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Court of Appeal, Second District, Division 4, California.

Carlos M. ROSARIO, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES,
Defendant and Respondent.

No. B210349.
|
(Los Angeles County Super. Ct. No. BC377581).
|
Sept. 30, 2009.

APPEAL from a judgment (order of dismissal) of the Superior Court of Los Angeles County, Conrad R. Aragon, Judge. Affirmed.

Attorneys and Law Firms

Law Offices of Stephan Math and Stephan Math for Plaintiff and Appellant.

Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton for Defendant and Respondent.

WILLHITE, J.

INTRODUCTION

***1** Plaintiff Carlos Rosario is a medical doctor employed by the County of Los Angeles (the County). In May 2005 he was suspended without pay for 30 days and in September 2005 he was discharged. Plaintiff appealed these actions to the Civil Service Commission which ultimately found that both the suspension and discharge were unsupported by the facts and therefore reduced his discipline to a 15-day suspension. Plaintiff did not seek review by mandamus of the decision of the Civil Service Commission but, instead, filed a lawsuit against the County. In so far as is relevant to this appeal, he alleged that the County had improperly disciplined him because he had complained about time card fraud and that as a result of the improper discipline, an unnamed prospective employer withdrew a lucrative job offer. The County demurred to plaintiff's second amended complaint on multiple grounds, including his failure to comply with the Tort Claims Act. The trial court sustained the demurrer without leave to amend and dismissed the lawsuit.

In this appeal, plaintiff contends that the County waived any defense based upon his non-compliance with the Tort Claims Act. He relies upon sections 910.8 and 911.[1] Essentially, those sections provide that: (1) a public entity has a duty to notify an individual who submits a claim which does not substantially comply with statutory requirements that the claim is defective and (2) the public entity's failure to so notify the putative claimant constitutes a waiver of its right to raise non-compliance with the Tort Claims Act in a subsequent lawsuit. Plaintiff identifies as his defective claim a series of letters he had written to the Civil Service Commission. We conclude that those letters did not trigger any duty by the County to notify plaintiff because the letters did not put the County on notice that plaintiff was asserting a claim for damages that, if rejected, would result in a lawsuit. Accordingly, we find that the County could properly raise as a defense to plaintiff's lawsuit his failure to file a claim. We also reject plaintiff's argument that the County is estopped from raising this defense. We therefore affirm the judgment of dismissal.[2]

FACTUAL AND PROCEDURAL BACKGROUND

1. *Plaintiff's Letters to the Civil Service Commission*

From March 2004 through June 2005, plaintiff wrote five letters to the Los Angeles County Civil Service Commission. The letters were from plaintiff himself (not counsel) and gave plaintiff's home as the return address. Plaintiff urges that these letters constituted a defective claim within the meaning of the Tort Claims Act which, in turn, required the County to inform him about the defects or forfeit the defense that plaintiff failed to comply with the Tort Claims Act. We therefore set forth the contents of the letters in some detail.

The first letter, written on March 14, 2004, complained about what plaintiff characterized as "[i]mproper, unfair and illegal implementation of disciplinary actions by county employees and organizations." Plaintiff attached documents (none of

which is included in the record on appeal) to support his claim of, among other things, a "denial of due process." Further, plaintiff suggested that, as "the only Hispanic physician in the department of Neuroscience," he was the victim of discrimination. The letter did not request particular relief or threaten litigation. It simply closed with: "Thank you for your attention to this matter. I look forward to your response."

***2** The second letter was written almost a year later on April 3, 2005. In it, plaintiff "request[ed] activation of Case No. 04-092 which was originally submitted for [Civil Service Commission] review Mar.14th 2004 (along with extensive documentation), and has since been held in abeyance." He reiterated his claim of racial discrimination and asserted that false complaints were continuing to be filed against him as "retaliation (for whistle blowing)." The letter concludes: "The remedies requested are contained in both the current submitted grievance as well as the attached letter *which was requested of me* by the Department of Health Services (DHS)." The record on appeal does not include either of the referenced documents (the grievance or letter).

