COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss. SUPERIOR COURT
C.A. 14-80

JOHN P. O'ROURKE,
PLAINTIFF
vs.

MARTHA COAKLEY, in her capacity as
ATTORNEY GENERAL OF
THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR JUDICIAL REVIEW

Introduction

Plaintiff John P. O"Rourke's complaint seeks judicial review pursuant to G.L. c. 30A, § 14, and pursuant to Massachusetts Superior Court Standing Order 1-96 of a settlement between the Attorney General and the Hampshire Council of Governments ("Council") concerning allegations that the Council violated the Massachusetts Open Meeting Law (OML) (G.L. c. 30A, §§ 18-25; 940 CMR 29). Plaintiff, who is a former employee of the Council, asks this Court to nullify the settlement—to which plaintiff was not a party—and to order the Attorney General to impose more stringent penalties on the Council.

Summary of plaintiff's complaint and defendant's motion to dismiss.

For purposes of the present motion, I accept as true, as I must, all well-pleaded factual allegations of the complaint, but disregard conclusions and characterizations asserted therein. *See Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) ("we do not accept legal conclusions cast in the form of factual allegations"); *Sisson v. Lhowe*, 460

Mass. 705, 707 (2011); *Welch v. Sudbury Youth Soccer Ass'n*, 453 Mass. 352, 354 (2009); *Eyal v. Helen Broad. Corp.*, 411 Mass. 426, 429 (1991).

Plaintiff's complaint alleges he was terminated from his employment at the Hampshire Council of Governments on August 19, 2013 by the Executive Director after deliberations and vote by the Executive Committee on August 15, 2013 in an unlawful executive session.

On or about October 18, 2013, plaintiff filed a complaint with the Attorney General alleging that the Executive Committee's closed sessions violated the Open Meeting Law.[1] The Attorney General responded to Plaintiff's October 18, 2013 complaint by conducting an OML Investigation. On March 13, 2014, the Attorney General issued OML 2014-24, a determination that "the Executive Committee violated the Open Meeting Law by holding discussions in executive session on three occasions in August 2013 that were not appropriate" under the § 21(a) purpose claimed by the Executive Committee. OML 2014-24 then ordered the "Executive Committee's immediate and future compliance with the Open Meeting Law" and "refer[red] this matter for a hearing" with a recommendation that the Executive Committee be ordered to compensate plaintiff for the period of unemployment between his termination at the behest of the Executive Committee and the Council's subsequent public affirmation of his termination, a remedy that the Attorney General may not take without a hearing, pursuant to 940 CMR 29.07(3).

Thereafter, on June 30, 2014, the Attorney General and the Council reached a "Settlement Agreement" in the matter (attached Exhibit B to Attorney General's motion)

[1] On November 5, 2013, plaintiff filed suit in Northampton District Court against the Council, Civil Action No. 1345-cv-259, alleging a failure to pay wages accrued as of the date of his termination. On January 16, 2014, the Council and plaintiff dismissed the district court action with prejudice.

in accordance with the preceding recommendation which the Attorney General determined obviated the need for a hearing. *See* complaint. ¶¶ 37, 38. Under the Settlement Agreement: (1) the Attorney General reiterated its conclusion that the Council's Executive Committee violated the open meeting law and that the Attorney General did not find that the violation to be an intentional violation; (2) the Council denied it violated the Open Meeting Law; (3) the Council agreed to compensate Plaintiff for three days' employment; and (4) the parties stipulated the agreement did not constitute an admission, that they entered into the agreement to avoid the need for a hearing, and that the Council waived any right it had to a hearing or appeal.

While plaintiff was waiting for the hearing to be scheduled by the Attorney General, plaintiff made multiple requests to the Assistant Attorneys General of the Division of Open Government. On July 2, 2014, plaintiff received a call from an Assistant Attorney General and was informed by the Assistant Attorney General that there would not be a hearing and that the matter had been settled with the Council. On July 16, 2014, plaintiff received a letter from the Assistant Attorney General with a copy of the Settlement Agreement executed by the Assistant Attorney General and the Counsel.

