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18-P-1071

Appeals Court

PAUL C. NORDBERG vs. COMMONWEALTH & others.¹

No. 18-P-1071.

Worcester. April 10, 2019. - October 10, 2019.

Present: Rubin, Henry, & Wendlandt, JJ.

Department of Youth Services. Statute, Appropriation of money, Construction. Declaratory Relief. Jurisdiction, Declaratory relief, Justiciable question. Practice, Civil, Declaratory proceeding, Motion to dismiss. Governmental Immunity.

Civil action commenced in the Superior Court Department on October 11, 2017.

A motion to dismiss was heard by Jane E. Mulqueen, J.

Paul C. Nordberg, pro se.
Maryanne Reynolds, Assistant Attorney General, for the Commonwealth.

WENDLANDT, J. The plaintiff, Paul C. Nordberg, appeals from a judgment dismissing his complaint seeking a declaration,

¹ Commissioner of the Department of Youth Services and Secretary of the Executive Office for Administration and Finance.

pursuant to the Declaratory Judgment Act, G. L. c. 231A, §§ 1-9 (the act), as to the proper construction of line items set forth in the general appropriation acts in each of four consecutive years ("budget statutes"). The line items at issue appropriate certain funds for "enhanced" salaries for teachers working at the Department of Youth Services (DYS).² The defendants moved to dismiss pursuant to Mass. R. Civ. P. 12 (b) (1), 365 Mass. 754 (1974), and Mass. R. Civ. P. 12 (h) (3), 365 Mass. 754 (1974), contending that neither the act nor the budget statutes created a private right of action for such a declaration and they have not waived sovereign immunity. A Superior Court judge allowed the motion. We reverse in part.

Background. Nordberg is a teacher employed by the Collaborative for Educational Services (CES) of Northampton. CES contracts to provide education services for youth in the custody of DYS.³ Pursuant to the contract, Nordberg has taught at DYS facilities for the last twelve years. For each fiscal

² St. 2017, c. 47, § 2, line item 4200-0500; St. 2016, c. 133, § 2, line item 4200-0500; St. 2015, c. 46, § 2, line item 4200-0500; St. 2014, c. 165, § 2, line item 4200-0500.

³ Specifically, the complaint avers that Nordberg's employer, CES, has a contractual relationship with Commonwealth Corporation. Commonwealth Corporation has a contractual relationship with DYS to provide educational services for youth in the custody of DYS. Nordberg's complaint assumes that he and other similarly situated teachers employed by CES are teachers at DYS for purposes of the line items at issue. Whether that assumption is valid is not before us.

year from 2015 to 2018, the general appropriation act included a line item for "enhanced salaries for teachers at the department of youth services." See note 2, supra. The complaint alleges that the purpose of these line items was to make DYS teachers' salaries more competitive. While the precise amount allocated to the line items varied from year to year, it was always slightly over \$3 million. Nordberg alleges that the full amount appropriated was not spent. For two of the fiscal years, Nordberg asserts that DYS received less than \$300,000 in salary increases; for one fiscal year, Nordberg asserts none of the appropriated funds were spent.⁴

Nordberg brought this action pursuant to G. L. c. 231A, seeking a declaratory judgment that the line items required DYS to increase teachers' salaries such that (1) for each fiscal year, DYS teachers' aggregate raises had to equal the full amount in each fiscal year's respective line item, and (2) for each subsequent year, the base salary scale for teachers should have been increased by the prior year's allocation. The defendants moved to dismiss, arguing that Nordberg does not have a private right of action and there had been no waiver of sovereign immunity.

⁴ At the time that Nordberg filed his complaint, the figures for the final fiscal year in question (2018) were not available.

Discussion. We review the allowance of a motion to dismiss pursuant to rule 12 (b) (1) for lack of subject matter jurisdiction de novo, accepting the complaint's allegations as true and drawing all reasonable inferences in favor of the plaintiff. See New Bedford Educators Ass'n v. Chairman of the Mass. Bd. of Elementary & Secondary Educ., 92 Mass. App. Ct. 99, 106 (2017); 311 W. Broadway LLC v. Board of Appeal of Boston, 90 Mass. App. Ct. 68, 73 (2016). Subject matter jurisdiction "concerns a court's competence to adjudicate a particular category of cases" and requires us to ask whether the "Legislature empowered the court to hear cases of a certain genre." Wachovia Bank, Natl Ass'n v. Schmidt, 546 U.S. 303, 316 (2006). See Weiler v. PortfolioScope, Inc., 469 Mass. 75, 93 n.38 (2014).

