TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-12-00453-CV

State Board for Educator Certification, Appellant

v.

Robert D. Lange, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT
NO. D-1-GN-11-001843, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellee Robert D. Lange is a former Texas high-school teacher whose certification as an educator—a prerequisite to his continuing to teach in this state[1]—was permanently revoked by the State Board for Educator Certification. The revocation was based on findings that he had, on two separate occasions, engaged in oral sex with an eighteen-year-old female, "C.S.," with knowledge that C.S. was then enrolled as a high-school student, albeit at a school other than the one at which he taught. As Lange acknowledges, he had first met C.S., then sixteen, in his capacity as her martial-arts instructor at a private studio he ran, and that Lange had since evolved into the role of C.S.'s "sensei," described by Lange as a "rather complicated" combination of "drill instructor, a father figure, and the person the student[] can go to with any problem or question." C.S. added that Lange's "sensei" role was "much more significant than instructor-student . . . more so in the capacity of a priest or pastor, . . . someone who leads someone else along a certain path."

[1] *See* Tex. Educ. Code § 21.003(a).

Lange challenged the Board's order in Travis County District Court and prevailed, obtaining a judgment reversing and remanding the order as "not supported by substantial evidence" and "arbitrary and capricious." We will reverse the district court's judgment and render judgment affirming the Board's order.

As the district court's judgment alludes, review of the Board's order by courts is governed by the "substantial evidence" standard that is codified in the Administrative Procedure Act, under which Lange has the burden to demonstrate that his substantial rights have been prejudiced because the Board's actions lack reasonable support in the record.[2] The analysis entails

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[2] More specifically, a reviewing court reverses or remands a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are:

> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code § 2001.174(2). Further, a reviewing court "may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." *Id*. § 2001.174.

Substantial-evidence review is essentially a rational-basis test to determine, as a matter of law, whether an agency's order finds reasonable support in the record. *See Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc*., 665 S.W.2d 446, 452–53 (Tex. 1984). "The test is not whether the agency made the correct conclusion in our view, but whether some reasonable basis exists in the record for the agency's action." *Slay v. Texas Comm'n on Envtl. Quality*, 351 S.W.3d 532, 549 (Tex. App.—Austin 2011, pet. denied). We apply this analysis without deference to the district court's judgment. *See Texas Dep't of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex. 2006) (per curiam). We presume that the Board's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden is on Lange to demonstrate otherwise. *See Slay*, 351 S.W.3d at 549.

two component inquiries: (1) whether the Board made findings of underlying facts that logically support the ultimate facts and legal conclusions establishing the legal authority for its decision; and, in turn, (2) whether those findings of underlying fact are reasonably supported by evidence.[3] Lange does not dispute the underlying facts regarding his sexual activities with C.S. and that he knew at the time that C.S. was a high-school student.[4] Rather, Lange's focus is the other inquiry within the substantial-evidence analysis—whether or how the Board possessed legal authority to revoke his certificate based on these facts and evidence.

In this regard, it is helpful to observe initially that the Texas Legislature has broadly charged the Board with "regulat[ing] and oversee[ing] all aspects of the certification, continuing education, and standards of conduct of public school educators,"[5] and specifically empowered and directed the Board to promulgate rules providing for, *inter alia*, "the regulation of educators

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[3] *See, e.g.*, *Vista Med. Ctr. Hosp. v. Texas Mut. Ins. Co.*, 416 S.W.3d 11, 26–27 (Tex. App.—Austin 2013, no pet.) (citing *Charter Med.-Dallas*, 665 S.W.2d at 453).

