BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:	)	
ROHIT CHETTY, M.D.	)	**Case No. 800-2018-045337**
	)	**OAH No. 2019030847**
Applicant.	)	

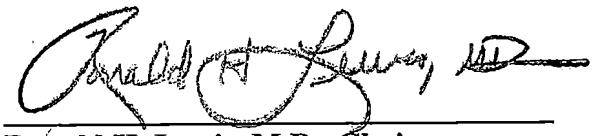
DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on November 27, 2019.

IT IS SO ORDERED: November 1, 2019.

MEDICAL BOARD OF CALIFORNIA



Ronald H. Lewis, M.D., Chair
Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
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In the Matter of the Statement of Issues Against:

ROHIT CHETTY, Applicant.

Case No. 800-2018-045337

OAH No. 2019030847

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter on August 14, 2019, in Oakland, California.

Rebecca D. Wagner, Deputy Attorney General, represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California.

Steven L. Simas, Attorney at Law, Simas & Associates, LTD, represented Rohit Chetty, who was not present.

The record was left open until September 20, 2019, for submission of written argument. Applicant's Closing Brief was marked for identification as Exhibit F. Complainant's Supplemental Closing Argument was marked for identification as Exhibit 16. Applicant's Reply Brief was marked for identification as Exhibit G. The record closed and the matter was submitted for decision on September 20, 2019.

Ruling on Motion to Take Additional Evidence or Official Notice

In connection with his submission of written closing argument, applicant requests that official notice be taken of the Program Director Guide to the Common Program Requirements issued by the Accreditation Council for Graduate Medical Education (ACGME) in September 2012. (Marked for identification as Exhibit H.) Alternatively, applicant requests that the document be received as evidence to rebut the testimony of complainant's expert James Nuovo, M.D. Complainant opposes the request.

Under the Administrative Procedure Act, official notice may be taken as authorized by Government Code section 11515.[1] Official notice may be taken, even after submission of a case for decision, of any generally accepted technical or scientific matter within the agency's special field, or of any fact which may be judicially noticed under the Evidence Code. Applicant has not established a basis for taking judicial notice of the ACGME Program Director Guide, and therefore has not established a basis for taking official notice pursuant to Government Code section 11515.

Alternatively, applicant requests that the record be opened and the guide be taken in evidence as rebuttal evidence. Dr. Nuovo testified that he was asked by complainant to review applicant's academic file and determine whether applicant was competent and capable of practicing safely without supervision. Dr. Nuovo was familiar with this phrase as it is "standard ACGME language." Dr. Nuovo did not reference or identify any specific ACGME materials in his opinion or in his testimony, other than to

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[1] Pursuant to Business and Professions section 2231, Government Code section 11515 applies to these proceedings.

say it is language contained "in the special requirements" of a residency program. At no time did Dr. Nuovo testify that he relied upon the 2012 ACGME Program Guide in order to inform his opinion. In addition, the record has been closed and Dr. Nuovo has been excused as a witness, and cannot be examined about the document. The request to receive the ACGME Program Guide in evidence is denied.

FACTUAL FINDINGS

Introduction

1. On July 25, 2017, the Medical Board of California (Board) received an application for a physician's and surgeon's certificate (certificate) from applicant Rohit Chetty.

2. The Board denied the application for an unrestricted certificate on July 2, 2018. The basis for the denial was performance deficiencies identified during applicant's postgraduate training. Applicant submitted additional evidence to the Board in the form of letters from the program directors and faculty members of his residency program. Following a review of those materials, the Board affirmed its denial of an unrestricted certificate on September 17, 2018.

3. On December 12, 2018, complainant Kimberly Kirchmeyer filed the statement of issues in her official capacity as Executive Director of the Board. Applicant filed a notice of defense, and this hearing followed.

Applicant's Education

4. Applicant graduated with a medical degree from Ross University School of Medicine on September 9, 2014. Applicant passed the United States Medical Licensing

Examination (USMLE) Step 1 on July 18, 2012; USMLE Step 2 CS on April 12, 2013; and the USLME 2 CK on May 1, 2014.

5. Applicant entered the family medical residency program at Natividad Medical Center on July 1, 2015, and completed the program on September 14, 2018. Early in his first year of residency, applicant failed two rotations, Family Medicine Inpatient Service (July 1 to 7, 2015), and Night Float (July 11 to 17, 2015). He also received an incomplete for an Obstetrics rotation (November 30, 2015 to January 3, 2016).

6. Program Director Steven Harrison, M.D., held a meeting with applicant and his advisor on September 9, 2015, to discuss applicant's deficiencies. A remediation program was implemented on September 22, 2015, which included meetings with his faculty advisor, taking the 2015 Family Medicine In-Training Examination, and taking steps to prepare for the USMLE Step 3.

7. Applicant was granted a medical leave of absence from October 26, 2015 through December 6, 2015. Applicant was cleared to return to the residency program on December 7, 2015.

8. Applicant was placed on formal probation in January 2016.[2] One of the requirements of probation was for applicant to complete the USMLE Step 3 by March

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[2] The written document setting forth the terms of probation was not provided to the Board. The terms of probation were partially summarized in the minutes of a June 1, 2016 ad hoc meeting during which applicant's progress on probation was reviewed, and it was determined to extend probation.

