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

D I S S E N T I N G O P I N I O N

For the reasons that follow, I respectfully dissent from the majority's opinion.

Educators act as guardians and caretakers and occupy a fundamental position in our society. Healthy relationships with teachers can provide students with skills that will allow them to succeed in their lives well past their time in school. In fact, it could be argued that some of the truest and most endearing aspects of healthy teacher-student relationships are their depth of caring and profundity coupled with their absence of any sexual activity or inclinations toward sexual activity. Given the role that teachers play and given their access to students, there is inherently a potential for abuse in teacher-student relationships. The potential for harm or abuse stems from, among other factors, the imbalance in power between students and teachers, the reality that most students are minors who are in the custody of adults, and the fact that children are obligated, unless an exemption applies, to attend school. *See* Tex. Educ. Code § 25.085 (requiring compulsory attendance); *see also*

Ex parte Guerrero, No. 05-06-01316-CR, 2006 Tex. App. LEXIS 10780, at *6 (Tex. App.—Dallas Dec. 19, 2006, pet. ref'd) (not designated for publication) (explaining that school employees "may be in a position to exercise authority over a student and, likewise, to coerce a student into engaging in sexual activity").

To combat the potential for abuse, the legislature promulgated a law criminally penalizing sexual relationships between teachers and students. *See* Tex. Penal Code § 21.12 (prohibiting improper relationships between educators and students). In fact, given the foundational role that the relationship between teachers and students occupies in our society as well as the potential for abuse, the legislature took the unusual step of criminalizing sexual relationships between teachers and students even if the student has reached the age of majority. *Id.* In other words, the legislature concluded that even though students who have reached the age of majority may choose to enter into sexual relationships with other consenting adults, regardless of the wisdom of those decisions or the motivations of the parties involved, teachers should not be permitted to enter into relationships with those students before the students have finished their educations. *See id.* However, recognizing that the statute in certain cases criminalizes conduct that would be legally permissible in other contexts and that the factors leading to the potential for abuse are diminished outside of the school context and in the absence of a teacher-student relationship, the legislature chose to limit the prohibition to sexual interactions between a school employee and a student "enrolled in a public or private primary or secondary school at which the employee works," between a teacher and a student "enrolled in a public primary or secondary school in the same school district as the school at which the" teacher works, and between a teacher and "a student participant

in an educational activity that is sponsored by a school district or a public or private primary or secondary school" where "students enrolled in a public or private primary or secondary school are the primary participants" and where the teacher "provides education services to those participants." *Id.* § 21.12(a)(1)-(2); *see also id.* § 21.12(a)(3) (criminalizing conduct in which employee commits online solicitation of minor student).

When discussing the boundaries of this prohibition, this Court in a prior opinion written by the author of the majority in the current case explained as follows:

> 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 with the vast universe of potential partners who are not enrolled as students at the same school where the employee works.

Ex parte Morales, 212 S.W.3d 483, 494 (Tex. App.—Austin 2006, pet. ref'd). Other than these expressly circumscribed limitations on sexual relationships between teachers and students, the legislature has not otherwise spoken on the issue of sexual relationships between people who are teachers and people who are students, and the legislature has not specified that legal conduct falling outside these statutory prohibitions may properly serve as the basis for a disciplinary proceeding against a teacher.

As outlined in the opinion by the majority, the Board adopted an educator's code of ethics, *see* Tex. Educ. Code § 21.041(b)(8), including Standard 3.6, which at the time relevant to

this case prohibited an educator from soliciting or engaging "in sexual conduct . . . with a student." 22 Tex. Reg. 11922 (1997) (proposing code of ethics), *adopted* 23 Tex. Reg. 1022 (1998), *amended in part by* 27 Tex. Reg. 7530 (2002) (amending code to add, among others, Standard 3.6); *see* 19 Tex. Admin. Code § 247.2 (2015) (State Bd. for Educator Certification, Code of Ethics and Standard Practices for Texas Educators) (containing current version of code of ethics). Although portions of the Standard would seem to mirror the prohibitions found in the Penal Code, the Standard does not contain the limitations only prohibiting conduct between a student and a teacher who works at the student's school or school district and conduct between teachers and students involved in educational activities. Moreover, at the time relevant to this appeal, there was no definition for the term "student" within the Educator's Code of Ethics. *Cf.* 19 Tex. Admin. Code § 249.3(54) (2015) (State Bd. for Educator Certification, Definitions) (containing current definition for "[s]tudent" as meaning "[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").

