

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**

**BAKERY'S MOTION TO DISMISS AND BRIEFING ON SUBJECT MATTER  
JURISDICTION**

Simply Delicious Baking Company (the "Bakery"), by and through counsel, hereby moves to dismiss this case for lack of subject matter jurisdiction, stating as follows:

1. On Tuesday, March 23, 2021, the Administrative Appeals Unit held a prehearing conference. At the conference, the Hearing Officer gave instructions that both parties provide briefing on the question of subject matter jurisdiction.

2. At this conference and in a subsequent scheduling order, the Hearing Officer ordered that the parties brief the question of subject matter jurisdiction no later than June 4, 2021. The Bakery accordingly now moves to dismiss on the grounds that the Appeals Unit does not possess subject matter jurisdiction to hear this case under Emergency Order #65.

**ARGUMENT****a. If this proceeding lies outside the terms of Emergency Order #65, the Appeals Unit lacks subject matter jurisdiction.**

3. Subject matter jurisdiction “cannot be [assumed] where it does not already exist.” *Bosonetto v. Town of Richmond*, 163 N.H. 736, 744 (2012). Although “subject matter jurisdiction may be raised at any time” in a proceeding, addressing the question early can save both parties and the decision-making body time and expense. *Route 12 Books & Video v. Town of Troy*, 149 N.H. 569, 575 (2003).

4. When any decision-making body is not “a court of general jurisdiction,” it follows that “[i]ts powers are limited to those conferred upon it by statute.” *Rogers v. Rogers*, 171 N.H. 738, 742-743 (2019) (quoting *Petition of Cigna Healthcare*, 146 N.H. 683, 688 (2001)).

5. For this reason, “[a]dministrative agencies are granted only limited and special subject matter jurisdiction... [which] jurisdiction is dependent entirely upon the statutes vesting the agency with power.” *Appeal of Brown*, 171 N.H. 468, 473 (2018).

6. The Governor’s power to declare a state of emergency, and to issue and enforce emergency orders, derived entirely from statute. *Binford v. Sununu*, Merrimack Cty. Super. Ct., 217-2020-CV-00152 (Mar. 25, 2020) (Kissinger, J.) (“[T]he governor’s power to declare a state of emergency is derived from RSA 4:45 and RSA 4:47.”).

7. The State and Bakery are currently before this Appeals Unit solely because Emergency Order #65 states that civil penalties may be imposed for reckless violations of any emergency order.

8. For the purposes of this Motion, the Bakery assumes without conceding that RSA 21-P:47 authorizes the Governor to order that civil liability be imposed for violations of emergency orders, and that Emergency Order #65 constitutes a lawful exercise of that power.

9. The Bakery also assumes *arguendo* that Emergency Order #65, by its own terms, gives this Appeals Unit subject matter jurisdiction over at least some violations of emergency orders. The Bakery notes, however, that this is not apparent on the face of Emergency Order #65, which specifies only that “a hearing” will be provided.

10. Even given these assumptions, however, this Appeals Unit does not have subject matter jurisdiction unless a proceeding is within the parameters of Emergency Order #65. Because Emergency Order #65 is itself purely a creature of statute, to go beyond its terms in assuming subject matter jurisdiction would be to exceed the Appeals Unit’s “limited” powers “conferred upon it by statute.” *Cf. Rogers*, 171 N.H. at 742-743.

**b. By its own terms, Emergency Order #65 contemplates hearings on final determinations made by the Division of Public Health. In this case, no final determination was made by the Division.**

11. By its terms, Emergency Order #65 contemplates situations in which the Division of Public Health “impos[es] civil penalties” which are then subject to “a hearing.” On a plain reading of the order, only the Division is authorized to make a final determination to impose a civil fine. This determination is then subject to “a hearing.”

12. Although Emergency Order #65 authorizes the Attorney General to issue notice, to negotiate, and to settle with accused violators, it does not authorize the Attorney General or any entity other than the Division to make a final determination to impose a fine.

13. On April 2, 2021, the Bakery submitted interrogatories to the State in order to determine what individuals and entities made the final determination to impose a civil fine on the Bakery, as well as by what process the determination was made.

14. The Bakery asked that the State “identify specifically the government official or officials... that made the determination that” the Bakery had violated Emergency Order #52, including the names, positions, and affiliations of those officials. *See* Department’s Response to Appellants Second Request for Information, attached hereto as **Exhibit 1**.

