

FILED

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

JAN 09 2015 CTR-4

Anthony P. Schubert Clerk of the
Circuit Court

CHRISTOPHER JENNER, LAUREL)
JENNER, THOMAS KLINGNER, ADAM)
LIEBMANN, KELLY LIEBMANN,)
MICHELLE MATHIA, KRISTINA)
RASMUSSEN, JEFFREY TUCEK, MARK)
WEYERMULLER, and JUDI WILLARD,)

Case No.

Plaintiffs,

2015MR000016

v.

ILLINOIS DEPARTMENT OF COMMERCE)
AND ECONOMIC OPPORTUNITY,)

Defendant.)

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Economic Development for a Growing Economy Tax Credit Act ("EDGE Act"), 35 ILCS 10/5-1 *et seq.*, authorizes Defendant Illinois Department of Commerce and Economic Opportunity ("DCEO") to enter into agreements with select Illinois businesses to award them tax credits. The EDGE Act makes clear that the tax credit a business receives must be limited to the income taxes withheld from "New Employees" the business hires *after* it enters into an agreement with DCEO. Nonetheless, DCEO has adopted a regulation that purports to authorize the agency to award tax credits based on the amount of income tax withheld from employees hired *both before and after* a business enters into a tax-credit agreement.

Plaintiffs therefore move this Court to issue a preliminary injunction enjoining DCEO from entering into agreements to issue tax credits exceeding the amounts authorized by the EDGE Act and from issuing such excessive tax credits. Without an injunction, Plaintiffs will suffer irreparable harm for which they have no adequate remedy at law because, as taxpayers,

they will be liable to replenish the public treasury for the revenue lost from DCEO's illegal awards of excessive EDGE tax credits.

BACKGROUND

I. The EDGE Act authorizes DCEO to award tax credits to select businesses.

The EDGE Act authorizes DCEO to enter into "Agreements" to award tax credits to businesses that propose projects that would "create new jobs in Illinois." 35 ILCS 10/5-15(b). To qualify to receive EDGE tax credits, a business must propose a project that involves:

- (1) "an investment of at least \$5,000,000 in capital improvements to be placed in service and [employment of] at least 25 New Employees within the State as a direct result of the project";
- (2) "an investment of at least an amount (to be expressly specified by the [DCEO] and the [Business Investment] Committee [of the Illinois Economic Development Board]) in capital improvements to be placed in service and [employment of] at least an amount (to be expressly specified by [DCEO] and the Committee) of New Employees within the State, provided that [DCEO] and the Committee have determined that the project will provide a substantial economic benefit to the State;" or
- (3) "if the applicant has 100 or fewer employees . . . at least \$1,000,000 in capital improvements to be placed in service and [employment of] at least 5 New Employees within the State as a direct result of the project."

35 ILCS 10/5-20(b).

After a business applies for an EDGE tax credit, the Business Investment Committee of the Illinois Economic Development Board (the "Committee"), a body within the DCEO, considers the application and makes a recommendation as to whether DCEO should accept it. 35

ILCS 10/5-25. In making this recommendation, the Committee considers seven factors, including whether the applicant's project "intends to hire the required number of New Employees in Illinois." 35 ILCS 10/5-25(b). The Committee also provides "guidance" to DCEO on the amount of an EDGE tax credit, considering eight factors enumerated in the statute. 35 ILCS 10/5-40.

DCEO, in turn, determines the amount and duration of an EDGE tax credit. 35 ILCS 10/5-45. When DCEO awards an EDGE tax credit, it must enter into an "Agreement" with the business receiving the credit, which must include, among other things: a "detailed description of the project that is the subject of the Agreement"; the duration and amount of the tax credit; a minimum number of years for the project; a "specific method for determining the number of New Employees employed during a taxable year"; and a requirement that the business report to DCEO "the number of New Employees, the Incremental Income Tax withheld in connection with the New Employees, and any other information the [DCEO] Director needs." 35 ILCS 10/5-50.

