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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ROBERT MALLANO,

Plaintiff and Respondent,

v.

JOHN CHIANG et al.,

Defendants and Appellants.

B272124 c/w B276842

(Los Angeles County
Super. Ct. No. BC533770)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Elihu M. Berle, Judge. Affirmed.

Skadden, Arps, Slate, Meagher & Flom, Raoul D. Kennedy,
James Schaefer, William Casey, and Pramode Chiruvolu for
Plaintiff and Respondent.

Kamala D. Harris, Attorney General, Julie Weng-
Gutierrez, Assistant Attorney General, Jennifer M. Kim and
Jonathan E. Rich, Deputy Attorneys General for Defendants and
Appellants.

In this declaratory relief action concerning the payment of judicial salaries and benefits, defendants and appellants John Chiang, Controller of the State of California (the Controller);¹ the Judges' Retirement System (JRS); and the Judges' Retirement System II (JRS II)² appeal from the judgment entered in favor of plaintiff and respondent Robert M. Mallano (plaintiff), individually and on behalf of a class of similarly situated persons (collectively, plaintiffs), ordering that plaintiffs are entitled to payments and benefits based on the formula set forth in Government Code section 68203³ for the fiscal years 2008-2009, 2009-2010, 2010-2011, 2013-2014, 2014-2015, and 2015-2016. Defendants also appeal the award of attorney fees pursuant to Code of Civil Procedure section 1021.5.

We affirm the judgment and the attorney fees award.

BACKGROUND

The parties

Named plaintiff is a retired Justice of the California Court of Appeal. Plaintiffs are: (1) all California state judges of the Superior Court or justices of the Supreme Court or Court of Appeal⁴ who were active since the commencement of fiscal year 2008-2009; (2) all persons who are receiving or since the

¹ John Chiang was the elected Controller when this action was commenced. He has since been succeeded in office by Betty Yee.

² The Controller, JRS, and JRS II are referred to collectively as defendants.

³ All further statutory references are to the Government Code, unless stated otherwise.

⁴ Judges and justices are collectively referred to herein as judges.

commencement of fiscal year 2008-2009, have received benefits from JRS; and (3) all persons who are receiving, or have received benefits from JRS II based on a final compensation that includes salary paid at any time since the commencement of 2008-2009.

Judges elected or appointed to office before November 9, 1994, may retire pursuant to JRS. (Gov. Code, §§ 75000 et seq., 75502.) Judges who retire pursuant to JRS and their beneficiaries receive benefit payments in proportion to the salaries of active judges currently holding their former office. (§§ 75006, 75025, 75032.)

Judges elected or appointed to office on or after November 9, 1994, at issue here, may retire pursuant to JRS II. (§ 75502.) Judges who retire pursuant to JRS II and their beneficiaries receive benefit payments based on the final salary they received when they served as judges. (§§ 75502, 75508, 75522.)

JRS and JRS II are both administered and governed by the Board of Administration of the Public Employees' Retirement System (CalPERS Board). (§ 75005.)

The Controller is an elected state officer and is part of the executive branch of the State of California. (Cal. Const., art. V, § 11.) The Controller is responsible for superintending the fiscal concerns of the state, is required to audit all claims against the state, and may audit the disbursement of any state money "for correctness, legality, and for sufficient provisions of law for payment." (§ 12410.) The Controller is also required to draw warrants for the payment of money directed by law to be paid out of the state treasury. (§ 12440.)

Law governing judicial compensation and benefits

Article VI, section 19 of the California Constitution requires the Legislature to "prescribe compensation for judges of courts of record." Since 1964, judicial salaries have been statutorily prescribed by sections 68200 through 68292, subject to

increases provided by section 68203. (*Staniforth v. Judges' Retirement System* (2014) 226 Cal.App.4th 978, 983.) Laws that set judicial salaries are appropriations. (Cal. Const., art. III, § 4; *Olson v. Cory* (1980) 27 Cal.3d 532, 539 (*Olson*).

Judges are elected state officers. (Cal. Const., art. VI, § 16.) As elected state officers, judges' salaries may not be reduced during a term of office below the highest level paid during that term. (Cal. Const., art. III, § 4.)

During the time periods relevant to this action, section 68203, subdivision (a) provided for mandatory annual increases in judicial salaries by an amount equal to a judge's then current salary multiplied by the average percentage salary increase for state employees during that fiscal year:

“On July 1, 1980, and on July 1 of each year thereafter, the salary of each justice and judge named in Sections 68200 to 68202, inclusive, and 68203.1 shall be increased by the amount that is produced by multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California State employees; provided, that in any fiscal year in which the Legislature places a dollar limitation on salary increases for state employees the same limitation shall apply to judges in the same manner applicable to state employees in comparable wage categories.”

