DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RICHARD HENELY, Plaintiff/Appellant, v. ARIZONA STATE BOARD OF NURSING, an agency of the State of Arizona, Defendant/Appellee.	)	1 CA-CV 09-0115 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-053094

The Honorable Robert A. Budoff, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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B R O W N, Judge

¶1 Richard Henely appeals from the superior court's dismissal of his complaint against the Arizona State Board of Nursing ("the Board").[1] For the following reasons, we conclude that the court did not err in its determination that Henely failed to state a claim for declaratory relief regarding the Board's administrative procedure, but we find the court erred in dismissing Henely's claim that the Board violated the open meeting law.

BACKGROUND

¶2 In July 2006, the Board began an investigation of Henely arising from a civil lawsuit filed by a former female patient of the hospital for which Henely worked as a nurse. During the course of the subsequent investigation, the patient informed an investigator that she contemporaneously kept a journal during her hospital stay. The Board's staff concluded its investigation and scheduled the matter for presentation to the Board, with a recommendation that the Board issue a "letter of concern" to Henely.

¶3 On March 26, 2007, the Board conducted an open meeting during which it voted unanimously to accept the staff recommendation to issue a letter of concern because the evidence

[1] On the court's own motion, it is hereby ordered amending the caption for this appeal as reflected in this decision. The above referenced caption shall be used on all documents filed in this appeal.

was insufficient to take disciplinary action against Henely. The letter of concern was mailed and Henely received it the following day. On that same day, however, the Board informed Henely that it intended to "reopen" his case so that the patient could make a statement to the Board. On March 28, 2007, the Board reopened the case, a portion of the patient's journal was read into the record, and ultimately the Board voted to rescind the letter of concern and reopen the investigation.

¶4 On May 16, 2007, the case was again presented at an open meeting. The Board's staff suggested that the Board go into executive session for the purpose of reviewing confidential information, which according to Henely, was the patient's journal. Following the executive session, the Board voted to send the case to hearing.

¶5 The administrative law judge subsequently vacated Henely's scheduled four-day hearing to allow Henely to seek relief in the superior court. Henely filed a complaint seeking a declaratory judgment that the Board did not have the legal authority to reopen, review, or reconsider the previously issued letter of concern and that the Board's rescission of the letter was null and void. He also alleged open meeting law violations and sought an order nullifying the Board's actions taken in violation of the open meeting laws, in addition to monetary penalties and attorneys' fees.

¶6 The Board moved to dismiss based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. After the completion of briefing on the issue, the superior court granted the motion, finding no subject matter jurisdiction to consider the claim for declaratory relief and that both counts failed to state claims for which relief could be granted. Henely timely appealed the dismissal and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶7 In reviewing the superior court's decision to dismiss a complaint for failure to state a claim, "we assume as true the facts alleged in the complaint and will not affirm the dismissal unless satisfied as a matter of law that the [plaintiff] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fidelity Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998).

A. Declaratory Relief

¶8 Henely asserts that the superior court erred in granting the Board's motion to dismiss because his claim under the Uniform Declaratory Judgments Act ("UDJA"), A.R.S. §§ 12-

1831 to -1846 (Supp. 2009)[2] stated a claim from which relief could be granted. We disagree.

¶9 The UDJA provides generally that any person whose "rights, status, or other legal relations are affected by statute" may seek a judicial determination as to the construction or validity of the statute. *See* A.R.S. § 12-1832 (2003). The UDJA is to be interpreted liberally. *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 45, ¶ 10, 13 P.3d 785, 787 (App. 2000). However, "[i]n every declaratory judgment action, there must be sufficient factual allegations to outline a justiciable controversy." *Riley v. County of Cochise*, 10 Ariz. App. 55, 59, 455 P.2d 1005, 1009 (1969).

¶10 A justiciable controversy exists if there is "an assertion of a right, status, or legal relation in which plaintiff has a definite interest" and there is a denial of that interest by the opposing party. *See Keggi*, 199 Ariz. at 45, ¶ 10, 13 P.3d at 787 (quoting *Samaritan Health Serv. v. City of Glendale*, 148 Ariz. 394, 395, 714 P.2d 887, 888 (App. 1986)); *see also Riley*, 10 Ariz. App. at 59, 455 P.2d at 1009 (1969) (To be entitled to relief, a plaintiff's "pleading must present a state of facts showing he has a present legal right against the defendant with respect to which he may be entitled as a general

[2] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

rule to some consequential relief, immediate or prospective."). Thus, the UDJA is properly invoked when a party has 1) a protectable interest, and 2) that interest has been denied. *See Ariz. Soc'y of Pathologists v. Ariz. Health Care Cost Containment Sys. Admin.*, 201 Ariz. 553, 557, ¶ 19, 38 P.3d 1218, 1222 (App. 2002).

