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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SAN JOAQUIN

BY FAX

11 DANA DEMERCURIO,
12 Petitioner,

13 v.

14 SAN JOAQUIN DELTA COMMUNITY
15 COLLEGE DISTRICT,
16 Respondent.

Case No.: STK-CV-~~1111~~2021-7444
VERIFIED PETITION FOR WRIT OF
MANDATE
[Code Civ. Proc. §1085]
Hearing Date:
Hearing Time:
Department:
Judge:
Date Action Filed:

17 This is a Petition for a Writ of Mandate pursuant to California Code of Civil Procedure
18 section 1085, brought by Petitioner Dana Demercurio (hereinafter "Petitioner"). Petitioner is
19 a College Professor at San Joaquin Delta Community College District (hereinafter
20 "Respondent"). Petitioner brings the instant action to compel Respondent to comply with the
21 mandate of Education Code section 87482.5(a) to classify a faculty member who worked
22 more than 67 percent of the hours per week considered a full-time assignment for regular
23 employees having comparable duties as either a contract or regular employee. Petitioner
24 alleges that Respondent began misclassifying her during or before the Fall 2019 semester and
25 continues to do so.

26 Petitioner seeks immediate court intervention to compel Respondent to immediately
27 comply with these Education Code sections by: 1) paying Petitioner any difference between
28 what she was paid as a temporary faculty member and what she should have been paid as a

1 contract employee from the 2019-2020 school year to the present; and 2) reclassifying
2 Petitioner as a third year contract employee for the 2021-2022 academic year.

3 **PETITION FOR A WRIT OF MANDATE**

4 By this Verified Petition, Petitioner alleges as follows:

5 1. Petitioner was a faculty member employed by Respondent from the Spring
6 semester 2017 through present day. (Declaration of Dana Demercurio [hereinafter
7 "Demercurio Decl.," ¶1.)

8 2. On December 15, 2016 Respondent's Board approved the appointment of
9 Petitioner as an hourly instructor. (Demercurio Decl., ¶¶2, and Exhibit A thereto).

10 3. On January 19, 2017 Respondent sent Petitioner a letter notifying her that
11 Respondent's Board approved her appointment as an hourly instructor. (Demercurio Decl.,
12 ¶3, and Exhibit A thereto).

13 4. Petitioner is a member of the San Joaquin Delta College Teachers' Association
14 CTA/NEA. (Demercurio Decl., ¶5).

15 5. Petitioner was a member of the Arts and Communication Division College and
16 appointed to teach in the discipline of Communications. (Demercurio Decl., ¶2-3.)

17 6. Petitioner is qualified as a faculty member. She has a Bachelor of Arts with a
18 Major in Comparative Literature that she completed in May 2011. (Demercurio Decl., ¶6, and
19 Exhibit C thereto, Resume of Dana Demercurio).

20 7. Petitioner completed her Master's degree in Communications in June 2013 at
21 California State University East Bay (Demercurio Decl., ¶7, and Exhibit C thereto).

22 8. Respondent College is located in San Joaquin County, California, and is a
23 public community college organized pursuant to and bound by the laws of the State of
24 California, including Education Code sections 87482.5(a), 87605, 87607, 87608, 87608.5 and
25 87610.

26 9. A Collectively Bargained Agreement ("CBA") between Respondent and the
27 San Joaquin Delta College Teachers' Association CTA/NEA sets forth a full-time workload
28 as a unit load of 15 units per semester pursuant to Articles 3.14 and 17.1. (Demercurio Decl.

1 ¶11 and Exhibit F thereto).

2 10. A Community College must reclassify as contract or regular faculty a faculty
3 member who works more than 67 percent of the hours considered a full-time assignment for
4 regular employees having comparable duties. Cal. Educ. Code § 87482.5(a).

5 11. To work more than 67 percent of the hours considered a full-time assignment
6 for regular employees having comparable duties, a faculty member at Respondent College
7 would need to work more than 10.05 weekly contact hours per semester. (Demercurio Decl.,
8 ¶11; see also Exhibit F thereto.)