The third letter was written on April 20, 2005. It refers to enclosed documents to substantiate plaintiff's claims of harassment, retaliation and discrimination. (None of the documents is included in the record on appeal.)

Several weeks later, plaintiff sent his fourth letter on May 5, 2005. It referenced additional documents he enclosed to support his "claims of harassment, retaliation and discriminatory treatment." (None of those documents is included in the record on appeal.)

The fifth and last letter, was sent on June 20, 2005. With it, plaintiff enclosed a chronological summary relating to what he characterized as his "current unfounded, unmerited suspension" which he claimed was "a continuation of this same pattern of harassment, retaliation (including for whistle blowing) and discriminatory behavior." Plaintiff asserted that his enclosed documents showed that the allegations against him were false. (None of the documents is included in the record on appeal.) Lastly, plaintiff referenced the matter then pending before the Civil Service Commission.

2. *The Civil Service Commission Decision*

Plaintiff's action before the Civil Service Commission contested two disciplines imposed upon him. The first occurred on May 2, 2005 when he was suspended without pay for a period not to exceed 30 days pending an investigation of charges that he had submitted inaccurate timecards. The second occurred on September 21, 2005 when he was fired based upon multiple charges. To adjudicate plaintiff's appeal of both these decisions, a hearing officer conducted a three-day hearing at which documents were introduced and nine witnesses (including plaintiff) testified.

In August 2006, the Civil Service Commission, adopting the hearing officer's recommendation, rendered its decision. In regard to plaintiff's suspension, it found that it "was wholly without basis." It concluded that the appropriate remedy was to reimburse plaintiff "for all lost compensation" for the 30-day suspension period. In regard to plaintiff's discharge, it found that because the County had proved only some (but not all) of the charges, the County had failed to establish that discharge was the appropriate discipline. Accordingly, the Civil Service Commission reduced the discharge to a 15-day suspension. It advised plaintiff that if he disagreed with its decision, his remedy was to file an action in the superior court under either section 1085 or 1094.6 of the Code of Civil Procedure. Plaintiff did not file a writ petition under either statutory provision.

3. *Plaintiff's Lawsuit*

***3** In September 2007, plaintiff filed this lawsuit against the County. The operative pleading is the second amended complaint. It alleges the following facts. Commencing in April 2005, plaintiff began to complain to the County's Human Resources Department, the District Attorney, and the Board of Supervisors about "unlawful acts of fraud and corruption," in particular "the intentional falsification of time cards at Martin Luther King-Drew Medical Center." According to plaintiff, he was wrongfully subjected to disciplinary action (first the 30-day suspension and then the discharge) in retaliation for filing his complaints. Plaintiff's complaint alleged that he had administratively contested those actions and (as set forth earlier), the Civil Service Commission had found that plaintiff had not committed many of the allegations made against him and consequently had ordered him reinstated to his position as staff doctor.

As for damages, the pleading alleged that "[o]n or about March 27, 2005, Plaintiff received a written offer of employment which, as a result of the unfounded accusations ..., was subsequently withdrawn. The withdrawal of this offer resulted in Plaintiff's loss of a position which provided for a $300,000.00 guarantee, a minimum employment of three years, a $20,000.00 sign-on bonus and up to $2,500.00 to defray marketing and promotional

expenses." Plaintiff further alleged that the Civil Service Commission "was without authority to determine any loss to [him] represented by the loss of a prospective employment resulting from the unjustified numerous charges levied against [him]" and that he had "suffered severe emotional distress ... due to the withdrawal of the offered position."

Based upon the allegations set forth in the two preceding paragraphs, plaintiff raised two causes of action. The first was for discrimination based on national origin or ancestry. (§ 12940, et seq.) The second was for wrongful termination in violation of public policy. Plaintiff relied upon Labor Code section 1102.5, et seq. which prohibits retaliation against an employee who complains about violation of state or federal laws. Plaintiff sought damages to compensate for "all actual, consequential and incidental losses, including, but not limited to the loss of income and benefits."

