

*Office of Adjudications*

***IN THE MATTER OF*** : ***SUSPENSION OF  
SAFE BOATING CERTIFICATE  
DEEP BUI # 22-005***

***WILLIAM BURKE*** : ***AUGUST 8, 2022***

***FINAL DECISION***

A probable cause hearing was held on August 4, 2022 via Zoom regarding the suspension of the Safe Boating Certificate of William Burke. General Statutes §15-140q. Participating in the Zoom hearing were: Attorney Gerald Klein and William Burke for the Operator; Officer Brandon Caires of the Rocky Hill police, and Timothy Delgado of the DEEP Boating Division. Officer Caires and William Burke provided testimony. DEEP-1 was admitted as an exhibit, which includes the Notice of Rights, Form B-44, Incident Report Narrative, USCG Report of Boarding, Boarding Team Member statements, Inventory of Property, Seized Without a Search Warrant, Request for Examination of Specimens for Alcohol/Drugs and Request for Analysis.

**PROCEDURAL HISTORY**

William Burke was arrested for boating while intoxicated on July 4, 2022. General Statutes §15-140q. A Notice of Suspension was mailed to him on July 14, 2022; a timely request for hearing followed.

**FACTUAL FINDINGS**

General Statutes §15-140q(g) provides that I must affirm the following four factors to suspend Mr. Burke's boating certificate: (1) whether the peace officer had probable cause to arrest Mr. Burke for operating a vessel while under the influence of intoxicating liquor or drugs, or both, or while he had an elevated blood alcohol content; (2) whether Mr. Burke was placed under arrest; (3) whether Mr. Burke : (A) refused to submit to a blood, breath or urine test or analysis at the request of the peace officer; (B) refused to submit to the nontestimonial portion of a drug influence evaluation at the request of a peace officer if one was requested; or, (C) submitted to such test, analysis or evaluation and the results of such test, analysis or evaluation indicated that at the time of the alleged offense Mr. Burke was operating a vessel while he was under the influence of intoxicating liquor or drugs or both, or while Mr. Burke had an elevated blood alcohol content; and, (4) whether Mr. Burke was operating the vessel.

It is undisputed that Mr. Burke was operating his vessel on the day he was arrested. Only one factor is at issue in this matter as stipulated by Burke's attorney: whether Officer Caires had probable cause to arrest Mr. Burke for operating a vessel while under the influence of intoxicating liquor or drugs, or both, or while he had an elevated blood alcohol content.

On July 4, 2022, the Rocky Hill Police Department and United States Coast Guard (USCG) conducted a joint operation on the Connecticut River. At approximately 4:11 PM, a safety inspection occurred on Mr. Burke's vessel. Upon boarding the vessel, a USCG Officer conducted a safety inspection. During this time, Officer Caires was observing the interactions between Burke and the USCG Officers. Caires noted in the Arrest Report and through his testimony that Burke had spent the afternoon at the "Sandbar", which was identified as an area of the river where the water is shallow, and boats can park. (DEEP-1, Tr. Caires, Burke, 8/4/22). During the initial conversation with the USCG, Burke stated he had not consumed alcohol that day but later admitted to drinking and smoking marijuana during his time at the Sandbar. Burke testified he had two "hits" of marijuana from another individual docked at the Sandbar when he first arrived and he brought four beers with him on the day in question, and believed he consumed three Sam Adams Summer Ale during his time at the Sandbar. (Tr. Burke, 8/5/22).

Upon approaching Burke on the vessel, Officer Caires detected "the strong and distinct odor of an alcoholic type beverage emanating from his breath and person." (DEEP-1). He further observed alcohol on the boat. A modified Horizontal Gaze Nystagmus Test was performed on the vessel and Burke had trouble keeping his head still and was observed to be trying to "overshoot" the officer's finger.<sup>1</sup> The test was stopped, Officer Caires instructed Burke not to move his head, and reinstated the test. Mr. Burke was not able to perform the test. Officer Caires observed that Burke was having difficulty following the directions and that Burke had distinct and sustained nystagmus at maximum deviation in both eyes. The investigation was then carried over to land, where after a 15-minute waiting period, the investigation continued with field sobriety tests (FST). Burke did not pass three of the four tests conducted. During the walk and turn it was observed by Caires that Burke failed to stand with his arms by his side as instructed, he stopped to steady himself and did not walk heel to toe but instead stepped on his own toes. It was further noted that Burke's eyes had a lack of convergence, which Officer Caires testified is an indication of the influence of marijuana. (Tr. Caires, 8/4/22).