[4] The Board's order was preceded by a contested-case proceeding before an administrative law judge (ALJ) from the State Office of Administrative Hearings. By agreement of the parties, in the view that the material facts were undisputed, the controlling issues were submitted on cross-motions for summary disposition on a record consisting chiefly of oral depositions and written statements from both Lange and C.S. The ALJ subsequently issued a proposal for decision with material proposed fact findings including that Lange and C.S. had engaged in oral sex on two separate occasions while Lange was employed as a high-school teacher in a Dallas-area school district, that C.S. was enrolled at the time as a high-school student in a different Dallas-area district, and that Lange had been aware at the time of her status as a high-school student. The Board also made findings acknowledging that the incidents occurred "away from campus during a time when school was not in session" (i.e., at Lange's martial arts studio, in the context of their non-school-related "sensei" relationship), that the conduct was consensual, and that C.S. was eighteen years of age at the time. The ALJ also made proposed conclusions of law that we will discuss shortly. The Board's order adopted in toto the ALJ's proposed findings of fact and conclusions of law with the sole exception of a recommendation that the Board "should revoke the Texas Educator Certificate held by [Lange]"—the Board modified this language to make the revocation permanent.

[5] Tex. Educ. Code § 21.031(a).

and the general administration of this subchapter in a manner consistent with this subchapter" (Subchapter B of Education Code Chapter 21); "the adoption, amendment, and enforcement of an educator's code of ethics"; and "disciplinary proceedings, including the suspension or revocation of an educator certificate" through an Administrative Procedure Act contested-case process.[6] In response to these delegations and directives, the Board has promulgated rules prescribing a "Code of Ethics and Standard Practices for Texas Educators" (a/k/a an "Educators' Code of Ethics")[7] and other substantive standards of educator conduct;[8] providing that violations of these standards are grounds for disciplinary action, including suspension or revocation of an educator's certificate;[9] and detailing the processes by which the Board enforces these standards.[10]

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[6] *Id*. § 21.041(b)(1), (7), (8). To be precise, the Board "proposes" its rules subject to the veto power of the State Board of Education, *see id*. § 21.042, but that component of the statutory scheme is not at issue here.

[7] *See* 19 Tex. Admin. Code §§ 247.1 (State Bd. for Educator Certification, Purpose and Scope; Definitions), .2 (Code of Ethics and Standard Practices for Texas Educators). As we will discuss shortly, this case is governed by the version of the Board's rules in effect at the time of Lange's conduct, and some of the provisions we discuss have been amended in the meantime. Where there are no differences between the current and applicable versions of a rule that are material to the point in discussion, we cite the current version for convenience.

[8] *See, e.g.*, *id.* § 249.15(b)(2) (Disciplinary Action by [Board]) (authorizing disciplinary action where Board determines, "based on satisfactory evidence," that "the person is unworthy to instruct or to supervise the youth of this state").

[9] *See id*. § 249.15(a) (prescribing range of disciplinary actions, which include suspension and revocation), (b) (enumerating grounds for disciplinary actions, which include "the person is unworthy to instruct or to supervise the youth of this state," "the person has violated a provision of the Educators' Code of Ethics," and others).

[10] *Id.* §§ 249.14 (Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition), .18–.44. More precisely, the Texas Education Agency provides administrative and support functions for the Board, *see* Tex. Educ. Code § 21.035; but for clarity we have used "the Board" when referencing both the agency itself and any functions TEA performs on its behalf.

The ultimate facts or legal conclusions on which the Board relied for its revocation decision was that Lange's conduct had violated a provision of the Educators' Code of Ethics, a ground for revocation under the Board's rules.[11] The specific Code provision invoked by the Board was Standard 3.6, a prohibition against educator–student "sexual conduct" or "romantic relationship."[12] Lange's challenges to the Board's legal authority center on the wording of Section 3.6 at the time of his acts made the basis for revocation. While the Board has since promulgated amendments to make the provision's scope more explicit, at relevant times Standard 3.6 had stated only that "[t]he educator shall not solicit or engage in sexual conduct or a romantic

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[11] *See* 19 Tex. Admin. Code § 249.15(a), (b)(3).

