM and PACC board. So I don't share Mr. Siller's reading of this that when you track down college students bar hopping or when you show up at their house at 1:30 in the morning, or (sic) I did share his interpretation of the facts. (Tr., p. 259)

Cox also testified as follows:

> . . . maybe this is an extreme example, Mr. Restuccia, who is his boss, worked with me in the Wayne County Prosecutor's office, a new prosecutor came in and Mr. Restuccia and I started a cold case unit. And we went back and literally charged 55 formerly cold cases in the City of Detroit and got convictions on
> two-thirds or 80 percent of them. So for whatever reason, sometime it can be laziness, sometimes it can be resources, sometimes it can just be any number of interpersonal things that happened, you know, prosecutors will cut someone a break at the warrant stage. (Tr., p. 246)

Cox testified that at the time of his own appearance on the Anderson Cooper show, at which time he agreed with the characterization of the grievant's behavior as that of a "bully" and that the conduct was of an offensive nature, he was not completely familiar with the contents of the "blog" posted by the grievant. He stated that:

> . . . the following morning I got up at 4:00 and started reading it through and I was shocked.
>
> Q. What was it about the blog that shocked you?
>
> A. It was a variety. There's a number of different levels. On the level of Andrew personally he just seemed obsessed and infatuated with the person he was blogging about. But he . . . outed that I could count clearly one person who was from a small town in the UP, I can't remember which one. And on the blog he's crowing about it. And then he's describing what in my days as a Wayne County prosecutor we would call "stalking," which is two or more unconsented contacts freely in the blog. (Tr., p.

245)

⊥13Cox testified that prior to making the decision to discharge the grievant, he reviewed the ten-page Executive Summary of the investigation into the grievant's conduct prepared for him by Douglas Bramble, director of the DAG Office of Human Resources, and Thomas Cameron, chief of the Criminal Justice Bureau (Joint Exhibit #4). He testified regarding that report that:

> This, in my mind, was in stunning detail, an overwhelming case to terminate Mr. ●Shirvell●. It outlined escalating behavior. It outlined behavior separate from the blog that dealt with not only his behavior in the workplace but also his behavior outside the workplace, some of which I would call minimally misdemeanant criminal, meaning stalking. Other behavior that would undermine the office in its daily operations. Some of it nuts and bolts but also some of it, you know, in the sense of it was conduct that one does not expect and should not accept from a state employee, especially a state employee in the Attorney General's office as a for instance. . . . There were a number of incidents where Mr. ●Shirvell● was inviting a civil lawsuit. On the blog there's arguably --
>
> THE WITNESS: And, Judge, and I can't remember -- I know there's four different types of invasion of privacy claims in the State of Michigan. And one of them deals with sexual behavior. And in this Mr. Restuccia was -- I can remember the young man's name, it was (name deleted), the young man from the UP. In essence outed this young man and bragged about it in the blog. (Tr., pp. 248-249)

Cox also testified that to the extent that there had been awareness within the office of the fact that the grievant was maintaining the "Chris Armstrong Watch" "blog" prior to the WXYZ-TV interview, the increased knowledge of the "blog" as a result of that appearance moved the conduct of the grievant up the ladder in terms of the importance of addressing it. He agreed that at the time of his own interview on the Anderson Cooper program, he did not see the grievant's conduct as necessarily interfering with the mission of the office, but once he became aware of the details of the "blog" and the conduct of the grievant, he came to believe that despite the grievant's excellent work performance, his conduct constituted a threat to the mission of the agency. This was based in large part on the resources that were devoted to addressing the over 22,000 telephone calls received by the DAG, as well as a flood of letters and emails regarding the conduct of the grievant. The Civil Rights Commission, one of the many State agencies represented by the DAG, adopted a resolution condemning the activities of the grievant.

OPINION

The issue before the hearing officer is whether the dismissal of the grievant from his position as an Assistant Attorney General was for just cause.

The decision is made somewhat more difficult by the amount of information contained in the charge letter, part of Joint Exhibit #5. The charge letter includes some charges that were already ⊥14addressed through prior disciplinary actions. One of those is "Inappropriate, unprofessional behavior toward your supervisors and co-workers." That issue was addressed by the two and one-half day suspension, as was noted above. Since that conduct (the loud outburst directed at Brad Beaver, which caused significant apprehension among staff in the office) was the basis for the disciplinary suspension, it cannot be included here as a basis for the dismissal charge. As was also noted above, the two and one-half day suspension and the conduct underlying it can be considered by the appointing authority when determining the penalty to be imposed for the conduct addressed in this disciplinary measure. An appointing authority, in imposing discipline, must determine whether there are any mitigating or aggravating circumstances that exist prior to determining the appropriate penalty for given conduct. The two and one-half day suspension as well as the written reprimand would be viewed here as aggravating circumstances. The grievant's undisputedly excellent performance of the tasks assigned to him as an

Assistant Attorney General would constitute a mitigating circumstance.