Plaintiff submits that the Attorney General' settlement agreement with the Council is (a) in violation of constitutional provisions in that it does not seriously consider the denial of plaintiff's due process rights; (b) is unsupported by substantial evidence in that the Assistant Attorney General devoted only three sentences to the issue that the Council's discussion, deliberation and vote on plaintiff's termination was not conducted in lawful executive sessions; (c) was is an "extreme abuse of discretion in that the Assistant Attorneys General of the Division of Open Government clearly acted with extreme bias

in favor of the public body and against the public employee": (d) was "not in accordance with the law in that the Attorney General concluded that the Council cured their multiple violations of the Open Meeting Law by holding an open session of the Full Board to confirm the termination of plaintiff on August 22, 2013." *See* complaint, p. 19.

In his requests for relief, plaintiff requests the Court to set aside the settlement agreement and compel the Attorney General to enforce the Open Meeting Law "by awarding the only remedy that would satisfy the demands of justice and equity in this matter" which would "reinstate [plaintiff] to his position as of August 19, 2013 without loss of compensation, seniority, tenure or other benefits;" nullify "all contracts entered into by the Council in connection with or as a result of the dismissal of Mr. O'Rourke"; award plaintiff his "attorneys' fees and costs, and enjoin the individual defendants from interfering in any manner with plaintiff's exercise of rights secured by the First and Fourteenth Amendments to the United States Constitution or from basing any action regarding Plaintiff's employment upon Plaintiff's exercise of First Amendment rights," *See* complaint, pp. 19-20.

In urging that plaintiff's complaint be dismissed pursuant to Mass. R. Civ. P. 12(b)(1), (5), (6), and (7), the Attorney General submits that the Legislature has vested her with the authority to enforce the Open Meeting Law. The Attorney General exercised that authority, investigated the allegation, determined that a violation occurred, and resolved the matter. The Attorney General submits that plaintiff cannot intercede, and that this Court lacks jurisdiction to grant the relief requested and the complaint should be dismissed with prejudice.

Standard of review

Plaintiff's complaint purports to be a claim for judicial review pursuant to G.L. c. 30A, § 14, which allows certain persons "aggrieved by a final decision of any agency in an adjudicatory proceeding" to file a claim in Superior Court for judicial review. Given my agreement with the Attorney General that the target of the requested judicial review (OML 2014-24 and the Settlement Agreement) are not "final decision[s] of any agency in an adjudicatory proceeding," the complaint should be reviewed under a motion to dismiss standard rather than the procedure for responding to a request for judicial review under G.L. c. 30A, § 14.

The standard of review for a motion to dismiss is well established: whether plaintiff 's allegations, if accepted as true and with every reasonable inference drawn in his favor, are "sufficient, as a matter of law, to state a recognized cause of action or claim," or to "plausibly suggest an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008).

Because the Legislature charged the Attorney General with enforcing the Open Meeting Law statute, her construction of it is accorded "great weight." *City of Springfield v. Civil Service Com'n*, 469 Mass. 370 (2014). Where "the Attorney General's office is the department charged with enforcing" a statute, "its interpretation of the protections provided thereunder is entitled to substantial deference, at least where it is not inconsistent with the plain language of the statutory provisions." *Camara v. Attorney General*, 458 Mass. 756, 759 (2011).

Discussion.

(a) Judicial Review under the Open Meeting Law.

The Open Meeting Law grants public bodies the right to pursue judicial review of the Attorney General's enforcement of the law. The Attorney General submits that plaintiff, himself, is not a public body and is therefore barred from seeking judicial review, and further submits that even if plaintiff were afforded the same right as a public body to seek judicial review under § 23(d), plaintiff cannot satisfy the remaining jurisdictional requirements of the law.

I agree. When the Legislature amended the Open Meeting Law in 2009, it enacted § 23(d) review as the sole avenue for judicial review of the Attorney General's enforcement actions under the law:

> *A public body or any member of a body* aggrieved by any order issued pursuant to this section may, notwithstanding any general or special law to the contrary, obtain judicial review of the order *only through an action in superior court seeking relief in the nature of certiorari*; provided, however, that notwithstanding section 4 of chapter 249, any such action shall be commenced in superior court within 21 days of receipt of the order. (emphasis supplied).

G.L. c. 30A, § 23(d).