15. The Bakery further asked the State to “explain in reasonable detail the process by which such determination was made and each step leading to it.” *Id.*

16. By discovery response dated May 3, 2021, the State reported that “Associate Attorney General [Anne] Edwards and Mr. [DJ] Bettencourt [of the Office of the Governor] together made the final determination that [the Bakery] had violated New Hampshire’s Order #52” and that a notice and fine should be issued.

17. Although the Attorney General appears to have “discussed the matter with the Division of Public Health,” the State’s responses provide no indication that any final determination to impose a fine was ever made by the Division.

18. On the contrary, the Attorney General seems to have decided *ex post facto* to take the position that it is representing and enforcing a decision by the Division of Public Health.

19. The citation received by the Bakery also gives every impression that the Attorney General decided—on its own initiative and not on the instructions of any other agency—to impose a fine on the Bakery. It does not describe any final decision having been made by the Division. *See* Citation, attached hereto as **Exhibit 2**.

20. Emergency Order #52 does not authorize the Attorney General or the Office of the Governor to impose civil penalties.

21. While courts and administrative agencies may naturally want to accord the State a wide breadth in dealing with an emergency like COVID-19, this leeway cannot extend to conferring subject matter jurisdiction where none exists.

22. Emergency Order #65 simply does not contemplate any kind of hearing in the absence of a prior final determination by the Division to impose a fine. *Cf. Brown*, 171 N.H. at 473 (the subject matter jurisdiction of agencies “is dependent entirely upon the statutes vesting the agency with power.”). Dismissal of this action is therefore appropriate.

#### PRAYER FOR RELIEF

WHEREFORE, the Bakery respectfully request that this Appeals Unit:

- A. Enter an order dismissing this matter for lack of subject matter jurisdiction; and
- B. Grant such other and further relief as the Appeals Unit deems just and proper.

Respectfully submitted this 4<sup>th</sup> day of June, 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.

A handwritten signature in black ink, appearing to read "Ian B. Huyett", with a long horizontal flourish extending to the right.

Ian B. Huyett

# **APPELLANT EXHIBIT 1**

**STATE OF NEW HAMPSHIRE  
DEPARTMENT OF HEALTH AND HUMAN SERVICES  
ADMINISTRATIVE APPEALS UNIT**

In re: Appeal of Simply Delicious Baking Co.

Docket No. 2021-137

**DEPARTMENT’S RESPONSE TO APPELLANT’S SECOND REQUEST FOR  
INFORMATION AND PRODUCTION OF DOCUMENTS**

The New Hampshire Department of Health and Human Services, Division of Public Health (“Department”), by and through its attorneys, the Office of the Attorney General, submit the following in response to the *Second Request for Information and Production of Documents*, dated April 2, 2021, from Simply Delicious Baking Company (“Appellant”).

1. “DHHS Exhibit 6,” submitted by the Division of Public Health in this matter on March 18, 2021 and identified in part in its Pre-Hearing Statement as “Email from Victim Witness Advocate Stacey MacStravic to Victim Witness Advocate Joelle Donnelly ...”, refers to employees not wearing masks but redacts wording after her name. **Please provide an unredacted copy of this exhibit and any additional contact information you may have in your records regarding such person.**

The Department objects to this request on the basis that the redacted information would serve to identify a confidential informant whose identity is protected by the prosecutor’s privilege. The informant is not being called as a witness in this case, nor does the information she provided form the basis for the civil penalty the Department is seeking to impose. The identity of this individual is therefore immaterial, and disclosure of her identity could have a chilling effect on similar reports in the future.

2. **Please identify specifically the government official or officials (if more than one) that made the determination that Simply Delicious had violated New Hampshire’s Emergency Order #52 and that a notice or letter of violation to Simply Delicious should be issued. Please provide the names of such individuals, the respective governmental agencies or departments for whom they work or with whom they are affiliated, their positions within such agency or department, and the date or dates upon which such decision or determination was made.**

- a. Anne Edwards, Associate Attorney General; DJ Bettencourt, Office of the Governor; Patricia Tilley, Division of Public Health, Department of Health



and Human Services; and Joelle Donnelly, Victim Advocate discussed Appellant's conduct between October 30 and November 16, 2020, with input from the local health officer in Bedford. Associate Attorney General Edwards and Mr. Bettencourt together made the final determination that Simply Delicious had violated New Hampshire's Emergency Order #52 and that a notice or letter of violation to Simply Delicious should be issued with a civil penalty.