Another of the charges against the grievant was "Ignoring the advice and counsel of your supervisors." Employees are not required to follow the advice and counsel of their supervisors. They are required to follow the directives of their supervisors. When, as here, a more experienced person in the office (here, Restuccia and McGormley) counsel an employee that his behavior is doing nothing to benefit his career and is doing nothing to benefit the office, a wise employee would heed that counsel and alter his/her behavior accordingly. That did not happen here, but it does not constitute a rule or policy violation upon which this discipline is based. Under other circumstances, such behavior might best be addressed through the issuance of a less than satisfactory service rating. None was issued here and, as noted above, all of the grievant's service ratings show him to have been a high-performing employee.

Another charge in Joint Exhibit #5 is "Conduct which has resulted in a variety of offenses, a criminal violation, and a civil warning regarding various statutes or ordnances (sic) including, but not limited to:

- Driving under the influence
- Trespass

There is in the record documentation regarding a DUI offense committed by the grievant in April 2009. (Joint Exhibit #3, Tab 8) Other documentation set forth at Tab 34 of Joint Exhibit #3 makes it clear that the grievant reported this offense and its' disposition to his chain of supervision within the DAG, specifically McGormley and Restuccia. To dredge this old information up at this point in order to justify a penalty of discharge is inappropriate. If the grievant was to be disciplined for an impaired driving plea, that discipline should have taken place when the incident occurred, in 2009. If it did not merit discipline at that point, it does not merit discipline now.

⊥15The "trespass" portion of the charge listed above results from a trespass warning (not citation) issued to the grievant on September 14, 2010, by the Department of Public Safety (DPS) at the University of Michigan. That document (Joint Exhibit #3, Tab 11) directed the grievant on that date to immediately leave "All UM Property." It further directed him not to enter into any property owned or leased by the University of Michigan in the future, or he would be subject to prosecution for criminal trespass. The grievant appealed that warning, and by letter of November 3, 2010 (Joint Exhibit #3, Tab 29) the warning was modified to allow the grievant to enter:

> . . . all public grounds, public events, and utilize all public services available at the University of Michigan, Ann Arbor Campus, with the following exceptions:
>
> 1. You are not permitted to make physical or verbal contact with Mr. Chris Armstrong.
> 2. This includes being in the same place as Mr. Armstrong on campus where you can reasonably anticipate Mr. Armstrong will be present. (This limitation does not apply to intercollegiate athletic events which are described in paragraph 4).
> 3. If you become aware of the presence of Mr. Armstrong at your location while on campus, you are directed to leave that immediate area.
> 4. You also are free to attend intercollegiate athletic events, but may not seek out Mr. Armstrong, and if you encounter him at an event, you must leave the immediate area.
>
> You, of course, will be expected to comply with all laws, rules, and regulations while on University property. Your anticipated cooperation is appreciated.

It is apparent from the warning and letter above that the grievant did not engage in criminal trespass once warned by the University DPS. There is nothing else in this record that would indicate that he violated any statute or ordinance resulting in a criminal trespass prosecution. This portion of the charge

letter, therefore, cannot be used as a basis for this disciplinary measure, at least as it concerns an allegation of criminal conduct. The conduct underlying the grievant having received this warning can be considered by the appointing authority as an aggravating factor when determining the penalty to be imposed.

The overarching issue in this case is contained in the first paragraph of the charge letter, in which Human Resources Director Douglas Bramble (the appointing authority designee in this matter) stated that, ". . . the Department has made a decision to terminate your employment for conduct unbecoming a State employee" (Joint Exhibit #5). While not specifying a rule violation, the ⊥16offense cited is set forth in Civil Service Rule 2-6.1:

2-6.1 Discipline

(a) Authorized. An appointing authority may discipline a classified employee for just cause.

(b) Just cause. Just cause includes, but is not limited to, the following:

(1) Failure to carry out the duties, and obligations imposed by agency management, an agency work rule, or law, including the civil service rules and regulations.

(2) Conduct unbecoming a state employee.

(3) Unsatisfactory service or performance.

The charge letter, in addition to terminating the grievant for conduct unbecoming a state employee, also utilized subsection (1) above in stating on page two of the three-page charge letter (Joint Exhibit #5) that the grievant had failed to carry out the duties and obligations imposed by agency management, an agency work rule, or law, including the civil service rules and regulations.

