STATE OF MICHIGAN
CIVIL SERVICE COMMISSION

EMPLOYMENT RELATIONS BOARD

A BOARD DECISION

MAILING DATE
JULY 12, 2012

ANDREW SHIRVELL	}	**ERB 2012-036**
	}	**CSHO 2012-022**
	}	**ERB 2011-036**
	}	**CSHO 2011-034**
	}	**CSHO 2011-026**
v	}	**Reference No. 2011-00627**
	}	
DEPARTMENT OF ATTORNEY GENERAL	}	
	}	**Discipline, Dismissal**

MEMBERS PRESENT

Ms. Susan Zurvalec	Chair
Mr. William J. Braman	Member
Mr. Richard I. Warner	Member

A matter decided during a Board conference after oral argument of the parties on June 19, 2012.

NOTICE

This is a recommended decision of the Employment Relations Board. The Board will file the decision with the Civil Service Commission (CSC) for its review and final action. Parties need not file additional documents requesting Commission review. The Commission's final decision may approve, reject, or modify, in whole or in part, the Board's recommendations. See Civil Service Commission Rule 1-15.5.

RECOMMENDED GRIEVANCE DECISION

The Board considered the appeal of right filed by Appellant Andrew Shirvell from the decision of Hearing Officer (HO) William P. Hutchens denying Appellant's grievance against Department of Attorney General.

BACKGROUND

In November 2006, Appellee hired Appellant as a legal assistant in its Public Service Division. In 2007, he became an assistant attorney general and was assigned to the Appellate Division under Eric Restuccia. When the previous Solicitor General retired, Restuccia became the Solicitor General and Joel McGormley became chief of the Appellate Division. While an

assistant attorney general, Appellant received positive performance ratings,[1] but he could be abrasive and his interactions were sometimes "over the top."[2]

In February 2010, Appellant received an email from a taxpayer advocacy group headed by former State Representative Leon Drolet about a planned protest on issues of concern to the gay community. Appellant replied to Drolet with an email calling Drolet and his organization "sick freaks" and "butt-buddies" and accusing them of attempting to "hijack our pro-life, pro-family party in pursuit of your PERVERTED radical homosexual agenda."[3]

Appellant claimed to have sent the email during lunch using his personal email account.[4] McGormley's office received a complaint noting that the email appeared to have been sent on state time.[5] McGormley and Restuccia met with Appellant.[6] They did not formally reprimand him, but explained that the comments were not helpful to Appellant or Appellee and that using state time and equipment for such activity was inappropriate.[7] Restuccia told Appellant that any such activity he chose to engage in needed to be done on his own time, and this incident made it look like he was engaging in political activity during state time.[8] Appellant said that he understood that he was not to engage in political activity during work time.[9] No additional discipline was taken against Appellant because of the email incident.

Appellant is a University of Michigan (U of M) alumnus. In April 2010, he began writing an anonymous blog focused solely on the U of M's new Michigan Student Assembly (MSA) president, Chris Armstrong.[10] Appellant began the blog after he read an interview Armstrong gave to the Detroit Free Press.[11] Armstrong is openly gay. Appellant was fixated with Armstrong, his sexuality, his background, and all aspects of his life.[12] Appellant accused Armstrong of being a "puppet of the militant homosexual organization known as the 'Gay and Lesbian Victory Fund'"; belonging to a "notorious secret student society with a well-documented history of racism and elitism"; and being a "closeted racist," a liar, and many other things.[13] Appellant intentionally outed at least one student via his blog.[14] He also posted similar anti-Armstrong criticism on his Facebook page beginning around this same time.[15] Some Facebook posts were made during Appellant's work hours.[16]

In May 2010, Restuccia received an email describing Appellant's blog, including criticism of Armstrong and a photo on the blog of Armstrong with a swastika superimposed over his face.[17]

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[1] Jt. Exs. 9-14.
[2] Tr., at 299.
[3] Jt. Ex. 3, Tab 24.
[4] Tr., at 295, 345.
[5] Tr., at 266.
[6] Tr., at 267.
[7] Tr., at 268, 294-95.
[8] Tr., at 294.
[9] Tr., at 295.
[10] Jt. Ex. 21, Tr., at 301; Jt. Ex. 3, tab 1.
[11] Tr., at 346-47; Gr. Ex. 10.
[12] Jt. Ex. 3, tab 1.
[13] Jt. Ex. 3, tab 1.
[14] Tr., at 407; Jt. Ex. 3, at tab 1, at 37.
[15] Jt. Ex. 3, tab 2.
[16] Jt. Ex. 3, at 32-34; Jt. Ex. 3, tab 2; Jt. Ex. 3, tab 15.
[17] Tr., at 296; Gr. Ex. 7.

The blog reminded Restuccia of the Drolet email and he wanted to ensure that Appellant was not again engaging in political activity on state time or with state resources.[18] At that point, Restuccia had not read the blog.

Appellant told Restuccia he was writing the blog on his own time without using state resources.[19] He demonstrated that he had not identified himself anywhere in the blog nor identified himself as an assistant attorney general.[20] Appellee's ethics officer, Frank Monticello, found that blogging was a permissible activity. Around May 1, 2010, Restuccia told Appellant that he was free to continue the blog on his own time, but should think about taking it down as it did not help the department's image.[21]

On May 8, 2010, Appellant attended an event at the U of M to heckle Armstrong and a gay rights play.[22] A May 20, 2010, newspaper article identified Appellant as the heckler, the author of the blog, and an assistant attorney general.[23] Restuccia and McGormley knew of the article but did not take any further action.[24] Restuccia believed he did not have authority to order Appellant to discontinue the blog, but advised him, as a friend, that it would be better for Appellant's professional career and Appellee's image to take down the blog.[25] Appellant replied that he would not give up his First Amendment rights by removing the blog.[26]

