

## The Association of San Diego County Employees

# WEINGARTEN RIGHTS

Weingarten rights guarantee an employee the right to Association representation during an investigatory interview. These rights, established by the Supreme Court, in 1975 in the case of (*NLRB vs. Weingarten, Inc. 420 U.S. 251. 88 LRRM 2689*)...**must be claimed by the employee.** The supervisor has no obligation to inform an employee that he/she is entitled to Association representation.

### What is an Investigatory Interview?

An investigatory interview is one in which a Supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his/her conduct. **If an employee has a reasonable belief that discipline or discharge may result from what he/she says, the employee has the right to request Association representation, if the employee is an ASDCE Member.**

It is an obligation of the Association to educate employees who are bargaining unit members about their Weingarten rights before an occasion to use them arises. **An employee must state to the employer that he/she wants an Association representative present: the employer has no obligation to ask: the employee if he/she wants a representative.**

ASDCE recommends this standard statement as your request for representation:

**"If this discussion could in any way lead to my being disciplined or discharged, I request that my Association representative be present at the meeting. Without representation, I choose not to answer any questions."**

*Ask for a Representative! Call Your ASDCE Representative:*

**1-877-92-ASDCE / 1-877-922-7323**

*DO NOT WALK OUT! This may be considered punishable insubordination by the employer!*

### When an Investigatory Interview occurs, the Following Rules Apply:

**Rule 1** - The employee must make a clear request for Association representation before or during the interview. The employee can't be punished for making this request.

**Rule 2** - After the employee makes the request, the supervisor has 3 options. He/she must either:

1. Grant the request and delay the interview until the Association representative arrives and has a chance to consult privately with the employee: or
2. Deny the request and end the interview immediately; or
3. Give the employee a choice of:
  - 1) having the interview without representation (**Please, help us help you, ask for an ASDCE Representative!**)
  - 2) or ending the interview.

**Rule 3** - If the supervisor denies the request and continues to ask questions, this is an **Unfair Labor Practice** and the **employee has a right to refuse to answer.** The employee cannot be disciplined for such refusal but is required to sit there until the supervisor terminates the interview. **Leaving before this happens may constitute punishable insubordination.**

### Your Association's Representation Rights Under Weingarten

Your Association Representatives are not required to merely be a "silent witness". Your representative has the right to:

- Be informed by the supervisor of the subject matter of the interview prior to the interview.
- Take the employee aside for a private conference before questioning begins.
- Speak during the interview. Be your witness during the interview.
- Request that the supervisor clarify a question so that what is being asked is understood.
- Give the employee advice on how to answer a question.
- Provide additional information to the supervisor at the end of the questioning.

Your Representative does not have the right to tell the employee not to answer nor, obviously, to give false answers. An employee can be disciplined for refusing to answer questions.

## Loudermill Rights & Skelly Rights

*An Individual's Right to Due Process*

Most San Diego County employees will work their entire career and never face any major discipline that could get them suspended, demoted or terminated from their jobs. However, by law, all permanent County employees are entitled to strong due process rights and pre-removal safeguards known as Loudermill Rights and Skelly Rights.

### **Facts County Employees Need to Know About Due Process Rights**

From the California Public Employee Relations (CPER): "Pocket Guide to Workplace Rights of Public Employees" and Civil Service Rules

#### **Due Process:**

Permanent, non-probationary County employees are entitled to certain procedures before they can be terminated, suspended, or demoted. This protection is commonly referred to as the right to "due process". The U.S. Constitution and the California Constitution declare that a person may not be deprived of a property interest without "due process of law".

#### **Just Cause:**

Employees may not be terminated or disciplined without good cause (just cause). Permanent county employees have a property interest in their job that creates a reasonable expectation of continued employment, which cannot be defeated without due process.