The grievant has contended that his conduct fell within his right to free speech guaranteed by the First Amendment to the U.S. Constitution. He cited (and entered as an exhibit) *United States v Treasury Employees*, 513 US 454, 115 S Ct 1003, 130 L Ed 2d 964, 63 USLW 4133 (1995). In that case, the U.S. Supreme Court determined that in order to inhibit speech on the part of a governmental employee, the government must identify some sort of nexus between the employee's job and the subject matter of the expression in dispute. Here, the Department of Attorney General has established such a nexus.

All of the disputed speech contained in the "blog" maintained by the grievant called "The Chris Armstrong Watch" was created, or at least was posted, on the grievant's own time. This provides some separation between himself and his position as an Assistant Attorney General. When the grievant, in violation of the DAG policy regarding media contact (Joint Exhibit #3, Tab 18) allowed himself to be interviewed regarding his "blog" and its contents, he did so without regard to the interests of his employer. He may well have been naïve enough to believe that the television news organization in question merely wanted to obtain more information regarding the "blog," but a reasonable person of ordinary prudence would suspect that some connection might be made to his position as an Assistant Attorney General. He might further wonder how WXYZ happened to become interested in the "blog" in the first place. The hearing officer is mindful that this interview was the subject of the reprimand given to the grievant and does not constitute an offense justifying this disciplinary measure. It is raised as part of an analysis of the nature of the speech and whether the employer established a nexus between the ⊥17speech and the employee's job. The fact that the grievant had received a written reprimand forms a part of his history of discipline, a factor to be considered when determining the appropriate penalty to impose for the conduct at issue.

Once the DAG became aware of the WXYZ interview, it became much more interested in the activities of the grievant. His participation in the interview was beginning to generate unfavorable publicity and

many phone calls (over 22,000, eventually, according to this record) as well as written complaints, both electronic and traditional. The "blog" was no longer "Concerned Michigan Alumnus;" after the WXYZ interview, it was well known that the publisher was State of Michigan Assistant Attorney General Andrew Shirvell.

Following the WXYZ interview came the inquiry from the Anderson Cooper program. The grievant informed his superiors of the request and said that he intended to do it. Restuccia counseled against it, telling the grievant that he would be made to look a fool if he appeared. The grievant, perhaps exhibiting a continuing naïvete, told Restuccia that he believed that this interview would go better than did the previous one. Restuccia initially told him not to do it, but when he informed Attorney General Cox, he was told that the Attorney General would not impose a prior restraint upon the grievant's right to speak. The grievant seems to believe that in this transaction, he asked for and was granted permission to appear on the Cooper show. It is clear that he did not ask for permission; he told Restuccia that he intended to go on the Cooper program. He was not granted permission; he was told that the Attorney General could not prevent him from appearing. The Cooper interview, being of a national cable audience nature, resulted in even more unfavorable press and public reaction against the grievant and against the Department of Attorney General for continuing to employ him.

As a result of the interview of the grievant on the Cooper program, Attorney General Cox found it necessary to appear on the Cooper program to explain the position of his agency. This is a direct nexus between the speech engaged in and the employee's job. The grievant exacerbated the situation by accepting an invitation to appear on The Daily Show with Jon Stewart. By accepting the invitations to appear on the Cooper program and The Daily Show, the grievant made a media spectacle of himself and cast the Department of Attorney General in a negative light. He did so paying attention to his own interests and disregarding the interests and reputation of his employer. The testimony in the record indicates that not only did the grievant create a great deal of scrutiny from the media, that scrutiny generated a tidal wave of condemnation from the public in the form of the aforementioned thousands of telephone calls, emails and letters. This impacted the DAG and its ability to successfully carry out its mission. In saying that, the hearing officer is not making a determination that the DAG became unable to represent its client state government agencies or the citizenry as a whole; instead, it is clear that there was a substantial expression of concern by that clientele that an agency who would retain such an employee would be unable to represent their interests. The Michigan Civil Rights ⊥18Commission, for example, passed a resolution condemning the actions of the grievant. It states, in pertinent part:

> BE IT RESOLVED THAT the Commission calls upon the Attorney General to make it clear that the Office of the Attorney General represents the interests of every Michigan resident equally, and to show that there is no room on his staff for an attorney who is unwilling to do so. (Joint Exhibit #3, Tab 16)

The City of Ann Arbor passed a resolution supporting the above Civil Rights Commission resolution on October 20, 2010. It reads in pertinent part:

> Whereas, in the City of Ann Arbor, it is illegal to discriminate against any person on the basis of their sexual orientation, gender identity, or gender expression, whether actual or perceived;
>
> Whereas, the actions of Assistant Attorney General Shirvell, including bullying, stalking and harassment are not consistent with the Ann Arbor Human Rights Ordinance;
>
> ***
>
> RESOLVED, that the Ann Arbor City Council expresses our support of the resolution adopted by the Michigan Civil Rights Commission on October 12, 2010; (Joint Exhibit #3, tab 26)

The facts as set forth in the findings of fact portion of this decision are but a sparse exemplary portion of the conduct engaged in by the grievant, whether it was in the email to former State Representative Drolet, in the "blog" itself, or in his attempts at confrontation with Armstrong and his acquaintances. The speech engaged in by the grievant is of the most base, hateful sort. When one reviews the performance ratings given to the grievant and reviews the opinions in this record of his supervisors as to his abilities as an Assistant Attorney General, it is truly disheartening to see that ability utilized to engage in the reprehensible speech, lies and
half-truths that are set forth in the grievant's "blog" postings. Even the Washtenaw County prosecutor's office, in its decision not to prosecute, found the speech "offensive," "mean spirited," "childish," and "disingenuous." (Joint Exhibit #3, Tab 30) This speech, generating the negative publicity that it did for the grievant's employer, is conduct unbecoming any state employee, let alone a state employee working as an Assistant Attorney General.

Using the September 5, 2010 "blog" posting as an example, the focus of the story is on a "raid" of an alleged drunken out-of-control party at which Armstrong and his friends allegedly were attempting to recruit individuals to homo-sexuality while at the University of Michigan. The "raid" was perpetrated by the grievant. He called the police. In the article, he noted that the Chris Armstrong Watch had obtained "exclusive" photos of the "raid." The grievant took the photos. It is doubtful that anyone else was interested in standing outside a Welcome Week party ⊥19at 1:30 in the morning in order to take photographs of a purported "raid," which was actually just a standard police response to a complaint about a loud party. That is hardly news at any college or university.

The grievant has contended that his focus on Armstrong was due to Armstrong's campaign pledge to not be a member of the Order of Angell, formerly known on the University of Michigan campus as "Michigammua." The grievant's contention is that the organization discriminates against minority groups and therefore is to be abhorred. If true, that is a valid point, and if Armstrong did promise not to join the organization and then did, that would also be a valid point to raise against him. It is clear from this record, however, that the actual basis for the appalling acts of harassment directed at Armstrong and his acquaintances by the grievant, however, was their homosexuality. It is clear that the Order of Angell issue, while it may have been of some concern to the grievant, was used as a pretext in an effort to couch the most vile hate speech in a constitutionally protected form. All one needs to do is read the "blog," article after article, to realize that the dominant theme is Armstrong's "disgusting" or "perverted" lifestyle.

The sexual orientation of an individual is a matter protected by Civil Service rules. That protection applies not only to state employees, but also to the general public when it prohibits an appointing authority from engaging in such discrimination in the hiring or recruitment process. The conduct of the grievant in creating a media circus around the hate speech against homosexuals in his "blog" could well impact the ability of the DAG to recruit and hire otherwise qualified individuals if they felt that their sexual orientation might be an issue with an agency that continued to employ such a truculent, intolerant individual. The focus of the "blog" postings by the grievant are determined to have been motivated by the grievant's obsession with the sexual orientation of Chris Armstrong and the fact that Armstrong had been elected by the student body to be the leader of their student government. For reasons known but to himself, the grievant could not bear the thought of Armstrong being elected to such a position. He therefore began the Chris Armstrong Watch, he began to peruse the Facebook postings of Armstrong and his friends, sometimes from work, and as time went on, his behavior seemed to become more bizarre. As former Attorney General Cox testified at the hearing, it was clear to him that the conduct of the grievant as outlined to him in the Executive Summary (Joint Exhibit #4) was of an "escalating" nature. Therefore, when the investigation was complete, the disciplinary conference was held, and it was recommended that the approved dismissal as the appropriate penalty, he concurred with that assessment.

The hearing officer has not addressed some of the issues raised in the hearing, such as the grievant's successful 2007 effort to have a student of Michigan State University expelled from school for allegedly interfering with a "Right to Life" prayer chain rally in East Lansing. The grievant, who was not directly affected by the actions of the student, nonetheless relentlessly ⊥20pursued him through Michigan State University channels to the point that the student was expelled. Using that series of events as an example, the hearing officer has determined that there are a number of issues contained in the investigation that are too old or too unrelated to merit close examination in this decision.