[12] Staff had also asserted other revocation grounds that included the one addressed in this Court's recent *Montalvo* opinion—that Lange's conduct demonstrated he was "unworthy to instruct or to supervise the youth of this state." 19 Tex. Admin. Code § 249.15(b)(2) ("The [Board] may take any of the [prescribed disciplinary] actions . . . based on satisfactory evidence that: . . . (2) the person is unworthy to instruct or to supervise the youth of this state . . . ."); *see generally State Bd. for Educator Certification v. Montalvo*, No. 03-13-00370-CV, 2015 Tex. App. LEXIS 12025 (Tex. App.—Austin Nov. 24, 2015, pet. filed) (mem. op.). The Board's subsequent order includes a legal conclusion acknowledging its authority to revoke Lange's certificate on this alternative "unworthy to instruct" ground, but it ultimately omits any explicit finding or conclusion that this ground existed or was a basis for revocation. Nor has the Board's litigation and appellate counsel argued that the order could be affirmed on this basis. In any event, in light of our ensuing analysis regarding the Standard 3.6 ground, we need not address whether the Board was or would be within its discretion in also determining that Lange was "unworthy to instruct" based on the facts here. *But see id*., at *12–16 (acknowledging that "unworthy to instruct" standard refers to an "absence of those moral and mental qualities" that are essential to performing the trusted role of educator, that "[t]he Board is given broad discretion to carry out its duties to regulate educators, including the discretion to determine who is unworthy to instruct," and that a finding of "unworthy to instruct" does not require any underlying determination that the educator violated some law, rule, or policy) (internal quotations and citations omitted). However, as we will explain shortly, the breadth of the "unworthy to instruct" standard and its long history in Texas educator-certification law nonetheless informs our analysis of Lange's arguments concerning Standard 3.6 and the Board's statutory authority.

relationship with a student,"[13] with no accompanying definition of "student."[14] Lange's arguments center on the absence of an explicit definition of "student" in this earlier version of Section 3.6.[15] In his view, "student" in its undefined state,[16] properly construed, does not extend to his "private" and "lawful" sexual activity while not "wearing his educator hat"—i.e., in a non-school setting, with a student who is enrolled at a school other than the one at which he taught, and there is no claim that the activity was nonconsensual or that he otherwise violated the criminal law.[17]

We reject Lange's proposed construction of Standard 3.6.[18] In the absence of an explicit definition of "student" in Standard 3.6, we look to the ordinary meaning of that term, viewed

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[13] *See* 27 Tex. Reg. 4515 (2002) (Code of Ethics and Standard Practices for Texas Educators), *adopted by* 27 Tex. Reg. 7530 (2002), *subsequently amended by* 35 Tex. Reg. 8038 (2010) (adding "or minor"), *adopted by* 35 Tex. Reg. 11242 (2010) (current version at 19 Tex. Admin. Code § 247.2(3)(F)).

[14] *Cf.* 35 Tex. Reg. 8041 (2010) (Definitions) (defining "student" as "[a] person enrolled in a primary or secondary school, whether public, private, or charter, regardless of the person's age, or a person 18 years of age or younger who is eligible to be enrolled in a primary or secondary school, whether public, private, or charter"), *adopted by* 35 Tex. Reg. 11249 (2010), *amended by* 36 Tex. Reg. 5592 (2011), *adopted by* 36 Tex. Reg. 8533 (2011) (current version at 19 Tex. Admin. Code § 249.3(54)).

[15] Lange does not dispute that he would be an "educator" and that his activities with C.S. would be "sexual conduct" within the meaning of the rule.

[16] Lange acknowledges that the amended version of Standard 3.6 and accompanying definition of "student" would have reached his conduct with C.S.

[17] It appears uncontested that the conduct at issue would fall outside the Penal Code prohibitions that are potentially implicated by teacher–student sexual activity, most notably including the "improper relationship between educator and student" prohibition, which has been limited to educator sexual activity with students who are either enrolled at the same school where the educator works or are participants in certain school-related activities. *See* Tex. Penal Code § 21.12. Whether this has any bearing on construction of the Board's rules or statutory authority is another matter, as we will discuss shortly.