Significantly absent from plaintiff's pleading was any allegation that he had complied with the provisions of the Tort Claim Act prior to filing the lawsuit.

4. *The County's Demurrer*

The County filed a demurrer to the second amended complaint. In so far as is relevant to this appeal, the demurrer noted that the complaint failed to allege that plaintiff had filed a claim in accordance with the provisions of section 911.2. In addition, the County asked the trial court to take judicial notice of the Civil Service Commission decision. The County urged that in this lawsuit plaintiff was bound by that decision's findings because he had failed to challenge them in a mandate action in the superior court.

5. *Plaintiff's Opposition to the Demurrer*

***4** Plaintiff's opposition to the demurrer did not contest that the Tort Claims Act applied to his lawsuit. Instead, he urged that the County had waived its right to raise this point. To support that argument, he first asked the trial court to take judicial notice of the five letters he had sent from March 2004 through June 2005. Next, he argued that the letters were the functional equivalent of a defective formal claim. He then relied upon section 911's provision that "[a]ny defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by failure to give notice of insufficiency with respect to the defect or omission as provided in Section 910.8."[3] As explained by plaintiff's counsel at the hearing on the demurrer: "The issue is the obligation, if any, on the part of the Civil Service Commission to notify. When the plaintiff in at least ... two of those letters specifically sets forth retaliation for whistle-blowing [and], harassment, that should have clicked and put the Commission on notice immediately that, hey, there is something else going on here. They were silent with respect to that issue. [My client] had no reason to believe he had to do anything else at the time. So this is what occurred. [¶] Now, they did not tell him of the right to file a tort claims act or that it was insufficient. Therefore, ... as to this proceeding, ... the defense raised by counsel [for the County] under Government Code section 911 is waived."

6. *The Trial Court's Ruling*

The trial court sustained the demurrer without leave to amend on multiple grounds. (See fn. 5, *infra.*) In regard to the Tort Claims Act, the trial court's ruling reads:

> "No Tort Claim Filed. [Plaintiff] argues that the numerous letters he sent to the Commission, and a letter sent to Supervisor Molina [4], constitute substantial compliance with the Government Tort Claims Act (Gov.Code, § 911.2). But no authority is submitted to bolster this argument. [Plaintiff] seeks judicial notice of these letters, and County objects on the grounds that no authority under Evidence Code section 451 et seq. is cited in support of such notice, except for a vague reference to California Evidence Code section 452 et seq.
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> "While the court sustains County's objection to [plaintiff's] request, the court has nevertheless reviewed the documents as an offer of proof by [plaintiff] as to how he might amend his pleading yet again to overcome County's legal objection based upon non-compliance with the tort claim filing requirement. The court finds nothing in that offer of proof constituting substantial compliance with the Tort Claims Act. County's demurrer to the second (Lab.Code § 1102.5) cause of action is sustained without leave to amend on this ground."

Thereafter, the trial court dismissed the complaint with prejudice.

DISCUSSION

In this appeal, plaintiff has explicitly "withdrawn" his first cause of action for employment discrimination. As for the remaining cause of action, he has now re-characterized it. Although the second amended complaint cast it as one for

wrongful termination, plaintiff now asserts that "the crux of [his] claim ... is not that he was wrongfully discharged but rather that the unjustified and retaliatory actions taken against him by [the County] in violation of Labor Code Sect. 1102.5 caused him to lose a lucrative offered employment." We need not decide whether plaintiff's second cause of action is legally sufficient or whether he should be given an opportunity to file an amended complaint because, as we now explain, the trial court properly sustained the demurrer without leave to amend based upon his failure to comply with the Tort Claims Act. [5] Plaintiff's arguments that the County has waived that defense or is estopped from asserting it are not persuasive.