There exists a difference of opinion in this record between the Washtenaw County prosecutor and the former Attorney General as to whether the grievant's repeated attempts at confrontation with Armstrong constitute criminal stalking. The hearing officer will not attempt to resolve that disagreement. I do find, however, that if the activities (apart from the "blog" entries) of the grievant (in appearing at the home of Armstrong, picketing outside that home, calling the police to disrupt activities at the home, following Armstrong's friends to a bar, then shadowing them down the street) do not constitute stalking, then they constitute something very much like it. As former Attorney General Cox testified, there are any number of reasons that a county prosecutor may choose not to pursue a matter other than the merits of the case. Such stalking activity also constitutes conduct unbecoming a state employee.

The ultimate question before the hearing officer is whether the conduct of the grievant constituted conduct unbecoming a state employee and, if so, whether discharge was the appropriate penalty. The hearing officer would not countenance the pursuit and harassment of any member of a group protected by Civil Service rules on the scale demonstrated here as being worthy of any state employee. The grievant, however, is an attorney and as such is held to a higher standard of conduct. The Lawyers Oath of the State Bar of Michigan, in its final paragraph, reads as follows:

> I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed upon members of the bar as conditions for the privilege to practice law in this State.

The hearing officer does not pass judgment on the conduct of the grievant as an attorney, but cites the portion of the oath set forth above as exemplary of the fact that all attorneys are aware, however and wherever they are employed, that they are to conform their behavior to a standard higher than that set for their non-attorney fellow employees.

All State of Michigan employees work for all of the citizens of this state. Assistant Attorneys General not only work for the citizens of this state, but are responsible to assure that the legal rights of those citizens are protected. The citizenry needs to be able to have faith that their government and its employees are there to serve and protect the citizens, all citizens, even those whose conduct may seem repugnant to them.

The standard of proof in Civil Service hearings, even discharge cases, is the civil standard of proof by a preponderance of the evidence. That means that the moving party (here the Department of Attorney General) has the burden of persuading the hearing officer that it is more ⊥21likely than not that the grievant engaged in the activity alleged, and that the activity merited discharge. The Department of Attorney General has in this case satisfied the preponderance of the evidence standard as it concerns the conduct of grievant Andrew Shirvell. He is found to have engaged in a substantial course of conduct that is unworthy of any state employee, let alone an Assistant Attorney General.

The other overarching charge against the grievant was that of "failure to carry out the duties and obligations imposed by agency management, an agency work rule, or law, including the civil service rules and regulations." This portion of the charge has been proven to a lesser extent than the conduct

unbecoming charge set forth above. The grievant has been shown to have violated the DAG policy regarding media contact. There is, as it concerns his work, no evidence of his having shirked any duties or responsibilities. The record shows that he was a conscientious, prompt, and detail-oriented employee. There was little dissatisfaction with his work product. The bulk of the conduct engaged in by the grievant, however, falls under the ambit of the "conduct unbecoming" charge set forth above.

The grievant has been determined, in the course of this fact-finding and opinion, to have engaged in harassing conduct of the basest sort. As was noted above, it is disheartening to see a bright individual with a great deal of potential engage in such conduct. The fact that the grievant deliberately made a media spectacle of himself and the department for which he worked without regard for the interests of his employer constitutes conduct unbecoming a state employee. It is the determination of the hearing officer that the grievant engaged in a willful course of conduct that justified his discharge from the classified service within the ambit of Civil Service Rule
2-6.1(b)(1) and (2). Since the discharge has been determined to have been for just cause, the grievance is denied.

DECISION

The grievance is denied for the reasons set forth above.

/S/
William P. Hutchens, Hearing Officer

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Notice: This decision may be appealed if received by the Civil Service Commission's Employment Relations Board within **28 calendar days of the mailing date on the face of this decision (April 18, 2012)** as authorized by Civil Service Commission Rule 8-7, *Appeal to Civil Service Commission.* Instructions and forms for filing an appeal, Civil Service Regulation 8.05, *Employment Relations Board Appeal Procedures*, and Regulation 8.06, *Computing Time and Filing Documents*, can be found at www.mi.gov/erb. Appeals and inquiries should be addressed to the Employment Relations Board, Michigan Civil Service Commission, Capitol Commons Center, 400 South Pine Street, P.O. Box 30002, Lansing, Michigan 48909; by telephone, at (517) 335-5588; by fax, at (517) 335-2884; or by e-mail to *MCSC-ERB@michigan.gov*.