IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CARGILL, INC.,	)	Case No. CI 10-2623
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
NEBRASKA DEPARTMENT OF REVENUE; DOUGLAS A. EWALD, NEBRASKA TAX COMMISSIONER; AND THE STATE OF NEBRASKA,	)	
	)	
Respondents.	)	

This matter comes before the court on Cargill Inc.'s ("Cargill's") petition for review of a Department of Revenue ("Department") order denying Cargill's application for a tax exemption under the Nebraska Advantage Act. NEB. REV. STAT. §§ 77-5701 to 77-5735 (Reissue 2009). A hearing was held on December 9, 2010 where Attorneys Nicholas Niemann and Matthew Ottemann appeared for the petitioner and Assistant Attorney General Jay Bartel appeared on behalf of the respondents. At the hearing evidence was adduced and the matter was submitted on written arguments. The court, being fully informed, now finds and orders as follows:

BACKGROUND

The parties have stipulated to most of the relevant facts in this case, including the following:

Cargill entered into a Nebraska Advantage Act Project Agreement (the "Agreement") with the Department of Revenue ("Department") on March 13, 2007. (Exhibit 1, ¶ 16). Pursuant to the terms of the Agreement and the Nebraska Advantage Act, Cargill would be eligible to receive a

personal property tax exemption if it made an investment of at least $10 million in qualified property and hired at least 100 new equivalent employees at its Nebraska Advantage project site. (Exhibit 7, § 7(b)).

Cargill timely filed a Nebraska Department of Revenue Form 5725X on April 30, 2009 to claim a personal property tax exemption under the Act for agricultural processing equipment. (Exhibit 1, ¶ 1). The parties agreed that if the claim was approved Cargill would receive a $170,815,888 tax exemption. (Exhibit 1, ¶ 2). The claim, however, was denied by the Department. (Exhibit 1, ¶ 5). Cargill then filed a timely protest. (Exhibit 1, ¶ 7). Following an administrative hearing in April of 2010, the Tax Commissioner issued an order denying Cargill's claim for a tax exemption. Cargill now appeals that ruling.

STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act, the court reviews the Tax Commissioner's order "without a jury de novo on the record of the agency." NEB. REV. STAT. § 84-917(5)(a) (Supp. 2009). "When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings." NEB. REV. STAT. § 84-917(6)(b) (Supp. 2009).

"The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independently of . . . the administrative agency." *TracFone Wireless, Inc. v. Nebraska Public Service of Comm'n*, 279 Neb. 426, 431, 778 N.W.2d 452, 457 (2010).

DISCUSSION

The general issue in this case is whether Cargill hired 100 new equivalent employees at its Nebraska Advantage Project site during FYE 5/08. The number of new equivalent employees is

defined under the Act as follows:

> Number of new employees, for a tier 1, tier 2, tier 3, or tier 4 project, means the number of equivalent employees that are employed at the project during a year that are in excess of the number of equivalent employees during the base year, not to exceed the number of equivalent employees employed at the project during a year who are not base-year employees and who are paid wages at a rate equal to at least sixty percent of the Nebraska average weekly wage for the year of application.

NEB. REV. STAT § 77-5714(1) (Reissue 2009).

The Department interprets this definition as including two "methods" of calculating the number of new employees. The Agreement provides that the number of new equivalent employees will be the lesser of the "Method 1" and "Method 2" calculations.

Method #1:	"the number of equivalent employees that are employed at the project during a year that are in excess of the number of equivalent employees during the base year."
Method # 2:	" the number of equivalent employees employed at the project during a year who are not base-year employees and who are paid wages at a rate equal to at least sixty percent of the Nebraska average weekly wage for the year of application."

(Exhibit 7, § 8). The parties have stipulated that Cargill has hired more than 100 new equivalent employees under "Method 2." The general question in this case, then, is whether Cargill has hired 100 new equivalent employees under "Method 1."

Specifically, the parties have stipulated that Cargill will be deemed to have hired 100 new equivalent employees under "Method 1" and that the Department will approve an exemption in the amount of $ 170,815,888 if the court finds for Cargill on either one of the following two stipulated

issues:

Stipulation #1. BOTH: (a) Cargill's regular workweek for full-time hourly employees, under the Department's Revenue Ruling 29-05-4, is 42 hours per week;
AND (b) the "product of forty times the number of weeks in a year" in NEB. REV. STAT. §77-5709 means 2,080 for Cargill for FYE 5/05 and FYE 5/08.

OR

Stipulation # 2. In determining the meaning of "number of equivalent employees during the base year" in NEB. REV. STAT. § 77-5714, the term "base-year employee" in NEB. REV. STAT. §77-5706 is not to be used.

Stipulation # 1

Stipulation #1 deals with the determination of the number equivalent employees for purposes of calculating the number of new equivalent employees under "Method 1." Under NEB. REV. STAT. § 77-5720 (Reissue 2009), the term "equivalent employees means the number of employees computed by dividing the total hours paid in a year by the product of forty times the number of weeks in a year."