At the times relevant to this action, subdivision (b) of section 68203 provided: “For purposes of this section, salary increases for state employees shall be those increases as reported by” either the Department of Personnel Administration (DPA) or

the California Department of Human Resources (CalHR).⁵
(§ 68203, subd. (b).)

All retirement allowances payable by law to judges who retire pursuant to JRS must be paid out of a fund in the state treasury known as the Judges' Retirement Fund (JRS fund) (§ 75100), or, for judges who retire pursuant to JRS II, out of a trust fund known as the Judges' Retirement System II Fund (JRS II fund). (§ 75600.) All payments from the JRS fund or the JRS II fund must be made upon warrants drawn by the Controller upon demands by the CalPERS Board. (§§ 75005, 75505.)

The Controller is required at the end of each month to ascertain the aggregate amount of the annual salaries of judges covered by JRS, and must transfer monthly into the JRS fund a sum equal to 8 percent of one-twelfth of the aggregate amount of those salaries from the state's general fund. (§ 75101.) The Controller is also required at the end of each month to ascertain the aggregate amount of the annual salaries (not including the additional compensation pursuant to section 68203.1) of all judges covered by JRS II, and must transfer monthly into the JRS II fund a sum equal to 18.8 percent of one-twelfth of the aggregate amount of those salaries from the state's general fund. (§ 75600.5.)

CalHR's calculation of average salary increases

Every fiscal year since 2003-2004, CalHR's costing unit has calculated the average percentage salary increase for California state employees. These calculations are sent to the Department

⁵ Before July 1, 2012, the DPA was responsible for reporting salary increases for state employees. CalHR assumed that responsibility effective July 1, 2012. CalHR was created on July 1, 2012, pursuant to a reorganization plan that consolidated the DPA with certain programs of the State Personnel Board. (§ 18502.) CalHR is part of the executive branch. (§ 19815.25.)

of Finance for purposes of preparing the annual state budget and may be revised from time to time until the budget is finalized. Throughout the budget process, CalHR communicates informally with other departments, including the Controller’s office, regarding the salary increase calculations and any revisions to those calculations.

Upon finalization of the budget, CalHR formally informs the Controller of salary increases by issuing written documents known as pay letters. The Controller’s office has relied on pay letters as the basis for paying state employee salary increases.

During the fiscal years relevant to this action, CalHR calculated average percentage salary increases for state employees as follows:

Fiscal year	Average percent salary increase
2007-2008	4.16%
2008-2009	0.97%
2009-2010	0.10%
2010-2011	0.11%
2011-2012	0.00%
2012-2013	0.00%
2013-2014	0.22%
2014-2015	1.83%
2015-2016	2.40%

In performing these calculations, CalHR’s costing unit did not consider decreases in state employee salaries, although most state employees experienced effective salary decreases during fiscal years 2008-2009, 2009-2010, and 2011-2012 as the result of mandatory furloughs or collectively bargained personal leave programs imposed pursuant to executive orders issued by then

Governor Schwarzenegger to address a fiscal emergency the state was experiencing during those years. The mandatory furloughs did not alter an affected state employee's rate of pay but did effectively reduce the wages or salary earned. (*Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1037.) For those employees whose salaries were effectively decreased, CalHR entered a zero for purposes of calculating the average percentage salary increase. Not all state employees experienced effective salary reductions during the furlough years. A few employee groups were exempt from the furloughs and received salary increases. Those salary increases are reflected in CalHR's calculations of average percentage salary increases during the applicable fiscal years.

In each of the fiscal years at issue, including those in which furloughs were imposed, CalHR provided the percentage salary increase calculations to the California Department of Finance. CalHR also formally communicated to the Controller, in the form of pay letters, salary increases for state employees who received such increases, except judges. CalHR did not issue any pay letters regarding judicial salaries in fiscal years 2008-2009, 2009-2010, 2010-2011, 2011-2012, or 2012-2013, and judges did not receive any salary increases during those fiscal years.

In a letter dated November 27, 2013, the Judicial Council of California and the California Judges Association informed judges that following discussions between the judicial and executive branches, judges would receive a pay increase of 1.40 percent (the combined total of the 0.97 percent, 0.10 percent, 0.11 percent, and 0.22 percent average percentage salary increases calculated by CalHR for state employees in fiscal years 2008-2009 through 2013-2014), and that this salary increase would be retroactive to July 1, 2013.