#### **Pre-Disciplinary - Pre-Deprivation Procedures (Skelly):**

Before disciplining a permanent public employee who has a property interest in continued employment, the employer must take certain steps. Under California law, specifically Skelly, the employer must provide the employee with the following: **notice of the proposed disciplinary action; the reasons for the adverse action; a copy of the charges and materials on which the action is based; the right to respond orally or in writing to the authority imposing the discipline prior to removal of paid status.**

#### **Notice of the Right to Appeal to the Civil Service Commission:**

The employee has the right to appeal the order of discipline. Notice of the right to appeal is required, pre-discipline. Each order of reduction in compensation, suspension, demotion or removal shall give notice of the employee's right to appeal as follows: **"If you wish to appeal this order to the Civil Service Commission, you must file such appeal and an answer to the charges in writing with the Commission within ten (10) days after this order is received by you. Such appeal and answer to the charges must be in writing and delivered to the Commission at its office at 1600 Pacific Highway, San Diego, California, 92101".** The employee must choose either to appeal or not to appeal.

#### **Employees Have the Opportunity for a Full Evidentiary Hearing Before a Neutral Decision Maker**

Due process rights require that an employee have the opportunity for a "full evidentiary hearing" before a neutral decision maker at some point in the process, but that can be after the discipline is imposed, when the employee appeals or grieves the discipline through civil service or contractual procedures. Employees are not entitled to a full evidentiary hearing prior to the discipline taking effect, but merely to the opportunity to respond informally to an individual authorized to impose or effectively recommend discipline, but who was not involved in making the decision. Alternately, the employee may be provided with an evidentiary hearing before the discipline is imposed. In this case, the evidentiary hearing is the Skelly hearing.

### Not All County Employees Have Due Process Rights

Temporary workers, "at will" employees and newly hired probationary employees do not have these protections; they are subject to summary release because they have no property interest in their jobs.

All permanent county employees have these due process rights because they have acquired tenure or permanency in their position and can only be terminated or otherwise significantly impacted for good cause. Such employees gained an expectation of continued employment because they successfully completed a probationary period during which they were subject to summary release.

Probationary employees (new hires) do not have these protections. A "probationary period" by definition is a period of time in which a person who is starting a new job is tested and watched to see if that person is able to do the job properly. All newly hired CR Unit and CM Unit employees must successfully complete a 12-month probation period per the 2013-2017 MOA. Probationary employees can be discharged at will any time during this probationary period. However, once a new employee successfully passes probation, he or she is entitled to strong due process rights as part of public service employment in the County of San Diego, California.

### Legal Decisions (Summary)

#### Loudermill v. Board of Education

The term stems from *Loudermill v. Cleveland Board of Education*, in which the United States Supreme Court held that non-probationary civil servants had a property right to continued employment and such employment could not be denied to employees unless they were given an opportunity to hear and respond to the charges against them prior to being deprived of continued employment.

The underlying principle in *Loudermill* is that because dismissals often involve factual disputes, a hearing provides the employee an opportunity to explain and refute any conclusions the employer reached which caused the employee's discharge. *(From Wikipedia, the free encyclopedia)*

#### Skelly v. State Personnel Board (1975) 15 Cal. 3d 194, 27 CPER 37

*(From "Pocket Guide to Due Process in Public Employment", Feb. 2013, Third Edition, California Public Employee Relations Publication)*

Pre-deprivation safeguards for an employee with a property interest in his or her job must include:

- Notice of the proposed action,
- The reasons therefore,
- Materials on which the action is based, and the...
- Right to respond, either orally or in writing, to the authority initially imposing discipline.

### Skelly Puts the Burden of Proof on the Employer

Skelly procedural safeguards put the burden of proof on management to maintain good records and careful personnel practices, because management knows that without decent records, effective communications and correctly following mandatory procedures, they cannot take disciplinary action against employees, even problem employees, in a full evidentiary hearing where they must persuade an impartial decision maker to uphold the discipline taken.

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## The Association of San Diego County Employees

### What is the County of San Diego Civil Service Commission?

The County of San Diego Civil Service Commission's mission is "to protect the merit basis of the personnel system through the exercise of the Commission's Charter mandated appellate and investigative authority". The Commission reviews and approves the Civil Service Rules, and they are the administrative appeals body for the County in personnel matters authorized by the County Charter. Important, detailed information about the Commission and disciplinary hearings is posted on the website listed below:

**CIVIL SERVICE COMMISSION - <http://www.sdcounty.ca.gov/civilservice/what.html>**

Civil Service Commission, Civil Service Rules, Disciplinary Hearings, Meeting Agenda, FAQ's & Contacts

### ASDCE Representation for Employee Discipline & Due Process ([www.asdce.org](http://www.asdce.org) - Member Resources)

Members of ASDCE are encouraged to ask for representation at any and all disciplinary interviews, investigations and due process hearings. **Don't go it alone, call a representative as soon as possible and remember, "The Outcome is Better if We Work Together."** Responding to and refuting charges with good representation may significantly impact management decisions on behalf of the employee, throughout the investigation process. ASDCE's goal is to represent each member with the best defense possible. Please call or email a representative if you have any questions about these rights.