3. With regard to the determination referenced in Request #2 above (if not already explained in the answer to such Request), **please explain in reasonable detail the process by which such determination was made and each step leading to it, including for instance when and by whom any complaints against Simply Delicious were received, who then reviewed them, and what steps were thereafter taken or followed, and by whom, until the notice of violation was issued to Simply Delicious on November 16, 2020. If not identified in the answer to Request #2, please provide (1) the names, positions and affiliated agencies or departments of the individuals involved in the process, and (2) the dates upon which each step in the process was taken. If not furnished previously, please provide copies of all documents reviewed or produced during the process.**

The Department refers to its Prehearing Statement, dated March 18, 2021, and its supporting exhibits as well as its response to Request 2, above, as partial response to this request.

The Department further responds as follows:

On July 13, 2020, the Bedford Health Officer performed an inspection of Simply Delicious Baking Company, during which it was found the owner refused to wear a mask. (DHHS Exhibits 1-3) On July 14, 2020, the Town of Bedford Emergency Management sent a warning letter to Simply Delicious Baking Company and Alexa Firman, reiterating the Bedford Health Officer's inspection and stating the requirement to wear a mask while serving customers. (DHHS Exhibit 4-5.)

On October 29, 2020, the then-Bedford Health Officer, Wayne Richardson, went to Simply Delicious Baking Company and found that masks were still not being worn. (DHHS Exhibit 1.)

On October 30, 2020, then-Deputy Bedford Health Officer Gary Pariseau emailed VWA Joelle Donnelly and explained the Bedford Health Office's July 13, 2020 inspection and Mr. Richardson's visit on October 29, 2020. (DHHS Exhibit 1.)

Also on October 30, 2020, VWA Donnelly informed Associate Attorney General Edwards of the information Mr. Pariseau had provided.

On November 6, 2020, VWA Stacey MacStravic received a call on the DOJ phone line for a citizen report of suspected emergency order violations. (DHHS Exhibit 6.) VWA MacStravic conveyed what the caller said to VWA Donnelly in an email, stating the report concerned Simply Delicious in Bedford, that employees were not wearing masks, and, when questioned, would state they did not have a "mask mandate." (*Id.*) That same day, VWA Donnelly provided this information to the Bedford Health Office. On or about November 9, 2020, VWA Donnelly provided this information to Associate Attorney General Edwards.

Between October 30 and November 16, 2020, Associate Attorney General Edwards discussed the matter with the Division of Public Health and the Governor's Office.<sup>1</sup>

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<sup>1</sup> The Department objects to this request to the extent it seeks attorney-client privileged or executive privileged information concerning the contents of conversations between the Office of the Attorney General and its clients, the Governor's Office and the Division of Public Health.

Respectfully submitted,

**NEW HAMPSHIRE DEPARTMENT OF  
HEALTH AND HUMAN SERVICES  
DIVISION OF PUBLIC HEALTH**

By and through,

/s/ Jennifer S. Ramsey \_\_\_\_\_

DATE: 05/03/2021 \_\_\_\_\_

Jennifer S. Ramsey, #268964  
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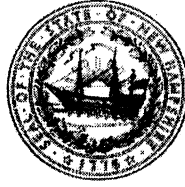
I hereby certify that copies of this document above were e-mailed to and mailed on this date to James T. Lombardi, *counsel of record*, 4 Bell Hill Road, Bedford, NH 03110 and [IanHuyett@protonmail.com](mailto:IanHuyett@protonmail.com); and Ian B. Huyett, *counsel of record*, PO Box 4683, Manchester, NH 03108 and [jtlombardi@lombardilawoffices.com](mailto:jtlombardi@lombardilawoffices.com), pursuant to He-C 202.03.

# **APPELLANT EXHIBIT 2**

**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD  
ATTORNEY GENERAL



JANE E. YOUNG  
DEPUTY ATTORNEY GENERAL

November 16, 2020

Simply Delicious Baking Co.  
c/o Alexa Firman  
176 Route 101  
Bedford, NH 03110

**Re: Violations of New Hampshire's Emergency Order 52, as extended, and the  
Restaurant/Food Service Industry Guidance**

Dear Ms. Firman:

Simply Delicious Baking Co. in Bedford is operating in violation of the Governor's Emergency Order 52, as extended by Emergency Order 70. This Emergency Order was issued pursuant to Section 18 of Executive Order 2020-04, as extended by Executive Order 2020-21. Exhibit A to Emergency Order 52 establishes Universal Guidelines that apply to all businesses, organizations, and individual business operators in the State. Exhibit B to Emergency order 52 establishes industry-specific guidance, including guidance for the Restaurant/Food Service Industry. Despite the use of the terms "guidelines" and "guidance" in the titles of these documents, your business is required to comply with the mandatory provisions of these documents if you want to continue to operate. See Emergency Order 52, Paragraph 1 ("All businesses and other organizations operating within this State shall comply with . . . the Universal Guidelines and any other industry-specific guidelines . . . issued subsequent to this Order.")

