

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-729

PAUL C. NORDBERG

vs.

PETER J. FORBES¹ & another.^{2,3}

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This appeal comes before us after proceedings on remand from our previous decision, in which we held that the plaintiff's complaint stated a claim under the declaratory judgment act. See Nordberg v. Commonwealth, 96 Mass. App. Ct. 237 (2019) (Nordberg I); G. L. c. 231A. On remand, the defendants again moved to dismiss, this time for lack of standing. See Mass. R. Civ. P. 12 (b) (1) and 12 (h) (3), 365

¹ As Commissioner of the Department of Youth Services.

² Michael J. Heffernan, as Secretary of the Executive Office for Administration and Finance.

³ The Commonwealth was a named defendant on the original complaint but was dismissed as a defendant in prior proceedings. See Nordberg v. Commonwealth, 96 Mass. App. Ct. 237, 245 (2019) (Nordberg I).

Mass. 754 (1974).⁴ The plaintiff appeals from the judgment dismissing his case. For the reasons that follow, we reverse.

Background. "We limit our consideration to the factual allegations in the plaintiff's complaint, taking them as true and drawing all reasonable inferences in the plaintiff's favor." Porter v. Board of Appeal of Boston, 99 Mass. App. Ct. 240, 243 (2021). "To survive a motion to dismiss, the factual allegations must plausibly suggest that the plaintiff is entitled to relief[, and] they must 'raise a right to relief above the speculative level'" Id. at 244, quoting Harrington v. Costello, 467 Mass. 720, 724 (2014).

Nordberg alleges that in each of the years 2014, 2015, 2016, and 2017 (setting the budget for fiscal years [FY] 2015, 2016, 2017, and 2018, respectively), the Legislature appropriated approximately three million dollars "[f]or enhanced salaries for teachers at the department of youth services." He further alleges that teachers like him at the Department of Youth Services (DYS)⁵ did not receive a raise, or a raise

⁴ The defendants also ask us to dismiss the case on the ground of mootness as the fiscal years to which the appropriations pertain have passed. The appropriation occurs annually and the language in the appropriation measures at issue appear to be inserted annually. Thus, this case is one that is "capable of repetition yet evading review." See Seney v. Morhy, 467 Mass. 58, 61 (2014); Matter of Sturtz, 410 Mass. 58, 60 (1991).

⁵ Nordberg was employed by a DYS contractor. The parties agree for purposes of this appeal that the line items were intended to apply to teachers employed by contractors.

commensurate with the appropriation, in all of those years. Fairly read, he asserts that he would have received a pay raise in each year had the appropriations been expended, and furthermore, that the appropriations would have resulted in cumulative raises in each succeeding year.

Nordberg further states he has "repeatedly contacted . . . state government officials" seeking the answers he now seeks via request for declaratory judgment. He has contacted the Commissioner of DYS, the Secretary of the Commonwealth's Executive Office for Administration and Finance, the Attorney General, and the State Auditor. He alleges that none of those officials have "taken any action consistent with the relief sought in this complaint," given him any indication that they are considering such action, or clarified the meaning of the line items. He further avers that he has met with legislative staff responsible for the appropriations bills at issue, that he explained his concern that raises were not being allocated to teachers at DYS, and that these staffers agreed that the words "enhanced salaries" would remain in the appropriations measures.

Discussion. "We review the judge's legal rulings as to the plaintiff['s] standing de novo." Pishev v. Somerville, 95 Mass. App. Ct. 678, 682 (2019). "It is settled that G. L. c. 231A does not provide an independent statutory basis for standing." Enos v. Secretary of Env'tl. Affairs, 432 Mass. 132, 135 (2000).

However, "[t]he notion of standing is an 'elastic concept[]' whose meaning depends on the particular parties at issue, and 'standing requirements should be liberally construed' in declaratory judgment proceedings" (citations omitted). Service Employees Int'l Union, Local 509 v. Department of Mental Health, 469 Mass. 323, 329 (2014), S.C., 476 Mass. 51 (2016).

"A party has standing pursuant to G. L. c. 231A where the defendant has violated some duty owed to the plaintiff . . . , and where the plaintiff . . . can allege an injury within the area of concern of the statute or regulatory scheme. In assessing whether a party may seek declaratory relief, we have considered the text and purpose of the relevant statute and the nature of the administrative scheme it sets forth, the availability of other remedies for the plaintiff . . . , and any adverse consequences that might follow should standing be recognized" (quotations and citations omitted). Service Employees, 469 Mass. at 328.

Liberally construed, and taking the allegations of the complaint as true, Nordberg has alleged the violation of a duty owed to him. The appropriations statutes provided for pay raises for DYS teachers, of which he is one. He has alleged that he would have received pay increases had the agency implemented the enhanced salaries contained in the appropriations. Nordberg's complaint falls within the "zone of

interests arguably protected" by the line items in the appropriations measures. See Enos, 432 Mass. at 135. See also Service Employees, 469 Mass. at 328-329.

