

OFFICE OF ADJUDICATIONS

IN THE MATTER OF : ***SUSPENSION OF BOATING
PRIVILEGES
DEP REFERENCE # 07-011***

MICHAEL LYONS : ***OCTOBER 18, 2007***

FINAL DECISION

A hearing was held on October 15, 2007 at DEP Headquarters in Hartford regarding the suspension of the boating privileges of Michael Lyons. General Statutes §15-140q. Present were: Mr. Lyons, Peter Soulsby, Counsel for Mr. Lyons, Sgt. Ryan Healy and Officer Stanislaw Mieldzoc of the DEP Environmental Conservation (EnCon) Police, Lisa Lyons, John Adams, Matthew Garber, and Eileen Levesque. Kathryn Keenan of the DEP Boating Division was observing the proceedings.

The following exhibits were admitted into evidence:

- a) DEP-1 – DEP Incident report
- b) DEP-2 – Chemical Alcohol Test Report dated August 18, 2007
- c) DEP-3 – 24-hour License Revocation and Interim Certificate
- d) RESP-1 – Copy of misdemeanor summons
- e) RESP-2 – Photograph of vessel
- f) RESP-3 – Aerial representation of Niantic boat launch area
- g) RESP-4 – Printout of conditions from NOAA website

Mr. Lyons was arrested on August 18, 2007. A Notice of Suspension was sent to Mr. Lyons on August 20, 2007. The Notice of Hearing to be held on September 7, 2007 was issued on August 27, 2007. The hearing was continued until October 15, 2007. Notice of the continuance was issued to Mr. Lyons and Attorney Soulsby on September 17, 2007.

FINDINGS OF FACT

1. On August 18, 2007, Sgt. Healy and Officer Mieldzoc approached a vessel (identified as MS 5588ZA) to conduct a boating safety check. Sgt. Healy observed Mr. Lyons at the helm of the vessel while it was at the dock. While conducting the boating safety check, Sgt. Healy and Officer Mieldzoc noticed that Mr. Lyons was unsteady, had slurred and mumbled speech. The officers also observed several empty beer cans on the vessel. While talking to Mr. Lyons, Sgt. Healy became aware of an odor of alcoholic beverage coming from his facial area.

2. Mr. Lyons was asked to step off of the boat so that Officer Mieldzoc could conduct a series of field sobriety tests. Mr. Lyons was asked to perform the walk and turn test, the one-leg stand, and the horizontal gaze nystagmus. His performance on all three tests indicated failure.
3. Mr. Lyons was placed under arrest. He was issued his Miranda warning and transported to Waterford Police Department for further processing. He was provided an opportunity to contact an attorney and refused.
4. Officer Mieldzoc advised Mr. Lyons that he would conduct an analysis of his blood alcohol content by means of a breath test. He also advised Mr. Lyons of the consequences of any refusal to take the test and of failure of the test. Mr. Lyons was first tested at 9:01 pm and again at 9:33 pm. The results of the two tests showed a blood alcohol content (BAC) of 0.161 of one percent and 0.148 of one percent respectively.

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. Lyons 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. Lyons 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 first, second, and fourth parts of the inquiry as stated in the preceding paragraph. As a result of the following, these three elements of the statutory inquiry are answered in the affirmative:

- 1) The peace officers observed Mr. Lyons at the controls of the vessel and reasonably concluded that he had operated the vessel into the dock area. Upon observing Mr. Lyons at the controls of the vessel the officers noticed that Mr. Lyons was unsteady, had slurred speech and Sgt. Healy noticed the odor of alcoholic beverage from Mr. Lyons' facial area. There was little to no attempt to indicate to the officers that Mr. Lyons had not been operating the vessel into the dock area. Further, Mr. Lyons failed three separate field sobriety tests conducted by Officer Mieldzoc. There is no evidence that Mr. Lyons had any medical condition or injury that caused an inability to perform the tests as instructed.

- 2) Mr. Lyons was placed under arrest given a Miranda warning, and provided with an opportunity to contact an attorney.
- 3) Mr. Lyons was operating the vessel at various times during the day as admitted in his own direct testimony.

The third part of the inquiry is at issue. More specifically, I must determine whether the chemical alcohol test was commenced within two hours of Mr. Lyons operating the vessel. Mr. Lyons called several witnesses (Mr. Garber, Mr. Adams, Mrs. Lyons and Ms. Levesque) whose sworn testimony was relevant to this issue. All four witnesses testified that Mr. Lyons had not operated the vessel into the dock. Mr. Lyons testified that he had not operated the vessel since 2:00 pm. All four witnesses indicated that Ms. Levesque operated the vessel into the dock and had been operating the vessel since 7:00 pm at a minimum. Sgt. Healy clarified that he could not actually see who was operating the boat as it approached the dock but that Mr. Lyons was at the controls when he came down to the dock.

For the purposes of General Statutes § 15-140q, the word “operate” means that the “vessel is underway or aground and not moored, anchored or docked.” General Statutes § 15-133. Based on the definition of “operate” and the testimony given under oath, I find the evidence that Mr. Lyons was operating the vessel into the dock area inconclusive. There is substantial testimony in the record that Mr. Lyons was only seated at the helm of the vessel after the vessel was docked. There was no other evidence presented that Mr. Lyons was operating the vessel at any other time within two hours of the commencement of the chemical alcohol testing. As a result, the suspension of Mr. Lyons’ boating privileges is stayed as required by General Statutes § 15-140q(h).

There is no probable cause to suspend the boating privileges of Michael Lyons. It is hereby ORDERED that the suspension of the boating privileges of Michael Lyons is stayed.

Entered this 18th day of October, 2007, as a final order of the Commissioner of Environmental Protection by:

/s/ Kenneth M. Collette
Kenneth M. Collette, Hearing Officer

October 18, 2007
Date

PARTY LIST

In the matter of Michael Lyons
(Suspension of Boating Certificate)
Incident No. 07-011

PARTY

Michael Lyons
20 Ridgeway Road
Hampden, MA 01036

REPRESENTED BY

Peter W. Soulsby, Esq.
Butler, Norris & Gold
224 Prospect Avenue, Suite 1
Hartford, CT 06106

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

Kathryn Keenan – DEP Boating Division