II. The EDGE Act limits the amounts of its tax credits.

The EDGE Act limits the amount of the tax credit a business can receive through an Agreement, tying it to the taxes paid by new employees the business hires in the state.

Specifically, the Act provides that the amount of tax credit that a business may receive under an Agreement "shall not exceed the Incremental Income Tax attributable to the project that is the subject of the Agreement." 35 ILCS 10/5-15(d). The Act defines the "Incremental Income Tax" attributable to a project as "the total amount withheld during the taxable year from the compensation of New Employees under Article 7 of the Illinois Income Tax Act arising from employment at a project that is the subject of an Agreement." 35 ILCS 10/5-5 (internal footnote omitted). The Act defines "New Employees," in turn, as those employees of the business who

are: (1) “first employed by [the] Taxpayer in the project that is the subject of an Agreement” and (2) “hired *after* the Taxpayer enters into the tax credit Agreement.” *Id.* (emphasis added). The Act contains two exceptions to this general rule controlling who may be considered a “New Employee.” One exception allows a business to treat an employee as a “New” if he or she “performs a job that was previously performed by someone who was: (1) treated under the Agreement as a New Employee; and (2) promoted by the Taxpayer to another job.” *Id.* The other exception allows a business applying for an EDGE tax credit to treat an employee as “New” if the following three conditions are all met: “(1) the Applicant is in receipt of a letter from the Department stating an intent to enter into a credit Agreement; (2) the letter . . . is issued by the Department not later than 15 days after the effective date of [the EDGE] Act; and (3) the employee was hired after the date the letter . . . was issued.” *Id.*

Thus, in sum, the Act limits the amount of the tax credit a business can receive under an Agreement to the amount of income tax withheld from employees who are both (1) hired to work on the project that is the subject of the Agreement and (2) hired *after* the business enters into the Agreement, with the limited exceptions noted above.

III. DCEO has adopted a regulation that purports to authorize greater tax credits than the EDGE Act permits.

Despite the EDGE Act’s clear language limiting tax credits to the amount of taxes withheld from employees hired after the business enters into an Agreement, DCEO has adopted a regulation that purports to authorize EDGE tax credits based on income taxes paid by certain employees hired *before* a business enters into an Agreement.

The DCEO regulation defines the “Credit” DCEO awards under the Act as “the amount agreed to between the Department and applicant,” which is “not to exceed the incremental payroll attributable to the applicant’s project.” 14 Ill. Admin. Code § 527.20 (citing 35 ILCS

10/5-15). DCEO defines “incremental payroll,” in turn, as “the total amount withheld by the taxpayer during the taxable year from the compensation of new employees *and retained employees* under Article 7 of the Illinois Income Tax Act [35 ILCS 5/Art. 7] arising from such employees’ employment at a project that is the subject of an Agreement.” *Id.* (emphasis added). DCEO’s definition of “new employee” comports with the Act’s definition: “a full-time employee first employed by a taxpayer in the project that is the subject of an Agreement and who is hired after the taxpayer enters into the Tax Credit Agreement.” *Id.* It adds, however, an additional exception not contained in the Act, which allows a business to treat an employee as “new” if he or she “fills a vacancy that had been continuously vacant for the 184 day period immediately preceding the date of the Agreement.” *Id.* DCEO’s definition of “retained employee” goes far beyond the Act’s definition of a “new employee” and includes any “full-time employee employed by a taxpayer during the term of the agreement whose job duties are directly and substantially-related (sic) to the project.” *Id.* For purposes of the regulation’s definition, “‘directly and substantially-related (sic) to the project’ means at least two-thirds of the employee’s job duties must be directly related to the project and the employee must devote at least two-thirds of his or her time to the project.” *Id.* DCEO applies these definitions in determining the amounts of tax credits it awards. *See* 14 Ill. Admin. Code §§ 527.20, 527.70.