[18] Construction of statutes or rules is a question of law that we review de novo. *See, e.g.*, *State v. Public Util. Comm'n*, 344 S.W.3d 349, 356 (Tex. 2011).

in the context in which the term is used.[19] As the Board maintains, a straightforward, ordinary-meaning construction of "student" in the context of its rules and the overarching statutory scheme would include a person who attends one of the schools with respect to which the Board exercises jurisdiction over educators, which undisputedly includes Texas public high schools like C.S. attended.[20] And contrary to Lange's arguments, as the Board further observes, nothing in Standard 3.6 purports to limit or qualify the scope of "student" according to whether she or he attends the same school where the educator in question is employed, the age of the "student," whether the sexual conduct would independently violate the criminal law, or any other feature of the activity.[21] Nor are any such limitations evident from the Educators' Code of Ethics as a whole or other Board disciplinary rules, which contemplate at least some application beyond the context of schools and school-centered relationships,[22] including conduct that is not necessarily criminal.[23] In the very least,

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[19] *See, e.g.*, *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

[20] *See Webster's Third New Int'l Dictionary* 2268 (2002) (defining "student" to include "a person engaged in study," and "one devoted to learning as . . . one enrolled in a class or course in a school, college, or university: PUPIL"); *see also The American Heritage Dictionary of the English Language* 1732 (5th ed. 2011) (defining "student" as "one who is enrolled or attends classes at a school, college, or university).

[21] *See TGS–NOPEC*, 340 S.W.3d at 439 (we presume the enactment's language was chosen with care, with each word included or omitted purposefully).

[22] *See, e.g.*, 27 Tex. Reg. 4515 (2002), *adopted by* 27 Tex. Reg. 7530 (2002) (prohibiting educator from "furnish[ing] alcohol or illegal/unauthorized drugs to any student or knowingly allow[ing] any student to consume [same] in the presence of the educator"), *subsequently amended by* 35 Tex. Reg. 8038 (2010), *adopted by* 35 Tex. Reg. 11242 (2010) (current version at 19 Tex. Admin. Code § 247.2(3)(G)).

[23] 19 Tex. Admin. Code § 249.15(f) (authorizing discipline for "student loan default or child support arrears"). *See also* our further discussion of the "unworthy to instruct" disciplinary ground, *infra*.

the Board's construction and application of Standard 3.6 here is reasonable and not inconsistent with the rule's text, such that we should defer to it.[24]

Lange ultimately falls back to the argument that Standard 3.6, so construed, exceeds the Board's statutory authority. This seems to be the view of the dissent as well. Such concerns are misplaced in the face of the expansiveness of the Legislature's delegation of regulatory authority to the Board, previously noted, and the historical and policy context in which the Legislature used that language. Illustrating the breadth of this grant is this Court's recent opinion in the *Montalvo* case—one joined fully by our dissenting colleague here.[25] As this Court recognized in *Montalvo* (and had previously), the Board's delegated authority encompasses such powers as revoking certificates upon findings that an educator is "unworthy to instruct or to supervise the youth of this state," a broad-based "moral and mental" fitness standard having deep historical roots in Texas educator-certification law.[26] This "unworthy to instruct" standard, as the *Montalvo* Court

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[24] *See, e.g.*, *TGS–NOPEC*, 340 S.W.3d at 438 ("If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation . . . we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule.").

[25] *See* 2015 Tex. App. LEXIS 12025, at *1.

[26] *See id.*, at *11–16 & n.3 (quoting *Marrs v. Matthews*, 270 S.W. 586, 587–88 (Tex. Civ. App.—Texarkana 1925, writ ref'd)). *Accord Gomez v. Texas Educ. Agency*, 354 S.W.3d 905, 914–17 (Tex. App.—Austin 2011, pet. denied) (discussing history of "unworthy to instruct" ground and explaining that concept refers to moral or mental unfitness); *see also Marrs*, 270 S.W. at 588 ("The controlling purpose of the Legislature" in enacting statutory predecessor to rule 249.15(b)(2) "was evidently to insure the giving of wholesome instruction to pupils attending the public schools, by excluding teachers who were found to be morally or mentally unfit. The word 'unworthy,' as used in common parlance, has a well-defined signification. As here used, it means the lack of 'worth'; the absence of those moral and mental qualities which are required to enable one to render the service essential to the accomplishment of the object which the law has in view. . . . To call one 'unworthy' is to impute moral delinquency to a degree of unfitness for the work in hand.").

