

STATE OF NEW HAMPSHIRE

DEPARTMENT OF HEALTH
AND HUMAN SERVICES

ADMINISTRATIVE APPEAL

OFFICE OF LEGAL AND
REGULATORY SERVICES

State of New Hampshire

v.

Simply Delicious Baking Company

Case No. 2021-137

MOTION TO APPLY ELEVATED STANDARD OF PROOF

Now comes Simply Delicious Baking Company, by and through counsel, with the following motion regarding the standard of proof in this case. The State may argue that He-C 203.14(f)(3) imposes a “preponderance of the evidence” standard in this matter. Even if this provision is applicable, however, it would be unconstitutional as applied. The Bakery hereby moves that the Appeals Unit instead rule that the State must meet a “clear and convincing evidence” standard in this case.

FACTS

1. Simply Delicious Baking Company (“the Bakery”) is a bakery located in Bedford, New Hampshire. Its sole owner is Alexa Firman, a resident of Bedford, New Hampshire. The Bakery has received a letter from the Attorney General, dated November 16, 2020, imposing a \$500 fine on the Bakery pursuant to Emergency Order 65.

2. The citation accuses the Bakery of “jeopardizing the health and safety of both the public and employees” and repeatedly warns the Bakery that it will face criminal penalties if it does not change its practices.

3. Given the novelty of this case, it is unclear what standard of proof should be applied in this case under the relevant statutes and rules. Under He-C 203.14(f)(3), however, the government “shall prove its case by a preponderance of the evidence in hearings that address... an administrative fine.” For the reasons stated below, the Bakery argues that this provision would be unconstitutional if applied in this case.

SUMMARY OF ARGUMENT

4. The Constitution requires the State to meet different standards of proof in different kinds of cases. While a strict “beyond a reasonable doubt” standard applies in criminal cases, a lower “preponderance of the evidence” standard may ordinarily be applied in merely civil cases. There is, however, a third kind of case: “quasi-criminal” cases. These cases occupy a middle ground between “criminal” and “civil” cases.

5. A quasi-criminal case is one in which, although the government is nominally imposing only a civil penalty such as a fine, the penalty is significantly similar to a criminal conviction. In particular, a quasi-criminal penalty generally has a stigmatizing effect on the defendant.

6. In quasi-criminal cases, the government must satisfy an intermediate standard of proof: “by clear and convincing evidence.” This standard is lower than the “beyond a reasonable doubt” standard but higher than a mere “preponderance” standard.

7. In this case, the State is unlikely to deny that its prosecution of the Bakery is stigmatizing. In fact, the State’s primary objective in this case appears to be to stigmatize the Bakery’s conduct as an example to other businesses.

8. On its face, the citation accuses the Bakery of endangering public and employee health. At the same time, the citation suggests that the Bakery is in violation of criminal laws. The State also appears to have publicly circulated its citation of the Bakery. Upholding this citation will be much more like a criminal conviction than an ordinary civil fine. It follows that a “clear and convincing evidence” standard is constitutionally required in this case.

ARGUMENT

I. **When penalties have a stigmatizing effect that is similar to a criminal conviction, a “clear and convincing evidence” standard applies.**

9. The U.S. Supreme Court has noted that there is “a continuum [of] three standards or levels of proof for different types of cases.” *Addington v. Texas*, 441 U.S. 418, 423 (1979). These three categories are usually called criminal cases, *quasi-criminal cases*, and ordinary civil cases. In order to determine what standard of proof the Constitution requires in this case, this Appeals Unit should determine which category is applicable.

10. “Quasi-criminal” is a well-established legal concept, referring to laws and penalties that are somewhere between a criminal and civil in nature. *See e.g. Appeal of Morgan* (New Hampshire Bd. of Pharm.), 144 N.H. 44, 47 (1999) (“Statutes with criminal *or quasi-criminal* penalties are reviewed under a more stringent standard than those with civil penalties.”) (emphasis added); *Addington v. Texas*, 441 U.S. at 424 (Stating that the idea of an intermediate standard of proof in quasi-criminal cases “is no stranger to the civil law.”) (quoting *Woodby v. INS*, 385 U.S. 276, 285 (1966)).