The instant lawsuit

Plaintiff filed the instant action on January 21, 2014, seeking declarations (1) that the salary of each judicial officer in fiscal years 2008-2009 through 2013-2014 was the salary provided pursuant to section 68203; (2) that the salary increases provided for in section 68203 are mandatory and not subject to the discretion or authorization of any state official; and (3) that JRS and JRS II pension benefits are based on the final judicial salaries calculated according to section 68203.

Defendants filed a demurrer, arguing that they were not proper parties because the Controller, JRS, and JRS II have no authority to set judicial salaries and section 68203 is not a self-executing appropriations statute. Defendants also moved to strike the class allegations in the complaint on the ground that the relief sought was inappropriate for class certification and required individualized factual determinations.

The trial court overruled the demurrer and denied the motion to strike, and defendants filed their answer on June 17, 2014.

Plaintiff moved for class certification, and defendants opposed that motion on the grounds that he was not a suitable class representative and had failed to sue the proper parties. The trial court granted plaintiff's motion and certified a class composed of all California judges who were active since commencement of fiscal year 2008-2009, all persons who are receiving, or any time since commencement of fiscal year 2008-2009 have received benefits from JRS I; and all persons who are receiving or who have received benefits from JRS II based on a final compensation that includes salary paid at any time since the commencement of fiscal year 2008-2009.

A bench trial ensued in which the parties submitted witness testimony by way of declaration and deposition

transcripts and other documentary evidence. On December 16, 2015, the trial court issued a statement of decision in which it made the following findings: “[t]he plain meaning of the words ‘salary increase’ in Section 68203(a), denotes amounts by which a salary is made larger. Thus, salary decreases are not considered part of the definition of ‘salary increase’”; “[a] finding, conclusion, or account by [CalHR] as to salary increases is sufficient to constitute a ‘report’ for the purposes of Section 68203(b)”; “[a]n ‘exempt pay letter’ or ‘written pay letter’ from [CalHR] is not a condition precedent for the mandatory ministerial obligations of the Controller to pay judicial salaries under Section 68203.” The trial court concluded that an award of reasonable attorney fees was appropriate under Code of Civil Procedure section 1021.5 and that plaintiffs are entitled to interest at 10 percent per annum on the unpaid salaries and benefits, from the dates on which such sums vested until they are paid. Defendants did not object to the statement of decision.

The trial court issued a proposed judgment on February 4, 2016. Defendants filed objections to portions of the judgment but did not object to the 10 percent rate of interest. On February 22, 2016, plaintiffs submitted a memorandum regarding proposed salary amounts that should be included in the judgment, along with a proposed judgment that specified the salary amounts active judges should have received during the fiscal years 2008-2009 through 2015-2016.

A hearing on the draft judgment was held on March 9, 2016. During that hearing, defendants would not agree that the specific salary amounts proposed by plaintiff were correct, but refused to state what the correct numbers should be, claiming counsel lacked authority to do so.

A final judgment was entered on March 10, 2016. Defendants appealed from that judgment on May 5, 2016.

Plaintiff filed a motion for attorney fees on March 17, 2016, and the trial court granted that motion in part, awarding plaintiff \$659,756 in attorney fees. Defendants appealed from the order granting the attorney fees motion, and we consolidated the two appeals.

DISCUSSION

I. Standard of review and general legal principles

The instant case involves interpretation of section 68203, an issue we review de novo. (*Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal.4th 1113, 1119.) When construing a statute, our analysis begins by ascertaining the underlying legislative intent. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) To do so, we first examine the language of the statute as the best indication of legislative intent. (*Ibid.*) “If the statutory language is clear and unambiguous our inquiry ends. ‘If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.’ [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. [Citation.] We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. [Citations.] Only when the statute’s language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation. [Citation.]” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.)

An appeal from an award of attorney fees under Code of Civil Procedure section 1021.5 is normally reviewed for abuse of discretion. (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1025.) However, de novo review is appropriate when the determination of whether the statutory criteria for an

award of attorney fees and costs have been satisfied. (*Id.* at pp. 1025-1026.)

We review for abuse of discretion the trial court's grant of declaratory relief. (See *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 872.)

II. Section 68203 does not include state employee effective salary decreases for purposes of calculating judicial salary increases

As discussed, during the times relevant to this action, section 68203 provided for mandatory annual increases in judicial salaries by “the amount that is produced by multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California state employees.” (§ 68203, subd. (a).) Defendants contend the phrase “average percentage salary increase for the current fiscal year for California State employees” as used in section 68203 must be construed to include not only salary increases but also effective salary decreases caused by mandatory furloughs imposed during fiscal years 2008-2009 through 2011-2012.