Thus, DCEO’s regulations allow a business to receive a larger tax credit than it could receive under the Act’s language alone. Instead of having its tax credit limited to the amount of income tax withheld from *new* employees’ paychecks, a business can receive a tax credit up to the amount of income tax withheld from the paychecks of both *new and retained* employees who work on the project that is the subject of an Agreement.

IV. DCEO's issuance of tax credits that exceed the amounts authorized by the EDGE Act injures Plaintiffs.

Plaintiffs are Illinois taxpayers; each of them has been paying taxes in Illinois for years, and each expects to continue paying Illinois state income taxes for the foreseeable future. For example, Plaintiff Michelle Mathia has been paying Illinois state income taxes every year since 1974 and expects to continue paying them in the years ahead. (Declaration of Michelle Mathia, attached as Exhibit A.) As Illinois taxpayers, Plaintiffs will be responsible for replenishing the State's general revenue funds for the loss of revenue from any excessive EDGE tax credits that DCEO awards.

V. Plaintiffs' Claim

In their complaint, Plaintiffs allege that DCEO has exceeded its authority by authorizing and awarding EDGE tax credits that exceed the amounts the EDGE Act authorizes. They ask the Court to declare that DCEO has acted unlawfully and to enjoin DCEO from entering into Agreements to issue EDGE credits that exceed the amounts authorized by law and from issuing such credits. (Complaint at 9-10.)

STANDARD OF REVIEW

To prevail on a motion for a preliminary injunction, Plaintiffs must establish by a preponderance of the evidence that they have a protected right, that they will suffer irreparable harm without an injunction, that they have no adequate remedy at law, and that they are likely to succeed on the merits of their claim. *Cameron v. Bartels*, 214 Ill. App. 3d 69, 73 (4th Dist. 1991). "An applicant for a preliminary injunction need not make out a case which will entitle him to the ultimate relief he seeks, but need only raise a fair question as to the existence of the right claimed, making it appear advisable that the positions of the parties should remain the same until the court has an opportunity to consider the case on its merits." *Id.* In addition, the Court

“must conclude that the benefits of granting the injunction outweigh the possible injury which a defendant might suffer as a result thereof.” *Id.*

ARGUMENT

This Court should enjoin DCEO from entering into agreements to issue tax credits that exceed the amounts authorized by the EDGE Act – and from issuing such credits – because Plaintiffs have a right to enjoin unlawful depletion of public revenues; DCEO’s issuance of excessive EDGE tax credits causes them irreparable harm for which they have no adequate remedy at law; and they are likely to succeed on the merits of their claim.

I. Plaintiffs have a right as taxpayers to enjoin DCEO’s illegal awards of excessive tax credits.

Plaintiffs, as taxpayers, have a right to prevent DCEO from depleting public revenues through the unlawful issuance of excessive tax credits.

Taxpayers are injured when an “unlawful governmental action” depletes public revenues. *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (4th Dist. 2011). “It has long been the rule in Illinois that citizens and taxpayers have the right to enjoin the misuse of public funds, and that this right is based upon [their] ownership of such funds and their liability to replenish the public treasury for the deficiency caused by such misappropriation.” *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956).

Here, Plaintiffs allege that DCEO is unlawfully awarding tax credits that exceed the amounts authorized by law and that they will be liable to replenish the public treasury for this unlawful depletion of public funds. (Complaint ¶ 48.) Tax credits are substantively indistinguishable from government spending – that is, awarding a tax credit is no different in effect from collecting tax revenues and then giving them back through an appropriation – and the illegal issuance of tax credits therefore constitutes a misuse of public funds. *See Rainbow Apts. v.*

Ill. Prop. Tax Appeal Bd., 326 Ill. App. 3d 1105, 1108 (4th Dist. 2001) (tax credits “practically equivalent to a government subsidy”); *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo. 1987) (tax credit is “as much a grant of public money and is as much a drain on the state’s coffers as would be an outright payment by the state”); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705, 717 (1970) (“A dollar is a dollar – both for the person who receives it and the government that pays it, whether the dollar comes with a tax credit label or a direct expenditure label.”).