***5** Section 900 et seq. "prescribes the manner in which public entities may be sued." (*Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 464.) Section 945.4 provides that " 'no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with ... Section 910 ... until a written claim therefor has been presented to the public entity and has been acted upon by the [public entity's] board, or has been deemed to have been rejected by the board....' Section 910, in turn, requires that the claim state the 'date, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted' and provide '[a] general description of the ... injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.' " (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 445.) Plaintiff was required to present a claim no later than six months after the accrual of his cause of action. (§ 911.2, subd. (a) [claim based upon personal injury must be presented within six months of accrual]; *Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1205-1209 [action for wrongful discharge based upon violation of public policy is a personal injury claim].) A plaintiff's failure to allege compliance with the Tort Claims Act constitutes grounds for a demurrer. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1240-1241, including fns. 8 & 9.)

The claim filing requirement serves several purposes: "(1) to provide the public entity with sufficient information to allow it to make a thorough investigation of the matter; (2) to facilitate settlement of meritorious claims; (3) to enable the public entity to engage in fiscal planning; and (4) to avoid similar liability in the future. [Citation.]" (*Westcon Construction Corp. v. County of Sacramento* (2007) 152 Cal.App.4th 183, 200.)

If a party submits a document that fails to comply substantially with the claim presentation requirements of the Tort Claims Act but, nonetheless, alerts the public entity to the existence of a claim for monetary damages and an impending lawsuit, it is considered a defective claim that triggers the notice and defense-waiver provisions of sections 910.8 and 911. (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 705-708 *(Phillips);* *Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635, 643-644.) Section 910.8 provides, in relevant part: "If, in the opinion of the board or the person designated by it, a claim as presented fails to comply substantially with the requirements of Sections 910 and 910.2, ... the board or the person may, at any time within 20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein." In turn, section 911 provides: "Any defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by failure to give notice of insufficiency with respect to the defect or omission as provided in Section 910.8."

***6** Given this law, the dispositive question is whether the County was required to treat plaintiff's five letters (either singularly or collectively) sent to the Civil Service Commission as a defective claim that triggered the notice and defense-waiver provisions of sections 910.8 and 911. We conclude that the answer is "no."

First, the letters cannot be construed together as a claim. In the context of determining whether a party had substantially complied with the requirements of the Tort Claims Act, one appellate court noted the problems inherent in construing a series of letters (as opposed to one letter) as a claim. It wrote:

> "[T]he often-cited purpose of the claims act is to enable the public entity to make an adequate investigation of the merits of the claim and to settle the claim without the expense of litigation. [Citation.] However, there are other practical considerations in determining whether or not the purposes of the act are being served. The established procedure for the filing of claims pursuant to the Tort Claims Act would become totally unworkable if this court were to hold that a series of writings could collectively be considered a claim.

> "If a series of letters received over a period of time could collectively constitute a claim, it would be impossible to ascertain whether a claim had been presented within the 100 days or one-year time limitation as specified in section 911.2. The act provides that if a claimant files a timely claim, the public entity has 45 days within which to grant or deny the claim. (§ 911.6.) If the claim is denied by way of written notice, the claimant has six months within which to file a court action. (§ 913.) If the claim is not acted upon by the public agency within 45 days, it is deemed denied by operation of law and the claimant has two years within which to file a court action. (§ 945.6.) It would be difficult for the public entity to identify whether a particular letter were a claim and which letter triggered its obligation to accept or deny a claim if a series of correspondence could be considered collectively to constitute a claim. If an agency was unable to determine whether a claim had been filed or when the claim had been filed, it would be equally difficult for the court to determine which statute of limitation applied or when the statute of limitation began to run.
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> "The procedures prescribed by the Tort Claims Act envisioned the filing of a single claim with the public entity so that the public entity may investigate the claim, consider settlement and formally approve or reject a claim." (*Dilts v. Cantua Elementary School Dist.* (1987) 189 Cal.App.3d 27, 35-36.)

In *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 Cal.App.4th 524, 536-537 (*Schaefer*), the appellate court found that these policy considerations applied as well when a series of letters is offered to establish that a defective claim was submitted. We agree with that analysis.

