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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **NEW MEXICO DEPARTMENT**
8 **OF WORKFORCE SOLUTIONS,**

9 Petitioners-Appellants,

10 **v.**

NO. 30,814

11 **COLD FRONT DISTRIBUTION, LLC.,**

12 Respondent-Appellee.

13 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

14 **Beatrice J. Brickhouse, District Judge**

15 Department of Workforce Solutions
16 Clyde D. DeMersseman, General Counsel
17 Albuquerque, NM

18 for Appellant

19 Civerolo, Gralow, Hill & Curtis, P.A.
20 Lisa Entress Pullen
21 M. Clea Gutterson
22 Albuquerque, NM

23 for Appellee

24 **MEMORANDUM OPINION**

25 **KENNEDY, Judge.**

26 Appellant, the Department of Workforce Solutions (the Department), appeals

1 the district court's order reversing the decision of the Board of Review for the
2 Workforce Transition Services Division (the Board) and denying Claimant
3 unemployment benefits. We granted the Department's petition for certiorari and
4 issued a notice of proposed summary disposition proposing to reverse. Employer,
5 Cold Front Distribution, has responded with a memorandum in opposition, which we
6 have duly considered. We remain unpersuaded, and we therefore reverse the district
7 court.

8 Claimant applied for unemployment benefits after he was terminated from
9 employment with Employer. The Appeals Bureau, following a hearing before the
10 administrative law judge (ALJ), determined that Claimant was not discharged for
11 misconduct, and was therefore not subject to disqualification from benefits pursuant
12 to NMSA 1978, Section 51-1-7-(A)(2) (2005) (stating that an individual shall not be
13 eligible for unemployment benefits if the individual is discharged for misconduct
14 related to employment). Employer appealed to the Board, which affirmed the decision
15 of the Appeals Bureau. Employer then appealed to the district court.

16 The district court reversed the Board's decision determining that: (1) the district
17 court was in as good a position to determine witness credibility as the Board because
18 the hearing before the Board was conducted telephonically, (2) Employer was more
19 credible than Claimant because there were inconsistencies in Claimant's testimony,
20 and (3) because the ALJ had determined that Claimant was credible when he was not,

1 all of the ALJ's findings based on Claimant's testimony were suspect. Based on this,
2 the district court concluded that the Board's determination that Claimant was not
3 terminated from his employment for misconduct was arbitrary and capricious and
4 reversed the Board's decision.

5 We hold that this constitutes reversible error. Rule 1-077(J) NMRA, governing
6 the scope of the district court's review of appeals involving unemployment
7 compensation law, states:

8 The district court shall determine the appeal upon the evidence
9 introduced at the hearing before the board of review or secretary of the
10 Employment Security Division. The district court may enter an order
11 reversing the decision of the board of review or the secretary if it finds
12 that:

- 13 (1) the board of review or secretary acted fraudulently, arbitrarily or
14 capriciously;
- 15 (2) based upon the whole record on appeal, the decision of the board of
16 review or secretary is not supported by substantial evidence; or
- 17 (3) the action of the board of review or secretary was outside the scope of
18 authority of the agency.

19 *See Mississippi Potash, Inc. v. Lemon*, 2003-NMCA-014, ¶ 8, 133 N.M. 128,

20 61 P.3d 837 (stating that the party challenging an agency decision bears the burden

1 on appeal of showing that agency’s decision is arbitrary and capricious, not supported
2 by substantial evidence, or represents an abuse of the agency’s discretion by being
3 outside the scope of the agency’s authority). The rule thus provides for whole record
4 review in the district court. *See also Chicharello v. Employment Sec. Div.*,
5 1996-NMSC-077, ¶ 1, 122 N.M. 635, 930 P.2d 170 (stating that review of a decision
6 of the board of review to deny unemployment benefits is whole record review).

7 When engaged in whole record review of a decision of an administrative
8 agency, it is improper for the district court to reweigh the evidence or substitute its
9 assessment of witness credibility for that of the agency. *See generally Easterling v.*
10 *Woodward Lumber Co.*, 112 N.M. 32, 37, 810 P.2d 1252, 1257 (Ct. App. 1991) (“In
11 making a whole record review, it is not a function of this court to reweigh the
12 evidence.”); *Garcia v. Borden, Inc.*, 115 N.M. 486, 491, 853 P.2d 737, 742 (Ct. App.
13 1993) (stating that under a whole record standard of review the reviewing court does
14 not weigh the credibility of witnesses and stating that simply because a witness’s
15 testimony was inconsistent or contradictory in part does not require that such
16 testimony be disregarded); *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124,
17 127-28, 767 P.2d 363, 366-67 (Ct. App. 1988) (noting that even under whole record
18 review a reviewing court may not reweigh the evidence), *modified on other grounds*
19 *by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 27, 131 N.M. 272, 34
20 P.3d 1148. In this case, the district court’s determination that the agency’s decision

1 was arbitrary and capricious was based on its substitution of its own credibility
2 assessment for that of the ALJ. This is not a basis on which the district court may
3 reverse the decision of the administrative agency. *See* Rule 1-077(J).