Accordingly, by alleging that DCEO’s regulations unlawfully authorize excessive tax credits and that DCEO is awarding such excessive tax credits, Plaintiffs have alleged the violation of a protected right for which they can obtain injunctive relief.

II. Plaintiffs will suffer irreparable harm if this Court does not enjoin DCEO from awarding tax credits that exceed the amounts the EDGE Act allows, and they have no adequate remedy at law for their injury.

Plaintiffs require a preliminary injunction to prevent DCEO from issuing further EDGE tax credits that exceed the amounts authorized by law because DCEO’s issuance of excessive tax credits causes Plaintiffs irreparable harm for which they have no adequate remedy at law.

Because Plaintiffs can establish that they have a protectable interest in preventing the State from unlawfully depleting the public treasury, as shown above, “irreparable injury is presumed if that interest is not protected.” *Cameron*, 214 Ill. App. 3d at 73.

In addition, Plaintiffs will have no adequate remedy at law for their injury because they cannot obtain monetary damages for it. *See Lumbermen’s Mut. Cas. Co. v. Sykes*, 384 Ill. App. 3d 207, 230-31 (1st Dist. 2008) (no adequate remedy at law where plaintiffs cannot be adequately compensated through monetary damages). Once public funds are lost, Plaintiffs will

have no way to get them back through an action for damages. No statute or case law gives taxpayers standing to sue tax-credit recipients to recover excessive tax-credit awards on the State's behalf or to recover damages for their own increased tax liability resulting from the issuance of unlawful tax credits. Instead, as the case law recognizes, taxpayers' only remedy for the unlawful depletion of public funds is an injunction. *See Barber*, 406 Ill. App. 3d at 1102.

III. Plaintiffs are likely to succeed on the merits of their claim because DCEO has no authority to authorize EDGE tax credits that exceed the amounts the EDGE Act permits.

Plaintiffs are likely to succeed on the merits of their claim because DCEO plainly lacks authority to authorize and award EDGE tax credits exceeding the amounts the EDGE Act permits.

“Regulations that are inconsistent with the statute under which they are adopted will be held invalid.” *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 38; *see also U.S. Liab. Ins. Co. v. Dep't of Ins.*, 2014 IL App (4th) 121125 ¶¶ 23-39 (striking down a Department of Insurance regulation that conflicted with a statute's unambiguous terms). A state agency cannot use its rulemaking power “to justify a policy that is inconsistent with or exceeds the specific language of the Act” authorizing it to make regulations. *Hernandez v. Fahner*, 135 Ill. App. 3d 372, 381-82 (1st Dist. 1985). “It is fundamental that the source of the power or authority claimed by an administrative agency must be found within the statute creating it.” *Hillside v. John Sexton Sand & Gravel Corp.*, 105 Ill. App. 3d 533, 539 (1st Dist. 1982) (citing *Bio-Medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540 (1977)).

In construing a statute, a court must “ascertain and give effect to the intent of the legislature,” the best evidence of which “is the language of the statute, which must be given its plain and ordinary meaning.” *Hadley v. Ill. Dep't of Corr.*, 224 Ill. 2d 365, 371 (2007). “Where

the statutory language is clear, it will be given effect without resort to other aides of construction.” *Id.* Where an administrative agency’s interpretation of a statute “conflicts with the statute, is unreasonable, or is otherwise erroneous,” a court will not defer to that interpretation but will instead give effect to the statute’s plain meaning. *Id.*

Here, the EDGE Act is clear and unambiguous: It explicitly limits the amount of a business’s EDGE tax credit to the amount of income tax the business withholds from “New Employees” hired “*after* [it] enters into the tax credit Agreement.” 35 ILCS 10/5-5 (emphasis added). The Act contemplates just two specific, limited exceptions to this general rule discussed above – one for employees who fill certain longstanding vacancies and one for certain employees who were hired within 15 days of the Act’s enactment in 1999. *See* 35 ILCS 10/5-5.