A. The plain language of section 68203 does not support defendants' interpretation

Defendants' interpretation is inconsistent with the plain language of the statute. “The plain meaning of ‘increase’ is to grow larger in size or amount. [Citation.]” (*Guillen v. Schwarzenegger* (2007) 147 Cal.App.4th 929, 940; Mirriam-Webster online dict., <<https://www.mirriam-webster.com/dictionary/increase>>.) “When a statute refers to an ‘increase’ occurring ‘[i]n any fiscal year’ [citation], it is logical to construe ‘increase’ as meaning an increase over the previous year.” (*Guillen*, at p. 940.) The plain meaning of the words

“salary increase” as used in section 68203, subdivision (a) is the amount by which a salary is made larger.

As the trial court noted in its statement of decision, when the Legislature has intended to use the phrase *increase or decrease*, or terms that denote deductions or decreases, such as *net increase*, or *change*, it has clearly done so. (See, e.g., § 31870.01, subd. (a) [county employees retirement benefits shall be “*increased or decreased* to nearest one-tenth of 1 percent, by 40 percent of the annual *increase or decrease* in the cost-of-living as of January 1st of each year” (italics added)]; Welf. & Inst. Code, § 7289.1, subd. (b) [“for computation of the *percentage change* in the cost of living . . . [t]he product of any percentage *increase or decrease* in the average index and the amount set forth in Section 7289 shall be the adjusted amount” (italics added)]; § 12406 [“Appointments to these exempt positions shall not result in any *net increase* in the expenditures of the Controller” (italics added)].) Section 68203, subdivision (a) does not include such terms.

Subdivision (a) of section 68203 includes an express proviso limiting judicial salary increases: “[I]n any fiscal year in which the Legislature places a dollar limitation on salary increases for state employees the same limitation shall apply to judges in the same manner applicable to state employees in comparable wage categories.” There is no similar provision limiting judicial salary increases during fiscal years in which state employee salaries are effectively decreased, and we decline to read one into the statute. (*California Teachers Assn v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 [if words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute].)

The language of subdivision (b) of section 68203 further reinforces the interpretation that “average percentage salary

increase” as used in subdivision (a) includes only salary increases, and not decreases. Subdivision (b) states: “For the purposes of this section, salary increases for state employees shall be those increases as reported by [CalHR].” Subdivision (b) refers only to salary increases, and it identifies CalHR as the source of information for such increases. It does not mention salary decreases, nor does it identify CalHR or any other agency as the source of information for salary decreases. Subdivisions (a) and (b) of section 68203, read together, unambiguously provide that only state employee salary increases reported by CalHR are to be considered in calculating judicial salary increases.

B. The legislative history does not support defendants’ interpretation

Defendants urge us to reject the plain meaning of the word “increase” as used in section 68203 based on the statute’s legislative history, which they claim evinces an intent to tie judicial salary increases to the percentage salary increase, if any, from the average of *all* state employees, and not just those few employees whose salaries were increased. They rely on an analysis prepared by the Assembly Committee on the Judiciary in connection with a 1979 amendment to the statute:⁶

“SB 53 changes the method of granting judges’ annual salary increases by tying the increase to the annual average salary increases granted to California State employees up to a maximum of 5%. Thus, if the

⁶ Prior to the 1979 amendment, section 68203 provided for annual cost of living increases to judicial salaries. The 1979 amendment replaced the cost of living increases with the current provision for judicial salary increases equal to “the average increase in state employee salaries, not to exceed 5%, as specified.” (Legis. Counsel’s Dig., Ch. 1018 (Sen. Bill No. 53) (1979-1980 Reg. Sess.)

average salary increase received by state employees is 3%, the judges would be entitled to a 3% increase. If state employees do not receive an increase in any year, the judges would not be entitled to an increase for that year. [¶] . . . [¶] By providing that judges would receive the same pay hikes as state workers . . . SB 53 presents an equitable alternative to the annual pay increases judges now receive.”

(Assem. Com. on Judiciary, analysis of Sen. Bill No. 53 (1979-1980 Reg. Sess.).)

There is nothing in the legislative history that indicates that the average percentage salary increase for state employees in any given fiscal year was intended to include effective salary decreases as well as increases. The analysis cited by defendants simply states that judges are not entitled to a salary increase in any year in which state employees do not receive an increase. CalHR calculated a 0.00 percent average percentage salary increase for state employees in fiscal years 2011-2012 and 2012-2013, and plaintiffs do not dispute that they were not entitled to any salary increase in those years.