11. Quasi-criminal cases are “government-initiated proceedings that threaten the individual involved with ‘a significant deprivation of liberty’ *or ‘stigma.’*” *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (emphasis added).

12. Laws that “nominally impose only civil consequences” may nonetheless be quasi-criminal when they have “a stigmatizing effect.” *Manning v. Caldwell*, 930 F.3d 264, 273 (2019).¹ See also e.g. *Dimmitt v. City Court*, 21 Utah 2d 257, 259 (1968) (helpfully distinguishing non-criminal and criminal sanctions by saying that non-criminal fines attach to actions that are “in the nature of errors... rather than as manifesting basic antisocial attitudes to which the stigma of crime should attach.”).

13. When a law is quasi-criminal, the government faces tougher constitutional hurdles than when enforcing a merely civil law. Specifically, in a quasi-criminal case, the prosecution must satisfy a higher standard in order to “reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.” *Addington v. Texas*, 441 U.S. 418 at 424.

14. This intermediate standard “usually employs some combination of the words ‘clear,’ ‘cogent,’ ‘unequivocal’ and ‘convincing.’” *Id.* See also *Santosky v. Kramer*, 455 U.S. at 756 (“This Court has mandated an intermediate standard of proof – ‘clear and convincing evidence’ -- when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’”)

II. The primary purpose of this citation is to stigmatize the Bakery. Accordingly, a “clear and convincing evidence” standard must apply.

15. In this case, the State’s own conduct demonstrates the stigmatizing effect of the citation. The State has publicized its citation of the Bakery online, quickly generating media coverage of the fine. Soon after it was issued, in fact, the citation itself became one of the most

¹ This Fourth Circuit decision has been favorably cited by New Hampshire’s own federal district court. *Frese v. Macdonald*, 425 F. Supp. 3d 64, 81 (2019).

prominent Google results for “Simply Delicious Baking Company.” *See* <https://www.doj.nh.gov/news/2020/documents/20201118-simply-delicious.pdf>, included with the Bakery's exhibits filed with the Department in this matter.

16. This public citation states that the Bakery is “jeopardizing the health and safety of both the public and your employees.” *Id* at 2.

17. Other factors also show that the citation is quasi-criminal in nature. The fine in this case is imposed on a kind of *a fortiori* basis under RSA 21-P:47, which does not explicitly authorize any “civil” penalties, but does state that persons who violate the order “shall be guilty of a misdemeanor.” The State, in its citation, also repeatedly warns that it may bring misdemeanor criminal charges against the Bakery. *Cf. Manning*, 930 F.3d at 273 (2019) (the fact that a civil penalty was statutorily interrelated with criminal sanctions showed that it was “at a minimum, [] quasi-criminal in nature.”).

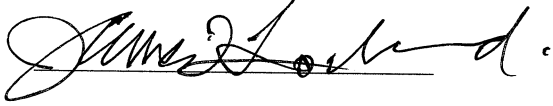
18. Accordingly, a “clear and convincing evidence” standard is constitutionally required in this case notwithstanding any administrative rules to the contrary.

PRAYER FOR RELIEF

WHEREFORE, the Bakery respectfully request that this Appeals Unit:

- A. Issue an order or other ruling holding that the State is required to prove its case in this matter by clear and convincing evidence;
- B. Waive or reverse the fine on the grounds that the evidence does not support an adjudication against the Bakery; or on constitutional grounds; and
- C. Grant such other and further relief as the Appeals Unit deems just and proper.

Respectfully submitted this 18th day of March, 2021.



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ATTORNEYS FOR BAKERY

I hereby certify that I have sent a copy of this appeal to Attorney Jennifer Ramsey pursuant to He-C 202.03.



James T. Lombardi