Rather than rely on the definition provided by the legislature in other contexts, *see, e.g.*, Tex. Fam. Code § 58.0051(a)(3) (providing that student means someone who "is registered or in attendance at a primary or secondary educational institution" and "is younger than 18 years of age"); Tex. Educ. Code § 37.151 (defining "[s]tudent" for purposes of hazing prohibition in reference to educational institution individual is attending or has been accepted to), the Board refers to the common meaning for "student" found in various dictionary definitions to support its position that the Standard was violated in this case, *see, e.g.*, *Merriam-Webster Dictionary*

(Feb. 16, 2016), http://www.merriam-webster.com/dictionary/student (defining "student" as "a person who attends a school, college, or university" or "a person who studies something"); *Merriam-Webster Learner's Dictionary* (Feb. 16, 2016), http://www.learnersdictionary.com/definition/student (same); *Oxford Dictionaries* (Feb. 16, 2016), http://www.oxforddictionaries.com/us/definition/american_english/student (explaining that "student" denotes "someone who is studying in order to enter a particular profession" or "[a] person who takes an interest in a particular subject"). Unquestionably, incorporating the full dictionary definitions into the Standard at issue would prohibit conduct far beyond any intention of the legislature or the reach of the Board, but based on those definitions, the Board determined that the term as meant in the Standard refers to "anyone enrolled in public, private, or charter schools between the grades of pre-school and 12th grade . . . regardless of their age and regardless of the location of the school." *See* Tex. Educ. Code § 21.031 (empowering Board to "regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators").

However, the construction offered by the Board prohibits sexual relationships irrespective of whether the teacher is employed by the same school or school district that the student attends and irrespective of whether the teacher provides educational services to the student through an educational activity sponsored by a school district or school. *See* Tex. Penal Code § 21.12(a); *see also In re Shaw*, 204 S.W.3d 9, 18 (Tex. App.—Texarkana 2006, pet. ref'd) (explaining that State has legitimate interest in "[p]rotecting students in primary and secondary schools—even those of age—from the pressures, emotional strain, conflicts, distractions, and other difficulties brought on by sexual conduct with persons, not their spouse, *employed at the students' schools*" (emphasis

added)). In fact, the prohibition, as evidenced by this case, would apply to a teacher who becomes involved with a student when the teacher is employed by another school district in another county and regardless of the fact that the teacher and the student became involved with one another through circumstances completely unrelated to any type of school activity. Moreover, the Board's reasoning would apply to students who are in their mid-twenties but still eligible to receive funding to attend public school. *See* Tex. Educ. Code § 25.001(a) (explaining that individuals up to 26 years of age who are pursuing high school diplomas are "entitled to the benefits of the available school fund for that year"); *see also Ex parte Morales*, 212 S.W.3d at 494-95 (noting legitimate State interests justifying legal prohibitions forbidding "the sexual exploitation of minors, persons prone to coercion, and those unable easily to refuse consent"). Worse still, although not an issue in this case, the imposition of a sanction would seem to be permissible under the Board's reasoning even if the school teacher was completely unaware of the fact that the person who he or she was involved with, although legally an adult, was a student enrolled at a school in Texas.[1]

In adopting this reasoning and issuing its punishment, the Board has exercised breathtakingly broad powers. In its brief, the Board attempts to justify its actions by stating that the Standard prohibiting sexual conduct between teachers and students "is reasonable and serves to ensure that students are not unduly influenced by an educator, whether or not they are in the

[1] Even though the equities may play out a little differently, the reasoning adopted by the Board is not dissimilar from a hypothetical situation in which, due to the potential for abuse and to the imbalance in power, the Texas Medical Board elects to issue rules prohibiting sexual relationships between doctors and patients regardless of whether there is a professional relationship between the two. In other words, a doctor would be subject to sanctions for entering into a relationship with the patient of any other doctor. In light of the majority's analysis, it seems likely that it would sanction even this type of unreasonable curtailment of consensual activity among adults.

