

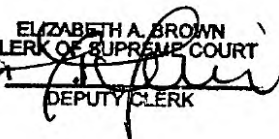
IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA DEPARTMENT  
OF BUSINESS AND INDUSTRY,  
Appellant,  
vs.  
JOSEPH MORGAN,  
Respondent.

No. 83882

**FILED**

JAN 27 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order granting a petition for a writ of mandamus to compel the Nevada State Personnel Commission to reimburse petitioner with full reinstatement pay. Eighth Judicial District Court, Clark County; Bitu Yeager, Judge.

Respondent Joseph Morgan worked as a Compliance Investigator with appellant Nevada Department of Business and Industry (NDBI)'s Division of Taxicab Authority. While working in this role, Morgan also had an approved second job. In May 2019, he was fired from his position with NDBI. Morgan appealed his termination pursuant to NRS 284.390, which outlines the hearing and appeal process for state employees who have been dismissed, demoted, or suspended. Following a hearing with a Nevada State Personnel Commission hearing officer, he was ordered reinstated with pay in December 2021. Throughout the period between Morgan's dismissal and subsequent reinstatement, he continued working at his second job.

Morgan filed a petition for a writ of mandamus in the district court, arguing that NDBI failed to award him his full reinstatement pay. NDBI countered that any restatement pay should be offset by the earnings from the second job because Morgan maintained that job after his dismissal.

Following a hearing, the district court summarily granted Morgan's writ petition, ordering NDBI to tender back pay with no offset.<sup>1</sup> This appeal followed.

NDBI's central contention on appeal is that any back pay awarded pursuant to NRS 284.390(7) must be offset by wages earned from outside employment between dismissal and reinstatement.

We review a district court order granting or denying a petition for a writ of mandamus for an abuse of discretion. *Reno Newspapers v. Sheriff*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010). An abuse of discretion occurs "when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). If a writ raises questions of statutory construction, however, we "will review the district court's decision de novo." *Reno Newspapers*, 126 Nev. at 214, 234 P.3d at 924.

Under NRS 284.390(7), state employees whose dismissal, demotion, or suspension lacks just cause, pursuant to a hearing officer's determination, must be reinstated "with full pay for the period of dismissal, demotion, or suspension." The statute's language does not address whether "full pay" contemplates an offset by interim earnings or not. However, we need not reach that issue here.

Regardless of whether NRS 284.390(7) imports an offset requirement, such an offset would be inappropriate on the facts of this case. Generally, the goal of an offset is to ensure the employee is not made "more

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<sup>1</sup>The district court also ordered NDBI to tender this back pay and its own one-half retirement contributions to Morgan's Nevada Public Employee Retirement System (NVPERS) account.


than whole.” See *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 363-64 (1951) (observing that the NLRB, when granting discretionary reinstatement pay, may reimburse employees “for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back-pay period”). Here, rejecting an offset would not generate any financial windfall, as evidence supports that Morgan maintained the same amount of work in his approved secondary employment before and after dismissal.<sup>2</sup> Rather, an offset would make Morgan *less* than whole. Therefore, without deciding whether NRS 284.390(7) requires an offset of interim mitigating earnings, we determine that an offset would nonetheless be inappropriate here.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

  
\_\_\_\_\_, J.  
Cadish

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, Sr. J.  
Gibbons

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<sup>2</sup>Although NDBI asked for wage history from the second job before the district court, NDBI does not address this issue in its opening brief and it did not file a reply brief on appeal. Cf. *Kitchen Factors, Inc. v. Brown*, 91 Nev. 308, 308, 535 P.2d 677, 677 (1975) (electing to treat the failure to file an answering brief as a confession of error); see also *Summa Corp. v. Brooks Rent-A-Car*, 95 Nev. 779, 780, 602 P.2d 192, 193 (1979) (“This court will not comb the record to ascertain matters which should have been set forth in respondent’s brief.”).

<sup>3</sup>The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

cc: Hon. Bita Yeager, District Judge  
Janet Trost, Settlement Judge  
Attorney General/Carson City  
Attorney General/Reno  
Law Office of Daniel Marks  
Eighth District Court Clerk