**Emergency Order 52 and its Applicable Guidance**

As has been explained to you directly and repeatedly, your business must comply with both the Universal Guidelines and the Restaurant/Food Service Industry Guidance. Under the Universal Guidelines established under Emergency Order 52, "[e]mployees and volunteers who are providing services to consumers or individuals must wear masks while providing such service." Exhibit A to Emergency Order 52, ¶ C-4-a. Additionally, under the Restaurant/Food Service Industry Guidance, "[d]irect customer contact employees shall wear cloth face coverings over their nose and mouth when at work and around others in settings where social distancing may be difficult (e.g. serving clients, greeting, etc.)." Exhibit B to Emergency Order 52, Restaurant/Food Service Industry Guidance, Safeguarding Guidance ¶ 7.

On July 13, 2020, Health Inspector Gary Pariseau conducted a compliance inspection of Simply Delicious Baking Co. as a result of a public complaint about your establishment. During that inspection, employees were not wearing face coverings. Moreover, you directly refused Inspector Pariseau's instruction to wear face coverings while directly serving customers. On July 14, Bedford Fire Chief Scott Hunter and Bedford Police Chief John Bryfonski, the Co-Directors of Town of Bedford Emergency Management, issued a written warning to you, explaining that your refusal to wear a face covering while directly serving customers violated the Food Services Industry Guidance. Even after this warning, you continued to refuse to wear a face covering while serving customers. As recently as October 29, Health Officer Wayne Richardson visited your establishment and found that you and your employees are not wearing face coverings while serving customers.

### **Violation and Civil Penalty**

Not requiring your direct customer service staff to wear face coverings while working is a violation of Emergency Order 52. Violations of the Governor's Emergency Order 52, and its applicable Guidance, are taken very seriously. These Orders have been instituted so New Hampshire businesses and organizations can operate as safely as possible during the COVID-19 pandemic. By not complying with the Emergency Orders, businesses risk endangering the health of their employees, customers, and the public in general. Businesses also risk further legal enforcement actions to achieve compliance.

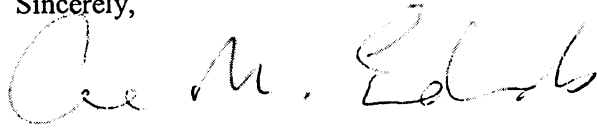
In addition to jeopardizing the health and safety of both the public and your employees, your failure to follow Emergency Order 52, as extended, is a violation of state law. Pursuant to RSA 21-P:47, the violation of an emergency order, rule, or regulation issued by the Governor can lead to misdemeanor criminal charges. Violations of any Emergency Order are subject to civil penalties of up to \$1,000 per violation or up to \$2,000 per day under Emergency Order 65, depending on the nature of the violation. Simply Delicious Baking Co.'s continued violation of the Emergency Orders place both you and your business at risk of these civil and criminal penalties.

In accordance with Emergency Order 65, Paragraph 4, and based on all of the relevant facts and circumstances, specifically including that Simply Delicious Baking Co. was made aware on at least 3 occasions that its staff had to wear face coverings while providing direct customer service, **a civil penalty of \$500.00 is being assessed for violating Emergency Order 52.**

**This civil penalty is required to be paid by November 30, 2020.** If Simply Baking Co. wants to challenge this civil penalty, it can raise that issue with the Attorney General's Office, under Paragraph 4 of Emergency Order 65, and negotiate a settlement or request a hearing.

Please ensure that Simply Delicious Baking Co. complies with the Emergency Orders and does not otherwise put the public or your employees at risk.

Sincerely,

A handwritten signature in black ink that reads "Anne M. Edwards". The signature is written in a cursive style with a large initial "A" and a distinct "M".

Anne M. Edwards  
Associate Attorney General

Enclosure