Appellant found out about a bar-crawl birthday party on June 4, 2010, in Ann Arbor for one of Armstrong's friends.[27] Appellant went to track down the party and find Armstrong, but Armstrong did not attend.[28] Appellant followed a group of Armstrong's friends until they noticed him and asked him to leave.[29] Appellant taunted the group until they threatened to call the police.[30]

In June 2010, Armstrong began an internship for Speaker of the House Nancy Pelosi in Washington, D.C.[31] Appellant called Pelosi's office several times, telling Armstrong's internship coordinator that Armstrong was a racist.[32] He claimed to have called as a taxpayer concerned about the type of persons being employed by the federal government.[33] At least one call was made during work hours.[34] Appellee's disciplinary report states that Appellant admitted that the calls were intended to have Armstrong "fired, censured, or disciplined."[35] Armstrong retained his internship.

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[18] Tr., at 296.
[19] Tr., at 300.
[20] Tr., at 297.
[21] Tr., at 297-98.
[22] Gr. Ex. 9; Jt. Ex. 3, tab 9, at 3.
[23] Gr. Ex. 9.
[24] Tr., at 330-31, 335-336; Gr. Ex. 8.
[25] Tr., at 304.
[26] Tr., at 304, 379.
[27] Jt. Ex. 3, at 5-6, 15-16.
[28] Jt. Ex. 3, at 5-6, 15-16; Jt. Ex. 3, tab 9.
[29] Jt. Ex. 3, at 5-6, 15-16; Jt. Ex. 18, at 12.
[30] Jt. Ex. 3, tab 9.
[31] Jt. Ex. 3, tab 3, at 3; Tr., at 402.
[32] Jt. Ex. 3, tab 3, at 3-4; Jt. Ex. 3, tab 1, at 25-26.
[33] Tr., at 402-405.
[34] Jt. Ex. 4, at 4.
[35] Jt. Ex. 4, at 5.

On July 9, 2010, Appellant staged a one-man protest of "Pride Night" at an Ann Arbor nightclub.[36] He stood outside the nightclub holding a sign advertising his blog and calling Armstrong a racist and a liar.[37] He asked people going into the club if he could speak with two of Armstrong's friends.[38] When the two exited the club, Appellant told them that he knew who they were, knew where one lived, and might go there to protest an upcoming "orgy."[39] Appellant blogged about the night's events, claiming he was attacked by Armstrong's friends and that they tore up his sign.[40]

On August 18, 2010, Appellant taped an interview with WXYZ television in Detroit about his blog.[41] Appellant did not ask for permission because he believed Appellee's media contact policy only prohibited speaking to the media about official business.[42] Before the WXYZ interview, the reporter apparently assured Appellant that questions about his job or personal life would not be asked.[43] But Appellant was ultimately asked about his role as an assistant attorney general and whether he encountered any gay persons in his work.[44] Appellant refused to answer.[45]

On August 31, 2010, Appellant was suspended for two-and-one-half days for an altercation with his supervisor, Brad Beaver.[46] Beaver had written an email to staff about how to handle an issue Appellant had encountered in court. Appellant lost his temper in Beaver's office by yelling obscenities and slamming doors and filing cabinets. Witnesses described Appellant as "out of control," "unhinged," and "looking crazed."[47] Appellant did not grieve the suspension.

At 1:30 a.m. on September 5, 2010, Appellant stood on the sidewalk outside Armstrong's home in Ann Arbor during a party.[48] Appellant called the police about "illegal activities" he observed there. Appellant photographed the police arriving and speaking to persons inside.[49] The police told Armstrong they were concerned about the man across the street taking pictures of the house.[50] Appellant then published a blog post titled "Bombshell: Ann Arbor Police Raid Chris Armstrong's Out-of-Control 'Gay Rush' Welcome Week Party."

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[36] Jt. Ex. 3, tab 1, at 51-56.
[37] Jt. Ex. 3, tab 1, at 51.
[38] Jt. Ex. 3, tab 3, at 4.
[39] Gr. Ex. 12; Jt. Ex. 3, tab 3, at 4; tab 9, at 6.
[40] Jt. Ex. 3, tab 1, at 51-56.
[41] Tr., at 366.
[42] Tr., at 354. The DAG's media contact policy states, in part:

> **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 interaction with the media representative. The Communications Office will then determine how the matter will be handled. Joint Ex. 3, at tab 18.

[43] Tr., at 354-55.
[44] Tr., at 357-58.
[45] Tr., at 357-58.
[46] Tr., at 202.
[47] Jt. Ex. 3, tab 14.
[48] Jt. Ex. 3, tab 1, at 59-63; tab 3, at 4.
[49] Tr., at 414-415.
[50] Jt. Ex. 3, tab 3, at 5.

On September 6, 2010, while the MSA was hosting events for welcome week, Appellant again stood in front of Armstrong's house in protest.[51] Ann Arbor police responded to a 911 call, but told Armstrong that Appellant could legally continue his protest.[52] The U of M's public safety department escorted Armstrong to his MSA event because of Armstrong's fears for his safety.[53] Appellant went to MSA events that day to protest. According to Armstrong, Appellant "engaged repeatedly with people defaming my character and interrupting the supportive atmosphere the event was meant to engender."[54] Appellant spoke at the MSA meeting on September 7, 2010, seeking Armstrong's resignation or impeachment.[55] Appellant allegedly told one of Armstrong's friends that he would keep coming to MSA meetings until Armstrong resigned.[56]

On September 13, 2010, Armstrong applied for a personal protection order (PPO) against Appellant.[57] Armstrong dropped the petition on October 25, 2010, after Appellant stopped contacting him.[58]