1. Private right of action. The defendants contend that the court lacks subject matter jurisdiction over Nordberg's complaint because Nordberg does not have a private right of action to seek a declaratory judgment as to the meaning of the line items. Whether a plaintiff has a private right of action does not concern the court's subject matter jurisdiction. See Arroyo-Torres v. Ponce Fed. Bank, F.B.S., 918 F.2d 276, 280 (1st Cir. 1990). Compare Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 543, 547 (1998) (affirming grant of summary judgment where enabling statute did not create private right of

action to enforce regulation). Instead, the issue whether a private right of action exists affects whether the plaintiff has an actionable claim. See Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974) (dismissal for failure to state claim for which relief can be granted). "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." Unitrode Corp. v. Dynamics Corp. of Am., 379 Mass. 487, 491 (1980), quoting Transamerica Mtge. Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979). We will not construe a statute to establish a private right of action without express terms or clear legislative intent to that effect. See Loffredo, supra at 543. Whether subject matter jurisdiction exists and whether a party had a private right of action both raise questions of law that we can assess on the record before us. Accordingly, we address both issues.

Nordberg maintains that subject matter jurisdiction is appropriate under § 2 of the act and that he has a cause of action for a determination of the proper construction of the line items of the budget statutes and the defendants' compliance therewith. Section 2 provides, inter alia, that "[t]he procedure [for obtaining a declaratory judgment] under section

one^[5] may be used to secure determinations of right, duty, status or other legal relations under . . . [a] statute . . . including determination of any question of construction or validity thereof which may be involved in such determination."

G. L. c. 231A, § 2. Section 2 provides further that the declaratory judgment procedure under § 1 may be used "to obtain a determination of the legality of the administrative practices and procedures of any . . . state agency or official which

⁵ General Laws c. 231A, § 1, provides, in relevant part:

"The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such"

The complaint alleges that, over the course of fifteen months, Nordberg repeatedly reached out to the defendants in an effort to garner their agreement as to the meaning of the line item, but was unsuccessful. The defendants do not argue that (i) the complaint fails to meet the "actual controversy" requirement of § 1 or (ii) Nordberg lacks standing. See Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 292-293 (1977) (act may be used to resolve dispute over meaning of statute so long as plaintiff has standing).

practices or procedures^[6] are alleged to be in violation of . . . [the] laws of the commonwealth . . . which violation has been consistently repeated" Id.

The complaint here falls within the act. It seeks a determination that it is the duty of DYS to allocate the full amount of funds appropriated in the line items for teacher raises. The complaint avers that, for each of the fiscal years at issue, DYS's repeated and usual method of conducting its business -- specifically, its failure to expend (in full) the funds appropriated for teacher raises -- violated its obligation under the budget statutes, and seeks a declaration that Nordberg's construction of these statutes is correct.

Relying on Boston Med. Ctr. Corp. v. Secretary of the Executive Office of Health & Human Servs., 463 Mass. 447, 471 (2012) (Boston Medical), the defendants maintain that the act cannot be used to circumvent the legislative decision not to create a private right of action within the budget statutes themselves. The Supreme Judicial Court rejected a similar argument in Service Employees Int'l Union, Local 509 v. Department of Mental Health, 469 Mass. 323, 335 (2014), holding that "[a] plaintiff may seek the equitable remedy of declaratory

⁶ General Laws c. 231A, § 2, defines "practices [and] procedures" as, inter alia, "the customary and usual method of conducting . . . state agency or official business."

relief, even if the relevant statute does not provide a private right of action" (citation omitted).⁷ More recently, the court has reiterated that "a dispute over an official interpretation of a statute constitutes a justiciable controversy for purposes of declaratory relief." Kain v. Department of Env'tl. Protection, 474 Mass. 278, 281 (2016), quoting Santana v. Registrars of Voters of Worcester, 384 Mass. 487, 493 (1981).

Boston Medical is not to the contrary. That case concerned a comprehensive statutory scheme and complex rate setting algorithm for hospitals serving low-income and vulnerable populations. Boston Medical, 463 Mass. at 451-452. Significantly, the rate setting statute provided for judicial review of certain rates but explicitly excluded hospital rates from this process. See Id. at 454-455. In that context, the court held that the act cannot be used to "circumvent a legislative judgment denying a provider the opportunity to seek . . . judicial review of the reasonableness of payment rates" (citation omitted). Id. at 471. See Second Church in

⁷ Relying on G. L. c. 29, § 63, which creates a mechanism for twenty-four taxpayers to challenge prospectively a State agency's decision to expend money in an unauthorized manner, the defendants argue that the existence of this statute implies a legislative intent not to create a private right of action regarding construction of line items in general appropriation acts. As set forth infra, however, courts have exercised jurisdiction to determine rights and duties under line items of budget statutes in cases other than those brought under G. L. c. 29, § 63.