C. Defendants’ interpretation is inconsistent with CalHR’s contemporaneous calculations of state employee salary increases

Defendants’ interpretation of average percentage salary increase as including effective salary decreases is inconsistent with CalHR’s contemporaneous calculations of average percentage salary increases during the fiscal years at issue. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-12 [agency’s interpretation of a statute entitled to consideration and respect by a court independently construing the statutory text].) CalHR contemporaneously calculated salary increases in the amounts of 0.97 percent in 2008-2009, 0.10 percent in 2009-2010, 0.11 percent in 2010-2011, and 0.22

percent in 2013-2014. These calculations did not include any effective salary decreases as the result of furloughs.

Defendants' interpretation is also inconsistent with the Controller's reliance on CalHR's contemporaneous calculations as the basis for paying judicial salary increases in 2013. In July 2013, judges were paid a salary increase of 1.4 percent (the combined total of the 0.97 percent, 0.10 percent, 0.11 percent, and 0.22 percent, the salary increase percentages calculated by CalHR during fiscal years 2008-2009 through 2013-2014).

Defendants' interpretation is also internally inconsistent. As the trial court noted in its statement of decision, if state employee annual salaries were to be treated as reduced during a furlough period, the salaries would also have to be treated as increased when the furlough period ceased. Defendants insist that CalHR's calculation of annual state employee salaries must reflect salary decreases during the years in which employees were furloughed, but they refuse to recognize any concomitant salary increases in the years following the furloughs.

D. The 2016 amendments to section 68203 do not support defendants' interpretation

Defendants contend the Legislature's 2016 amendments to section 68203 support their interpretation of the statute. In 2016, subdivision (b) of section 68203 was amended to provide:

“(b)(1) For the purposes of this section, average percentage salary increases for California state employees shall be those increases as reported by the Department of Human Resources to the State Controller in a pay letter.

“(2) For purposes of this section the average percentage salary increase for the current fiscal year for California state employees shall be reduced by the average percentage salary decrease resulting from the furlough or enrollment in a personal leave

program of California state employees in that current fiscal year, as determined by the Department of Human Resources, in consultation with the Department of Finance.

“(3) If the reduction required pursuant to paragraph (2) results in a percentage that is equal to or less than zero, the salary of each justice and judge named in Sections 68200 to 68202, inclusive, and 68203.1 shall not be increased.

“(4) Persons working for the California State University system, the judicial branch, or the Legislature are not considered California state employees for purposes of this subdivision.”

“A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. [Citations.]” (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) With respect to the 2016 amendments, the Legislature plainly stated otherwise: “By amending Section 68203 of the Government Code in this act, the Legislature does not intend to create an inference about the legal effect of the statute prior to the enactment of this act.” (Stats. 2016, ch. 35, § 23.) The 2016 amendments to section 68203 accordingly do not support defendants’ interpretation.

III. Issuance of a pay letter by CalHR was not a condition precedent to the Controller's duty to issue warrants

Defendants contend their duties under section 68203 are expressly conditioned upon the reporting of salary increases by CalHR in the form of pay letters. Because CalHR did not formally inform the Controller of any judicial salary increases during the fiscal years at issue by sending a pay letter, defendants contend they had no duty to issue warrants to pay judges any salary increase.⁷

The plain language of section 68203 does not support defendants' interpretation. Subdivision (a) of the statute states that judicial salaries "shall be increased" each fiscal year by the amount that is the product of the judge's then current salary multiplied by the average percentage salary increase for state employees for that fiscal year. (§ 68203, subd. (a).) Subdivision (b) states that "salary increases for state employees shall be those increases as reported by" CalHR.

Section 68203 does not condition payment of judicial salary increases upon CalHR's issuance of any formal written report or pay letter, nor does it require CalHR to issue a written report or specific form of communication regarding state employee salary increases to the Controller or anyone else.⁸ CalHR notifies the

⁷ CalHR's attorneys deny any obligation or duty by CalHR during the fiscal years at issue to formally report state employee salary increases to the Controller or to anyone else. During the deposition of a CalHR employee, CalHR's counsel stated: "Subsection b [of section 68203] doesn't impose a duty on CalHR to do anything. It simply defines what salary increase[s] for state employees shall be."