On September 14, 2010, Ann Arbor police were again called to Armstrong's house to address Appellant. He explained to the police that he had taken a vacation day from his job as an assistant attorney general to protest because he did not agree with Armstrong's ideas.[59] The U of M police then arrived and issued a trespass warning, prohibiting Appellant from entering any U of M property.[60] Appellant successfully appealed the trespass warning by having it amended to allow him on U of M public property, if not in the same immediate area as Armstrong.[61]

Appellant's interview with WXYZ aired on September 15, 2010. During 2010, Attorney General Mike Cox had begun a "cyber-bullying" initiative to protect children and raise the level of discourse on the internet. Appellee's communications office told Restuccia about the WXYZ interview and that reporters were asking questions about how Appellant's actions related to the initiative.[62] After hearing about the interview, Restuccia read Appellant's blog for the first time.[63] He was surprised to see that every column was about Armstrong.[64] Restuccia found the blog angry, caustic, and with no purpose other than attacking Armstrong.[65] Restuccia and Appellate Division First Assistant Attorney General Laura Moody formally interviewed Appellant as part of the disciplinary process involving the WXYZ interview.[66] Restuccia again told Appellant that he could not require him to take down the blog, but encouraged him to take it down because it was not helpful to him at the office and undermined his professional

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[51] Jt. Ex. 3, tab 1, at 65-66; tab 3, at 5.
[52] Jt. Ex. 3, tab 1, at 65-66.
[53] Jt. Ex. 3, tab 3, at 5; Jt. Ex. 3, tab 32.
[54] Jt. Ex. 3, tab 3, at 5.
[55] Dept. Exs. 15 & 16.
[56] Jt. Ex. 3, tab 3, at 6.
[57] Jt. Ex. 3, tab 3.
[58] Jt. Ex. 20.
[59] Jt. Ex. 3, tab 10.
[60] Jt. Ex. 3, tab 9, at 8-10; tab 11.
[61] Jt. Ex. 17.
[62] Tr., at 302.
[63] Tr., at 303.
[64] Tr., at 303.
[65] Tr., at 303-304.
[66] Tr., at 302.

credibility.[67] At the formal interview, Appellant told Restuccia that the Michigan Daily had asked for an interview and he was going to do it.[68] Appellant answered written questions for the Michigan Daily.

On September 16, 2010, Appellant told Restuccia, McGormley, and Selleck, that CNN's *Anderson Cooper 360°* and Comedy Central's *The Daily Show* had requested interviews.[69] Restuccia first told Appellant he could not do the interviews because CNN and Comedy Central would only want to talk about his job as an assistant attorney general and his blog and make him look foolish.[70] Restuccia told Appellant that he may be subject to civil liability; Appellant said he would rather file for bankruptcy than lose his right to express his opinion.[71] Even though Appellant thought he could do well on CNN, he initially decided to not do the interviews.[72]

On September 20, 2010, Restuccia issued Appellant a formal reprimand for violating Appellee's media policy by appearing on WXYZ without first notifying the communications office.[73]

Less than two weeks after telling Restuccia that he was not going to do the CNN and Comedy Central interviews, Appellant reconsidered.[74] Restuccia called Cox to see if he had the authority to forbid Appellant from conducting the interviews.[75] Appellee's communications division and ethics officer confirmed Appellant's First Amendment right to participate in the interviews.[76] Restuccia then told Appellant that while he could not forbid Appellant from doing the interviews, he advised Appellant that the interviews would make Appellant look absurd and would harm the reputation of the office.[77] Appellant ultimately taped interviews for CNN and Comedy Central in late September 2010.[78] Appellant told CNN that he would not answer any questions relating to his employment.[79] The CNN interview aired on September 28, 2010; the Comedy Central interview aired on November 1, 2010.

The CNN interview, as predicted by Restuccia, focused on Appellant's employment and how it conflicted with harassing a college student.[80] Anderson Cooper's first question to Appellant was:

> Andrew, I want to go over some of the stuff that you have on your blog. There's a picture of Chris Armstrong with a Nazi swastika near his face, there's another with the words "racist elitist liar" scrawled on his face. You accused him at one point of being Satan's representative on the assembly. I've got to ask you, I mean, you're a state official, this is a college student, what are you doing?[81]

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[67] Tr., at 304.
[68] Tr., at 307-308, 386.
[69] Tr., at 308, 312; Gr. Ex. 6.
[70] Tr., at 308-309.
[71] Tr., at 310.
[72] Tr., at 310, 359-60.
[73] Tr., at 205; Jt. Ex. 3, tab 18.
[74] Tr., at 311-314.
[75] Tr., at 311-12.
[76] Tr., at 311.
[77] Tr., at 312.
[78] Tr., at 362; Jt. Ex. 3, tab 5. (Note that the record does not include a transcript or recording of Appellant's appearance on Comedy Central's "The Daily Show.")
[79] Tr., at 360-361.
[80] Jt. Ex. 3, tab 5.
[81] Jt. Ex. 3, tab 5, at 1.

Cooper asked how Appellant could reconcile his conduct with Cox's cyber-bullying initiative and his employment as an assistant attorney general.[82] Appellant refused to speak about his employment.

Cooper separately interviewed Cox about Appellant and his blog.[83] Cooper asked why Appellant was still employed. Cox said Appellant's freedom of speech was protected and he could engage in whatever activity he liked while off state time. But Cox also said Appellant was acting like a bully and he was shocked at the content of Appellant's blog.[84] Cox's interview aired the night after Appellant's aired.

