

**STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION**



OFFICE OF ADJUDICATIONS

IN THE MATTER OF

***: BOATING DIVISION/
SUSPENSION OF SAFE
BOATING CERTIFICATE
DEP INCIDENT NO. 09-001***

RAYMOND J. BAME

: SEPTEMBER 1, 2009

FINAL DECISION

A hearing was held on August 26, 2009 at the Department of Environmental Protection (DEP) Headquarters in Hartford regarding the suspension of the above-named operator's safe boating certificate. General Statutes §15-140q. In attendance at the proceeding were Robert Britt, legal counsel for Raymond J. Bame, Mr. Bame, Tim Delgado of the DEP Boating Division and Officer William Kogut of the Cromwell Police Department.

The following exhibits were admitted into evidence:

- a) DEP-1 – Arrest report
- b) DEP-2 – Vessel Operator's Chemical Test Report, dated July 18, 2009
- c) DEP-3 – DEP Boating Accident Report
- d) DEP-4 – Judicial Branch Notice of Rights form
- e) DEP-5 – Appearance Bond signed by Mr. Bame

Mr. Bame was arrested on July 18, 2009. General Statutes §15-133(d). A Notice of Suspension was mailed to Mr. Bame on July 22, 2009, advising of his right to a hearing prior to the effective date of the suspension to determine probable cause for the suspension. A hearing was requested by Mr. Bame through counsel on July 24, 2009 and a Notice of Hearing was issued to Mr. Bame on July 28, 2009. Attorney Britt requested a continuance on July 30, 2009. I granted this request and continued the matter for three weeks. A revised notice of hearing was sent to Mr. Bame on August 4, 2009 after confirmation that all parties were available on the selected date.

FINDINGS OF FACT

1. Mr. Bame was operating a vessel, identified as CT-5522-AT, on the Connecticut River in the vicinity of the Cromwell Outboard Association on July 18, 2009. Mr.

Bame's vessel was involved in a collision with a vessel operated by James O'Keefe, identified as CT-272-AL. After the collision, Mr. Bame operated his vessel to the docks at the Cromwell Outboard Association at the direction of public safety officials. He did not indicate to any public safety official on the water that he was impaired or otherwise unable to operate the boat to the docks when instructed to do so. Officer William Kogut of the Cromwell Police Department was waiting at the dock in response to a call received at 2255 hours from the Middletown Police Department regarding a boat collision. Officer Kogut observed Mr. Bame operate his vessel up to the dock and assisted him in securing the vessel.

2. Officer Kogut smelled a strong odor of an alcoholic beverage on Mr. Bame's breath as he conversed with him. When asked if he had had anything to drink, Mr. Bame indicated that he had consumed two martinis earlier that evening. Officer Kogut asked Mr. Bame to walk with him and he observed that Mr. Bame was swaying; had slurred speech, bloodshot eyes, and a red face; and that he appeared to be intoxicated.

3. Officer Kogut informed Mr. Bame that he would be conducting a series of field sobriety tests on him. After waiting approximately 30 minutes, Officer Kogut performed the tests. Mr. Bame failed the horizontal gaze nystagmus test. Prior to the test Officer Kogut inquired if Mr. Bame needed his glasses and if he had any injury that would prevent him from completing the test. Mr. Bame informed Officer Kogut that he required his glasses to see and that he had lost his right eye. Mr. Bame was allowed to keep his glasses on and Officer Kogut only observed the results on Mr. Bame's left eye. In the left eye, 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. Bame failed the walk and turn test. When asked if he had any injuries to his legs that would affect his ability to perform the test, he indicated that he had both knees replaced but he understood the directions and would try the test. Mr. Bame stepped off the line, used his arms for balance, and never attempted to turn after nine steps as instructed. Mr. Bame attempted to perform the one-leg stand and could not perform the test.

4. Officer Kogut is a seven year veteran of the Cromwell Police Department and has completed advanced training in operating under the influence enforcement techniques. Based on his seven years of professional experience and training, Officer Kogut placed Mr. Bame under arrest for operating a vessel under the influence of intoxicating liquor.

5. Mr. Bame was brought to the Cromwell Police Department, was processed and after Officer Kogut advised him of his rights and provided him with an opportunity to contact an attorney, he submitted to two chemical alcohol breath tests after being informed of the criminal consequences of refusing to take the tests and of failing the tests. Mr. Bame's first test was conducted at 0049 hours and indicated a blood alcohol content (BAC) level of 0.115 of one percent. The second test was conducted at 0135 hours and indicated a BAC level of 0.100 of one percent.

6. Mr. Bame's safe boating certificate was seized and he was released on a \$500.00 non-surety bond with a copy of his test report, a misdemeanor summons and a copy of his rights.

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. Bame 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 or analysis, or (B) submitted to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that at the time of the alleged offense that Mr. Bame 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. Bame for operating his vessel under the influence of intoxicating liquor or drugs or both while Mr. Bame had an elevated blood alcohol content; (2) Mr. Bame was operating his vessel on July 18, 2009 and ceased operation at 2255 hours at the earliest; (3) Mr. Bame was placed under arrest; and (4) the results of a test initiated within two hours of operation indicated that he had an elevated BAC level at the time of operation.