31, 2016. Applicant took but failed the exam. As of June 1, applicant had not satisfied all conditions of probation, and he was continued on probation. Among other things, applicant was required to pass the USMLE Step 3 by September 7, 2016, and pass the remaining first year rotations. Applicant was advised he would not be scheduled for a higher level of residency call until he advanced.

9. Applicant passed the USMLE Step 3 on August 10, 2016, and he passed his remaining first year rotations. Probation was lifted and applicant promoted to his second residency year on September 15, 2016. He promoted to his third residency year on September 15, 2017. He graduated from the program on September 14, 2018.

Expert Review of Application

10. Applicant's application and supporting documentation was reviewed by an Executive Staff Committee, which decided to seek a medical consultant's expert review. That review was conducted by James Nuovo, M.D. Dr. Nuovo was asked to review the application and determine if applicant "is safe to practice medicine independently and without supervision." Dr. Nuovo wrote two reports containing his opinions, and testified at hearing.

11. Dr. Nuovo is board certified in family medicine, and has been a licensed physician in California since 1992. From 1992 to 2004, and from 2018 until very recently, Dr. Nuovo served as a Professor and as the Residency Program Director in the Department of Family and Community Medicine at the University of California, Davis, School of Medicine (US Davis). From 1992 to 2001, Dr. Nuovo also served as the Director of the UC Davis Network of Affiliated Family Medicine Residency Programs. From 2006 to 2018, Dr. Nuovo served as the Associate Dean of Graduate Medical

Education at UC Davis. In that capacity, Dr. Nuovo was the designated institutional officer for graduate medical education, and functioned as Program Director over all the residency programs of UC Davis. As of the date of hearing, Dr. Nuovo is transitioning into retirement.

12. Dr. Nuovo explained that the purpose of a residency program is to train medical school graduates to be able to function as physicians competently, safely and independently (without direct supervision) upon graduation. The Accreditation Council of Graduate Medical Education (ACGME) sets the curriculum standards, and standardizes the methods by which residents are evaluated in the six core competencies of medical knowledge, systems-based practice, practice-based learning and improvement, patient care and procedural skills, interpersonal and communication skills, and professionalism.

Over the course of a three-year residency, residents are given increased levels of responsibilities and reduced levels of supervision. Residents are evaluated at the end of each rotation by their supervising physician, but they are also evaluated quarterly by staff and patients. Residents in family medicine take written tests each year administered through the American Board of Family Medicine.

The structured curriculum for family medicine is broad, because practitioners in this field are generalists who care for everyone from newborn babies to geriatric patients. The resident rotates through services across this broad spectrum in patient care in various settings. The Program Director has the authority and responsibility over all aspects of the residency training program, including remediation of identified performance concerns.

13. Dr. Nuovo evaluated applicant's ability to practice competently and independently based on the documents he reviewed. Dr. Nuovo concluded that

following completion of the period of remediation and probation, applicant continued to demonstrate concerning performance deficiencies that were not adequately addressed during residency.

14. Applicant failed his initial night float rotation because of performance issues that included: showing up an hour late without responding to calls and texts; providing inconsistent explanations for being late; leaving the hospital before starting and/or finishing a history and physical examination multiple times; failing to admit a pediatric patient and leaving the patient in the emergency room for six hours before another physician realized that the patient had not been admitted as ordered; leaving the hospital without signing out; difficulty in formulating an assessment and plan independently; insufficient medical knowledge; and an inability to access information.

Dr. Nuovo found the performance deficiencies demonstrated by applicant during his initial night float rotation to be unusual for a first-year resident. He found the deficiencies to be significant because they go to critical skills needed in order to demonstrate the ability to practice medicine safely and without supervision.

15. Dr. Nuovo found applicant's performance deficiencies to persist throughout the remainder of his residency program.

a. While applicant satisfactorily completed the Emergency Medicine rotation (August to September 2016), with respect to generating a differential diagnosis, applicant was rated: "fairly complete, prioritized differential, sometimes misses 'not miss conditions.'" In the section for opportunities for improvement, it was written: "Increase speed, do not miss the life threatening dx." In Dr. Nuovo's opinion, this is a serious red flag for a second-year resident doing an emergency room rotation.

b. Although applicant was rated as performing at an acceptable level in the Intensive Care Unit rotation (March 2017), the evaluator followed with, "But needs to improve." Under Area of Improvement, it was written:

> The resident needs to know his patient well to be able to formulate a good plan. Patient [*sic*] has to review the medical record, examine the patient well and know the patient's hospital course well.

Dr. Nuovo finds this comment concerning because it speaks to performance deficiencies previously documented. In his opinion, a resident at this stage of training should be able to review the medical record, examine the patient, know the patient's hospital course, and formulate a treatment plan.