Appellant's media appearances led to 22,000 emails, 150 letters, and 940 phone calls to Appellee.[85] According to Restuccia:

> They were furious, of course, because the whole theme of it was that the attorney general has a cyber-bullying policy and here you're engaging in this really aggressive attacking conduct and how is that consistent with [Appellant]. I mean, the whole reason he came on was -- it had the effect of disgracing the office.
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> I got an e-mail from the deputy solicitor general from Virginia asking me about it and I remember one of the -- kind the very effective appellate attorneys was asking, "What's going on with Andrew? What about your office?" And that was just kind of the universal experience where the entire legal community was exquisitely aware of how, you know, crazy the Department of Attorney General [was] for having someone who is engaging in this kind of conduct.[86]

When asked whether he thought Appellant could be reassigned to any position with Appellee after the events of 2010, Restuccia testified:

> No, there is no role that [Appellant] could provide for the state ever again. He has been irrevocably undermined, he has no credibility. In the eyes of the community and the legal community he is the paradigm of the bigot. There is nothing he could do for our office. If we were forced to somehow retain him or bring him back into the employment of the attorney general, of the department, my recommendation would be that he [be] given no assignment much like they have for these people who commit offenses that are being investigated, that he just be forced to report and be given nothing to do because there is nothing that he can do for the office that would not then cast doubt on its credibility and legitimacy. There is nothing further he can do for the office.[87]

Appellant's interviews with CNN and Comedy Central, the U of M trespass warning, and the PPO request triggered an investigation by Special Agent Michael Ondejko of Appellee's Criminal Division beginning on October 1, 2010.[88] A forensic examination of Appellant's

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[82] Jt. Ex. 3, tab 5.
[83] Tr., at 233-34; Jt. Exs. 7 & 19.
[84] Tr., at 244-45; Jt. Exs. 7 & 19.
[85] Jt. Ex. 4, at 10.
[86] Tr., at 314.
[87] Tr., at 315-16.
[88] Tr., at 48.

computer found that all the blog posts were made after work hours.[89] Ondejko also could not prove that Appellant made any Facebook or Twitter postings from his work computer.[90]

Cox was interviewed by WWJ in Detroit on October 1, 2010, to answer many of the same questions asked by Cooper. Cox explained that Appellant was on a leave of absence, but would have a disciplinary conference upon his return focused on his actions and not his speech.[91] Cox said Appellant's First Amendment rights were assumed to be protected. Cox recognized that the Armstrong Blog and Appellant's behavior was reprehensible, but he could "not just fire people at a whim."

On October 12, 2010, the Michigan Civil Rights Commission (MCRC) adopted a resolution condemning Appellant's actions toward Armstrong.[92] The MCRC resolution stated, in part:

> WHEREAS the Commission condemns the conduct of Assistant Attorney General Andrew Shirvell targeting Christopher Armstrong, a University of Michigan student. . . . WHEREAS the Commission is concerned about the scope and nature of the involvement of Assistant Attorney General Shirvell in the execution of the work of the Office of the Attorney General. . . .BE IT RESOLVED THAT the Commission call 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 not room on his staff for an attorney who is unwilling to do so.[93]

The MCRC hoped that Appellant would be removed from his position. On October 20, 2010, the Ann Arbor City Council passed its own resolution supporting the MCRC's resolution.[94]

After Appellant's actions throughout the summer of 2010, the U of M Department of Public Safety asked the Washtenaw County Prosecutor's Office to prosecute Appellant for stalking. On October 26, 2010, the prosecutor's office declined to prosecute:

> The only fair review of Mr. Shirvell's statements is that they are offensive and mean spirited. . . . . 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.[95]

Cox believed that Appellant could have been prosecuted under Michigan's anti-stalking law.[96]

When Cox appeared on CNN, he was not completely familiar with the contents of the blog. The morning after his CNN interview, he read the blog and was shocked.[97] "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

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[89] Tr., at 47, 56, 107-108.
[90] Tr., at 112.
[91] Jt. Ex. 8.
[92] Jt. Ex. 3, tab 16.
[93] *Id.*
[94] Jt. Ex. 3, tab 26.
[95] Jt. Ex. 3, tab 30.
[96] Tr., at 246.
[97] Tr., at 245.

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."[98]

Cox at first did not see Appellant's conduct as necessarily interfering with the agency's mission, but once he learned the details of the conduct he saw it as a threat, based in part on the resources devoted to addressing the thousands of responses to Appellant's conduct.[99]

Before deciding to discharge, Cox reviewed the ten-page executive summary of the investigation into Appellant's conduct from Douglas Bramble, director of Appellee's Office of Human Resources, and Thomas Cameron, chief of the Criminal Justice Bureau.[100] Cox said:

> 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. . . .[101]

Cox found that Appellant's actions indicated a complete lack of concern for the consequences of his actions on other individuals in his office.[102]

At the disciplinary conference on November 5 and 8, 2010, Bureau Chief Cameron asked Appellant about specific charges in the Notice of Disciplinary Conference, and allowed Appellant and his representative to respond.[103] Generally, Appellant did not believe he had done anything inappropriate toward Armstrong. He claimed he had not performed any blogging or other actions during work hours or on state equipment related to Armstrong.

On November 8, 2010, after a two-day disciplinary conference, Appellee discharged Appellant for "conduct unbecoming a state employee." Appellee's discharge letter to Appellant specified the conduct as:

- Engaging in inappropriate conduct by targeting individual members of the public, both in person and through electronic media, that 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 that resulted in filing of a request for a personal protection order against you for alleged stalking behavior.

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[98] Tr., at 245.
[99] Tr., at 214-216, 242-243, 248-249; Jt. Ex. 4, at 10.
[100] Jt. Ex. 4.
[101] Tr., at 248-249.
[102] Tr., at 249.
[103] Jt. Ex. 3, at 47-57; Jt. Ex. 3, tab 25.