Dorchester v. Boston, 343 Mass. 477, 479-480 (1962) (action under act impermissible where allowing action would circumvent statute of limitations applicable to tax controversies). Here, unlike in Boston Medical, the budget statutes do not prohibit judicial review of the proper construction of a line item. See Service Employees Int'l Union, Local 509, 469 Mass. at 336 ("To be sure, a party may not seek declaratory relief to effect an 'end run' around the absence of a private right of action where the Legislature intended to foreclose certain remedies" [emphasis added]).

Indeed, as the defendants acknowledge, the Supreme Judicial Court has exercised subject matter jurisdiction to resolve disputes between an individual with standing and State officials regarding the proper construction of line items in budget statutes. See, e.g., Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 743, 751 (2018) (exercising jurisdiction over claim that State agency's practices regarding placement of families on emergency assistance failed to comply with line items in budget statute); Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 858-859 (2004) (in an action for declaratory and injunctive relief against State officials, court construed line item in budget appropriation for emergency assistance program). See also Felicetti v. Secretary of Communities & Dev., 386 Mass. 868, 873 (1982) (exercising

jurisdiction over suit against State officials who refused to release funds appropriated in line item of budget statute); ABCD, Inc. v. Commissioner of Pub. Welfare, 378 Mass. 327, 334 (1979) (exercising jurisdiction over suit against State officials challenging their decision to impound funds appropriated in line item of budget statute on basis that it would be wasteful and contrary to legislative purpose to release funds).

The defendants distinguish these cases on the ground that they involved "extraordinary" issues regarding public benefit entitlements existing under other statutes; however, the defendants cite no legal basis to limit the courts' subject matter jurisdiction to such situations. Indeed, courts have exercised subject matter jurisdiction over declaratory judgment actions seeking construction of a statute (and State officials' compliance therewith) in contexts other than emergency assistance benefits without reference to whether the underlying statute itself creates a private right of action. See Village Dev. Co. v. Secretary of the Executive Office of Env'tl. Affairs, 410 Mass. 100, 110 (1991) (holding G. L. c. 231A provided subject matter jurisdiction and rejecting argument that "another statute must expressly provide jurisdiction before a declaratory judgment action may be brought"). See also Kain, 474 Mass. at 281 (exercising jurisdiction over declaratory judgment action to

determine proper construction of Global Warming Solutions Act requiring agency to develop regulations to reduce greenhouse gas emissions); Peterborough Oil Co. v. Department of Env'tl. Protection, 474 Mass. 443, 444 (2016) (exercising jurisdiction over declaratory judgment action seeking construction of term "oil" in agency regulations and statute). Contrast Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 725-726 (2016) (declaratory judgment action was not proper where there was no actual controversy as to construction of regulation).

It is significant that the defendants have not challenged Nordberg's standing, as set forth in note 5, supra.⁸ "Assuming that a plaintiff has proper standing to bring the action, a dispute over an official interpretation of a statute constitutes a justiciable controversy for purposes of declaratory relief" (citation omitted). Santana, 384 Mass. at 493.

The defendants next contend that Nordberg lacks a private right of action because an appropriation sets a maximum amount to be spent for a specified purpose;⁹ it is not a requirement

⁸ "It is settled that G. L. c. 231A does not provide an independent statutory basis for standing. . . . It is not enough that the plaintiffs be injured by some act or omission of the defendant; the defendant must additionally have violated some duty owed to the plaintiffs" (citation and quotation omitted). Enos v Secretary of Env'tl. Affairs, 432 Mass. 132, 135 (2000)

⁹ In his brief on appeal, Nordberg suggest that we "acknowledge" that monies appropriated in the line items may have been used for "illegal" purposes. However, Nordberg's

that the full amount of the funds appropriated be spent. See G. L. c. 29, § 1 (defining "appropriation" as "authorization . . . of the expenditure of budgeted revenues from a specified fund for a specified purpose up to a specified maximum amount for a specified period of time" [emphases added]). This argument, however, does not address either the court's subject matter jurisdiction or whether Nordberg has a private right of action for declaratory relief as to the proper construction of a line item in a budget statute and the defendants' compliance therewith.

Instead, the defendants' argument addresses the merits (or lack thereof) of Nordberg's claims that the line items mandate that the full amount appropriated be spent.¹⁰ That question is

complaint does not include such an allegation or a basis therefor, the defendants' position is that the appropriated funds have been used only for teachers' salaries, and the complaint fails to allege an "actual controversy" regarding the ability to use the appropriated funds for purposes other than those set forth in the line items at issue. Accordingly, we address neither Nordberg's aforementioned suggestion nor the defendants' response that Nordberg has failed to follow the process set forth in G. L. c. 29, § 63 (setting forth procedure for twenty-four taxpayers challenging prospective spending of monies contrary to legal right). See, e.g., Mitchell v. Secretary of Admin., 413 Mass. 330, 330 n.1, 331 (1992) (twenty-four taxpayer suit regarding prospective transfer of funds from transportation fund to general fund).