For this rotation, David Goldstein, M.D., gave applicant a marginal pass. Dr. Goldstein wrote:

> MARGINAL PASS rotation is assigned based on performance identified as below expected for level of training with regard to oral presentation, written documentation, and plan formulation with regard to critically ill adult patients. The performance gaps are perceived as caused by a lack of attention to detail rather than specific gaps in medical knowledge or critical thinking skills. Recommended remediation is not necessarily additional training in ICU, but rather closer supervision of clinical work with regard to oral presentation and written documentation with constructive feedback. Dr. Bautista

> specifically requested revision of one death summary document perceived as not meeting minimum standards for documentation.

To Dr. Nuovo this is another red flag as it evidences concern about applicant's attention to detail. In Dr. Nuovo's opinion, these comments document performance gaps in written documentation and development of a treatment plan, caused by lack of attention to detail, as well as the need for closer supervision of applicant.

c. Applicant passed his Pediatric rotation (April to May 2017), but in his evaluation it was written with respect to applying critical thinking skills in patient care: "Moving forward, continue to work on developing a well-rounded assessment that considers a scope of possibilities but with a clear presumptive diagnosis and thorough plan."

d. Dr. Goldstein completed a Procedure Competency Assessment Tool on May 16, 2017, regarding applicant's insertion of a contraceptive implant (Nexplanon). Dr. Goldstein wrote:

> Patient had signed consent but had not shown evidence of being counseled appropriately. Relevant history regarding menstruation, prior contraceptive methods and problems associated with them, and recent intercourse had not been collected.

Dr. Nuovo found this concerning as applicant was not demonstrating the ability to provide informed consent which is an important skill for any physician to be able to practice competently and independently. It also evidenced a failure to obtain an appropriate history before performing the procedure which could have resulted in a

substantial medical error, as you would not insert a contraceptive device into a patient who was pregnant. Finally, Dr. Nuovo found this note was continued evidence of an individual who is failing to pay attention to detail, who may have knowledge gaps, and who did not obtain an appropriate history from a patient about to have a procedure.

e. Applicant passed his night float rotation in June 2017, but in the overall comments of his evaluation it was written:

> Areas of improvement consider broadening differential when seeing triage patients on L and D. Notes could be a bit more detailed, continue to be open when receiving feedback.

f. In his third-year Night Float rotation (December 2017), applicant was rated "Pass" but the evaluator wrote that applicant was "performing at the lower end of that spectrum." Under area of improvement it was written:

> Dr. Chetty needs to better recognize the acuity of patients and prioritize his time to treat those in most need first. He needs to work on his management of critically ill patients in the ICU and provide more active management in order to prevent their deterioration.

Dr. Nuovo finds this review concerning as applicant is continuing to have performance deficiencies in the "very important" skills of recognizing how sick a patient is, how to prioritize who needs to be treated as soon as possible, and how to manage critically ill patients. These deficits demonstrate an inability to practice safely, competently and without supervision.

In this evaluation, it was also written that applicant was "performing more like a late second year rather than half-way through his third year." To Dr. Nuovo, that applicant was not progressing as expected of a resident half-way through his third year further demonstrates an inability to practice safely, competently and without supervision.

g. Applicant passed his Adult Hospital Medicine/Family Medicine rotation in January 2018. In his review, it was written, "Continued to maintain attention to detail while learning to take the broader view."

16. In Dr. Nuovo's opinion, applicant's performance deficiencies persisted following remediation and probation, and they evidence his inability to practice medicine competently and independently without supervision. He further opines, based on his review of the Natividad records, that the program did not take appropriate action after probation was lifted to address these performance deficiencies.

17. In connection with the application process, Natividad Program Director Harrison completed a Program Director Official Certification on September 11, 2017, at the end of applicant's second year. Dr. Harrison attested, under penalty of perjury that, as of that date applicant "has acquired the skill and qualifications necessary to safely assume the unrestricted practice of medicine in this state." In a letter submitted to the Board that same day, Dr. Harrison attested that applicant was in good standing and expected to graduate on September 14, 2018. Dr. Harrison retired as Program Director some time after he issued the certification.

18. Following the initial denial of his license application, applicant submitted letters written by the two Program Directors that oversaw the program during his residency and various faculty members, two of which were former Natividad Program Directors. Each of the writers strongly recommends to the Board that applicant be granted an unrestricted certificate. The letters were written in August 2018, which was one month prior to applicant's graduation from the residency program. None of the letter writers appeared at hearing.

a. Dr. Harrison wrote that it was his responsibility to remediate or dismiss residents found to be lacking in medical knowledge, professionalism or any other core competency. Applicant had significant knowledge deficits and a poor understanding of the American medical system, which he was required to remediate. Dr. Harrison reports that applicant accepted assistance and "rose to the occasion."

b. Melissa Nothnangle, M.D., became the Program Director in October 2017. Dr. Nothnangle worked extensively one-on-one with applicant in outpatient family medicine and labor and delivery. In her opinion, applicant is a competent and trustworthy physician.

c. Marc Tunzi, M.D., is an Associate Program Director, and former Program Director, at Natividad. He has been associated with the residency program for over 25 years. He worked with applicant throughout the residency, in both ambulatory and inpatient settings. In his opinion, applicant successfully remediated his deficiencies and is ready to practice independently.