¶11 Nowhere in the record before us does Henely properly allege facts establishing that he was denied a protectable interest by the Board. Instead, he argues that the Board lacked authority to rescind its letter of concern and reopen its investigation. He asserts that the letter of concern foreclosed all further inquiry and that the Board's decision to issue the letter was an adjudicative act, not a discretionary one; thus the Board was not free to change its mind. He further argues that administrative agencies do not have implied or inherent powers, so the Board's action, absent clear statutory language permitting reopening completed investigations, cannot be supported on that basis.

¶12 In essence, Henely's claim for declaratory relief suggests, without so stating, that Henely had a right to rely on the Board's initial letter of concern as conclusively terminating the investigation against him and that its decision to rescind the letter and reopen the investigation denied him

that right. In support of his argument he cites A.R.S. § 32-1664(G) (2008) which states:

> If *after completing* its investigation the board finds that the information provided pursuant to this section is not of sufficient seriousness to merit direct action against the licensee or certificate holder it may take either of the following actions:
>
> . . .
>
> 2. File a letter of concern if in the opinion of the board there is insufficient evidence to support direct action against the licensee ... but sufficient evidence for the board to notify that person of its concern.

(Emphasis added.) He argues that the plain language of the statute makes it clear that a letter of concern can only be issued once an investigation is complete; thereby foreclosing continued investigation. He cites *Murphy v. Bd. of Med. Exam'rs of State of Ariz*. in support of this interpretation of the statute. 190 Ariz. 441, 949 P.2d 530 (App. 1997). We do not agree that *Murphy* supports his position.

¶13 *Murphy* involved a doctor's challenge to the issuance of a letter of concern by the Arizona Board of Medical Examiners wherein this court found that the letter was not a "decision, order or determination of an administrative agency rendered in a case, that affects the legal rights, duties or privileges of persons and which terminates the proceeding before the

administrative agency." A.R.S. § 12-901(2) (2003); *Murphy*, 190 Ariz. at 448, 949 P.2d at 537. On that basis, we held that the "issuance of a letter of concern is not a final decision subject to review before the agency or superior court." 190 Ariz. at 448-49, 949 P.2d at 537-38. Although we acknowledged that the letter of concern was a decision to terminate the investigation, we specifically found that such a decision was discretionary. *Id*. at 448, 949 P.2d at 537. Moreover, we decided that Murphy's allegations of harm were purely speculative because merely placing a letter of concern in Murphy's file did not affect any legal right or privilege. *Id*.

¶14 Although *Murphy* did not involve an action for declaratory relief, its reasoning applies with equal force here because a final determination has not yet been made. Although Henely continues to be under investigation for allegations of misconduct, that procedure in itself is not a violation of any of Henely's legal rights or privileges—indeed, the procedure serves to protect his interests. The Board has significant latitude in determining how and when to conduct, or continue, investigations regarding its license holders. *See* A.R.S. § 32-1664(A), (G) (making both an investigation regarding professional misconduct and action following such investigation discretionary by use of the word *may* as opposed to *shall*). Notably, the Board could complete its investigation and

ultimately determine that no action regarding Henely's license is necessary, thus leaving Henely in a better position than had the Board chosen not to rescind the letter of concern. As we noted in *Murphy*, the placement of a letter of concern in a licensee's file, or in this case, the continued investigation to determine if such action is appropriate, does not affect a legal right or privilege; any possible harm from such action is purely speculative. *Murphy*, 190 Ariz. at 448, 949 P.2d at 537.

¶15 Henely made a bare allegation in his complaint that a "justiciable controversy exists between the parties." On appeal, he states that an "actual controversy" exists because his nursing license is under investigation and is subject to "unnecessary scrutiny and speculation by the public, including employers and patients." These broad allegations, raised for the first time, do not identify a justiciable controversy. Thus, Henely has not alleged or otherwise identified a protectable interest that has been denied. As such, we do not find a justiciable controversy exists for the purposes of a declaratory judgment action under the UDJA and therefore the superior court did not err in dismissing Henely's declaratory relief claim for failure to state a claim. Based on this conclusion, we need not consider whether the superior court had subject matter jurisdiction over Henely's request for a declaratory judgment.

B. Open Meeting Law Violations

¶16 Henely asserts that the superior court erred in dismissing his complaint regarding a violation of the Open Meeting Law, A.R.S. §§ 38-431 to -431.09 (Supp. 2009). "When a trial judge grants a motion to dismiss, we will affirm only if the facts pled by [a]ppellant—and assumed by us to be true—fail to state a claim upon which relief can be granted." *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 120, 912 P.2d 1345, 1349 (App. 1995).