While entities other than public bodies have a right to raise complaints with the Attorney General. G.L. c. 30A, § 23(b)-(e); 940 CMR 29.05-07, the Legislature did not grant such entities any right to participate in the litigation or resolution of their complaints, much less appeal to the courts the Attorney General's enforcement actions. Similarly, only the Attorney General can bring a suit to compel compliance with its enforcement actions. G.L. c. 30A, § 23(e).

Citizens may bring lawsuits to enforce the Open Meeting Law, but the public's right to seek redress in court is limited to lawsuits brought by "3 or more registered vot-

ers." *Id.* Furthermore, unlike the instant action brought against the Attorney General, such claims must be brought against the public body accused of violating the Open Meeting Law. *Id.* When the Legislature granted the Attorney General and groups of three voters the right to enforce the Open Meeting Law, it excluded the possibility of any private actions brought by individuals. *See Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 372-373 (2008) (where a statute running to the benefit of employees includes a grant of authority to enforce the law, the law may only be enforced by those granted authority in the statute, and in accordance with the terms of the statute).

Plaintiff's right to bring an Open Meeting Law violation complaint to the Attorney General—which he did—and his right to partner with two other voters and bring a lawsuit against the public body are, therefore, the limits of plaintiff's involvement in the enforcement of the Open Meeting Law. This is consistent with the overall purpose of the law. "The open meeting law reflects a general policy that all meetings of a governmental body should be open to the public unless exempted by the statute." *Dist. Attorney for N. Dist.*, 455 Mass. 561, 563 (2009). Public bodies and their members are the only entities that can be punished under the Open Meeting Law. The Open Meeting Law does not create individual rights for members of the public.

The scope of Attorney General's authority to enforce the Open Meeting Law is consistent with the prosecutorial discretion afforded other state agencies charged with administrative enforcement actions. *See Binns v. Board of Bar Overseers*, 369 Mass. 975, 975 (1976) ("Nowhere in the rule has provision been made for an appeal by a complainant from any decision of the board. A citizen filing a complaint with the board is not a party to any action taken against the attorney, nor are the citizen's rights jeopardized. As

in the case of a criminal prosecution, the complainant may be a witness, but he may not appeal or participate as a party to the litigation."); *Berman v. Board of Registration in Medicine*, 355 Mass. 358, 360 (1969) (even assuming a petitioner "has the right to compel the [Board of Registration of Medicine] to consider whether to act in respect of a matter of public concern within its jurisdiction" the petitioner has no "further right to bring a public action to review the board's preliminary discretionary decision not to act. There is no such right under our statutes or law.").

A private citizen not wishing to relinquish control of his allegations against a public body is not without options, as he may collaborate with two other voters to bring a direct action against the public body. G.L. c. 30A, § 23(f). That has not happened here.

(b) The remaining requirements of § 23(d) review.

§ 23(d) only allows for judicial review of an "order" of the Attorney General, and only if the action is commenced within 21 days of receipt of the order. This action satisfies neither requirement.

A settlement agreement does not constitute an "order." Absent the Council's assent to the Settlement Agreement, the Attorney General has no statutory authority to order the remedy contained therein without a hearing pursuant to G.L. c. 30A, § 23(c) and 940 CMR 29.07. The Settlement Agreement can be categorized only as an "informal action," which is not subject to § 23(d) Review. 940 CMR 29.07.

In any event, even if an "order" was before me triggering § 23(d) review, plaintiff's suit is time-barred because it was filed August 15, 2014, more than 21 days after the July 16, 2014 date plaintiff admitted he received the Settlement Agreement and months after OML 2014-24 issued on March 14, 2014. Complaint, ¶ 38. *See* G.L. c. 30A, § 23(d)

(actions must be "commenced in superior court within 21 days of receipt of the order.") This deadline is a jurisdictional. *See Clemons v. Dir. of the Div. of Employment Sec.*, 395 Mass. 174, 176 (1985) (statutory deadlines for filing request for judicial review are jurisdictional requirements, and a failure to comply with them results in the dismissal of the appeal); *Bonfatti v. Zoning Bd. of Appeals*, 48 Mass. App. Ct. 46, 50 (1999) ("Bonfatti's complaint for judicial review, filed a year after the planning board's decision, was untimely.")

(c) Judicial review under G.L. c. 30A, § 14.

Plaintiff seeks judicial review of the Attorney General's settlement with the Council under G.L.c. 30A, § 14. The Attorney General argues that the Legislative grant of § 23 review, however, necessarily precludes plaintiff's use of § 14 review to appeal the resolution of an Open Meeting Law investigation.