same school, classroom, or district. Educators are perceived as having an aura of authority and trustworthiness in relation to students." However, glaringly absent from these statements is any justification for the need for the type of expansive position adopted by the Board that extends beyond the specific prohibitions outlined by the legislature. Moreover, the Board's determination is inconsistent with the efforts made by other administrative agencies confronted with similar concerns. In an effort to minimize the potential for abuse due to imbalances in power without too heavily curtailing consensual activity among adults, various administrative agencies have prohibited sexual relationships but have limited those restrictions to sexual relationships and behaviors between licensed professionals and *their* clients. *See, e.g.*, 22 Tex. Admin. Code §§ 217.12(6)(D), (E) (2015) (Texas Bd. of Nursing, Unprofessional Conduct), 871.13(p) (2015) (Advisory Bd. of Athletic Trainers, Standards of Conduct).

Although the Board unquestionably has the authority to ensure that teachers conform to a code of conduct that is consistent with the establishment of healthy student-teacher relationships, there is simply no authority allowing the Board to appoint itself as the morality police of conduct occurring between consenting adults who have both reached the age of majority and occurring completely absent of even the hint of a teacher-student relationship or educational involvement. The shocking overreach by the Board is further evidenced by the fact that its edict would apply to situations in which both parties are in their twenties and reside hundreds of miles apart (e.g., a 24 year-old teacher who is employed in Corpus Christi and a 26 year-old "student" who resides in Amarillo).[2]

[2] To the extent that the majority attempts to temper the extremity of the Board's proclamation by limiting the Standard to Texas students who are attending or are eligible to attend schools that employ educators over which the Board may exercise jurisdiction, that limitation only further

It cannot be debated that the Board has not expressly been provided with this type of authority. In fact, there is no indication in the governing statutes that the legislature intended for the Board to have this type of power. *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 765 (Tex. 2014) (explaining that when construing statutes, "our primary objective [is] to give effect to the Legislature's intent"). Thus, the critical question to be addressed is whether this type of power must be implied in order to allow the Board to effectively carry out the functions that have been specifically assigned to it. *See Texas Mun. Power Agency v. Public Util. Comm'n*, 253 S.W.3d 184, 192-93 (Tex. 2007) (noting that "agency's powers are limited" to those "expressly conferred by the Legislature" and those implied that are reasonably necessary to carry out agency's express responsibilities); *City Pub. Serv. Bd. v. Public Util. Comm'n*, 9 S.W.3d 868, 873-74 (Tex. App.—Austin 2000) (explaining that it is "axiomatic that" agency "has no inherent power, but only such powers as are delegated to it by the legislature in clear and *express* statutory language, together with any implied power that may be necessary . . . to perform a function or duty that the legislature has required of the agency in *express* terms" and that agency powers "must be construed narrowly when they are claimed to authorize governmental interference with established or traditional property rights"), *aff'd*, 53 S.W.3d 310, 312, 325 (Tex. 2001); *GTE Sw., Inc. v. Public Util. Comm'n*, 10 S.W.3d 7, 12-13 (Tex. App.—Austin 1999, no pet.) (providing that grants of power to agencies must be construed narrowly when claimed

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compounds the arbitrary nature of the Board's reasoning. If the Board believes that the potential for abuse is so strong that it would authorize the type of draconian measure at issue in this case for relationships between students and teachers who live in Texas but hundreds of miles apart, it is hard to understand why those concerns would not be present in a relationship between a Texas educator and a student from another state, particularly in a situation where they both live in a town straddling the state line and where the student lives a few feet across that line.

to interfere with property rights and that power may be implied only if express powers could be defeated in absence of implied powers). And the answer to that question is a resounding no. The Board's charge to oversee public-school educators is not diminished in the slightest by reining in the use of their power to the degree that the legislature actually intended.