⁸ As discussed in section II D *ante*, the Legislature amended section 68203, subdivision (b) in 2016 to state that average percentage salary increases for state employees "shall be those

Department of Finance of state employee salary increases. State employee salary increases are also the subject of informal communications between CalHR and the Controller that occur regularly throughout the state budget process. The former manager of CalHR's costing unit testified in deposition and at trial that the Controller's office "is well aware" of CalHR's salary increase calculations and revisions to those calculations throughout the process because "[t]hey've been in contact on finding out . . . the numbers." There is no evidence that communications about percentage salary increases between CalHR and the Controller (both of which are departments within the executive branch) did not occur during the fiscal years in question, nor does the Controller claim that it had no knowledge of CalHR's salary increase calculations.

The Controller does not dispute that its ministerial duties include paying judicial salaries and salary increases. Section 68203 does not condition the Controller's exercise of those duties upon the issuance of a pay letter. These duties exist whether or not CalHR has, as a matter of practice, historically issued pay letters. (*Gilb v. Chiang* (2010) 186 Cal.App.4th 444, 454, fn. 6 (*Gilb*).

IV. The Controller was not constitutionally or statutorily constrained from implementing judicial salary increases

Defendants contend the Controller lacked authority to implement judicial salary increases during the fiscal years at issue absent a legislative appropriation to pay such increases. As support for this argument, they cite a provision of the California

increases as reported by [CalHR] to the State Controller in a pay letter" but expressly disclaimed any intent "to create an inference about the legal effect of the statute" prior to the amendment.

Constitution⁹ that prohibits the drawing of money from the Treasury without an appropriation.¹⁰

Section 68203 was such an appropriation. Article III, section 4 of the California Constitution provides that laws setting the salaries of elected state officers are appropriations.¹¹ Judges are elected state officers. (Cal. Const., art. VI, § 16), and laws that set judicial salaries, including salary increases, are accordingly appropriations. (*Olson, supra*, 27 Cal.3d at p. 543

⁹ Defendants cite case law that in turn cites former article XIII section 21 of the California Constitution, which provided in part: “No money shall be drawn from the Treasury but in consequence of appropriation made by law.” The current provision is article XVI, section 7, which states: “Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller’s duly drawn warrant.

¹⁰ “An appropriation is a legislative act setting aside ‘a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money and no more for such specified purpose.’ [Citation.]” (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1282.)

¹¹ Article III, section 4 of the California Constitution provides: “(a) Except as provided in subdivision (b), salaries of elected state officers may not be reduced during their term of office. Laws that set these salaries are appropriations. [¶] (b) Beginning on January 1, 1981, the base salary of a judge of a court of record shall equal the annual salary payable as of July 1, 1980, for that office had the judge been elected in 1978. The Legislature may prescribe increases in those salaries during a term of office, and it may terminate prospective increases in those salaries at any time during a term of office, but it shall not reduce the salary of a judge during a term of office below the highest level paid during that term of office. Laws setting the salaries of judges shall not constitute an obligation of contract pursuant to Section 9 of Article I or any other provision of law.”

[laws setting judicial salaries are appropriations, including law that provides for annual cost of living salary increases].) Such laws take effect as appropriations upon enactment (*White v. Davis* (2002) 108 Cal.App.4th 197, 219), and no further legislative action is required to authorize payment of those salaries. (*Ibid.*)

Defendants cite *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317 (*Tirapelle*) and *Gilb, supra*, 186 Cal.App.4th 444 (*Gilb*) as support for their argument that the Controller lacked statutory authority to implement the judicial salary increases at issue. Neither of those cases involved the setting or payment of judicial salaries or the salaries of other elected state officers. (see *Tirapelle, supra*, at pp. 1320-1321 [Controller lacked authority to refuse to implement salary reductions for certain state employees following reduced appropriations by the legislature]; *Gilb, supra*, at p. 451 [Controller lacked authority to pay state employee salaries when appropriations to pay such salaries were unavailable].) *Tirapelle* and *Gilb* are accordingly inapposite.

Defendants next contend they had no authority to implement judicial salary increases under section 68203 because the statute refers only to CalHR and does not mention the Controller, JRS, or JRS II. They argue that by designating CalHR as the source for state employee salary increase information, the Legislature expressly delegated to CalHR the authority to set judicial salary increases. That argument was rejected by the court in *Tirapelle*: “The DPA [CalHR’s predecessor] is not vested with authority with respect to the salaries of judicial employees. [Citations.]” (*Tirapelle, supra*, 20 Cal.App.4th at p. 1320, fn. 4.)