explained, does not require any underlying violation of law, rule, or policy,[27] and this Court in *Gomez* upheld the Board's revocation of a certificate for "unworthy to instruct" where the underlying facts involved educator conduct occurring entirely outside the school or student context.[28] In sum, as the *Montalvo* Court put it, the statutory scheme affords the Board "broad discretion to carry out its duties to regulate educators, including the discretion to determine who is unworthy to instruct."[29] While the educator conduct to which this discretion extends is not infinite, of course, these precedents regarding the "unworthy to instruct" standard confirm that disciplining teachers who have sexual relations with high-school students would lie well within the bounds of the Board's statutory authority.

While Lange eventually concedes that the Board's disciplinary power can in some instances extend to educators' "personal lives," such as if "the educator commits fraud on his taxes, commits physical assault at a Little League baseball game, or drives while intoxicated," he insists that such instances are limited to criminal conduct. That limitation, he reasons, is implicit in sections 21.058 and 21.060 of the Education Code. Section 21.058 requires the Board to revoke the certificate of an educator who is convicted of an offense under Title 5 of the Penal Code (offenses against the person, such as homicide, assault, sexual assault, or kidnapping) or an offense

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[27] *Montalvo*, 2015 Tex. App. LEXIS 12025, at *14–16. *See also Gomez*, 354 S.W.3d at 914–15 (similarly holding that no underlying criminal conviction was required).

[28] *See Gomez*, 354 S.W.3d at 914–17 (underlying findings that educator had indecently exposed and sexually gratified himself in a bar).

[29] *Montalvo*, 2015 Tex. App. LEXIS 12025, at *15 (citing Tex. Educ. Code §§ 21.031(a), .041(a), (b)(1), (7), (8)); *see also Marrs*, 270 S.W. at 588 ("What qualities, or lack of qualities, should render one unworthy would be difficult for legislative enumeration. . . . In the very nature of the subject there must be lodged somewhere a personal discretion for determining who are the 'unworthy.'").

that otherwise requires sex-offender registration, where the victim is under eighteen years of age.[30] Section 21.060, on the other hand, expressly authorizes the Board to deny, suspend, or revoke certification of a person who has been convicted of an offense "relating to the duties and responsibilities of the education profession," including an offense involving moral turpitude, an offense involving sexual or physical abuse in which the victim is a "minor or student," certain drug offenses, an offense involving illegal misappropriation of school-district funds or property, or an offense involving an attempt by fraudulent or unauthorized means to obtain certification.[31] This Court rejected the same argument in *Gomez*, reasoning that the Legislature had "merely simplified the disciplinary process in certain cases" by "providing the Board with a nonexclusive list of offenses for which it has discretionary authority to revoke a certificate after an educator's conviction [in 21.060] and mandating it to revoke a certificate without a disciplinary proceeding after certain other convictions [in 21.058]."[32] Moreover, this Court observed, the proposed construction would "render superfluous" the Legislature's broad grants of regulatory and rulemaking authority to the Board that are found in other provisions of chapter 21.[33] Lange does not present any persuasive reason for this Court to depart from *Gomez*.

Similarly, both Lange and the dissent also suggest that the Board's statutory powers should be construed to have limits parallel to Penal Code Section 21.12, the statute creating the offense of "improper relationship between educator and student," whose scope the Legislature has

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[30] *See* Tex. Educ. Code § 21.058(a).

[31] *See id.* § 21.060.

[32] 354 S.W.3d at 915 n.7.