Review under § 14 is a generally available form of judicial review that is not available when a specific form of judicial review is otherwise provided by statute:

> Except so far as any provision of law expressly precludes judicial review, any person . . . aggrieved by a final decision of any agency in an adjudicatory proceeding . . . shall be entitled to a judicial review thereof . . . [except that] . . . [w]here a statutory form of judicial review or appeal is provided such statutory form shall govern in all respects, except as to standards for review.

G.L. c. 30A, § 14. *See also Olmstead v. Department of Telecommunications and Cable*, 466 Mass. 582, 591 (2013) (a claim for § 14 review is not available for final orders issued by the Department of Telecommunications and Cable because such orders are issued pursuant to G.L. c. 25, § 5 of which provides a method of judicial review). Even where a statutory provision for judicial review does not contain "express language . . . which bars

other avenues of review," if the statute "sets out a particularized method of judicial review," that method constitutes an "exclusive mode of review." *New England Milk Dealers Ass'n, Inc. v. Department of Food and Agriculture*, 22 Mass. App. Ct. 705, 706-707 (1986) (meaning of "exclusive mode of review" as used in G.L. c. 30A, § 7).

I conclude therefore that judicial review under § 23 of the Open Meeting Law itself necessarily precludes § 14 review. *See New England Milk Dealers Ass'n, Inc.*, 22 Mass. App. Ct. at 707 (the "handiwork of the Legislature in enacting [the method of judicial review] would be a nullity if alternate review offering different limitation periods, different specifications for the record, and a different scope of relief were available.") Plaintiff may not simply opt for § 14 review and supplant or evade the Legislature's decision to limit claims for judicial review to those filed by a public body. The only fair reading of the Open Meeting Law is that § 23(d) specifies limits only on the ability of public bodies to seek review because other entities have no ability to seek review at all.

Accordingly, courts have jurisdiction to hear a request for judicial review of the Attorney General's resolution of Open Meeting Law violations only if the claim for judicial review is brought by a public body and pursuant to the requirements of § 23 review. Thus, plaintiff may not seek review under § 14.

Moreover, even if the Open Meeting Law did not automatically prohibit any § 14 review of the Attorney General's resolution of complaints, plaintiff failed to name and serve a necessary party and his claim must fail. Here, plaintiff sues the Attorney General to force reinstatement[2] by the Council—yet he has not sued the Council which terminated

[2] At the hearing on this motion, plaintiff advised that he was abandoning his request for reinstatement. The concession, however, will not save this action.

his employment. *DeSimone v. Civil Service Com'n*, 27 Mass. App. Ct. 1177, 1178 (1989) (declaratory action for reinstatement must name the employer, not just the agency that previously denied plaintiff's request for reinstatement, and "the appropriate disposition was dismissal of the action for failure to join an indispensable party"). Plaintiff seeks payments from, and further employment by, the Council. Plaintiff's requested relief would fundamentally prejudice, impair and impede the Council's ability to protect its own financial interest. The Council is a necessary and indispensable party to plaintiff's claims. Mass. R. Civ. P. 19 (requiring the joinder of a person if that person is required for complete relief to existing parties or if the disposition of the action may impair or impede that person's interests).

Having not named the Council as a defendant, or even alleged that he served the Council in accordance with the requirements of § 14(2) ("Service shall be made upon the agency and each party to the agency proceeding in accordance with the Massachusetts Rules of Civil Procedure governing service of process"), plaintiff's claim must be dismissed. *See* Mass. R. Civ. P. 12(b)(5) and (7).

Finally, only those "*aggrieved* by a *final decision* of any agency in an adjudicatory proceeding" may seek review under § 14. (emphasis supplied). Because there was no adjudicatory proceeding and no final decision, plaintiff has not been aggrieved by the Attorney General's actions. "Adjudicatory proceeding" is "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." G.L. c. 30A, § 1. *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 115-116 (1984) (issue is "whether the [plaintiff]