d. Walt Mills, M.D., is the Natividad Director of Medical Education/Designated Institutional Officer, and Chair of the Graduate Medical Education Committee. Dr. Mills has previously served as Program Director at Natividad,

and was Chief of Staff of Natividad Medical Center. Dr. Mills served as applicant's faculty advisor in the last year of his residency, and clinically worked closely with him over three years in the family medicine practice, and in the hospital. Dr. Mills is director of the geriatric curriculum, and in that capacity, rates applicant as a "star" on the Geriatrics rotation. In Dr. Mills' opinion, applicant has repeatedly demonstrated competence in all six ACGME core competencies.

e. Matthew A. Calzetta, M.D., served as applicant's clinical preceptor on inpatient internal medicine and pediatric rotations for three years. In his opinion, applicant successfully remediated his deficiencies and is a competent physician.

f. Christina Zaro, M.D., is a faculty physician who supervised applicant for three years in both inpatient and outpatient settings, and she directed the third-year resident curriculum. In her opinion, applicant's clinical reasoning through verbal precepting and written documentation is of a highly competent physician, and he was at the same level of competence as his peers.

g. Ana Abril Arias, M.D., is a Family Medicine faculty physician who worked with applicant in outpatient clinics, patient services, and labor and delivery. In her opinion, applicant remediated his deficiencies, and she is confident in his medical abilities and medical care.

19. Dr. Nuovo reviewed each of the letters set forth in Finding 18. None of the authors addressed specifically the performance concerns that continued after probation was lifted. For that reason, the opinions of the letter writers did not alter Dr. Nuovo's opinion. In his view, the program should have further remediated the deficiencies and extended the training until that was accomplished. Dr. Nuovo cannot

understand how the Natividad program could find that applicant was capable of being graduated.

20. Dr. Nuovo was found to be a credible and persuasive expert witness. His expert testimony was unrefuted.

21. Dr. Nuovo is familiar with the statutory term of incompetence in the practice of medicine as a basis for discipline of a licensed physician. He has served as an expert reviewer and is familiar with, and has utilized, the Board's Expert Reviewer Guidelines. When he is providing expert review of an application, as he did here, the referral does not include the Board's Expert Reviewer Guidelines, and he does not refer to them in rendering his opinion.

22. Dr. Nuovo understood his direction from the Executive Staff Committee was to review the application and render an opinion as to whether applicant was capable of practicing medicine safety, competently and without supervision. In reviewing applicant's file, Dr. Nuovo relied on his own experience with, and understanding of ACGME standards based on his many years of experience as a Program Director at UC Davis.

LEGAL CONCLUSIONS

1. The purpose of the Medical Practice Act is to assure the high quality of medical practice in California. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 574-575.) When exercising its licensing functions, the highest priority of the Board is protection of the public. (Bus. & Prof. Code, § 2001.1.)

2. The burden of proof is on the applicant to establish that he or she meets the requirements for licensure. (*Martin v. Alcoholic Beverage Control Appeals Bd.* (1959) 52 Cal.2d 259, 265; *Coffin v. Alcoholic Beverage Control Appeals Board* (2006) 139 Cal.App.4th 471, 477-478.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Cause for Denial

3. The Board has set forth the requirements to be eligible for a physician's and surgeon's certificate. (See, e.g., Bus. & Prof. Code, §§ 2096, 2102 & 2013.) Notwithstanding that an applicant is eligible for licensure, Business and Professions Code sections 475, subdivision (a), and 480, subdivision (a)(3)(A), provide that a license may be denied if an applicant has committed an act, which if done by a licentiate, would be grounds for disciplinary action. Business and Professions Code section 2234 authorizes the Board to impose discipline upon a licensee for unprofessional conduct. Business and Professions Code section 2234, subdivision (d), authorizes the Board to impose discipline upon a licensee for incompetence. Incompetence is not defined in the Medical Practice Act. Incompetence has generally been defined as a lack of knowledge or ability in the discharge of professional obligations. (*James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096, 1109.) Incompetence has also been described as "the absence of qualification, ability or fitness to perform a prescribed duty or function." (*Pollack v. Kinder* (1978) 85 Cal.App.3d 837; accord *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040,1054.)

4. Complainant alleges that applicant's license application should be denied because he demonstrated unprofessional conduct and incompetence during his residency training, conduct which, if done by a licentiate, would be grounds for license denial.

Applicant graduated from his Family Medicine Residency Training program. During his first year of training, however, applicant did not satisfy several program requirements. After taking a formal leave of absence from the program, applicant was placed on a remediation program and probation. Applicant did not pass the USMLE 3 on the first attempt, and his probation was extended. Dr. Nuovo reviewed applicant's records at Natividad throughout the three years of his residency and based on his review and experience opined that applicant did not completely remediate the performance deficiencies which led to remediation and probation, and for that reason concluded that applicant is not safe to practice medicine competently and independently. There is no competent evidence in the record to rebut that expert opinion. While it is recognized that the Natividad Program Director certified applicant's competency, neither the Program Director or anyone else from program testified to rebut Dr. Nuovo's concerns about applicant's fitness.