Accordingly, DCEO’s regulation that allows a business to receive an EDGE tax credit up to the amount of income tax withheld from both “new employees” hired after a business enters into an EDGE tax credit Agreement and “retained employees” hired *before* a business enters into an Agreement conflicts with the plain language of the EDGE Act. Because the Act’s language is clear and unambiguous – and because nothing in the EDGE Act authorizes DCEO to redefine the Act’s terms or to issue tax credits exceeding the amounts the Act permits – DCEO had no authority to adopt a limit on tax credits that exceeds the Act’s limit. *See* 35 ILCS 10/5-10(a) (listing DCEO’s powers under the Act). DCEO’s regulation is therefore invalid, and Plaintiffs are highly likely to succeed on the merits of their claim that DCEO has exceeded its authority.

IV. The benefits of granting Plaintiffs an injunction outweigh any possible injury to DCEO.

Plaintiffs will benefit from an injunction because the State will not lose any more revenue that Plaintiffs will be responsible for replacing through their taxes. This benefit outweighs any injury to DCEO because DCEO has no legitimate interest in applying a regulation that is not

authorized by law. Moreover, an injunction will not prevent DCEO from continuing to award EDGE tax credits; it will simply have to conform its awards of tax credits to the limits established by the EDGE Act. The Act's plain language demonstrates that the General Assembly believed that the State and the public would not be harmed by limiting EDGE tax credit awards to the amount of income taxes withheld from new employees alone.

CONCLUSION

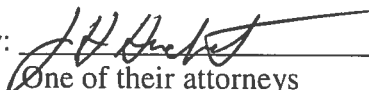
By adopting a regulation that purports to authorize tax credits exceeding the amounts permitted under the EDGE Act, DCEO has exceeded its authority and threatens to irreparably harm Plaintiffs by unlawfully depleting public revenues. This Court should therefore issue a preliminary injunction ordering DCEO to limit its awards of tax credits to the amounts allowed under the law.

Dated: January 8, 2015.

Respectfully submitted,

**CHRISTOPHER JENNER,
LAUREL JENNER, THOMAS
KLINGNER, ADAM LIEBMANN,
KELLY LIEBMANN, MICHELLE
MATHIA, KRISTINA RASMUSSEN,
JEFFREY TUCEK, MARK
WEYERMULLER, and JUDI
WILLARD**

By:



One of their attorneys

Jacob H. Huebert (#6305339)

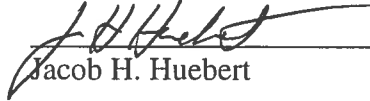
Jeffrey M. Schwab (#6290710)

Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org

CERTIFICATE OF SERVICE

I certify that on January 8, 2015, I served the foregoing Motion for Preliminary Injunction on Defendant Illinois Department of Economic Opportunity by sending it by regular U.S. mail to:

Adam Pollet, Director
Illinois Department of Commerce and Economic Opportunity
500 E. Monroe Street
Springfield, Illinois 62701



Jacob H. Huebert

Exhibit A

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS**

CHRISTOPHER JENNER, <i>et al.</i> ,)
)
Plaintiffs,)
)
v.)
)
ILLINOIS DEPARTMENT OF COMMERCE)
AND ECONOMIC OPPORTUNITY,)
)
Defendant.)
)

DECLARATION OF MICHELLE MATHIA

I, Michelle Mathia, in support of Plaintiffs' motion for preliminary injunction, declare as follows:

1. I am a Plaintiff in the above-captioned matter.
2. I am a resident of Lake County, Illinois.
3. I have paid Illinois state income taxes every year since 1973.
4. I am currently employed in Illinois and expect to continue paying Illinois state

income taxes every year for the foreseeable future.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, and certify that I verily believe the same to be true.



Michelle Mathia

January 8, 2015