¹⁰ The defendants' reliance on Attorney Gen. v. Baldwin, 361 Mass. 199, 206 (1972), for the proposition that an appropriation creates no "legal obligation" is misplaced. In that case, a licensee who was obligated under a license with the Commonwealth to build a culvert tried to rely on an appropriation line item

not before us and is premature at this stage of the proceedings. For present purposes, it is sufficient that the complaint alleges that that the requirement of the line items is being violated; indeed, according to the complaint, at least in one fiscal year, the defendants spent none of the line item at all for enhanced salaries. See, e.g., Felicetti, 386 Mass. at 873, quoting Opinion of the Justices, 375 Mass. 827, 836 (1978) ("While the executive branch may decline to expend funds if such expenditure would be wasteful, that decision will be upheld only if there was a prior determination 'that such a decision will not compromise the achievement of underlying legislative purposes and goals'"); ABCD, Inc., 378 Mass. at 335 ("Although the circumstances in which the Executive Department may decline to implement legislation are strictly limited by constitutional principles, it has some discretion 'not to spend money in a wasteful fashion, provided that [it] has determined reasonably

in the State budget setting aside funds to be used for the Commonwealth to build a culvert to negate the licensee's obligation. Id. at 205-206. Rejecting the argument that the licensee's legal obligations under the license were affected by the appropriation, the court stated that the "appropriation of public funds [does] not establish any legal obligation on the part of the Commonwealth to do [the] same." Id. at 206. The case did not hold that line items in a budget statute do not have the force of law. To the contrary, the cases discussed supra exemplify that a party with standing to do so, may seek a declaratory judgment seeking construction of a line item.

that such a decision will not compromise the achievement of underlying legislative purposes and goals'" [citation omitted]).

2. Sovereign immunity. The defendants next contend that, absent a waiver of sovereign immunity, Nordberg cannot maintain an action under the act. Whether a defendant has sovereign immunity raises questions of subject matter jurisdiction. See Vining v. Commonwealth, 63 Mass. App. Ct. 690, 691 (2005) (waiver of sovereign immunity "grants subject matter jurisdiction to courts of the Commonwealth for claims against governmental entities"). In a case like this, the defendants are correct with regard to the Commonwealth. See Executive Air Serv., Inc. v. Division of Fisheries & Game, 342 Mass. 356, 357-358 (1961). See also Walter E. Fernald Corp. v. Governor, 471 Mass. 520, 525 (2015) ("we have continued to maintain that a plaintiff cannot sidestep the common-law shield of sovereign immunity, to the extent that shield remains intact, by using the procedural device of an action for declaratory judgment"). Thus, the complaint properly was dismissed as against the Commonwealth.

However, the act expressly includes a limited waiver of sovereign immunity for government agencies and officials with regard to determinations of right, duty, status, or other legal relations under statute and with regard to the legality of administrative practices and procedures. See G. L. c. 231A, § 2

(preserving sovereign immunity for declaratory relief only as to "the governor and council [and] the legislative and judicial departments"); Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15, 23-24 (2006) (declaratory judgment against State official). See also Barnes v. Secretary of Admin., 411 Mass. 822, 822 n.2 (1992) (dismissing declaratory judgment action regarding line item in State budget as against Governor on basis of sovereign immunity preservation pursuant to G. L. c. 231A, § 2, but not as against other State officials).¹¹

¹¹ As set forth supra, at this stage of the proceedings, Nordberg has sufficiently alleged that the underlying requirement of the line items is being violated. Of course, a blanket declaration requiring the executive to spend the full amount appropriated, in circumstances where the executive department has determined that the legislative purposes can be achieved with less spending, implicates constitutional separation of powers principles. See Opinion of the Justices, 375 Mass. at 832, 835-836, 839 (prohibition against less than full expenditure of line item in budget statute by executive unconstitutional interference with the "discretion by the Governor to avoid wasteful expenditures in circumstances where the social purposes of the underlying legislation are not compromised"); Opinion of the Justices, 302 Mass. 605, 615 (1939) ("however minutely appropriations are itemized, some scope is left for the exercise of judgment and discretion by executive or administrative officers or boards in the expenditure of money within the limits of the appropriation"). Indeed, in his brief, Nordberg acknowledges that DYS teacher salaries are determined by collective bargaining negotiations between DYS and the Service Employees International Union, Local 509. Nothing in our decision should be read to limit the agency's discretion to negotiate favorably within the limits of the funds appropriated so long as the underlying purpose of the line items is met. See Opinion of the Justices, 375 Mass. at 835-836. We note finally that the parties have not addressed (and we have accordingly not adjudicated) the extent to which

Conclusion. Insofar as the judgment dismisses the complaint against the Commonwealth, it is affirmed. The remaining portions of the judgment are reversed.

So ordered.

Nordberg's claims, which are based on prior fiscal year line items authorizing spending for a single year, are moot.