Part A: Total Hours Paid in a Year

The total number of hours worked is easily calculated for hourly employees. The parties disagree about how to quantify the number of hours that should be attributed to salaried employees for a week's work. Revenue Ruling 29-05-4 offers the following guidance:

> A salaried employee who is considered a full-time employee by his or her employer will be treated as having worked the number of hours established as the regular workweek for full-time hourly employees for any time period for which the full amount of the salary is paid. . . . When the employer does not use a forty hour workweek for determining full-time employment for hourly employees, then the

> number of full-time equivalents for the salaried employees will be different than the number of salaried employees . For example, if the regular full-time workweek for hourly employees is thirty-six hours, then each salaried employee will be considered to have worked thirty-six hours a week. When converted to equivalent employees of forty hours a week, each salaried employee will be nine-tenths of an equivalent employee.

Cargill argues that the "regular full-time workweek for hourly employees" should be interpreted as the number of hours worked on average by the largest number of employees. Cargill asserts that the workweek for a salaried employee is 42 hours because that is the average number of hours worked by the majority of hourly employees at the project site. The majority (163/223) of hourly employees at the site are "Operations Technicians." (Petitioner's Brief p. 19). These workers have a two week shift rotation where they work 36 hours one week and 48 hours the next. Cargill averages these two weeks together to get an average 42 hour workweek.

The Department interprets the phrase "regular full-time workweek for hourly employees" to mean the standard number of hours an employee is required to work to be considered full-time by the company. The Department argues that salaried employees should be deemed to have worked 40 hours per week because 40 hours is the standard that Cargill uses to determine who is a full-time employee for purposes of overtime, vacation, and other benefits. The Department notes that, despite Cargill's argument that the court should focus on the actual hours worked instead of employment policies when calculating the regular workweek, the company has offered no evidence that any of its employees actually work 42 hours per week.

The court finds the Department's arguments the most persuasive. While a majority of Cargill's full-time hourly employees work an average of 42 hours per week, it should be noted that

60 of the 223 full-time hourly employees at the project work 40 hours per week. (Petitioner's Brief p. 19). Cargill simply ignores this group of employees in its argument. The evidence presented does, however, show that all employees who are considered to be full-time work at least 40 hours per week. This is the standard used by the company to determine which employees are treated as full-time. For the foregoing reasons, the court finds that Cargill's "regular full-time workweek for hourly employees" is 40 hours per week. This finding is in no way inconsistent with Revenue Ruling 29-05-4.

Part B: The Number of Weeks in a Year

Under "Method 1" the number of equivalent employees is determined by dividing the "total hours paid in a year" to employees at the site by "forty times the number of weeks in a year."

The Department notes that pursuant to NEB. REV. STAT. § 77-5720 a "[y]ear means the taxable year of the taxpayer." Cargill's taxable year ran from 5/31/07 to 6/1/08. The Department argues that the number of weeks in Cargill's taxable year was actually 52.2. This number is determined by calculating the number of weeks covered by the pay periods in Cargill's FYE 5/08. The Department then multiplies 40 times 52.2 to get 2088 as the number of hours that will count as one equivalent employee.

Cargill argues that a plain reading of the statute indicates that there are 52 weeks in a 12 month fiscal year. Cargill would multiply 40 times 52 to get 2080 as the number of hours that will count as one equivalent employee. It suggests that if legislature meant to include the extra days in a pay period it could have used the phrase "number of pay periods in a year" instead of "number of weeks in a year." Cargill suggests that the definition of "year" in NEB. REV. STAT. §77-5720 does not expressly determine the length of the year in weeks, particularly because the definition of "year"

also uses the term "year." Additionally, Cargill argues that the statute uses the phrase "number of weeks in a year" instead of the number 52, because a merger or change in fiscal year may cause a taxpayer to have a taxable year that is substantially shorter than 12 months. Finally, Cargill argues that the method proposed by the Department creates much confusion, and does not support the consistent treatment of taxpayers.

"In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning." *State v. County of Lancaster*, 272 Neb. 376, 384, 721 N.W.2d 644, 650 (2006). The Department used 52 weeks in its calculation of equivalent employees for Cargill's FYE 5/05. (Exhibit 1, ¶ 48). It now attempts to use 52.2 weeks to calculate the number of equivalent employees for Cargill's FYE 5/08 despite the fact that FYE 5/05 contained the same number of days and workdays. The court finds that the "number of weeks in a year" is ordinarily understood to be 52 weeks. Therefore, the court finds that pursuant to NEB. REV. STAT. § 77-5709 the product of 40 times "the number of weeks in a year" equals 2,080. However, because Cargill did not prevail in Part A, the court cannot find for Cargill on Stipulation # 1.