Section 68203 contains no express delegation of legislative authority to CalHR to set judicial salary increases. Such delegation is prohibited by article VI, section 19 of the California Constitution, which requires the legislature to “prescribe” judicial

compensation. “When the Constitution has ‘prescribed’ a duty ‘the named authority must itself exercise the function described; in other words, it imposes a nondelegable duty.” (*Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630, 652.) When such a nondelegable duty exists, the legislature may “permit other bodies to take action based on a general principle established by the legislative body so long as the Legislature provides standards or safeguards which assure that the Legislature’s fundamental policy is effectively carried out. [Citation.]” (*Id.* at p. 653.) Section 68203 identifies CalHR as the source of information for state employee salary increases. It does not delegate to CalHR the authority to set judicial salary increases.

Nothing in section 68203 constrains or prohibits the Controller from fulfilling its ministerial duty to pay judicial salary increases.

V. Trial court’s authority to specify judicial salary amounts

The judgment states that based on the formula set forth in section 68203 and the average percentage salary increases granted to California state employees during the fiscal years at issue, judicial salary increases were mandated as follows: 0.97 percent for fiscal 2008-2009, 0.10 percent for fiscal 2009-2010, 0.11 percent for fiscal 2010-2011, 0.22 percent for fiscal 2013-2014, 1.83 percent for fiscal 2014-2015, and 2.4 percent for fiscal 2015-2016.¹² The judgment also specifies the salary amounts

¹² The judgment also makes clear that the annual increases in judicial salaries should be the applicable percentage increase for that fiscal year over the previous year’s salary, as adjusted by the percentage increase applicable to that previous year. For example, fiscal 2008-2009 judicial salaries should be increased by 0.97 percent. For fiscal 2009-2010, judicial salaries should be

that are to be the bases for payments and benefits to class members for each of the fiscal years at issue.

We reject defendants' contention that the judgment improperly awards "retrospective relief akin to damages for past alleged wrongs," when plaintiff sought only declaratory relief in his complaint. The judgment includes no monetary damages award. Rather, it resolves a statutory interpretation dispute by specifying salary amounts for judicial officers during the fiscal years at issue. An actual controversy existed between the parties regarding those salary amounts, given their disagreement over the construction and operation of section 68203 during the fiscal years at issue, and the Controller's duty to pay salary increases during those years. (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723 [declaratory relief is appropriate "when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law"].) The trial court did not abuse its discretion by including in the judgment judicial salary amounts during the fiscal years at issue.

VI. Interest

The judgment states that plaintiffs are entitled to interest at 10 percent per annum on unpaid salaries and retirement benefits from the dates on which such sums vested until they are paid. Defendants contend the interest award was improper because there was no basis for an award of damages. Defendants did not object to the interest award in the trial court below, despite multiple opportunities to do so. They accordingly waived

increased by 0.10 percent over the increased 2008-2009 salary levels (i.e., as adjusted to reflect the 0.97 percent increase for 2008-2009).

the right to do so in this appeal. (*Jones v. Wagner* (2001) 90 Cal.App.4th 466, 481-482.)

We do not address the impact, if any, of subdivision (f) of section 68203,¹³ enacted after this appeal commenced, on the interest award. That issue was not presented to the trial court, nor was it raised by defendants in their opening brief on appeal, except as a passing reference in a footnote. We do not consider on appeal issues not raised in the trial court (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603), or raised for the first time in a reply brief. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

VII. Attorney fees award

Code of Civil Procedure section 1021.5 authorizes an award of attorney fees to a successful party “in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery.” (Code Civ. Proc., § 1021.5.) The underlying purpose of the statute “is to encourage the presentation of

¹³ Subdivision (f) of section 68203 states: “Notwithstanding Article 2 (commencing with Section 3287) of Chapter 1 of Title 2 of Part 1 of Division 4 of the Civil Code, Chapter 5 (commencing with Section 685.010) of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure, any other law, or any court judgment that has not been finally determined upon appeal as of the date this subdivision is enacted, any award of interest on an order to pay unpaid salary or judicial retiree benefits pursuant to this section shall not exceed the rate of interest accrued on moneys in the Pooled Money Investment Account.”

meritorious claims affecting large numbers of people by providing successful litigants attorney fees incurred in public interest lawsuits. [Citation.]” (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 110-111 (*Beach Colony II*.)

Defendants contend the attorney fees award should be reversed because plaintiff did not satisfy the statutory requirements for such an award. They claim that the instant lawsuit did not confer a significant benefit on the general public or a large class of persons and was motivated by plaintiff’s personal pecuniary interest. They further claim that plaintiff assumed no financial burden in litigating the instant action to make an award of attorney fees appropriate.