If a licensed physician is unable to safely practice medicine independently and competently, the physician would be subject to license discipline for unprofessional conduct pursuant to Business and Professions Code section 2221 and for incompetence pursuant to Business and Professions Code section 2234, subdivision (d). Cause is therefore established to deny the application for a physician's and surgeon's certificate pursuant to Business and Professions Code sections 475, subdivision (a), and 480, subdivision (a)(3)(A).

Applicant's Arguments

5. Applicant argues that his application is complete and sufficient for licensing purposes and for that reason, the Board does not have the authority to deny his application. Applicant is correct, and complainant does not challenge, that he has met the threshold qualifications to apply for licensure as a physician and surgeon.

Notwithstanding this, the Board has the authority to inquire into his fitness for licensure. And the Legislature has empowered the Board to deny a certificate to an applicant guilty of unprofessional conduct or any other conduct that would subject a licensee to license discipline. (Bus. & Prof. Code, § 2221, subd. (a).) The Board's authority to determine a party's fitness to engage in the profession derives from the state's inherent power to regulate the use of property to preserve the public health, morals, comfort, order, and safety. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 790; *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 768-769.)

In accordance with this authority, the Board's application seeks, in addition to evidence of completion of the qualifications for licensure, detailed information about what took place during the post-graduate training program. An applicant is required to divulge, and provide a written explanation regarding, the following circumstances: receiving partial or no credit for a program; taking a leave of absence; being terminated, dismissed, or expelled from a program; being placed on probation; being disciplined or investigated; having limitations or special requirements placed on him or her for clinical performance, professionalism, medical knowledge, or discipline; or having a contract not renewed for the following year. If inquiry into these aspects of the post graduate training program raise questions about the applicant's fitness for licensure, the Medical Practice Act empowers the Board to deny the application even though the applicant completed the educational requirements necessary for being eligible for a certificate.

6. Applicant argues that the Board's expert utilized an improper standard of incompetence when evaluating applicant; and that for that reason, his expert testimony should not be given any weight. Dr. Nuovo's expert opinion was premised on looking at applicant as a resident and determining that he did not develop to a

competence standard of being able to practice independently as expected of a physician graduating from a residency program. This was sufficient to establish cause for denial for incompetence.

7. Applicant argues that he was not given proper notice of the standard of incompetence by which the Board was going to judge him, which he argues violates his right to due process.

The statement of issues properly advised applicant of complainant's factual and legal bases for denying his request for an unrestricted license, as required by Government Code section 11504. The statement of issues provided adequate notice that complainant was seeking denial under Business and Professions Code sections 475, subdivision (a)(4), and 480, subdivision (a)(3)(A), in connection with section 2234, subdivisions (a) and (d).

Applicant argues that he had no notice, prior to hearing, that Dr. Nuovo was basing his opinion on ACGME guidelines, rather than the definition of incompetence set forth in Business and Professions Code section 2234, subdivision (d), and interpreted by case law.

Applicant was provided with Dr. Nuovo's expert review prior to hearing. In his review, Dr. Nuovo did not cite any law or standards, but set forth his review of applicant's residency record, and his concerns regarding applicant's ability to practice safely, competently and independently. There is no requirement that Dr. Nuovo, as a reviewer of an application, set forth more than he did in his report. The basis for his opinion can be, and was, examined at hearing.

8. Finally, applicant argues that the complainant, through Dr. Nuovo, has utilized an "underground regulation" to deny his application. This contention is without merit.

The Administrative Procedure Act provides that no state agency shall utilize a regulation without complying with its notice and comment provisions. (Gov. Code, § 11340.5, subd. (a).) A regulation is broadly defined to include:

> every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any administrative agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.

(Gov. Code, § 11242, subd. (g).)

An "underground regulation" is a regulation that a court may invalidate because it has not been adopted in substantial compliance with the Administrative Procedure Act. (*Excelsior College v. Board of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1239.) To be an underground regulation, (1) the agency must intend for its policy to apply generally rather than to a specific case, and (2) the agency adopted it to implement, interpret, or make specific the law enforced by the agency. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) An interpretation that arises during the course of adjudication of a specific case is not a regulation. (*Ibid.*) It was not established that this application was denied based on a policy or procedure that amounted a regulation.

Analysis

9. Cause for denial having been established, the next consideration is whether applicant has established that he should nevertheless be granted a certificate. Applicant graduated from medical school and completed a residency in family medicine.

Applicant requests, and the residency program supports, an unrestricted certificate, but neither applicant nor anyone associated with the residency program has explained to the Board why the deficiencies noted by Dr. Nuovo should not be of concern. For that reason, applicant has not established that the issuance of an unrestricted certificate satisfies public protection.

Complainant does not advocate for a license denial. Complainant argues that applicant should be granted a probationary license with conditions consistent with public protection. Complainant avers that applicant should be provided the same terms as offered in settlement of the case. Considering the terms of an offer in settlement is not appropriate.

Guidance and instruction are more appropriately drawn from Business and Professions Code section 2221, which empowers the Board to issue a probationary certificate subject to terms and conditions. Pursuant to Business and Professions Code section 2221, subdivision (a), terms and conditions may include limiting practice to a supervised, structured environment where the activities are supervised by another physician or surgeon, and payment of the cost of probation monitoring. Additional terms and conditions may appropriately be drawn from the Board's Manual of Model Disciplinary Orders and Disciplinary Guidelines (12th ed.).