9 12. During the Fall 2019 and Spring 2020 semesters, Petitioner worked more than
10 67 percent of the hours per week considered a full-time assignment for regular employees
11 having comparable duties to either a contract or regular employee.

12 13. During the Fall 2019 semester, Petitioner taught twelve (12) units of lecture
13 courses: Three sections of Comm ST 1A, Public Speaking, and one section of COMM ST 7,
14 Intercultural Communication. (Demercurio Decl., ¶9; see also Exhibit D thereto).

15 14. During the Spring 2020 semester, Petitioner taught twelve (15) units of
16 courses: 5 sections of Comm ST 1A, Public Speaking, each at 3 units (Demercurio Decl., ¶10,
17 and Exhibit E thereto).

18 15. Under Articles 3.14 and 17.1 of the CBA, a full-time workload at Respondent
19 College is a load of 15 units per semester. (Demercurio Decl., ¶11, and Exhibit F thereto).

20 16. Pursuant to California Education Code section 87482.5, a person employed to
21 teach classes at a community college for 67 percent or more of the hours considered a full-
22 time assignment for “regular employees having comparable duties” will be considered full-
23 time and may not be classified as a temporary employee. Cal. Educ. Code § 87482.5 (a).

24 17. Petitioner would need to work more than the equivalent of 10.05 units (.67
25 times 15) to be more than 67 percent of the hours considered a full-time assignment.

26 18. In Fall 2019, Petitioner taught a total of twelve (12) units, as described above,
27 putting Petitioner above a 67 percent workload.

28

1 19. In Spring 2020, Petitioner taught a total of fifteen (15) traditional classroom
2 units putting Petitioner above a 67 percent workload

3 20. Respondent therefore averaged more than 67% of a full time unit load for the
4 2019-2020 academic year.

5 21. After Petitioner taught her first semester of more than 67 percent of a full-time
6 assignment, Respondent had a legal mandate to recognize Petitioner as contract, not
7 temporary, faculty. Cal. Educ. Code § 87482.5(a).

8 22. Respondent failed to comply with this mandatory duty. *Ibid.*

9 23. Respondent had a duty to recognize that Petitioner fulfilled her first
10 probationary contract year at the end of the 2019-2020 school year after she worked more
11 than 75 percent of the days of that year. Cal. Educ. Code § 87605; 87482.5.

12 24. Respondent failed to comply with this mandatory duty.

13 25. Contract faculty, at Respondent College, have the right to be employed full-
14 time, at the equivalent of fifteen units. (Demercurio Decl., Exhibit F, CBA, section 17.2).

15 26. Respondent continues to violate its mandatory duty under California Education
16 Code sections 87482.5(a), 87605-87610, 87667-87682, 87732, and 87740 by not reemploying
17 Petitioner as a full-time contract faculty member.

18 27. The College continued to misclassify Petitioner. *Ibid.*

19 29. Petitioner has a beneficial interest in Respondent faithfully performing its legal
20 duty to classify Petitioner properly, to continue her employment, and to provide Petitioner
21 with due process protections prior to ceasing her employment.

22 30. Petitioner, as California Community College faculty, is the intended
23 beneficiary of California Education Code sections 87482.5(a), 87605, 87607, 87608, 87608.5,
24 and 87610 and Respondent's persistent violation of the mandates of those provisions deprive
25 Petitioner of her legal rights.

26 31. Respondent has a clear, present, nondiscretionary, and mandatory duty to
27 comply with Education Code sections 87482.5(a), 87605, 87607, 87608, 87608.5, and 87610

28 32. There are no available administrative remedies for Petitioner to exhaust. The

1 California Education Code is not self-executing and Petitions for Writ of Mandate are the
2 vehicle commonly used to vindicate Education Code rights. E.g. *Theiler v. Ventura County*
3 *Community College Dist.*, (2011) 198 Cal.App.4th 852; *McGuire v. Governing Bd.*, (1984)
4 161 Cal.App.3d 87.