- 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[104]

The discharge letter also stated that just cause existed under CSC Rule 2-6.1, *Discipline*:

> Your conduct, taken in its totality, undermines your ability to perform your assigned duties and responsibilities as an Assistant Attorney General. Furthermore, based on the information and responses that you made during the disciplinary proceedings, the Department has concluded that you have made misrepresentations through the course of the disciplinary proceedings and have used state resources to engage in inappropriate conduct towards others. The Department has determined that you have engaged in conduct unbecoming a state employee and have failed to carry out the duties and obligations imposed by agency management, and agency work rule, or law, including the civil service rules and regulations.[105]

The HO discussed the specific charges in the charge letter, noting that the August 2010 incident from Appellant's confrontation with Beaver is listed in the charge as "Inappropriate, unprofessional behavior toward your supervisors and co-workers."[106] The HO clarified that the August 2010 incident could only be considered an aggravating factor in connection with Appellant's discharge, but the underlying conduct could not form a factual basis for additional discipline.[107] Appellant's drunk-driving conviction from 2009 also could not be brought up years

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[104] Jt. Ex. 5. Note that Appellant pleaded guilty to driving while impaired in June 2009. Appellant immediately reported his arrest to Appellee and was not disciplined by Appellee for the incident. See Jt. Ex. 3, tab 8; Tr., at 134-135.
[105] Jt. Ex. 5, at 2.
[106] Jt. Ex. 5.
[107] CSHO 2012-22, at 14.

later to justify additional discipline. Similarly, the HO found that the charge letter's mention of trespass as a criminal violation could not be used as a basis for discharge. Appellant was not charged with a crime, but the conduct underlying the warning could be considered as an aggravating factor when determining the penalty to be imposed.[108]

Appellant argued that his speech as a governmental employee was protected as set forth in *US v Treasury Employees*.[109] In that case, the Supreme Court determined that to inhibit a governmental employee's speech, the government must identify a nexus between the employee's job and the subject matter of the disputed expression dispute. The HO concluded that Appellee established such a nexus. The HO found that while Appellant did not post to his blog during work hours, when Appellant allowed himself to be interviewed about the blog, he did so without considering Appellee's interests. "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."[110]

After the WXYZ interview, it became well known that the formerly-anonymous "Concerned Michigan Alumnus" publishing the Armstrong Blog was Appellant. Appellee, as a result, was subjected to over 23,000 complaints. Appellant's appearance on CNN resulted in even more unfavorable press for Appellee, causing Cox to decide to appear on the Cooper program to defend Appellee's position. The HO stated:

> This is a direct nexus between the speech engaged in and the employee's job. . . . . By accepting the invitations to appear on the Cooper program and The Daily Show, [Appellant] 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. . . . [N]ot only did [Appellant] 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.[111]

As examples of the backlash, the HO cited the MCRC and Ann Arbor City Council resolutions condemning Appellant's actions.

The HO found Appellant's actions against Armstrong were conduct unbecoming any state employee, much less an assistant attorney general. The HO pointed to Appellant's actions of September 4 and 5, 2010, when he went to Armstrong's house to call the police about a party, took photos, and then misleadingly blogged about it. The HO also found that while Appellant's

[108] *Id.*, at 15.
[109] 513 US 454 (1995).
[110] *Id.*, at 16.
[111] *Id.*, at 16.

stated reason for blogging about Armstrong was his opposition to involvement with the Order of Angell, the main subject of the blog was Armstrong's "homosexual" and "perverted" lifestyle. Such hateful speech, the HO surmised, "could well impact the ability of the DAG to recruit and hire otherwise qualified individuals."[112]

The HO pointed out that sexual orientation is a protected class under the CSC Rules.

The HO believed that even if Appellant's actions toward Armstrong did not legally constitute stalking, they were conduct unbecoming a state employee.

Appellee proved that Appellant engaged in the conduct alleged, resulting in just cause to dismiss Appellant under CSC Rule 2-6.1(b)(1) and (2). "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."[113] The HO denied the grievance and upheld the discharge.

APPELLANT'S ARGUMENT

Appellant argues the HO's decision was erroneous. Appellant's exercise of First Amendment rights outside work does not constitute "conduct unbecoming a state employee" when he expressed his views on matter of public concern as a private citizen. The state's interest in preventing Appellant's expression does not outweigh his First Amendment rights. The HO violated Appellant's constitutionally-guaranteed right to freely express his political and religious beliefs outside work when he characterized Appellant's conduct as "hate speech."

Appellant cites *Westmoreland v Sutherland*[114] summarizing the three things a public employee must demonstrate to prove that his speech is protected:

(1) The speech must be made as a private citizen, rather than as part of the employee's official duties;

(2) The speech must involve a matter of public concern; and

(3) The public employee's interest as a private citizen in commenting on the matter of public concern outweighs "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[115]

Appellant spoke only as a private citizen about Armstrong, his beliefs, and his blog. Before each interview about his blog, he elicited agreements that he would not be asked about his employment. All the interviews concerned Appellant's non-work-related political activities. The HO incorrectly found that Appellant had not received permission to conduct the interviews on CNN and Comedy Central, as he told his supervisors about the interview offers and the supervisors did not forbid him from doing the interviews.[116]

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[112] *Id.*, at 19.
[113] CSHO 2012-22, at 21.
[114] 662 F3d 714 (6th Cir 2011).
[115] *Garcetti v Ceballos*, 547 US 410, 417 (2006), quoting *Pickering v Bd of Educ of Twp High Sch Dist 205*, 391 US 568 (1968).
[116] Gr. Ex. 6.

"Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'"[117] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[118] The HO did not address whether Appellant's speech addressed matters of public concern. At the grievance hearing, Appellant explained how he started the blog after being upset by some of Armstrong's statements in a Detroit Free Press interview about how he intended to promote gay rights.[119] Armstrong was a public figure involved in controversial matters of public concern when Appellant began his blog. The blog discussed Armstrong being the first openly gay MSA president, his joining the Order of Angell, and the U of M's College Democrats' criticism of Armstrong. The blog also reported on Armstrong's public speaking engagements and criticized his oversight of MSA. Even if the blog speech was hurtful, it is still protected.[120] Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.[121]

The HO's decision found that blogging about Armstrong's involvement with an allegedly racist organization would be a valid subject, but that such subject was used as a pretext to instead criticize Armstrong's sexuality. The HO does not have the authority to decide what constitutes a "valid point" for a public employee to assert against a public figure like Armstrong, and has no authority to censor a classified employee's constitutional right to freedom of expression based on only the content of that employee's speech. Appellant argues that Armstrong injected his sexuality into the public eye by emphasizing his being the first openly homosexual MSA president. Therefore, Appellant's speech about Armstrong's sexuality is a matter of public concern.

Appellant's constitutional interest in making outside political statements outweighs Appellee's interest in preventing Appellant's speech. Appellant's political speech was not directed at Appellee. Appellant did not knowingly or recklessly make false statements. Appellant testified that he believed each statement in the blog to be true when made. No witnesses with first-hand knowledge contradicted his statements. Appellant's speech did not cause Appellee to become unable to perform its duties. The HO even found that Appellee was not precluded from performing its duties.[122] Appellee did not offer any evidence identifying who complained about Appellant. Most of the emails were from out-of-state special interest groups organized by a publicist, Howard Bragman. The resolutions by the Michigan Civil Rights Commission and Ann Arbor City Council were political and did not affect the efficiency of Appellee's operation.

The HO stated that Appellant's actions "could well impact the ability of [Appellee] to recruit and hire otherwise qualified individuals if they felt that their sexual orientation might be an issue." There is no evidence that anything like this happened.

There is also no evidence that Appellant's political speech affected his work in any way. Restuccia assigned him to summarize a 130-page California judicial decision about gay rights

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[117] *Westmoreland*, 662 F3d at 719 (quoting *Connick v Meyers*, 461 US 138, 146 (1983)).
[118] *Connick*, 461 US at 147-48.
[119] Tr., at 346-47.
[120] *Snyder v Phelps*, 562 US __ (2011), slip op at 15.
[121] *Connick*, 461 US at 145.
[122] CSHO 2012-022, at 17.

after Restuccia knew of the blog. Cox, in his interview with CNN, recognized that Appellant's speech was protected by the First Amendment and did not interfere with Appellant's work at the office. The HO erred by saying that Cox told CNN that Appellant's conduct was being investigated while preserving Appellant's right to free speech. It was not until Appellant took a medical leave on September 30, 2010, that the pressure on Appellee increased, resulting in Cox telling WWJ that Appellant would be subject to a disciplinary hearing when he returned. Cox falsely claimed at the WWJ interview that he did not know anything about the blog until the last week of August 2010. Appellant's supervisors, Carol Isaacs, and Monticello, all knew about the blog and its content as early as mid-May 2010. It is unbelievable that Cox would not have read the blog before appearing on CNN to defend Appellant's right to free speech.

Cox correctly defended Appellant's right to free speech on non-work-related political activities until the political and media pressure caused Appellant to become a political liability.

Appellant was unjustly discharged in retaliation for exercising his First Amendment rights. The HO's decision should be reversed, and Appellant should be reinstated to his former classification with full back pay and benefits.

Motion to Admit New Evidence. Appellant seeks to admit an email chain from September 16, 2010, showing that Appellant immediately asked Restuccia, McGormley, Bramble, and Selleck for permission to participate in the CNN interview. It is submitted now because he just recently discovered it had been copied to his personal email account, and because Grievant Exhibit 6, supplied by Appellee after a document request, is not entirely legible.

Appellant also moves to admit a series of emails obtained in February 2012 after subpoenaing the U of M in civil litigation between Appellant and Armstrong. The emails show that Armstrong used a Hollywood publicist to bring public pressure on Appellee to terminate Appellant. Appellant only recently received the documents and could not have brought them to hearing in October 2011.

APPELLEE'S ARGUMENT

Appellee argues the HO's decision was supported by competent evidence. Appellee had just cause to dismiss Appellant for conduct unbecoming a state employee.

Regardless of Appellant's arguments about First Amendment protections, the questions are whether Appellant violated a CSC rule and whether the decision to discharge Appellant was arbitrary and capricious. Appellant engaged in conduct unbecoming a state employee when he engaged in a pattern of harassing and stalking behavior against private individuals and chose to publicize those activities which damaged not only Appellant's reputation, but also damaged Appellee's reputation, credibility, operations, and ability to function. Appellant engaged in the harassing conduct despite repeated warnings from his supervisors.

Appellee cites *Williams and DOC*, HO 069-85, recognizing that off-duty conduct may form the basis for discipline: "While generally an employee's conduct away from the place of business is normally viewed as none of the employer's business, there is a significant exception where it is established that an employee's misconduct off the premises can have a detrimental effect on the employer's reputation or product, or where the off-duty conduct leads to a refusal, reluctance or inability of other employees to work with the employee." Appellee cites two court cases from

other jurisdictions holding that conduct unbecoming can include conduct outside the workplace "which adversely affects the morale or efficiency of the bureau or which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services."[123] *Karins* upheld the suspension of an off-duty fireman who used one racial epithet during a traffic stop. Here, Appellant's off-duty conduct impaired his ability to function, damaged Appellee's reputation, and adversely affected Appellee's ability to perform its duties. Appellee had to use two staff exclusively to respond to the thousands and thousands of complaints about Appellant's actions, and also had to respond to media inquiries. Appellee also points to the MCRC and Ann Arbor City Council resolutions condemning Appellant's actions and questioning his and Appellee's ability to represent clients in the state.

