

**OFFICE OF ADJUDICATIONS**

**IN THE MATTER OF**

**: BOATING DIVISION/  
SUSPENSION OF SAFE  
BOATING CERTIFICATE  
DEP NO. 04-002**

**SCOTT E. FABIANSKI**

**:JULY 26, 2004**

**FINAL DECISION**

A hearing was held on July 23, 2004, at the Department of Environmental Protection Marine Headquarters in Old Lyme regarding the suspension of the above-named operator's safe boating certificate. General Statutes §15-140q. In attendance were Scott E. Fabianski, his attorney Adam Teller, Esq., Officer Ryan J. Healy of the DEP Division of Law Enforcement and Eleanor Mariani of the DEP Boating Division. (See Appendix B.)

Mr. Fabianski was arrested on July 3, 2004. General Statutes §15-133(d). A Notice of Suspension was mailed to Mr. Fabianski on July 8, 2004, advising of his right to a hearing prior to the effective date of the suspension to determine probable cause for said suspension. Notice of Hearing was issued to Mr. Fabianski on July 13, 2004.

**FINDINGS OF FACT**

1. The vessel being operated by Mr. Fabianski was stopped by Officer Healy and another officer on July 3, 2004. Following this stop, Officer Healy observed Mr. Fabianski exhibiting signs of possible intoxication. Pursuant to Connecticut law, Mr. Fabianski was subsequently given a chemical test to determine if he had been under the influence of alcohol or any drug while operating the vessel. As noted on the chemical alcohol test report (CTR) admitted into evidence, Mr. Fabianski was informed of and refused the opportunity to telephone an attorney; he was also apprised of the consequences of refusing to submit to a chemical/alcohol test. As noted on the CTR, Mr. Fabianski agreed to the breath test selected by the Officer. The CTR shows that the results of the required two tests indicated that Mr. Fabianski had elevated blood alcohol counts of .137, initially, and .126, 75 minutes later. Mr. Fabianski, who is over the age of 21, was subsequently placed under arrest, for what was apparently his first offense.

2. Mr. Fabianski does not dispute the fact that he was arrested or the results of the blood alcohol tests administered to him. He does not dispute the timeliness of those tests, nor does he deny that he was operating the vessel at the time it was stopped. Counsel for Mr. Fabianski inquired as to the basis for the officer's observations of the behavior of Mr. Fabianski, but the primary issue raised in opposition to this suspension is that the initial stop of the vessel operated by Mr. Fabianski, referred to at various times as a boating safety check and a BUI check, violated the constitutional right of Mr. Fabianski to be free from unreasonable search or seizure. In sum, it is contended that the DEP officer had no probable cause to stop the boat Mr. Fabianski was operating and therefore, no right to take the actions leading to his arrest.

### CONCLUSIONS OF LAW

To suspend a safe boating certificate under the provisions of §15-140q, I must find that the peace officer had *probable cause to arrest* Mr. Fabianski for operating his vessel under the influence of intoxicating liquor or drugs, or both, while Mr. Fabianski had an elevated blood alcohol content. I must find that Mr. Fabianski was operating the vessel, was placed under arrest, and submitted to a timely chemical test that showed he was operating that vessel with an elevated blood alcohol content. Answers to these questions, as well as a determination of the operator's age and status of the offense (first, second, etc), factor into my decision.

The "probable cause to arrest" element in §15-133q does not prescribe the *initial* investigative stop of the vessel. The statutory language of §15-133q narrowly limits the license suspension hearing to the following issues I have previously enumerated: 1) whether the officer had *probable cause to arrest* the operator; 2) whether he was placed under arrest; 3) whether he submitted to a blood alcohol test that showed an elevated blood alcohol content; and 4) he was operating the vessel. The question of whether there were legal grounds for the initial stop is not part of this determination. See *Fishbein v. Kozlowski*, 252 Conn. 38, 48 (1999) (questions as to compliance with procedures by the police does not preclude the suspension of a license when the elements for an administrative decision regarding the suspension of that license have been demonstrated).

The primary purpose of this administrative proceeding, the suspension of a boating certificate, is to promote public safety by removing those operators who have demonstrated disregard for the safety of others. This is distinguished from a criminal proceeding, the primary purpose of which is punishment. Therefore, the subject of such an administrative hearing is not entitled to all of the procedural protections that would be available in a criminal proceeding. *Id.* See also *State v. Hickam*, 235 Conn. 614, 624 (1995), cert. denied, 517 U.S. 1221 (1996) (principal purpose of the statute providing for the suspension of drivers' licenses is to protect the public by removing potentially dangerous drivers from the state's roadways).

The basis of my decision is therefore, whether, subsequent to the stop of the vessel being operated by Mr. Fabianski, Officer Healy had probable cause to arrest him for operating that vessel while under the influence of intoxicating liquor or drugs, or both. Probable cause is an objective standard, and comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe an activity actually occurred. See, e.g., *State v. Spencer*, 268 Conn. 575 (2004).

This administrative record contains substantial evidence to support my findings of fact and the reasonable conclusions I draw from those facts.<sup>1</sup> It is undisputed that Mr. Fabianski was operating a vessel on July 3, 2004. Officer Healy, a trained and experienced officer, observed behavior that indicated possible intoxication. This observation was later confirmed when Mr. Fabianski was given two timely blood alcohol tests that revealed he was intoxicated while operating that vessel. The CTR shows that Mr. Fabianski had a blood alcohol content of .137 and .126, respectively, which led to his arrest.

Having found in the affirmative on all of these 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 Scott E. Fabianski should be suspended.**

NOTE: Although I need not consider the circumstances of the initial stop of the vessel, I wish to address the arguments made as to the authority of the DEP to make boating safety or BUI stops and the protocols surrounding DEP procedures. The reasonableness of a search and seizure, whether it is from a safety check or a check for boaters who are possibly operating a vessel while under the influence, is measured under the same criteria. The reasonableness of a search and seizure can be determined by balancing a need to search and, possibly, seize, against the invasion that the search or seizure warrants. In other words, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on an individual's interests against its promotion of legitimate state governmental interests and the level of intrusion on an individual's privacy. The state's interest in this case -- the interest of all boaters -- is to protect public safety by preventing often-serious accidents caused by those operating unsafe vessels or those operating vessels while intoxicated. The minimal intrusion of a stop of a vessel by officers to question the occupants<sup>2</sup> is not more than is necessary to provide for this legitimate interest in promoting safe boating. See also *State v. Mikolinski*, 256 Conn. 543 (2001). (Use of highway sobriety checkpoints not prohibited under the fourth and fourteenth amendments to the United States Constitution.)

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<sup>1</sup> *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).

<sup>2</sup> Apparently, the DEP officers did not even board the vessel during the initial questioning of Mr. Fabianski.

**ORDER**

The safe boating certificate of **Scott E. Fabianski** (Cert. # P000775AO) is hereby suspended for 90 days, *effective August 7, 2004 through November 4, 2004*. **Scott E. Fabianski** 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, *on or before August 11, 2004*.

*Entered this 26th day of July, 2004, as a final order of the Commissioner of Environmental Protection by:*

/s/ Janice B. Deshais  
Janice B. Deshais  
Hearing Officer