***7** Second, none of the letters considered alone establishes a claim. *Green v. State Center Community College Dist.* (1995) 34 Cal.App .4th 1348 (*Green*) distilled the "legal standard to apply in determining whether a letter is a claim that triggers the notice-waiver provisions" to be that "the content of the correspondence to the recipient entity must at least be of such nature as to make it readily discernible by the entity that *the intended purpose thereof is to convey the assertion of a compensable claim against the entity which, if not otherwise satisfied, will result in litigation.*" (*Id.* at p. 1358, italics added.)

None of plaintiff's letters to the Civil Service Commission meets the standard set forth in *Green.*

For one thing, it is not clear that the letters were even presented to the statutorily required recipient. Section 915, subdivision (a) requires a claim to "be presented to a local public entity by either of the following means: [¶] (1) Delivering it to the clerk, secretary or auditor thereof. [¶] (2) Mailing it to the clerk, secretary, auditor, or to the governing body at its principal office." The only defendant named in plaintiff's lawsuit is his employer, the County. However, plaintiff did not mail any of his letters to the County's governing body, the Board of Supervisors. (Charter, art. I, § 2; art. III, §§ 10-11.) Instead, he mailed them to the Civil Service Commission. But the Civil Service Commission is a distinct entity from the County. The Civil Service Commission is "a charter agency exercising quasi-judicial powers delegated by the county charter." (*Department of Health Services v. Kennedy* (1984) 163 Cal.App.3d 799, 802; Charter, art. IX, § 34 .) Consequently, it has an autonomous stature, distinct from the County's corporate identity. As can be seen from this case, its role is to adjudicate employment disputes within the civil service system, not to investigate and settle claims made against the County. Here, it was simply the body to which plaintiff appealed to contest the disciplinary actions taken against him. Given the salutary purposes of the claims-filing requirement of the Tort Claims Act, we question whether giving notice to the Civil Service Commission in the context of plaintiff's prosecution of his administrative appeal was sufficient to give notice to the public entity (here, the County) to assure that it had an opportunity to review a claim before suit was filed.[6] (See *Westcon Construction Corp. v. County of Sacramento, supra,* 152 Cal.App.4th at pp. 200-201.) Assuming arguendo that it was, we find that the letters were insufficient to trigger the notice-waiver provisions of the Tort Claims Act.

The first letter (March 14, 2004) simply complained about what plaintiff perceived to be unfair disciplinary actions and suggested that he was the victim of invidious discrimination. The letter did not seek particular relief or threaten litigation. The second letter (April 3, 2005) reiterated the claims made in the first letter and stated that plaintiff sought the remedies set forth in his submitted grievance. No mention was made of the potential for litigation. Apparently, the only purpose of the third and fourth letters (April 20, 2005 and May 5, 2005) was to direct the Civil Service Commission's attention to documents plaintiff enclosed which allegedly

substantiated plaintiff's claims. The fifth letter (June 20, 2005) referenced the then pending hearing before the Civil Service Commission and enclosed (additional) documents related to the issues to be resolved there. Even taken together, the five letters merely set forth plaintiff's complaints, enclosed documentation to support his version of the operative events, and referred to the hearing to be held by the Civil Service Commission. That is, they addressed only the administrative appeal that plaintiff was prosecuting to challenge the disciplines imposed upon him. None of the letters was sent by an attorney. None of the letters contained a demand for a money payment to avoid litigation. None of the letters mentioned the possibility of a lawsuit. Thus, the plain import of the letters was merely to provide information and to set forth plaintiff's view of the administrative (civil service) dispute, "not to advise of imminent litigation over a 'claim.' " (*Schaefer, supra,* 48 Cal.App.4th at p. 534.) Stated another way, the letters did not "definitely" disclose "the existence of a claim for monetary damages." (*Phillips, supra,* 49 Cal.3d at p. 710.) Because the letters did not constitute a defective claim, they did not trigger the notice and waiver provisions of the Tort Claims Act. Consequently, the County could properly raise as a defense plaintiff's failure to comply with the Tort Claims Act. That the trial court did not explicitly rely upon this ground in its ruling does not matter. A dismissal following a demurrer will be upheld on any sufficient ground stated in the demurrer, whether or not the trial court relied upon it. (*Wheeler v. County of San Bernardino* (1978) 76 Cal.App.3d 841, 846, fn. 3.) Here, the County's demurrer raised plaintiff's failure to comply with the Tort Claims Act and plaintiff's written opposition to the demurrer as well as his argument at the hearing on the demurrer raised the notice-waiver defense, a contention he has pursued on this appeal. It is therefore proper to uphold the trial court's sustaining of the demurrer on that basis.