In its analysis, the majority relies on two prior opinions from this Court when arguing that the Board's revocation was warranted, *see State Bd. for Educator Certification v. Montalvo*, No. 03-13-00370-CV, 2015 Tex. App. LEXIS 12025 (Tex. App.—Austin Nov. 24, 2015, no pet. h.) (mem. op.); *Gomez v. Texas Educ. Agency*, 354 S.W.3d 905 (Tex. App.—Austin 2011, pet. denied), but those cases are procedurally and factually distinguishable from this case. As discussed above, the Board in this case chose to revoke Lange's certification on the ground that he violated Standard 3.6 of the Educator's Code of Ethics "by engaging in sexual conduct and a romantic relationship with a student." *See* 19 Tex. Admin. Code § 249.15(b)(3) (2015) (State Bd. for Educator Certification, Disciplinary Action by State Bd. for Educator Certification) (authorizing sanctions if teacher has violated Educators' Code of Ethics). However, in *Montalvo* and *Gomez*, the Board revoked the certifications on the ground that the teachers were "unworthy to instruct or to supervise the youth of this state." *See id.* § 249.15(b)(2); *Montalvo*, 2015 Tex. App. LEXIS 12025, at *1, *3, *5; *Gomez*, 354 S.W.3d at 909, 911. Accordingly, given the nature of the Board's ruling and given that no determination regarding Lange's worthiness to instruct was made, it would seem that the analyses from *Gomez* and *Montalvo* would have limited, if any, precedential value to the issues presented in this case.

Setting aside that significant distinction, I would still conclude that the analysis from those two cases would not support the revocation at issue in this case. The Board in *Gomez*

proceeded to terminate Gomez's teacher's certification after several people witnessed him commit a crime by exposing his penis and "rubb[ing] himself" at a bar. 354 S.W.3d at 909; *see* Tex. Penal Code § 21.08 (providing that "[a] person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act"). After considering the testimony from the arresting officer who witnessed the act, the Board determined that Gomez was unworthy to instruct and revoked his license. *Gomez*, 354 S.W.3d at 910-11. In contrast, in the present case, there was no testimony establishing that any sexual crime occurred; on the contrary, even under the selective filter used by the majority, the evidence only established consensual and perfectly legal sexual activity.

I find the majority's reliance on *Montalvo* similarly misplaced. In *Montalvo*, the Board sought to and did revoke Montalvo's certification on the ground that he was unworthy to instruct. *Montalvo*, 2015 Tex. App. LEXIS 12025, at *1, *3, *5. Montalvo was a coach and was accused of having improper interactions with students on *his* track team, including attempting to personally treat a student's injuries with "rub downs" and stretching instead of sending the student to a trainer, allowing students to come to his home to use the "Jacuzzi in the master bath," and being involved in 480 phone calls with one of his students, including 80 phone calls occurring after 10:00 p.m., over a five-month period. *Id.* at *9-10. Accordingly, the allegations pertained to the type of improper relationship between a teacher and a student identified by the legislature. *See* Tex. Penal Code § 21.12(a). As pointed out by the majority, when discussing the scope of the unworthy-to-instruct provision, this Court did explain that the provision "does not require an 'improper' event

or actual harm" and referred to another appellate court's reasoning that the provision "means '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.'" 2015 Tex. App. LEXIS 12025, at *12, *14 (quoting *Marrs v. Matthews*, 270 S.W. 586, 588 (Tex. Civ. App.—Texarkana 1925, writ ref'd)). However, rather than standing as support for the nearly unbounded agency authority that the majority advocates for, I believe that the language is more accurately read in the context of the improper alleged misconduct at issue in *Montalvo* and in light of the language of the unworthy-to-instruct provision relied on in *Montalvo*.

After hearing the arguments of the Board and Lange, the district court concluded that the Board's decision was "not supported by substantial evidence." In light of the fact that the legislature has weighed the compelling public-policy concerns regarding sexual relationships between individuals who are teachers and individuals who are students and specifically determined to penalize only those relationships between students and teachers who are employed at the students' schools or by the students' school districts and between teachers and students who are involved in educational activities that are sponsored by a school or school district and in the absence of any statutory authority authorizing the expansion of power undertaken by the Board in this case when it permanently revoked Lange's license, I would similarly conclude that the Board's decision was not supported by substantial evidence because it was "in excess of the agency's statutory authority" and "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *See* Tex. Gov't Code § 2001.174(2). Further, I believe that the legislature's deliberative resolution of the various public-policy concerns present in this case as well as the

resolution reached by other agencies confronting similar concerns warrant further consideration than that offered by the majority. Although the majority is correct that those directives were made in different contexts, I cannot agree that with the majority's unsupported assertion that those policy determinations have "no bearing" on the issues presented here.

Accordingly, I respectfully dissent.

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David Puryear, Justice

Before Chief Justice Rose, Justices Puryear and Pemberton

Filed: February 25, 2016