### ASDCE Recommends: Document! Document! Document!

These "due process" and "procedural safeguards" provide permanent county employees, the opportunity to "tell their side of the story". These laws recognize that there are at least two sides of a story in factual disputes and allow employees to refute conclusions managers may have made. Logic and common sense follow that good record keeping and accurate, complete documentation become very effective tools for employees to use to support their story. ASDCE recommends that members **document, document, document** with the facts in clear, accurate, truthful and complete written statements, either handwritten or by email, that the Association, can use in the employee's defense to support the employee's version of the story.

### ASDCE's Member Advocacy Committee (MAC) ([www.asdce.org](http://www.asdce.org) - MAC)

The Association of San Diego County Employees has an internal policy for determining whether to exceed its basic legal duty of representation in order to appeal the outcome of a particular case or grievance to the highest level allowed in a given jurisdiction. In order to provide a fair and objective determination, ASDCE has devised a Member Advocacy Committee (MAC) to hear the merits of any case before it is appealed to the highest level. The MAC meets when there are cases to review. The MAC discusses contract violations and disciplines. For more information, go the [ASDCE.org](http://ASDCE.org) under the heading "MAC" or call or email a representative.

**ASDCE: Merit Determination:** Employees may not be terminated or disciplined without good cause (just cause) and the mandated due process rights must be adhered to by the employer. If the Member Advocacy Committee (MAC) determines that an ASDCE member's case has merit, ASDCE will represent the member's case before the Civil Service Commission and the Association shall pay for representation costs. If the Member Advocacy Committee (MAC) determines that an ASDCE member's case does not have merit, the member may appeal the MAC decision to the ASDCE Board of Director's. The determination of the Board of Director's is final.

### GLOSSARY OF TERMS

From "Pocket Guide to Due Process in Public Employment", February 2013, Third Edition,  
California Public Employee Relations Publication

**"At Will Employee or Position"** – An "at will" position is employment having no specified term, that may be terminated at the will of either party on notice to the other. Because at-will employees have no property interest in their jobs, they may be released without due process.

**Due Process** – Due process requires notice and an opportunity to be heard before the government deprives a citizen of a significant property interest. The purpose of the guarantee is to provide procedural protections against the arbitrary taking of a property interest by the government. In the context of public employment, the right of due process is triggered by the proposed deprivation of permanent public employment.

**Expectation of Continued Employment** – Employees who have acquired tenure or permanency in their position or whose employment can be terminated or otherwise significantly impacted only for good cause have due process rights. Such employees gained an expectation of continued employment because they successfully completed a probationary period during which they were subject to summary release.

**Impartial Decision Maker** – An employee facing potential discipline is entitled to respond before a reasonably impartial, non-involved reviewer. To be impartial, the decision maker must not have a stake in the outcome. For example, it would be improper for that person to be embroiled in the facts of the dispute or be a potential witness.

**Post-deprivation Hearing** – Public sector employees are entitled to a full evidentiary hearing in which the employer bears the burden of proof and must persuade an impartial decision maker to uphold the discipline taken.

**Pre-deprivation Hearing** – Employees with property interests in their jobs are entitled to a pre-deprivation hearing prior to losing their job or suffering an involuntary reduction in pay. Pre-removal safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials on which the action is based, and the right to respond, orally or in writing, to the authority initially imposing discipline.

**Property Interest** – The interest arises where an employee has a legally enforceable right to continued employment.

**Skelly Meeting/Hearing** – A meeting that occurs before an impartial decision maker before an employee is deprived of his or her property interest in continued public employment. The employee is entitled to notice of the proposed actions, the reasons therefore, the materials on which the action is based, and the right to respond to the authority imposing discipline.

**Weingarten Rights** – The employee's right to have Association representation during an investigatory interview conducted by the employer that the employee reasonably believes may result in disciplinary action.