Burke was taken to the Rocky Hill Police Department and given a breath test. The results indicated a blood alcohol content (BAC) of 0.0648. This occurred approximately an hour and forty-five minutes after the initial stop. Section 15-140q(b)(2) provides that "if the person submits to a breath test and the peace officer, for reasonable cause, requests an additional chemical test of a different type to detect the presence of a drug or drugs other than or in addition to alcohol, the peace officer may administer such test...." Given that Burke had admitted to smoking marijuana, Officer Caires determined a urine sample was appropriate as the method for the second test. Burke provided this sample, and the results of such test are pending. Section 15-140q(b)(2) further states the "right to operate a vessel that requires a safe boating certificate for operation or certificate of personal watercraft operation may be suspended if ... the officer concludes, through investigation, that such person was operating a vessel under the influence of intoxicating liquor or any drug, or both." Upon the conclusion of Officer Caires' investigation, he determined that Burke was under the influence of intoxicating liquor or any drug, or both. (Tr. Caires, 8/4/22).

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<sup>1</sup> Officer Caires testified this test was modified because it was being conducted on the vessel and under the circumstances felt modifying the test was appropriate. It was again conducted on land. (Tr. Caires, 8/4/22).

## CONCLUSIONS

The primary purpose of this administrative proceeding on this suspension of a boating certificate is to promote public safety by removing those operators who have demonstrated disregard for the safety of others by operating their vessel while intoxicated. E.g. *State v. Hickam*, 235 Conn. 614 (1995), cert. denied, 517 U.S. 1221 (1996). 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. See *Fishbein v. Kozlowski*, 252 Conn. 38, 48 (1999) (questions as to compliance with procedures by the police do not preclude the suspension of a license when the elements for an administrative decision regarding the suspension of that license have been demonstrated). Section 15-140q of the General Statutes implements this intent by establishing standards under which a boater operating a vessel under the influence can be removed from the waters by suspending a boating certificate for periods of time set out in that statute. Four factors are listed in §15-140q(g)(d)(3); DEEP has the burden of proving each by a preponderance of the evidence in order for this suspension to be affirmed.

A “preponderance of the evidence” means that there is substantial evidence in the hearing record that provides a decision-maker with a substantial basis of fact from which a fact in issue can be reasonably inferred. *Tompkins v. Comm'r of Motor Vehicles*, 60 Conn. App. 830, 833–34 (2000). A “preponderance of the evidence” only requires a certainty greater than 50 percent, or, that a party must prove the facts by “the greater weight of the evidence.” To put it another way, the party with the burden of proof must satisfy the trier of fact that the evidence shows that what the party claims to be true is more probably true than not.<sup>2</sup>

I must determine only whether the DEEP has proven that there was there probable cause to arrest William Burke for operating a vessel under the influence, as Mr. Burke’s attorney stated on the record this was the only factor being contested. “Probable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . Reasonable minds may disagree as to whether a particular [set of facts] established probable cause. . . . Thus, [a determination of probable cause] need only have a substantial basis of fact from which [it] can be inferred . . . that the evidence in the administrative record supports a finding of probable cause with respect to the plaintiff’s violation.” (Citations omitted; internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 344 (2000). I have reviewed the record in this matter, including the testimony of the parties and the arrest report and supporting documents, and have considered the arguments regarding differing interpretations of certain issues and circumstances. Given all the events described and shown, and for the reasons that follow, I find that the DEEP has met its burden to prove by a preponderance of the evidence that it had probable cause to arrest William Burke.

Officer Caires’ initial observations on the boat, including the smell of alcohol on Burke’s breath and person, a failed test for nystagmus on the boat, and the presence of alcohol on the boat, led to a reasonable decision to bring Burke ashore for further investigation. Once on shore, Burke failed to pass three of the four FST that Caires explained, demonstrated, and administered. Further, once on shore Burke admitted to drinking three or four beers and having two hits of marijuana during his time at the Sandbar. These facts, along with the accumulated observations of Officer Caires, provided probable cause to arrest Burke.