Mr. Bame's attorney introduced mitigating circumstances that he argues would favor a negative finding on three of the four factors outlined above. He does not challenge the fact that Mr. Bame was arrested. First, he argues that Officer Kogut lacked probable cause to arrest Mr. Bame for the offense because the field sobriety tests administered did not sufficiently account for his client's lack of a right eye and prior knee surgery. Officer Kogut based his decision to arrest Mr. Bame on the totality of his observations. In addition to Mr. Bame's failure of two correctly and professionally administered field sobriety tests, Officer Kogut observed the odor of an alcoholic beverage emanating from Mr. Bame, slurred speech, swaying, bloodshot eyes, and the general appearance of intoxication. During the walk and turn test, Officer Kogut noted Mr. Bame's inability to follow the instructions for the test as well as his problems with balance. All of these factors resulted in Officer Kogut's decision to arrest Mr. Bame and support a finding that there was probable cause to arrest him.

Second, Atty. Britt argues that his client's operation of his boat to the dock was at the direction of an authority figure and cannot be used for determining the point in time that his client ceased operation. I decline to accept this argument. The definition of "operate" for purposes of this statute offers no such exception and only requires that "the vessel is underway or aground and not moored, anchored or docked." General Statutes § 15-133(d). Furthermore, Mr. Bame did not indicate that he was in an impaired condition and should not operate the boat to the dock when he was instructed to do so. Officer Kogut was at the dock in response to a call that came in at 2255 hours and observed Mr.

Bame operate the boat until he was docked. DEP-1 and DEP-2 clearly indicate that Mr. Bame's BAC level was initially tested at 0049 hours and this fact is not disputed. Therefore, it was commenced within two hours of operation by at least six minutes.

Next, Atty. Britt argues that the boating under the influence statute requires expert testimony to demonstrate that the results of the alcohol breath tests initiated within two hours of operation are evidence of Mr. Bame's BAC level at the time of operation. Again, I decline to accept this argument because the statute in question specifically states that "the results of the test or analysis *shall be sufficient to indicate the ratio of alcohol in the blood of such person at the time of operation*, except that if the results of an additional test, administered pursuant to section 15-140r, indicate that the ratio of alcohol in the blood of such person is eight-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and analysis thereof accurately indicate the blood alcohol content at the time of operation." General Statutes §15-140q(g)(emphasis added). The narrow exception that requires additional evidence does not apply in these circumstances, because the second test was clearly not 0.08 of one percent or less and was not higher than the first test. Mr. Bame's first test, initiated within the two-hour timeframe, indicated a BAC level of 0.115 of one percent and the second test indicated a BAC level 0.100 of one percent. Mr. Bame did not challenge either of these test results or the method by which the tests were administered. They are valid and competent evidence that he was operating with an elevated blood-alcohol content.

Finally, Atty. Britt argued that Mr. Bame's due process rights were violated because he 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. Mr. Britt based his argument on the implied consent language within DEP-2, which put Mr. Bame 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 Kogut specifically informed Mr. Bame orally that his safe boating certificate could be suspended and DEP-1 does not clearly indicate if Mr. Bame was provided with such notice. Attorney Britt argues that the lack of notice language in the implied consent language is a fatal flaw that requires a stay of the suspension.

I acknowledge that General Statutes §15-140q(b) requires the arresting officer to give specific notice that a test failure or a refusal to take a test will impact someone's safe boating certificate and make a notation that such notice was given. 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) is not one of 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).¹ 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. Bame'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.² It is undisputed that Mr. Bame was operating a vessel on July 18, 2009. Officer Kogut, a trained and experienced officer, made observations of Mr. Bame that indicated possible intoxication, including odor of an alcoholic beverage from Mr. Bame, slurred speech, and an inability to perform a battery of field sobriety tests and he arrested Mr. Bame. These observations were later confirmed when Officer Kogut initiated blood alcohol tests in a timely manner that revealed Mr. Bame was operating the vessel with an elevated blood alcohol content.

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 Environmental Protection, §22a-2, **I find that the safe boating certificate of Raymond J. Bame should be suspended.**

ORDER

The safe boating certificate of **Raymond J. Bame** is hereby suspended for 90 days, *effective September 1, 2009 through November 30, 2009*. **Raymond J. Bame** is hereby **ordered to surrender his safe boating certificate**, by personal delivery or first class mail, to the Division of Boating, Department of Environmental Protection, 333 Ferry Road, Old Lyme, CT 06371-0280, *within 2 days of receipt of this decision*.

Entered this 1st day of September, 2009, as a final order of the Commissioner of Environmental Protection by:



Kenneth M. Collette, Hearing Officer

¹ 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).

² *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).

PARTY LIST

In the matter of Raymond Bame
(Suspension of Boating Certificate)
Incident No. 09-001

PARTY

Raymond J. Bame
113 King Philip Drive
West Hartford, CT 06117

REPRESENTED BY

Robert J.T. Britt, Esq.
Rome McGuigan, P.C.
One State Street
Hartford, CT 06103

Department of Environmental Protection
Boating Division
333 Ferry Road
Old Lyme, CT 06371-0280

Tim Delgado– DEP Boating Division