Moreover, the declaratory judgment remedy is the remedy least likely to promote adverse consequences, as opposed to, for example, a mandamus action. See Service Employees, 469 Mass. at 334-335. The defendants claim that Nordberg's complaint threatens to violate the separation of powers by forcing the government to expend funds in a certain manner. This argument conflates the merits and the appropriate scope of declaratory relief with standing. "The threshold question of whether [a plaintiff] has standing is different than the ultimate merit of [his] allegations." Hoffman v. Board of Zoning Appeal of Cambridge, 74 Mass. App. Ct. 804, 809 (2009). "A review of standing . . . does not require that the factfinder ultimately find a plaintiff's allegations meritorious. To do so would be to deny standing, after the fact, to any unsuccessful plaintiff" (citation omitted). Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81, 91 (2007). Nordberg may or may not obtain the relief he seeks, but as currently presented, he has alleged a duty.

The defendants further contend that Nordberg can demonstrate no cognizable injury and that DYS has discretion as to how to expend appropriated funds, that the statutes did not

require that DYS raise any particular teacher's salary, that the salary structure is in any event collectively bargained, and that this suit improperly interferes with the defendants' authority to allocate funds as they see fit. The defendants also assert that the Commonwealth in fact has expended the appropriated funds on teacher salaries, although it acknowledges that this contention is one that cannot be resolved on a motion to dismiss on the basis of the present record.

We think the latter acknowledgment is equally applicable to the defendants' other arguments, which are implicitly (if not explicitly) fact based. "Frequently, the question whether a plaintiff has made the requisite showing is a question of fact." Butler v. Waltham, 63 Mass. App. Ct. 435, 440 (2005). To repeat, the complaint alleges that if the monies were expended the plaintiff would have received a raise. For purposes of its motion to dismiss the defendants must take that allegation as true. However, the premise underlying the defendants' arguments is that this allegation is untrue, that Nordberg was not entitled to a raise, that the appropriations were expended, and that the defendants acted appropriately in the exercise of their discretion. Compare Felicetti v. Secretary of Communities & Dev., 386 Mass. 868, 873 (1982). Yet we have been provided no record, no collective bargaining agreements, and no affidavits as to how the monies were spent or what discretionary decisions

were made. Contrast id. (challenge to expenditure of funds under appropriation measure submitted on motion for summary judgment on statement of agreed facts). The matter is not appropriately adjudicated on a motion to dismiss, and there is no factual record to support treating the defendants' motion in any other way.⁶ See, e.g., Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974).

To the extent that the defendants appear to posit that their discretionary powers of the purse are immune from challenge, we consider the proposition too broad. See generally Foster v. Commissioner of Correction, 488 Mass. 643, 657 (2021) (appropriate to amend complaint to include additional budget line item). As we previously noted in Nordberg I, 96 Mass. App. Ct. at 242, we have repeatedly exercised jurisdiction over disputes between individuals with standing and State officials regarding the construction of budget statutes. See Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 743 & 751 (2018); Wilson v. Commissioner of Transitional Assistance, 441

⁶ We further note that the factual showing required to demonstrate standing is not the same as the factual showing required to succeed on the merits. "When the factual inquiry focuses on standing, . . . a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true." Butler, 63 Mass. App. Ct. at 441. The relevant question will be whether Nordberg "put forth credible evidence of a particularized injury." Hoffman, 74 Mass. App. Ct. at 809, quoting Butler, supra.

Mass. 846, 858-859 (2004); Felicetti, 386 Mass. at 875; ABCD, Inc. v. Commissioner of Pub. Welfare, 378 Mass. 327, 334 (1979).

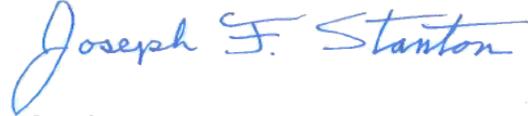
The argument should be assessed in its factual context.

We pause to reiterate the unusual posture of this case. That is, after two appeals, we still have no basis upon which to evaluate any of the allegations of the complaint or the arguments made by the defendants. Nothing in this opinion should be taken as suggesting that we endorse the underlying merits of plaintiff's claims. We additionally note that when the merits of his claims are addressed, he will face the significant burden of demonstrating that the agency's

interpretation and implementation of the statutes was unreasonable.⁷

Judgment reversed.

By the Court (Milkey,
Sullivan & Ditkoff, JJ.⁸),



Clerk

Entered: May 13, 2022.

⁷ The defendants apparently interpret the statutes as requiring that the salaries be \$3 million greater than the FY 2009 amount, and that each line item after that is to fund that FY 2010 raise. Nordberg alleges that each line item required that the salaries be raised \$3 million over the previous year, so that the FY 2022 salaries should be \$39 million higher than those in FY 2009. Assuming 175 teachers, as alleged, that would mean that the average salary would be \$222,857 more in FY 2022 than it was in FY 2009. That allegation may seem facially implausible, but the defendants did not file dispositive motions on the merits, or make any argument on this basis either in the Superior Court or on appeal. Nor did they provide an affidavit showing that the funds had been expended or for what purpose, thus demonstrating that the department exercised whatever discretionary authority it had in a manner that complied with the law as interpreted by them. Compare Felicetti, 386 Mass. at 875.

⁸ The panelists are listed in order of seniority.