is a specifically named person whose legal rights, duties or privileges have been determined by the [defendant] in circumstances that constitutionally or statutorily require an opportunity for a hearing." Here, no hearing was held simply because the Attorney General and Council resolved their dispute over compliance with the Open Meeting Law. Neither OML 2014-24 nor the Settlement Agreement determined plaintiff's rights. The Attorney General's investigation was whether or not the public's right to a transparent government was violated. She did not determine whether plaintiff's employment rights were or were not violated. In fact, plaintiff pursued an action against his employer in the district court, which action was dismissed with prejudice. There was no adjudicatory proceeding which is the sine qua non of review under § 14. *See School Committee of Hudson v. Board of Ed.*, 448 Mass. 565 (2007) (a decision to grant a school charter was the adjudication of the rights of the school, not a concerned entity such as the town's school committee); *School Committee of Springfield v. Board of Ed.*, 365 Mass. 215, 230 (1974).

"Even if we were to assume that" this appeal arose from what "fairly could be characterized as 'adjudicatory proceedings,'" it does not mean that the Attorney General issued "a final order" as would be required for § 14 review. *Collective Bargaining Reform Ass'n v. Labor Relations Com'n*, 436 Mass. 197, 203-204, 763 (2002).

A settlement is not even a "decision," much less a "final decision."

> [A] settlement agreement clearly is not a "final decision" as required under G.L. c. 30A, § 14 . . . Pursuant to G.L. c. 30A, § 14(4), the agency's answer to the plaintiff's complaint is to consist of the record of the proceeding under review. Furthermore, pursuant to G.L. c. 30A, § 14(5), the Superior Court's review is confined to the record; and, under G.L. c. 30A, § 14(7), the court can only set aside an agency decision for a few specific reasons. That record is not available when a disposition is arrived at through an agreement of the parties.

Tecce v. Office of State Fire Marshal, 2004 WL 2550514, at *3, 18 Mass.L.Rptr. 392, No. 20041164A (Mass. Super. Ct. Oct. 18, 2004) (Bohn, J.). *See also Teamsters Local Union 480 v. UPS*, 748 F.3d 281, 289 (6th Cir. Tenn. 2014) ("Because the Settlement Agreement was not a decision reached at any step of the grievance procedure, it is not final and binding under this clause of the CBA."); *U.S. v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) ("A consent decree is 'essentially a settlement agreement subject to continued judicial policing.' It is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise.") (emphasis added) (internal citations omitted); *Beatrice Foods Co. v. F.T.C.*, 540 F.2d 303, 312 (7th Cir. 1976) ("The entering of a consent decree, however, is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto.") (emphasis added).

A party must be *aggrieved* in a legal sense and show that substantial rights have been prejudiced in order to obtain § 14 review in the Superior Court. *Board of Health of Sturbridge v. Board of Health of Southbridge*, 461 Mass. 548 (2012); *B.K. v. Department of Children and Families*, 79 Mass. App. Ct. 777, 783 (2011) (rejecting a c. 30A, § 14, claim despite the defendant's failure to comply with its own regulations because "no showing of prejudice . . . has been made"). Plaintiff has not been aggrieved in any legal sense by the Attorney General's settlement with his former employer. OML 2014-24 and the Settlement Agreement have not prejudiced any employment right plaintiff may have. Neither OML 2014-24 nor the Settlement Agreement purport to limit plaintiff's employment rights. *See Matter of Trust Under Will of Fuller*, 418 Mass. 466, 483-484 (1994)

("only the Attorney General [as opposed to non-parties] is bound by the Attorney General's settlement"). The mere fact that plaintiff benefited somewhat from the Settlement Agreement—surely to a lesser degree than he would have liked—does not alter the underlying purpose of the Open Meeting Law which is to enforce the *public body's* obligation to be transparent, not private rights.

Because plaintiff cannot demonstrate that he was aggrieved by the Attorney General's actions, he is not entitled to § 14 review. Nor nor can plaintiff challenge in the Superior Court the type or severity of the remedy negotiated between the Council and the Attorney General. Just as a reviewing court cannot "interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh[,]" *Mass. Elec. Co. v. Dep't of Pub. Util.*, 469 Mass. 553, 576 (2014) (quotations omitted), a reviewing court should not be able to interfere because plaintiff feels the negotiated penalty is too lenient.

ORDER

For the foregoing reasons, defendant's motion to dismiss plaintiff's complaint with prejudice is **ALLOWED**.

Edward J. McDonough Jr.
Justice of the Superior Court
Date: 1/15/15