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<sup>2</sup> This is unlike the greater legal burden of “beyond a reasonable doubt,” which is the higher legal burden of proof required to affirm a conviction in a criminal case.

At the police station, a breath test was taken approximately an hour and forty-five minutes after the time of the stop. At that time, Burke's BAC was 0.0648. This is below the legal limit for alcohol of 0.08. In light of the fact that the urine sample is still pending, there is no information in the record to confirm that Burke had an elevated blood alcohol content at the time of his operation of the vessel. With that said, the standard I need to look at is whether Officer Caires had probable cause to arrest Mr. Burke for operating a vessel while under the influence of intoxicating liquor or drugs, or both, or while he had an elevated blood alcohol content. General Statute 15-140q(g). Therefore, Burke's BAC is not the only factor to consider, and in the instant case, at the time of the stop, Burke smelled of alcohol and failed three of the four field sobriety tests. He could not conduct the walk and turn to standard, failed the horizontal gaze nystagmus, with distinct and sustained nystagmus at maximum deviation in both eyes observed, and had a lack of eye convergence. While he did pass the one leg stand, it was noted that he required the use of his arms for balance. Burke further admitted to both drinking and use of marijuana. Based on the experience of Officer Caires, who has served as a police officer for eight years, it was determined that Burke was under the influence at the time of operation, and his testimony on this subject was persuasive. Mr. Burke's attorney asserted that it is not illegal for an individual to drink and or smoke marijuana and operate a boating vessel in Connecticut, and in some circumstances such a statement may be accurate, but this is an administrative hearing, which has a different legal standard than a criminal court, and I must evaluate Mr. Burke's actions and the arresting officer's investigation within the context of the language and requirements of §15-140q. Based on the substantial facts presented DEEP has proved by a preponderance of the evidence that Officer Caires had probable cause to arrest Burke for operating a vessel while under the influence of intoxicating liquor or drugs or both at the time of his operation.

Burke's attorney further argued that there is a statutory requirement to conduct two breath tests, and because only one breath test was conducted in this matter there was not probable cause to arrest Burke. Officer Caires testified that the point of having two breath tests is to see over time whether the individual's BAC is increasing or decreasing to help determine whether at the time of operation the individual was intoxicated. In the instant case, Caires determined that the second test was going to be a urine sample because of the indication of marijuana use. As indicated above, Section 15-140q(b)(2) allows an officer to determine that a different type of test is necessary to detect the presence of a drug other than or in addition to alcohol. The decision to not conduct two breath tests is within the context of the regulations and the officer's right while conducting his investigation. It does not, on its face, raise doubt for my probable cause determination. While I cannot determine that Burke was above the legal limit at the time of his operation, the facts reasonably demonstrate that at the time of operation, Burke was under the influence of intoxicating alcohol or drugs or both.

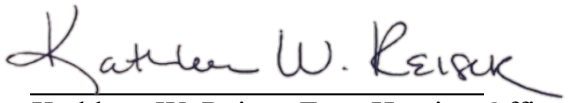
I affirm the suspension contained in the suspension notice. General Statutes §15-140q(h) provides that if I find in the affirmative on the factors for the suspension, I must affirm the suspension contained in the suspension notice for the appropriate period specified in subsection (i) of §15-140q. Section 15-144q(i) provides for a suspension of Connor's safe boating certificate for ninety days.

### **ORDER**

It is hereby ORDERED that the Connecticut Safe Boating Certificate of William Burke is suspended for a period of not more than ninety days, effective August 8, 2022 through November 6, 2022. If still in his

possession, Mr. Burke is hereby ordered to deface all paper copies of his safe boating certificate in his possession and send any card he may have to the Division of Boating, Department of Energy and Environmental Protection, 333 Ferry Road, Old Lyme, CT 06371-0280, *within 2 days of receipt of this decision.*

*Entered as a final order of the Commissioner of Energy and Environmental Protection by:*

A handwritten signature in cursive script that reads "Kathleen W. Reiser". The signature is written in black ink and is positioned above a horizontal line.

Kathleen W. Reiser, Esq., Hearing Officer

**SERVICE LIST**  
**DEEP BUI #22-005 Burke**

DEEP Boating Division

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