[33] *Id*. at 914–15.

thus far confined to educator sexual activity with students who are either enrolled at the same school where the educator works or are participants in certain school-related activities.[34] Our response is straightforward: The Legislature's policy judgments in making particular conduct a crime, reflected in a provision of the Penal Code, has no bearing on the scope or meaning of a regulatory delegation found in the Education Code absent some textual basis for concluding so, and there is none.[35] The dissent's emphasis on language from this Court's *Ex parte Morales*[36] opinion is similarly misplaced. In *Morales*, we rejected a "due process" constitutional challenge to Section 21.12, and the point of the excerpted discussion was merely to highlight the criminal proscription's narrowness before examining its justifications.[37] The case had nothing to do with the non-criminal, professional disciplinary consequences of teacher–student sexual activity, whether proscribed by Section 21.12 or beyond it.

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[34] *See* Tex. Penal Code § 21.12.

[35] For the same reasons, other external statutes and rules emphasized by Lange and the dissent, such as sexual-harassment laws and disciplinary standards of various other regulated professions, are not instructive regarding the intended scope of the Board's delegation.

[36] 212 S.W.3d 483, 494 (Tex. App.—Austin 2006, pet. ref'd).

[37] *Id.* at 494 ("We begin our analysis by briefly emphasizing some basic features of the challenged statute. Section 21.12 is narrowly addressed to sexual conduct by a specific class of persons—employees of Texas public and private primary and secondary schools—with another specific class of persons—students—which is further limited to those enrolled *at the same school* where an employee works. Section 21.12 is thus not a general proscription against or regulation of the private sexual conduct of Texas school employees, nor does it categorically proscribe employees from having sexual relations even with students (as long as the student is not enrolled at a school where the employee works). Section 21.12, in other words, leaves undisturbed a school employee's private choices and sexual conduct [not otherwise proscribed criminally] with the vast universe of potential partners who are not enrolled as students at the same school where the employee works.") (internal citations omitted).

We accordingly hold that the Board acted within Standard 3.6 and its statutory authority in revoking Lange's educator certificate. In the alternative, Lange argues that the absence of an explicit definition of "student" renders the applicable version of Standard 3.6 unconstitutionally vague with respect to the universe of "students" with whom he was required to refrain from engaging in sexual conduct. We will strike down a rule as *unconstitutionally* vague where it: (1) fails to give "fair notice" of the conduct that may be punished; and (2) invites arbitrary and discriminatory enforcement by its lack of guidance for those charged with its enforcement.[38] This occurs when "persons of common intelligence are compelled to guess at a law's meaning and applicability."[39] But "[a] law is not unconstitutionally vague merely because it does not define words or phrases,"[40] nor is such a defect demonstrated by the mere "existence of a dispute as to a law's meaning."[41]

Moreover, in the context of economic regulations like those at issue here, courts allow "greater leeway" in regard to vagueness than with penal laws.[42] Such regulations need only provide a "reasonable degree of certainty" as to their application.[43] For reasons we have already

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[38] *See, e.g.*, *Vista Healthcare, Inc. v. Texas Mut. Ins. Co.*, 324 S.W.3d 264, 273 (Tex. App.—Austin 2010, pet. denied).

[39] *See id*.

[40] *Id*.

[41] *Id*.

[42] *See id*. Lange insists that we should analyze Standard 3.6 in the same manner as a penal law. We disagree. *See, e.g.*, *Scally v. Texas State Bd. of Med. Exam'rs*, 351 S.W.3d 434, 447 (Tex. App.—Austin 2011, pet. denied) (professional disciplinary action "is not a quasi-criminal proceeding; it is civil").

[43] *See Vista Healthcare*, 324 S.W.3d at 273.

demonstrated, Standard 3.6—even before the rule amendments adding an explicit definition of "student"—provided Lange abundant notice that his sexual activities with a partner whom he knew was a Texas high-school student would run afoul of that provision.[44] Lange's vagueness challenge fails.

We reverse the district court's judgment and render judgment affirming the Board's order.

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Puryear and Pemberton;
Dissenting Opinion by Justice Puryear

Reversed and Rendered

Filed: February 25, 2016

[44] *See id.*