4 In its memorandum in opposition, Employer argues that the district court acted
5 properly in determining that Claimant’s testimony that he was unaware of Employer’s
6 policy was not credible in light of all the other evidence in the record. [MIO 3]
7 Employer argues that the district court, when engaged in whole record review, is
8 entitled to find a witness’s testimony to be not credible when compared with all of the
9 other evidence in the record. [MIO 5-6] However, we disagree with Employer’s
10 assertion that all the other evidence in the record indicated that Claimant was not
11 credible when he said that he was unaware of Employer’s policy. Based on our
12 review of the record, the Board found that Claimant had been informed by the
13 warehouse manager that he could do whatever he wanted with the expired food. Rene
14 Valdez, Claimant’s former supervisor, testified that Employer did not have a written
15 policy governing disposal of out of date food and that the policy changed several
16 times before the current policy was implemented. We believe this evidence and
17 Claimant’s testimony is sufficient to support the Board’s conclusion that Claimant was
18 unaware of Employer’s policy when he acted. Although Employer testified that he
19 told Claimant about the policy at some point during the training process, neither the
20 ALJ nor the Board was required to accept this testimony, and could find that Claimant

1 was not aware of the policy, as he testified.

2 Employer argues that the evidence is undisputed that Claimant deviated from
3 his established route, met his brother in a park, and was untruthful about disposing of
4 the pizzas in a dumpster. [MIO 6] Employer argues that this evidence justifies the
5 district court’s determination that Claimant was not credible. We disagree. Even if
6 this evidence were undisputed, we do not believe it is not sufficient to overcome the
7 ALJ’s determination that Claimant was not aware of Employer’s policy when he
8 disposed of the pizzas. *See Las Cruces Prof’l Fire Fighters v. City of Las Cruces*,
9 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177 (“The question is not whether
10 substantial evidence exists to support the opposite result, but rather whether such
11 evidence supports the result reached.”). To the extent that Employer argues that
12 evidence that suggests that Claimant was untruthful in one aspect of his testimony is
13 sufficient to allow the district court to reject the Board’s conclusion that he was
14 unaware of Employer’s policy governing out of date food disposal, this is inconsistent
15 with whole record review. *See Garcia v. Borden, Inc.*, 115 N.M. 486, 491, 853 P.2d
16 737, 742 (Ct. App. 1993) (stating that under a whole record standard of review the
17 reviewing court does not weigh the credibility of witnesses and stating that simply
18 because a witness’s testimony was inconsistent or contradictory in part does not
19 require that such testimony be disregarded).

20 Employer also asks this Court to affirm the district court’s denial of

1 unemployment benefits to Claimant on the theory that it is right for any reason. *See*
2 *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (stating
3 that an appellate court may affirm a trial court’s ruling on a ground that was not relied
4 below if reliance on the new ground would not be unfair to the appellant). Employer
5 again points to evidence in the record that Claimant deviated from his route, gave the
6 pizzas to his brother, told Employer that the pizzas had been put into a dumpster, and
7 returned the pizzas to Employer the next morning. Employer argues that, in light of
8 this evidence, it was unreasonable and irrational for the Board to conclude that
9 Claimant did not know that he was acting contrary to Employer’s instructions with
10 respect to the pizza. [MIO 8]

11 We decline to affirm the district court on this basis. As we noted above, the
12 Board’s conclusion that Claimant was unaware of Employer’s policy was supported
13 by evidence in the form of Claimant’s testimony and by Mr. Valdez’ testimony that
14 no written policy had been given to the employees and that the policy had been
15 changed several times. Contrary evidence in the record, even evidence suggesting that
16 a witness was not entirely credible, does not provide a basis for a reviewing court to
17 declare an administrative agency finding unreasonable and irrational under whole
18 record review. *See Easterling v. Woodward Lumber Co.*, 112 N.M. 32, 37, 810 P.2d
19 1252, 1257 (Ct. App. 1991) (“In making a whole record review, it is not a function of
20 this court to reweigh the evidence. The judge could give such weight as he deemed

1 appropriate to the testimony of worker and his witnesses.”); *Tom Growney Equip. Co.*
2 *v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (““Where the testimony
3 is conflicting, the issue on appeal is not whether there is evidence to support a
4 contrary result, but rather whether the evidence supports the findings of the trier of
5 fact.”” (citation omitted)). Here, the district court explicitly exceeded the boundaries
6 of whole record review in its review of the evidence, to make credibility
7 determinations and reweigh the evidence. To countenance a result based on ‘right for
8 any reason’ in this case would place us in the same position, and we decline
9 Employer’s invitation to travel to that destination.

10 For these reasons, we reverse the district court.

11 **IT IS SO ORDERED.**

12 _____
13 **RODERICK T. KENNEDY, Judge**

14 **WE CONCUR:**

15 _____
16 **MICHAEL E. VIGIL, Judge**

17 _____
18 **TIMOTHY L. GARCIA, Judge**