All things considered, it is determined that issuance of a three-year probationary license is consistent with public protection. In addition to the standard terms and conditions, applicant will be required to complete a clinical competence assessment program as a condition precedent to practice, and to have a practice monitor, and he will be prohibited from having a solo practice. Each of these conditions is consistent with the disciplinary guidelines for a physician found to have committed acts of incompetence. These terms are imposed to further the intent of the Legislature that deficiencies in competency are addressed with measures which remove such deficiencies. (Bus. & Prof. Code, § 2229, subd. (c).)

ORDER

The application of Rohit Chetty for a Physician's and Surgeon's Certificate is granted. Applicant shall be issued a Physician's and Surgeon's Certificate. Upon issuance, the certificate shall be immediately revoked; however, the revocation shall be stayed, and applicant shall be placed on probation for three years subject to the following terms and conditions:

1. Clinical Training Program

Within 60 calendar days of the effective date of this Decision, applicant shall enroll in a clinical competence assessment program approved in advance by the Board or its designee. Applicant shall successfully complete the program not later than six (6) months after applicant's initial enrollment unless the Board or its designee agrees in writing to an extension of that time.

The program shall consist of a comprehensive assessment of applicant's physical and mental health and the six general domains of clinical competence as defined by the Accreditation Council on Graduate Medical Education and American Board of Medical Specialties pertaining to applicant's current or intended area of practice. The program shall take into account data obtained from the pre-assessment, self-report forms and interview, and the Decision, Statement of Issues, and any other information that the Board or its designee deems relevant. The program shall require applicant's on-site participation for a minimum of three (3) and no more than five (5) days as determined by the program for the assessment and clinical education evaluation. Applicant shall pay all expenses associated with the clinical competence assessment program.

At the end of the evaluation, the program will submit a report to the Board or its designee which unequivocally states whether applicant has demonstrated the ability to practice safely and independently. Based on applicant's performance on the clinical competence assessment, the program will advise the Board or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, evaluation or treatment for any medical condition or psychological condition, or anything else affecting applicant's practice of medicine. Applicant shall comply with the program's recommendations.

Determination as to whether applicant successfully completed the clinical competence assessment program is solely within the program's jurisdiction.

Condition Precedent: Applicant shall not practice medicine until applicant has successfully completed the program and has been so notified by the Board or its designee in writing.

2. Monitoring - Practice

Within 30 calendar days of the effective date of this Decision, applicant shall submit to the Board or its designee for prior approval as a practice monitor, the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with applicant, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Board, including but not limited to any form of bartering, shall be in applicant's field of practice, and must agree to serve as applicant's monitor. Applicant shall pay all monitoring costs.

The Board or its designee shall provide the approved monitor with copies of the Decision and Statement of Issues, and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision, Statement of Issues, and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision and Statement of Issues, fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement for approval by the Board of its designee.

Within 60 calendar days of the effective date of this Decision, and continuing throughout probation, applicant's practice shall be monitored by the approved monitor. Applicant shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours and shall retain the records for the entire term of probation.

If applicant fails to obtain approval of a monitor within 60 calendar days of the effective date of this Decision, applicant shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Applicant shall cease the practice of medicine until a monitor is approved to provide monitoring responsibility.

The monitor shall submit a quarterly written report to the Board or its designee which includes an evaluation of applicant's performance, indicating whether applicant's practices are within the standards of practice of medicine, and whether applicant is practicing medicine safely. It shall be the sole responsibility of applicant to ensure that the monitor submits the quarterly written reports to the Board or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, applicant shall, within five (5) calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If applicant fails to obtain approval of a replacement monitor within 60 days of the resignation or unavailability of the monitor, applicant shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Applicant shall cease the practice of medicine until a replacement monitor is approved and assumes monitoring responsibility.

In lieu of a monitor, applicant may participate in a professional enhancement program approved in advance by the Board or its designee, that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Applicant shall participate in the professional enhancement program at applicant's expense during the term of probation.

3. Solo Practice Prohibition

Applicant is prohibited from engaging in the solo practice of medicine. Prohibited solo practice includes, but is not limited to, a practice where: 1) applicant merely shares office space with another physician but is not affiliated for purposes of providing patient care, or 2) applicant is the sole physician practitioner at that location.

If applicant fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 days of the effective date of this Decision, applicant shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Applicant shall not resume practice until an appropriate practice setting is established.

If, during the course of probation, applicant's practice setting changes and applicant is no longer practicing in a setting in compliance with this Decision, applicant shall notify the Board or its designee within five (5) calendar days of the practice setting change. If applicant fails to establish a practice with another physician or secure employment in an appropriate setting within 60 calendar days of the practice setting change, applicant shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Applicant shall not resume practice until an appropriate practice setting is established.

4. Notification

Within seven (7) days of the effective date of this Decision, applicant shall provide a true copy of this Decision and Statement of Issues to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to applicant, at any other facility where applicant engages in the practice of medicine,

including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to applicant. Applicant shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

5. Supervision of Physician Assistants and Advanced Practice Nurses

During probation, applicant is prohibited from supervising physician assistants and advanced practice nurses.