***8** To a large extent, plaintiff relies upon the doctrine of estoppel to avoid this conclusion. He argues that the County should be "estopped from asserting the defense of failure to comply with the Tort Claims Act." The argument is not persuasive. In this context, estoppel requires a showing that a claimant has "been misled by governmental agents with respect to the procedural and time requirements of the claim statute." (*Fredrichsen v. City of Lakewood* (1971) 6 Cal.3d 353, 357.) Here, plaintiff has not and cannot point to any affirmative misrepresentation made by a County employee. He concedes that he "was not advised by any employee of the Civil Service Commission specifically as to what it was he should or shouldn't do with respect to his whistle blower and retaliation claims." Nonetheless, he argues that the County should be estopped because "the agency remained silent and accepted those claims for filing [e.g., his appeals of the disciplinary actions imposed on him] without advising [him] of the necessity of a proper filing under the California Tort Claims Act." This argument is not persuasive because it is essentially a recasting of his contention (which we have rejected) that his letters to the Civil Service Commission constituted a defective claim, triggering the notice and waiver provisions of the Tort Claims Act. In any event, the touchstone of an estoppel claim is that the public agency acted in an unconscionable matter or took unfair advantage of a plaintiff such that it should be estopped from asserting that the plaintiff failed to file a claim. (*Fredrichsen v. City of Lakewood, supra,* 6 Cal.3d at p. 358.) Plaintiff has failed to point to any facts that would support that characterization of the County's actions.

DISPOSITION

The judgment (order of dismissal) is affirmed. Costs are awarded to respondent.

We concur: EPSTEIN, P.J., and SUZUKAWA, J.

All Citations

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Footnotes

1 All undesignated statutory references are to the Government Code.

2 Because we conclude that the trial court properly sustained the demurrer without leave to amend based upon plaintiff's failure to comply with the Tort Claims Act, there is no reason to address plaintiff's secondary contention that the trial court erred in finding that he had failed to allege a viable cause of action (see fn. 5, *infra*) and that he should be permitted to file a third amended complaint to cure whatever deficiencies exist.

3 The text of section 910.8 will be set forth *post* in our discussion of plaintiff's contention.

4 This apparently is a reference to the allegation in plaintiff's complaint that on September 4, 2005 he had sent a complaint to Supervisor Gloria Molina about time card fraud. Plaintiff reiterated this claim in his opposition to the demurrer but never produced a copy of the letter.

5 In sustaining the demurrer without leave to amend, the trial court also found that plaintiff had failed to state a cause of action for retaliation. It explained:

> "As to his loss of prospective employment, [plaintiff] does not allege who extended that offer to him. From the language of the pleading, it appears that a prospective employer, other than the County, made that offer to him. The alleged withdrawal of that offer was an 'adverse action' taken by a third party, not by the County. It is not actionable ... as a retaliation claim (under Lab. C. § 1102.5 as against the County.
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> "... [Plaintiff] has no retaliation claim under Labor Code § 1102.5 because he has not identified a state or federal statute, or a state or federal rule or regulation that was violated by County, the reportage of which resulted in County's retaliatory conduct. The demurrer to the retaliation (second) cause of action is sustained without leave to amend on this ground, as well as those noted above."

6 The County argues that adoption of plaintiff's position "would eviscerate the claims statute.... [T]he County would be forced to interpret *every* civil service appeal as a government claim. The Commission would be required to report filings to the County-at-large. As a result, the Commission would no longer act as a 'neutral' arbitrator in employee disputes. Instead, the Commission would be the County's agent, fundamentally changing the Commission's relationship between the parties, and ceasing to exist as an independent quasi-judicial body." There is much force to this argument.