Termination was the only possible remedy. Appellant's reputation was too damaged to represent the state in any capacity. As an assistant attorney general, Appellant was held to a higher standard both on and off duty. The administrative law judge deciding Appellant's unemployment insurance claim found that his conduct, "adversely affected the ability of the employer to execute its duties to such an extent that they represented misconduct under the [Unemployment Act]."[124] Appellant was warned how his ongoing conduct was affecting his personal and professional reputation and could have stopped. But he continued with the offending conduct, providing Appellee just cause to dismiss him.

Appellant waived his right to assert his First Amendment claim because he did not raise it in his grievance, grievance appeal, or closing argument. Issues not raised in an employee's grievance or grievance appeal are waived.[125] Even if he had not waived that claim, his speech was not protected by the First Amendment. Appellee describes the same three-prong test cited by Appellant, but lists factors that may be included in the balancing test:

> In conducting a *Pickering* balance of a public employee's First Amendment rights against a public employer's interest in promoting public efficiency, the courts are to consider 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.

Appellee cites a New York case upholding the discharge of two city police officers who rode on a parade float mocking African Americans.[126] The court held that an employer's interest in maintaining a relationship of trust between its departments and the citizens they serve outweighed an employee's expressive interests. The court stated "the First Amendment does not

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[123] *Karins v. City of Atlantic City*, 706 A2d 706, 706 (N.J. 1988); *Civil Service Commission of City of Philadelphia v. Wiseman*, 501 A2d 350 (Pa. 1985).
[124] Dept.'s Closing Brief, Attachment 1.
[125] *Kim A. Currin and DOC*, ERB 2002-054.
[126] *Locurto v. Guiliani*, 447 F3d 159 (CA2 2006).

require a Government employer to sit idly by while its employees insult those they are hired to serve and protect."[127]

In an Illinois case over the discharge of a city civil service commissioner who wrote a letter to a newspaper expressing hostility toward Hispanics, the court held that a public employee does not have an absolute right to speak out on matters of public concern and can be fired if the speech unduly interferes with the mission of the employer.[128]

A Nevada court upheld the discharge of a department of corrections employee for publicly discussing his plans to open a brothel.[129] The court held that the employee's First Amendment interests were outweighed by the government's interest in operating a prison system without potential disruption due to negative publicity surrounding its employee's private activities, even though the employer offered no proof that any disruption had occurred.

Here, Appellant continuously harassed and blogged about a college student, then went on TV to talk about it despite repeated warnings that he was hurting his and the department's reputation by doing so. Appellant had no right to continued employment.

DISCUSSION AND CONCLUSION

Motion to Admit New Evidence. The portion of the motion seeking to admit the September 16, 2010, email is denied, because the email was available to be introduced before the record was closed. The portion of the motion seeking to admit 11 email exchanges involving Bragman and Armstrong is granted, as the emails were not reasonably available to Appellant until after the grievance appeal hearing.

Appeal as of Right. Appellee found that Appellant "engaged in conduct unbecoming a state employee and . . . 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."[130] While some conduct discussed in the investigatory report and discharge letter involved on-duty acts, the primary impetus for the discharge was Appellant's off-duty conduct and its fallout. Classified employees may be subject to discipline for off-duty actions that negatively affect the employer.[131] Under Civil Service (CS) Regulation 8.01, *Grievance and Grievance Appeal Procedures*, the appointing authority normally has the initial burden of demonstrating just cause to discipline a classified employee; the burden then shifts to the employee, who must demonstrate that the particular discipline chosen was improper.[132]

Appellee could reasonably determine that Appellant's entire course of inappropriate behavior during his last six months of employment was conduct unbecoming a state employee. While elements of his political activities and targeting of Armstrong could be viewed as legitimate, his stalking, confronting, and outing of Armstrong and his friends, disregard of supervisors' counsel and Appellant's mission, and misrepresentations during disciplinary proceedings qualify as

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[127] *Id.*, at 183.
[128] *Jungels v. Pierce*, 825 F2d 1127 (CA7 1987).
[129] *Knapp v. Miller*, 873 F Supp 375 (DC Nev 1995).
[130] Jt. Ex. 5, at 2.
[131] *See., e.g., DOC and Waller*, ERB 2001-007 (approved by CSC 2001-016) (off-duty harassing phone calls to coworker); *Horton v DOC*, CSC 2001-042 (threatening behavior without conviction during domestic dispute).
[132] CS Regulation 8.01, Standard 4.B.13.c.

unbecoming conduct. Further, it is difficult to recall another classified state employee in recent history who has brought as much negative publicity to his department. Appellant was an employee with a previous disciplinary history with a recent written reprimand for violating agency work rules and a suspension for inappropriate behavior. Under normal circumstances, discharge would be wholly appropriate in this case.

This case, however, must also involve consideration of Appellant's First Amendment rights. Appellee claims that Appellant waived his First Amendment claims because they were not raised in his original grievance, grievance appeal or written closing argument.[133] Appellant argued at his disciplinary conference that his speech was protected by the First Amendment.[134] Appellant's grievance alleged that his termination was without just cause and was arbitrary and capricious.[135] Appellant's opening statement at the hearing argued that he was exercising his free-speech rights during non-work hours on a matter of public concern.[136] Appellant's First Amendment rights were discussed at length at the hearing, in arguments, and in the HO's decision. Appellant's initial claim that his discharge was without just cause and was arbitrary and capricious can, given this context, reasonably be construed to encompass a claim that the discharge violated his First Amendment protections. Pleadings in civil service appeals must provide adequate notice of violations alleged and defenses asserted, which the Board finds occurred here.[137] Accordingly, Appellant did not waive his claim that his speech was protected by the First Amendment.