5 33. The only way to seek relief for a violation of these Education Code rights is
6 through a Petition for a Writ of Mandate; there is no administrative hearing process for a
7 violation of California Education Code section 87482.5 (b). E.g. *Theiler v. Ventura County*
8 *Community College Dist.*, 198 Cal.App.4th 852; *McGuire v. Governing Bd.*, (1984)
9 161 Cal.App.3d 871.

10 34. The Education Code does not establish a cause of action to enforce these
11 provisions through an ordinary action for damages. Petitioner must file this Petition for Writ
12 of Mandate in order to obtain relief for a violation of her employment rights under the
13 Education Code. Mandamus is the proper remedy for violations of the Education Code where
14 no other relief is specifically provided. See E.g. *Entezampour v. North Orange County*
15 *Community College Dist.*, (2010) 190 Cal.App.4th 832.

16 35. Regardless, Petitioner has sought to resolve this matter with Respondent. On
17 June 5, 2020, Petitioner's attorney sent letters to Respondent College placing Respondent on
18 notice of Petitioner's misclassification. (Declaration of Matthew Chevedden in Support of
19 Petition for Writ of Mandate, (hereinafter "Chevedden Decl."), ¶¶2, 3, and Exhibit A thereto).

20 36. Petitioner, through her attorney, also sent a letter to Respondent's Board on
21 December 21, 2020, which constituted a claim pursuant to the California Tort Claims Act,
22 California Government Code sections 905 et. seq. (Chevedden Decl., ¶4, and Exhibit C.)

23 37. Respondent, though counsel, sent a February 10, 2021, Rejection of Tort Claim
24 letter, setting out six month (August 10, 2021) deadline by which Petitioner must file a claim.
25 (Chevedden Decl. ¶ 6 and Exhibit E).

26 38. Petitioner has exhausted all available administrative remedies required to be
27 pursued by him, and Petitioner has fulfilled any administrative prerequisites to bringing this
28 Petition as described above.

1 39. Petitioner has not been able to resolve this matter with Respondent College.
2 (See Chevedden Decl., ¶¶2, 3, 9 and Exhibits A and B.)

3 40. Petitioner has no plain, speedy, and adequate remedy at law to challenge
4 Respondent's conduct other than the relief sought in this Petition for violation of her rights
5 under the Education Code.

6 41. Petitioner filed this Petition in a timely fashion.

7 42. Petitioner has not engaged in any delay that has prejudiced Respondent.
8 Petitioner has attempted to resolve this issue through both formal and informal means
9 multiple times without success.

10 43. As a result of Respondent's above-described actions, and in the event
11 Respondent is not compelled by this Court to perform its legal duty, Petitioner will be
12 irreparably damaged.

13 RELIEF

14 WHEREFORE, Petitioner respectfully prays that:

15 1. This Court issue a Writ compelling Respondent to comply with the mandatory
16 provisions of the California Education Code sections.

17 2. This Court issue a Writ of Mandate ordering Respondent to:

18 a) Classify Respondent as a 3rd year Contract Employee;

19 b) Pay Petitioner any difference between what she was paid as an
20 temporary faculty member and what she should have been paid as a full-time contract
21 employee; and

22 3. This Court award Petitioner the costs of this action and/or reasonable
23 attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and/or California
24 Government Code section 800 and/or any other applicable statute;

25 4. This Court grant such other relief as may be just and proper.
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1 Dated: August 5, 2021.

LANGENKAMP, CURTIS & PRICE, LLP



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4 By: MATTHEW CHEVEDDEN
Attorneys for Petitioner

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VERIFICATION

I, Dana Demercurio, hereby declare under penalty of perjury that I read the attached
Verified Petition for Writ of Mandate, I know the contents thereof to be true and correct.

Executed at Stockton, California on August 5, 2021.



DANA DEMERCURIO