Stipulation # 2

Stipulation # 2 concerns whether, for the purpose of calculating the number of new equivalent employees under "Method 1," the "number of equivalent employees during the base year" should include workers who were previously employed by Cargill at some other site in Nebraska during the base year and then transferred to the project site during FYE 5/08. Simply stated, Cargill would like to include as new employees workers who were transferred to the project site from elsewhere in the company. The Department argues that these transferred employees should be added to the number of base-year employees. The dispute centers around whether the definition of a "base-

year employee" should be used to interpret the phrase "employees during the base year." A "base-year employee" is defined as "any individual who was employed in Nebraska and subject to the Nebraska income tax on compensation received from the taxpayer or its predecessors during the base year and who is employed at the project." NEB. REV. STAT. § 77-5706 (Reissue 2009).

The Department argues that the phrase "number of equivalent employees during the base year" is simply another way of expressing the idea of "base-year employee." First, it suggests that this is how the terms were originally understood by the parties. The Department points to language in the Agreement that was meant to clarify how transferred employees would be counted: "[t]he number of equivalent base-year employees at the project will increase during the term of this Agreement if Applicant transfers employees who were employed in Nebraska by the taxpayer during the base year from other Nebraska locations into the project. . . ." (Exhibit 7, § 7 (b)). This language uses the defined term"base-year employee" to explain how transferred employees are to be counted in the calculation of "equivalent base-year employees."

Cargill argues, however, that the term "equivalent base-year employee" is a "rouge" term because it appears no where in the "Method 1" language. Cargill points out that the exact term "base-year employee" does not appear in "Method 1." Instead, "Method 1" refers to an "equivalent employee during the base year." Cargill argues that these terms have two distinct meanings. It suggests that an "equivalent employee during the base year" refers to the number of equivalent employees during the base year at the project location and does not include transferred employees. For these reasons, Cargill asserts that the language in the Agreement that purports to define "equivalent base-year employee" should not be used to determine the meaning of the phrase "equivalent employee during the base year."

Cargill makes one additional argument. It notes that "[i]n order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject." *Cox Nebraska Telecom, L.L.C. v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004). Cargill argues that the definition of "base-year employee" cannot be used to interpret the phrase "equivalent employee during the base year" because the Act is largely based on LB 775 and the legislature had previously revised LB 775 to exclude that term. Section 77-4103 (9) of the original LB 775 from 1987 defined the number of new employees as follows: "Number of new employees shall mean the excess of the average number of employees employed at the project during a year over the average number of base-year employees." In 1988 the legislature revised LB775 to count full-time "equivalent employees." The language was changed with the passage of LB 1234 which read as follows:

> ~~(9)~~(10) Number of new employees shall mean the excess of the ~~average~~ number of equivalent employees employed at the project during a year over the ~~average~~ number of equivalent ~~base-year~~ employees during the base year.

(Exhibit 31). Cargill argues that the fact that the legislature removed the term "base-year" from this section while continuing to use it in other sections of the Act is conclusive proof of its intention to substantively change the way the number of new equivalent employees is calculated.

The court finds the Department's arguments to be persuasive. A court must "place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent." *Walton v. Patil*, 279 Neb. 974, 983, 783 N.W.2d 438, 446 (2010). The Act's legislative findings state that one of its purposes is to "promote the creation and retention of new jobs in Nebraska." NEB. REV. STAT. § 77-5702 (Reissue

2009). If workers transferred from other Nebraska sites are to be counted as new employees, a taxpayer could receive a tax exemption without creating a single new Nebraska job. This outcome would be contrary to the express legislative intent.

When LB 1234 is read in concert with the express purposes of the act, it is clear that the legislature did not intend to substantively change the way transferred employees are counted. It is probable that the legislature did not intend to remove the concept of "base-year employee" but simply intended to replace the concept of the "average number" of employees with that of the "equivalent employee." In that case, the legislature could have left the word "base-year" and added the word "equivalent." The statute would have then read "equivalent base-year employees." The legislature may simply have been attempting to avoid an awkward sentence and the confusion that would arise if "employee" was preceded by two modifiers. This idea is also supported by the fact that Nebraska Advantage Act uses the term "base-year employee" in every instance where the word "employee" is not modified by the word "equivalent." For example, NEB. REV. STAT. § 77-5714 provides that the number of new equivalent employees is "not to exceed the number of equivalent employees employed at the project during a year who are not base-year employees . . . ."

For the foregoing reasons, the court finds that the definition of "base-year employee" in NEB. REV. STAT. § 77-5706 should be used to interpret the meaning of the phrase "number of equivalent employees during the base year" in NEB. REV. STAT. § 77-5714.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the decision of the Tax Commissioner is affirmed and Cargill's 2009 claim for a personal property tax exemption is denied. Costs of this action are taxed to Petitioner.

Dated this 28th day of March, 2011.

BY THE COURT:

John A. Colborn
District Judge

cc: Attorneys Nicholas Niemann and Matthew Ottemann, counsel for the Petitioner
Assistant Attorney General Jay Bartel, counsel for Respondent