¶17 In his complaint, Henely challenged the Board's actions at its May 16, 2007, meeting. Henely alleged that the Board's decision to discuss his investigation in executive session, for the purpose of reviewing confidential records, violated the Open Meeting Law because the patient's journal was not a confidential record. *See* A.R.S. § 38-431.03 (2001) (providing that a public body may convene in executive session to discuss or consider "records exempt by law from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law"). Henely further alleged that the Board improperly discussed the merits of the case and also talked about matters that were not described in the Board's

agenda giving notice of the executive session.[3] We find these allegations sufficient to support Henely's claim challenging the Board's executive session held on May 16, 2007. *See Fisher,* 185 Ariz. at 120, 912 P.2d at 1349.

¶18 The Open Meeting Law describes the required procedures for conducting valid meetings of public bodies. *See id*. at 122-23, 912 P.2d at 1351-52. These statutory provisions require public bodies to conduct meetings in a manner that ensures the public can attend and monitor the meetings. *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 569, 20 P.3d 1148, 1150 (App. 2000). The Open Meeting Law also requires that all legal actions be preceded both by disclosure of what is to be discussed and what information will be made available so that the public may scrutinize any action taken at the meeting. *Karol v. Bd. of Ed. Trustees, Florence Unified Sch. Dist. No. 1*, 122 Ariz. 95, 98, 593 P.2d 649, 652 (1979). Pursuant to A.R.S. § 38-431.07(A) (2001), "[a]ny person affected by an alleged violation of [the laws], . . . may commence a suit in the superior court . . . for the purpose of requiring compliance with, or the prevention of violations of, [the law],

[3] Henely also alleged that the Board again violated Open Meeting Laws on March 20, 2008, when it attempted to ratify its prior actions from the May 16, 2007, meeting. Based on our conclusion that Board failed to meet its burden of showing compliance with executive session requirements, we need not address issues relating to the Board's attempted ratification.

by members of the public body, or to determine the applicability of [the law] to matters or legal actions of the public body."

¶19 The burden of proving a violation of the Open Meeting Law generally rests on the plaintiff asserting the violation; however, this is not the case for challenges to executive sessions. *Fisher*, 185 Ariz. at 120-21, 912 P.2d at 1349-50 (citing *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 486 n.4, 803 P.2d 891, 897 n.4 (1990)). A public body has the "burden of proving that its actions fall within an executive session exception . . . ." *Id*. at 121, 912 P.2d at 1350. Thus, the Board has the burden of proving that its decision to discuss Henely's case behind closed doors was in compliance with the Open Meeting Law. *See Fisher*, 185 Ariz. at 122, 912 P.2d at 1351 ("Requiring a plaintiff to plead and prove specific facts regarding alleged violations that are taking place in secret is a circular impossibility."). Based on the scant record before us, the Board has not met its burden. Other than generally denying the allegations of the complaint, the Board has not provided evidence of compliance with the Open Meeting Law. Additionally, the Board failed to counter Henely's contention that the patient waived any confidentiality to the journal's contents by testifying and allowing excerpts from her journal to be read aloud. A copy of the Board's meeting agenda was provided to the superior court; however, nothing in the record

indicates that the superior court (1) reviewed the contents of the journal to determine its confidentiality or (2) examined the minutes of the executive session to determine what matters were discussed.

¶20 We conclude that the superior court erred when it dismissed Henely's claim that the Board violated the Open Meeting Laws.

C. Attorneys' Fees

¶21 Henely seeks an award of attorneys' fees and costs incurred on appeal pursuant to various statutes and also the private attorney general doctrine. Because Henely has not prevailed on his claim for declaratory relief, we deny his request for fees relating to that claim. For his claim relating to Open Meeting Law violations, he cites A.R.S. § 38-431.07(A), which provides that a court may "order payment to a successful plaintiff in a suit brought under this section of the plaintiff's reasonable attorney fees, by the defendant state, the political subdivision of the state or the incorporated city or town of which the public body is a part or to which it reports." Awarding attorneys' fees under § 38-431.07(A) at this juncture would be premature. The superior court may award fees after it determines whether Henely ultimately becomes a "successful plaintiff." Regarding costs incurred on appeal, we decline to award costs to either party as neither party

prevailed on the merits. *Columbia Parcar Corp. v. Ariz. Dep't of Transp.*, 193 Ariz. 181, 185, ¶¶ 20-21, 971 P.2d 1042, 1046 (App. 1999).

CONCLUSION

¶22 We affirm the superior court's dismissal of Henely's claim requesting a declaratory judgment regarding the Board's rescission of the letter of concern. We reverse, however, the court's dismissal of Henely's claim alleging violations of the Open Meeting Laws and thus remand for further proceedings.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
ANN A. SCOTT TIMMER, Chief Judge