A. Significant benefit to the general public

Defendants’ argument that the instant lawsuit did not confer a significant benefit on the public because it vindicates the rights of only a group of judges “confuses the question whether there was an important public interest at stake with the question whether a ‘significant benefit’ has been ‘conferred on the general public or a large class of persons’ [Citation.] The significant benefit criterion calls for an examination whether the litigation has had a beneficial impact on the public as a whole or on a group of private parties which is sufficiently large to justify a fee award. This criterion thereby implements the general requirement that the benefit provided by the litigation inures primarily to the public. [Citation.] In contrast, the question whether there was an important public interest at stake merely calls for an examination of the subject matter of the action -- i.e., whether the right involved was of sufficient societal importance. [Citation.]” (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1417.)

Judicial compensation is a matter of statewide concern, as it is the principal means of protecting the independence of the judicial branch. (*Olson, supra*, 27 Cal.3d at pp. 544-545;

Sturgeon v. County of Los Angeles, supra, 167 Cal.App.4th at p. 654.) “[P]rotection of a judge’s subsistence is not so much for the benefit of the judge as it is for the public interest in the preservation of an independent judiciary. [Citation.]” (*Olson, supra*, 27 Cal.3d at p. 552 (dis. opn. of Newman, J.), citing *Evans v. Gore* (1920) 235 U.S. 245, 248-254.) The instant lawsuit enforced an important right affecting the public interest.

The right to compensation by persons serving their term in public office is protected by the contract clause of the Constitution. (*Olson, supra*, 27 Cal.3d at p. 538.) “Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. [Citation.]” (*Ibid.*) Judges have a vested right to their office for a certain term, and, during the time periods relevant to this action, to an annual increase in salary in accordance with the formula prescribed in section 68203. (See *Olson*, at p. 538.) Because the statutorily mandated salary increases were not paid, judges entitled to those increases suffered impairment of a vested right.

Judicial pensioners receiving benefits that are based on judicial salaries paid since the commencement of fiscal year 2008-2009 similarly suffered impairment of a vested right. (See *Olson, supra*, 27 Cal.3d at pp. 541-542.) The instant lawsuit sought and obtained redress for such impairment.

B. Significant benefit on a large class of persons

The statutory requirement that a significant benefit has been conferred on a large class of persons has been satisfied in this case. (Code Civ. Proc., § 1021.5.) As a result of the instant lawsuit, more than 3,000 judges, judicial retirees, and their beneficiaries will receive salaries and benefits that were wrongfully withheld. Active judges were each entitled to payment of back salary and interest between \$14,600 and \$18,700. Assuming there were 1,600 active judges during the

class period, those class members are owed more than \$23 million in back salary and interest. Assuming there were 1,800 judicial retirement beneficiaries during the class period and that each beneficiary received benefits in an amount equal to 50 percent of the salaries owed to active judges, those class members are owed more than \$13 million in unpaid benefits and interest.

C. Financial burden of private enforcement

The test for determining whether the financial burden of private enforcement warrants an award of attorney fees under Code of Civil Procedure section 1021.5 is whether “the necessity for pursuing the lawsuit placed a burden on the plaintiff “out of proportion to his individual stake in the matter.” [Citation.]” (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941.) This requirement is intended to preclude an award of attorney fees to “litigants motivated by their own pecuniary interests who only coincidentally protect the public interest. [Citations.]” (*Beach Colony II, supra*, 166 Cal.App.3d at p. 114.) A party’s pecuniary interest in the lawsuit does not disqualify a successful plaintiff from recovering attorney fees under Code of Civil Procedure section 1021.5. (*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1352.) In such cases, a statutory attorney fees award “will be appropriate except where the expected value of the litigant’s own monetary award exceeds by a substantial margin the actual litigation costs.’ [Citation.]” (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215-1216, quoting *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9-10.)

In the instant case, plaintiff’s recovery of approximately \$17,898.13 in unpaid wages and benefits does not exceed actual litigation costs by a substantial margin.

Defendants argue that plaintiff cannot satisfy the financial burden requirement for an attorney fees award under Code of

Civil Procedure section 1021.5 because he has no personal exposure for fees or costs from his attorneys. They cite no authority, however, to support that argument. The law is to the contrary. Attorney fees may be awarded under Code of Civil Procedure section 1021.5 in cases where the plaintiffs incurred no personal liability for the services of their attorneys. (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 681; *Lyons v. Chinese Hospital Assn.*, *supra*, 136 Cal.App.4th at p. 1351.)

The trial court did not err by awarding plaintiff attorney fees under Code of Civil Procedure section 1021.5.

DISPOSITION

The judgment is affirmed, as is the award of attorney fees. Plaintiff is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.
ZELON