

## Client Challenge

After a long day of work travel, our future client stopped by a restaurant to have dinner and two beers. The individual then drove to a grocery store where they met friends, participated in a wine tasting, and had another beer. The group then drove (in their separate vehicles) to a second location where they consumed bar food and beer – following a couple of hours the group continued to a third location where they consumed additional mixed drinks. Early the next morning, our future client went to their car to charge a cellular phone in order to call a ride sharing service for transportation home. The individual fell asleep with the driver's door open and local police doing a routine check, woke the sleeping individual and arrested them on charges of public intoxication – violation of a local ordinance.

Immediately after being released from jail, the individual reported the arrest to their security officer at work. Because of their security clearance and employment in the national security field, such reporting is critical anytime there is contact with local law enforcement officials. Because of various problems with their case, local authorities dropped all charges; however, the matter continued to be addressed by the employer.

Following a security office investigation interview with others drinking that evening, it was found that the individual in question had driven his personal vehicle to the third establishment after consuming several drinks. This led The Agency Office of Professional Responsibility (OPR) to conduct their own investigation, which resulted in a proposed 40-day unpaid suspension; 10 days for public intoxication and 30 days for driving under the influence. The OPR also sent their findings back to the Security Office for possible additional action regarding the individual's security clearance. The individual then retained Dunlap Bennett and Ludwig (DBL) to represent them in responding to the Government's proposal.

## Problem

In the greater Washington D.C. metro area, security clearances are a critical asset for employees and make all the difference between getting, keeping, or losing jobs. For many people, their security clearance is the key possession that allows them to provide for their families and participate in their chosen career. Losing a clearance, whether on first application or during a periodic re-investigation, or not receiving one in the first place, is traumatic. While many attorneys can adequately represent people in such situations, I find that having the experience of having gone through the full-scope polygraph process and the anxiety of waiting for adjudication along with comfort with issues involved with clearances and Agency HR processes helps me understand a client's concerns.

In this situation, it was clear that potential security clearance ramifications and such a glaring red mark on a personnel record going forward outweighed concerns with the potential 40-day unpaid suspension. This client was not only involved in the national security field but had law enforcement responsibilities which made adverse action based on disregard for the laws an enormous issue.



## Government

Related Practice Areas: Employment, Security Clearances, and National Security



## Our Role

Attorney For a National Security Employee Facing Suspension

## Our Approach

Some proposed suspensions are more problematic than others, and this proposal was squarely in that group. The case had problems with both too much and too little evidence. On one hand, the facts unfavorable. Not only was there a completely forthcoming self-report by the client that documented a lot of bad decisions but also an investigation with others involved that made things appear even worse. On the other hand, there was no breathalyzer or blood test documenting the actual amount of alcohol consumed and the client was being penalized by their employer for something (DWI) for which they had not been arrested.

The position of the government was fairly clear – on one hand, they had a charge for public intoxication and Agency Rules that allowed for punishment for 'other misdemeanors. The reason for the punishment was clear – when someone, let alone someone in the national security/law enforcement community, breaks the law and interacts with local law enforcement or the public when doing so it potentially brings disrepute on the Agency, possibly harming relationships between the public or local government and the federal government. The apparent hypocrisy in enforcing laws while breaking laws is clear.

The report of heavy drinking and acknowledgement of having driven to the last establishment clearly led to the conclusion that there had been driving under the influence (though the client indicated they were sober, other testimony said otherwise and another individual involved had taken a cab because they had consumed too much). The Agency in question had specific rules and possible penalties for DWI situations and, as is with the case for many employers, punishment did not depend on being arrested by local law enforcement. When dealing with security clearances, that reasoning is clear. If the chief concern when dealing with security clearances and employment is the reliability and decision-making of individuals, the fact that someone is not 'caught' by the police does not make their reliability and decision-making any less concerning.

Because of all of the issues, we viewed the proposed suspension as a collection of problems. First and foremost was the DWI – that constituted the bulk of the suspension and a month of pay for the employee. It was a toss-up as to which part of the suspension was more of a problem for the security clearance and job – on the one hand, the Agency took negative interactions with local law enforcement very seriously and bringing disrepute to the Agency was a glaring red flag to have in one's personnel file. On the other hand, a DWI is a DWI whether charged or not. If that part of the suspension stayed, any potential follow-up violation, no matter how small, could be grounds for termination and loss of clearance. Making sure the client had clear expectations and an understanding of the gravity of the situation was critical. It was likely that no matter the defense, the client would end up with a significant suspension but hopefully mitigation that made the official charges less extreme.

Over several months we reviewed every part of the official investigation record and all Agency disciplinary actions over the past decades involving either DWI, public intoxication, or poor interactions with local officials. We noted all proposed discipline in other similar situations as well as proposed discipline in situations where the conduct appeared much worse. The hope was that examples could be found where the Agency had proposed lesser discipline for worse conduct. If so, the argument could be made that the Agency was not acting according to their own 'precedent' – very important in cases involving proposed discipline.

In addition, the facts themselves had to be addressed. Though the client and witnesses were not clear about the types of alcohol consumed – we made every effort to determine the range of offerings at the various establishments and research various alcohol metabolism formulas. In particular we were interested in any formulas that had law enforcement approval that would help give some idea of what the client's blood alcohol content might have been at the time it seemed the client had driven their vehicle. Since the Agency proposal and investigation did not contain any similar research, any argument that blood alcohol was not at the DWI level in the respective jurisdiction would not be easily answered by the government and the original investigation might appear haphazard. For the public intoxication charge, we focused on both the fact that the case had been dropped by local authorities and I researched other local ordinances in the same locality – pointing out that activities such as 'loud cursing' were also similar violations under local law.

## Result and Impact

After sending a lengthy response to the Agency, they reduced the proposed forty-day suspension to a seven-day suspension; however, even five days of the reduced suspension were attributed to the DWI. We advised the client to challenge that reduction at an in-person hearing – even though a better result was in no sense guaranteed. Following the hearing and presentation of arguments, the government issued a final decision. That final decision reduced the seven-day suspension to a one-day suspension without pay. The charge of DWI was dropped and the suspension was attributed to the commission of 'other misdemeanors. The client was very pleased with the result and considered the time and cost in having legal representation a good investment.



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