6. Obey All Laws

Applicant shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

7. Quarterly Declarations

Applicant shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Applicant shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

8. General Probation Requirements

Compliance with Probation Unit: Applicant shall comply with the Board's probation unit.

Address Changes: Applicant shall, at all times, keep the Board informed of applicant's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021, subdivision (b).

Place of Practice: Applicant shall not engage in the practice of medicine in applicant's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

License Renewal: Applicant shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California: Applicant shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event applicant should leave the State of California to reside or to practice applicant shall notify the Board or its designee in writing 30 calendar days prior to the departure and return.

9. Interview with the Board or its Designee

Applicant shall be available in person for interviews either at applicant's place of business or at the probation unit office, with the Board or its designee upon request at various intervals and either with or without prior notice throughout the term of probation.

10. Non-Practice While on Probation

Applicant shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of applicant's return to practice. Non-practice is defined as any period of time applicant is not practicing medicine as defined by Business and Professions Code section 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If applicant resides in California and is considered to be in non-practice, applicant shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve applicant from complying with all the terms and conditions of probation. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event applicant's period of non-practice exceeds 18 calendar months, applicant shall successfully complete the Federation of State Medical Board's Special Purpose Examination, or, at the Board's discretion, a clinical competency assessment program that meets the criteria of Condition 18 of the current version of the Board's

"Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Applicant's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice will not apply to the reduction of the probationary term.

Periods of non-practice for an applicant residing outside California, will relieve applicant of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; and Quarterly Declarations.

11. Completion of Probation

Applicant shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon completion successful of probation, applicant's certificate shall be fully restored.

12. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If applicant violates probation in any respect, the Board, after giving applicant notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against applicant during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

13. License Surrender

Following the effective date of this Decision, if applicant ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, applicant may request to surrender his or her license. The Board reserves the right to evaluate applicant's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, applicant shall within 15 calendar days deliver applicant's wallet and wall certificate to the Board or its designee and applicant shall no longer practice medicine. Applicant will no longer be subject to the terms and conditions of probation. If applicant re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

14. Probation Monitoring Costs

Applicant shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year.

DATE: October 11, 2019

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Oil By for
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MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings

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FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO December 12 20 18
BY K. Voong ANALYST

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: **ROHIT CHETTY** **619 E. Romie Lane, #20** **Salinas, CA 93901** Applicant.	Case No. 800-2018-045337 **STATEMENT OF ISSUES**

Complainant alleges:

PARTIES

1. Kimberly Kirchmeyer (Complainant) brings this Statement of Issues solely in her official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs.

2. The Medical Board of California (Board) received from Rohit Chetty (Applicant) an application for a Physician's and Surgeon's License on July 25, 2017. In his application, Applicant certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Board denied Applicant's application for a Physician's

and Surgeon's Certificate on July 2, 2018, and Applicant requested a hearing on the denial of his application.

JURISDICTION

3. This Statement of Issues is brought before the Medical Board of California under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 475 of the Code states in pertinent part, that:

"(a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

" . . . "

"(4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license."

5. Section 480 of the Code states:

"(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

" . . . "

"(3)(A) Done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

" . . ."

6. Section 2221, subdivision (a) provides that the Board may deny a physician's and surgeon's certificate to an applicant guilty of unprofessional conduct or of any cause that would subject a licensee to revocation or suspension of his or her license; or, the Board in its sole discretion, may issue a probationary physician's and surgeon's certificate to an applicant subject to terms and conditions, including, but not limited to, any of the conditions enumerated in this subdivision, which includes payment of the cost of probation monitoring.

7. Section 2234 of the Code, states, in relevant part:

"The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

" . . .

"(d) Incompetence.

" . . . "

STATEMENT OF FACTS

8. On July 25, 2017, the Board received an application for a Physician's and Surgeon's Certificate from Applicant. In the application, Applicant answered "yes" to the following questions: having taken a leave of absence or break from training, having been placed on probation and having had limitations or special requirements placed upon him for clinical performance, professionalism, medical knowledge, discipline or any other reason. In addition, Applicant answered "yes" to having suffered a criminal conviction. Applicant had filed a Postgraduate Training Authorization Letter application with the Board on June 30, 2016 which additionally disclosed that in March of 2016 he had failed USMLE Step 3.

9. In letters of explanation, Applicant stated that he took a medical leave from residency from October 26, 2016 to December 6, 2016. Applicant stated he was placed on probation for six months beginning on February 1, 2016 due to "not fully" completing two rotations. Applicant further advised that he was convicted for Driving While Under the Influence (DUI) in June 2004 and had completed all the terms and conditions of probation.

