



Connecticut Department of
**ENERGY &
ENVIRONMENTAL
PROTECTION**

ENVIRONMENTAL PROTECTION
OFFICE OF ADJUDICATIONS

IN THE MATTER OF: : ***SUSPENSION OF SAFE BOATING
CERTIFICATE
DEEP REFERENCE NO. 11-006***

KEVIN R. McCUSKER : ***AUGUST 23, 2011***

FINAL DECISION

A hearing was held on August 23, 2011 at the Department of Energy and Environmental Protection (DEEP/Department) Marine Headquarters in Old Lyme regarding the suspension of the above-named operator's safe boating certificate. General Statutes §15-140q. In attendance at the proceeding were Ryan Dunn, legal counsel for Kevin McCusker, Tim Delgado of the DEEP Boating Division and Officer Sal Milardo of the Old Lyme Police Department.

The following exhibits were marked and admitted into evidence:

- a) DEEP-1 – Arrest report with attachments ¹.

Mr. McCusker was arrested on July 20, 2011. General Statutes §15-133(d). A Notice of Suspension was mailed to Mr. McCusker on August 2, 2011, advising of his right to a hearing prior to the effective date of the suspension to determine probable cause for the suspension. Mr. McCusker requested a hearing through counsel in a timely fashion and a Notice of Hearing was issued to Mr. McCusker on August 15, 2011.

¹ Attorney Dunn objected to the admission of these documents but based his arguments for excluding this evidence solely on the fact that the forms used and attached to the arrest report were not the ones currently in use by the Department. He provided no other evidence that could lead me to conclude that the information in the forms is irrelevant, immaterial, unduly repetitious, untrustworthy, or unreliable. Regs., Conn. State Agencies §22a-3a-6(s)(1). His objection was overruled.

FINDINGS OF FACT

1. Mr. McCusker was operating a vessel, identified as a Sea Doo personal watercraft with registration VA7692BE, on Long Island Sound in the vicinity of the swimming area at Point O'Woods in Old Lyme on July 20, 2011. Officer Milardo observed Mr. McCusker operate the vessel up to a trailer and truck at the adjacent boat launch. (Ex. DEEP-1; test. S. Milardo, 8/23/11².)
2. After Mr. McCusker came to shore, Officer Milardo observed that Mr. McCusker had slurred speech, red glassy eyes, and a moderate odor of an alcoholic beverage on his breath. Mr. McCusker was asked to perform a series of standard field sobriety tests. He indicated to Officer Milardo that he was able to perform the tests and that he understood the instructions. (Ex. DEEP-1; test. S. Milardo.)
3. Mr. McCusker failed the horizontal gaze nystagmus test. In the both eyes, there was a lack of smooth pursuit, a distinct nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees, all indicators of intoxication. Mr. McCusker failed the walk and turn and the one leg stand test. (Ex. DEEP-1; test. S. Milardo.)
4. Officer Milardo is a professional law enforcement officer with over thirty years of experience, including several years of marine enforcement experience. Based on his professional experience and training, Officer Milardo placed Mr. McCusker under arrest for operating a vessel under the influence of intoxicating liquor. (Ex. DEEP-1; test. S. Milardo.)
5. Mr. McCusker was brought to the State Police Barracks in Westbrook for further testing and processing. He was advised of his rights and as he was being advised of the consequences of refusing to undergo chemical alcohol testing by breath, he indicated to Officer Milardo that he refused to say or do anything further. Trooper Farotti of the Connecticut State Police witnessed Mr. McCusker's refusal to undergo further analysis. (Ex. DEEP-1; S. Milardo.)

CONCLUSIONS OF LAW

To suspend a safe boating certificate under the provisions of §15-140q, I must find: (1) that the peace officer had probable cause to arrest Mr. McCusker for operating the vessel while under the influence of intoxicating liquor or drugs, or both, or while he had an elevated blood alcohol content; (2) that he was placed under arrest; (3) that he (A) refused to submit to such test

² The testimony and proceedings in this matter were recorded. No written transcript has been prepared. The audio recording of this hearing is on file with the Office of Adjudications and is the official record of this proceeding.

or analysis, or (B) submitted to such test or analysis and the results of such test or analysis indicated that at the time of the alleged offense that Mr. McCusker had an elevated blood alcohol content; and (4) that he was operating the vessel. If these questions are answered affirmatively, then I am required to affirm the operator's suspension.

There is no evidence disputing the facts that: (1) the officer had probable cause to arrest Mr. McCusker for operating his vessel under the influence of intoxicating liquor or drugs or both while Mr. McCusker had an elevated blood alcohol content; (2) Mr. McCusker was operating the vessel on July 20, 2011; (3) Mr. McCusker was placed under arrest; and (4) that he refused to submit the results of a chemical alcohol test or analysis.