A public employee's right to engage in protected speech is not absolute.[138] The employee's speech may be protected if (1) spoken as a private citizen (as opposed to as a public official) and (2) about a matter of public concern. "If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[139]

Appellant's job did not involve the matters that he spoke on nor did he identify himself as being connected with Appellee during his blogging and protesting. Appellant did not produce the blog or participate in political speech as an assistant attorney general. He repeatedly stated that all his political speech was performed as a private citizen. Appellee had no dealings with Armstrong or the MSA. Any comments Appellant made about them had nothing to do with Appellee or Appellant's duties with Appellee. The Board finds that Appellant's speech was made as a private citizen.

The Board also finds that Appellant's criticism of Armstrong was a matter of public concern. The Sixth Circuit Court of Appeals has stated:

> [S]peech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community....' 'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by

[133] Appellee's reply brief, at 20.
[134] Jt. Ex. 3, at 53.
[135] Jt. Ex. 2, at 17.
[136] Tr., at 38-40.
[137] See, e.g., *Licavoli v MSEA*, CSC 2000-015; *Castillo and DOC*, ERB 95-092.
[138] *See, e.g.*, *Connick*, 461 US at 150-51; *Locurto*, 447 F3d at 183.
[139] *Garcetti*, 547 US at 418.

> the whole record....' Nor is it necessary for the entire expression to address matters of public concern, as long as some portion of the speech does. While motive for the speech is a relevant factor, this court has explained that 'the pertinent question is not *why* the employee spoke, but *what* he said.'[140]

"A 'matter of public concern' is one that involves 'issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government.'"[141]

Here, Appellant's political speech began with criticism of Armstrong, who as MSA president was arguably a minor public figure. His policies and character were therefore of some level of public concern. The Board finds that Appellant's blog, protests, and media appearances were therefore marginally about a matter of public concern. There may be legitimate questions as to whether Appellant's harassing and threatening of acquaintances of Armstrong related to matters of public concern, but the Board finds that some of the speech underlying the discipline did address a matter of public concern.[142]

With those two prongs met, the final and crucial test is whether, on balance, Appellee demonstrated that its legitimate administrative interest in effectively providing services to the public outweighed Appellant's First Amendment rights. The United States Supreme Court has identified matters to consider in balancing the employee's and employer's interests:

> We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.
>
> These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.[143]

The Sixth Circuit has explained that a court must "consider whether an employee's comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees."[144]

Appellant's First Amendment right to speak his mind and convictions were respected in this case. Appellee conscientiously refrained from imposing prior restraint on Appellant while still cautioning him as to how his activities made him and Appellee look. Appellant has stated that he was thrown under the bus by Appellee in the interests of political expediency at the altar of

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[140] *Westmoreland*, 662 F3d at 719 (citations omitted).
[141] *Brandenburg v. Housing Auth. of Irvine*, 253 F3d 891, 898 (6th Cir. 2001) (citations omitted).
[142] The Board cannot identify a public concern implicated in falsely outing a friend of Armstrong, outing another friend, hanging across the street from students' housing at 1:00 am in the morning surveilling and taking pictures of a party, and stalking Armstrong's friends during a bar-crawl.
[143] *Rankin v McPherson*, 483 US 378, 388 (1987) (citations omitted).
[144] *Leary v. Daeschner*, 349 F3d 888, 900 (CA6 2003).

political correctness. Appellee countered—accurately—that after Appellee had warned Appellant repeatedly that a bus was coming he chose to walk out in the middle of the road, lie down, and wait for the bus to roll over him.

That Appellant's speech was not directed at his employer does not mean that Appellee could not reasonably exercise discretion to remove Appellant if his conduct was hindering the effectiveness of the agency.[145] Appellee has convincingly demonstrated that its operations were adversely affected and impeded as the direct result of Appellant's acts. Appellee received tens of thousands of complaints, disrupting the office's business by requiring some employees to exclusively respond to the complaints for several days. Cox had to give interviews to defend Appellant's continued employment. Appellant's behavior led to the questioning of Appellee's initiatives against cyber-bullying. Appellee had to assure other legal professionals in Michigan and other states that Appellant's conduct did not reflect the department's views. Two public bodies issued resolutions condemning Appellant's actions, questioning Appellant's ability to perform his duties for Appellee, and calling for his dismissal. Restuccia reasonably concluded that Appellant's reputation and credibility was so damaged that Appellant could perform no further service for Appellee.

Further, Appellant's behavior in disregarding the advice of his superiors, concerns for the impact of his actions on Appellee, and the truth during the investigation also impaired harmony and working relationships for Appellee. Appellant's obliviousness to the obvious consequences of his continuing crusade made trusting his judgment impossible.

The disruption to Appellee, in both performance of duties and damage to its credibility, outweighs Appellant's right to speak freely about the U of M's student assembly president, a matter of limited public concern. Appellant only intermittently commented on Armstrong's politics in an ongoing string of false or unrelated comments involving the private lives of college students.

Appellant protests that the outrage against him was political and manufactured. In his interview with CNN, Appellant faced criticism for putting swastikas on pictures of Armstrong on his blog, videotaping Armstrong, and making unproven accusations about Armstrong and his friends. Appellant shrugged these comments off, noting that such tactics are "par for the course" in a political campaign.[146] If Appellant willingly entered this arena aware of hardball tactics, it is disingenuous to plead shock that others might fight back against his speech.

Appellant's actions moved beyond mere protest into areas of bizarre and arguably criminal behavior. The fallout from his campaign damaged the reputation and efficacy of Appellee's operations. He demonstrated a lack of judgment and a lack of concern for his employer. Just cause has been demonstrated to discipline Appellant for his actions, the consequences of which are not shielded by the First Amendment. Accordingly, the Board recommends affirming the HO's decision.

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[145] *See e.g., Connick*, 461 US at 150-51; *Locurto*, 447 F3d at 183.
[146] Jt. Ex. 3, tab 5, at 4.