10. On September 13, 2017, the Board received information, including letters from the program director and a copy of Applicant's training documents, from the family medicine residency program regarding Applicant's tenure there. Applicant started residency training at the program on June 30, 2015. Soon after beginning his residency, Applicant failed his family medicine inpatient rotation from July 1 to July 10, 2015. Subsequently, Applicant failed his initial night float rotation because of multiple performance issues, including, but not limited to:

showing up an hour late without calling or responding to calls and texts; inconsistent explanations for his tardiness; leaving the hospital multiple times before finishing and/or starting a history or physical examination; failing to admit a pediatric patient and leaving the patient in the emergency room for six hours before another doctor realized the patient had not been admitted as ordered; difficulty formulating an assessment and plan independently; insufficient medical knowledge and ability to access information. On September 9, 2015, program personnel met with Applicant after multiple third year residents and nocturnists had expressed negative opinions of Applicant's performance including being unprofessional and unprepared. As a result of these difficulties, a Remediation Plan was implemented on September 22, 2015, which Applicant accepted.

11. Applicant's struggles during his residency persisted and he received a poor performance evaluation for his Family Medicine Inpatient Service from December 29, 2015 to January 14, 2016. Serious concerns were noted including effecting an unsafe discharge by not arranging primary hospital continuation treatment and appearing to abandon responsibility. In addition, discharge summary deficiencies were noted, oral presentations were disorganized and hard to follow, and Applicant had difficulty independently developing a plan of treatment or conducting self-directed learning.

12. On or about February 1, 2016, Applicant was placed on probation at the residency program for a period of six months due to inadequate performance on his rotations. On or about August 22, 2016 to September 7, 2016, Applicant completed an emergency medicine rotation and his performance evaluation noted that Applicant on occasion missed "not-miss conditions" and it was recommended that he should "increase speed, don't miss the life threatening" diagnosis. On September 15, 2016; Applicant was taken off probation and advanced to his second year of training.

13. Applicant completed an Intensive Care Unit rotation from March 2, 2017 to March 19, 2017, however, the performance evaluation noted that Applicant "may require remediation." This evaluation further stated that he had a "marginal pass rotation grade" because of performance gaps including a lack of attention to detail. In particular, a death summary document had to be revised to meet minimum standards for documentation. Remediation was

recommended to include closer supervision of clinical work with regard to oral and written presentation. Applicant completed an Intensive Care Unit rotation from September 8, 2017 to September 25, 2017 and, although he received an overall satisfactory evaluation, his performance evaluation noted that he needed to improve his knowledge of his patient including reviewing the medical record, examining the patient and knowing the patient's hospital course.

14. Throughout the latter half of 2017, other concerns were raised in Applicant's performance evaluations including: lack of proper counseling for informed consent, difficulty recognizing patient acuity and prioritizing accordingly related to managing critically ill patients in Intensive Care to avoid patient deterioration, maintaining attention to detail, broadening differential related to treating triage patients in labor and delivery, detailing notes and considering a scope of possibilities while working with a clear presumptive diagnosis and thorough plan.

15. Applicant's application for licensure and the documentation from the residency program were reviewed on behalf of the Board. That review concluded that Applicant's performance during residency training demonstrated multiple performance deficiencies which indicate Applicant is not able to practice medicine "safely, competently, and independently" including: inability to recognize life threatening diagnoses, inability to formulate a treatment plan, inappropriate attention to detail, inappropriate documentation, inappropriate pre-procedure consent and documentation, inability to recognize the acuity of illness in his patients, inability to prioritize patients, and inability to broaden the differential and treatment plan. These performance deficiencies persist despite being removed from probation.

16. The Board denied Applicant's application for an unrestricted Physician's and Surgeon's Certificate on July 2, 2018 on the basis of unprofessional conduct or of any cause that would subject a licensee to revocation or suspension of his license pursuant to Business and Professions Code sections 2234 (unprofessional conduct) and 2234(d) (incompetence).

17. In an August 16, 2018 letter to the Board, Applicant's attorney disputed that his client was incompetent during his residency program and provided additional documentation from individuals "involved with and in charge of" Applicant's training who agreed that Applicant "overcame challenges" in the residency program and successfully completed the program.

18. On September 17, 2018, after review of the additional documentation provided by Applicant's counsel, the Board advised Applicant that its decision to deny the application for an unrestricted license was confirmed. Applicant has requested an administrative hearing.

CAUSE FOR DENIAL OF APPLICATION

(Unprofessional Conduct - Incompetence)

19. Applicant's application is subject to denial under sections 475(a)(4) and/or 480(a)(3)(A) and/or 2234 (unprofessional conduct) and/or 2234(d) (incompetence) in that Applicant is guilty of conduct which, if done by a licentiate, would be grounds for suspension or revocation of license, i.e., unprofessional conduct and/or incompetence. Applicant's conduct, as outlined in Paragraphs 8 through 18, constitute unprofessional conduct within the meaning of section 2234 (a) and (d) and is conduct subject to discipline within the meaning of section 2221.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Medical Board of California issue a decision:

1. Denying the application of Rohit Chetty for a Physician's and Surgeon's License;

2. If issued a probationary license, ordering Applicant to pay the Board the costs of probation monitoring;

3. If placed on probation, revoking, suspending or denying approval of the Applicant's authority to supervise physician assistants and advanced practice nurses; and

4. Taking such other and further action as deemed necessary and proper.

DATED: December 12, 2018

KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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