Attorney Dunn introduced mitigating circumstances that he argues would favor a negative finding on two of the four factors outlined above. He does not challenge the fact that Mr. McCusker was arrested or that he was operating the vessel. First, he argues that Officer Milardo lacked probable cause to arrest Mr. McCusker for the offense because he did not provide Mr. McCusker a suitable surface on which to stand for the one-leg stand test and the walk and turn test. Officer Milardo based his decision to arrest Mr. McCusker on the totality of his observations. In addition to Mr. McCusker's failure of three correctly and professionally administered field sobriety tests, Officer Milardo observed the odor of an alcoholic beverage on Mr. McCusker's breath, slurred speech, swaying, bloodshot eyes, and the general appearance of intoxication. During the walk and turn test and the one leg stand, Officer Milardo noted Mr. McCusker's inability to follow the instructions for the tests as well as his problems with balance. All of these factors resulted in Officer Milardo's decision to arrest Mr. McCusker and support a finding that there was probable cause to arrest him.

Atty. Dunn also argued that Mr. McCusker was not properly on notice that a refusal to take a chemical alcohol test or his failure of such a test would result in the suspension of his safe boating certificate. This argument is based on the implied consent language within DEEP-1, which put Mr. McCusker on notice that he could face criminal prosecution and the results of any test or a refusal to take the test could be used in that prosecution. There was no evidence presented whether or not Officer Milardo specifically informed Mr. McCusker orally that his safe boating certificate could be suspended and DEEP-1 does not clearly indicate if Mr. McCusker was provided with such notice. Attorney Dunn argues that the lack of notice in the implied consent language and the lack of a signature from a third-party witness to the refusal are fatal flaws that requires a stay of the suspension.³

I acknowledge that General Statutes §15-140q(b) and (c) require the arresting officer to give specific notice that a test failure or a refusal to take a test will impact someone's safe

³ Atty. Dunn also argues that the use of the old forms and lack of specific language in those forms is a fatal flaw. The lack of complete implied consent language serves as an example and the ruling on that issue applies to the other issues regarding the forms used by the arresting officer.

boating certificate and, in the case of the refusal, the endorsement of a third party who witnessed the refusal. However, subsection (g) of §15-140q specifically limits the inquiry for this proceeding to the four issues outlined above. Whether or not effective notice was given pursuant to subsection (b) or the form was endorsed by a third person pursuant to subsection (c) are not among the four statutorily enumerated factors. As with driving under the influence, the legislature made the license suspension an administrative matter and expressly and narrowly limited the hearing on a license suspension to four enumerated factors. *Fishbein v. Kozlowski*, 252 Conn. 38, 46 (1999).⁴ A license suspension hearing is not a criminal proceeding and the subject of such a hearing is not entitled to all of the procedural protections that would be available in a criminal proceeding. *Id.* The Supreme Court of Connecticut has consistently held that the inquiry in a suspension hearing must be limited to the four factors. *Volck v. Muzio*, 204 Conn. 507, 512 (1987). As a result, I base my decision to suspend Mr. McCusker's safe boating certificate on the fact that I have found in the affirmative on those four factors.

This administrative record contains substantial evidence to support my findings of fact and the reasonable conclusions I draw from those facts.⁵ It is undisputed that Mr. McCusker was operating a vessel on July 20, 2011. Officer Milardo, a trained and experienced officer, made observations of Mr. McCusker that indicated possible intoxication, including odor of an alcoholic beverage from Mr. McCusker, slurred speech, and an inability to perform a battery of field sobriety tests and he arrested Mr. McCusker. Upon being presented with an opportunity to undergo chemical alcohol testing, Mr. McCusker refused to do so.

Having found in the affirmative on the four factors enumerated in General Statutes §15-140q, and, pursuant to the authority delegated to me by the Commissioner of Energy and Environmental Protection, §22a-2, **I find that the safe boating certificate of Kevin R. McCusker should be suspended.**

ORDER

The safe boating certificate or certificate of personal water craft operation of **Kevin R. McCusker** is hereby suspended for six months, *effective August 25, 2011, through February 25, 2012*. **If he has not already done so, Kevin R. McCusker is hereby ordered to surrender his safe boating certificate or certificate of personal water craft operation, by personal delivery or first class mail, to the Division of Boating, Department of Energy and Environmental**

⁴ Subsection (g) of §15-140q (boating) contains the same limiting language and four factors for consideration in administrative hearings related to licenses suspensions as subsection (g) of §14-227b (driving).

⁵ *Pizzo v. Commissioner of Motor Vehicles*, 62 Conn. App. 571, 577 (2001), quoting *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343 (2000) (standard of review of an administrative decision is whether there is substantial evidence in record to support agency's findings of fact and whether conclusions drawn from facts are reasonable).

Protection, 333 Ferry Road, Old Lyme, CT 06371-0280, *within 2 days of receipt of this decision.*

Entered this 23rd day of August, 2011, as a final order of the Commissioner of Energy and Environmental Protection by:



Kenneth M. Collette, Hearing Officer

SERVICE LIST

In the matter of Kevin R. McCusker
(Suspension of Boating Certificate)
Reference No. DEP 11-006

PARTY

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