Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-202

JANUARY TERM, 2021

In re Appeal of L.P.*	}	APPEALED FROM:
	}	
	}	Human Services Board
	}	
	}	DOCKET NO. N-10/19-688

In the above-entitled cause, the Clerk will enter:

Petitioner appeals pro se from a decision of the Human Services Board denying her petition to have her name expunged from the child protection registry. We reverse and remand for further proceedings.

The Department for Children and Families (DCF) is required by law to maintain a "Child Protection Registry" containing "a record of all investigations that have resulted in a substantiated report" of child abuse or neglect. 33 V.S.A. § 4916(a)(1). A person whose name has been entered in the registry may file a request with the Commissioner "seeking a review for the purpose of expunging" a registry record. 33 V.S.A. § 4916c(a)(1).

In July 2015, petitioner was substantiated by DCF for placing her five-year-old son at risk of physical harm by riding on the roof of a car traveling at reported speeds of up to fifty-five miles per hour while holding the child. A witness photographed the incident. Petitioner was twenty-seven years old at the time.

On the day after the incident, petitioner was interviewed by police, who reported that she appeared to be under the influence of drugs. She initially denied that the incident took place or that her son had been on the roof of the car. She eventually pled guilty to one count of cruelty to a child less than ten years old and one count of providing false information to a law enforcement officer. According to petitioner, she spent four days in jail and was on probation for three years. She was required to participate in substance-abuse treatment as a condition of her probation.

The incident also caused DCF to file a petition alleging that petitioner's son was a child in need of care or supervision (CHINS). Petitioner stipulated to a finding of CHINS and custody of son was transferred to his father, with petitioner having supervised visitation. The case was closed in 2016. Petitioner subsequently regained custody of son, who splits his time between his father and petitioner.

Petitioner did not request review of the 2015 substantiation and her name was placed in the Vermont Child Protection Registry.

In 2019, petitioner applied for expungement of her name from the registry. After a hearing, the Commissioner's reviewer denied the petition. The reviewer found that petitioner continued to minimize the facts of the incident and to blame others for her conduct. The reviewer found that petitioner had engaged in counseling, was receiving medication-assisted treatment, and had submitted numerous letters of support from employers, friends, family, and counselors who praised her relationship with her son. However, the reviewer found that petitioner was not completely truthful about her past relapses and compliance with counseling requirements, citing notes from the CHINS case, which stated that in late 2015 and early 2016, petitioner had positive urinalysis results and was not making progress in substance-abuse treatment. The reviewer also found that petitioner inaccurately stated that she had always had custody of her son, noting that custody was transferred to son's father for a period in the CHINS proceeding. The reviewer also found that petitioner was not forthright about her criminal record because she failed to mention two misdemeanor charges for petty theft and unlawful trespass at Walmart. Finally, the reviewer faulted petitioner for denying that she was currently in a relationship. The reviewer concluded that petitioner had failed to demonstrate a significant change from the circumstances that led to the initial substantiation, which included substance abuse, poor judgment, and lying.

Petitioner appealed the decision to the Human Services Board, which concluded in a May 2020 decision that the Commissioner's reviewer acted within her discretion in denying the expungement. A week after the Board issued its decision, petitioner submitted a letter challenging certain facts that were relied upon by the reviewer. The Board construed this as a motion to reopen the decision and held a hearing on the motion. Petitioner argued that the reviewer had erred in finding that she failed to take responsibility for the underlying incident, that petitioner's records had shown that she tested positive for drugs, and that petitioner was not being forthright about her criminal record and relationship. She also argued that the Board's order incorrectly stated that petitioner had a 2019 conviction for unlawful trespass because that case was still pending. The Board concluded that the reviewer's findings were supported by the record and petitioner's arguments did not provide a basis to reopen the decision. It corrected its decision to reflect that petitioner had a pending charge for unlawful trespass rather than a conviction. This appeal followed.

To obtain expungement from the Child Protection Registry, a petitioner bears the burden "of proving that a reasonable person would believe that he or she no longer presents a risk to the safety or well-being of children." 33 V.S.A. § 4916c(b)(1). On appeal of an expungement decision to the Board, the Board is limited to considering "whether the Commissioner abused his or her discretion in denial of the petition for expungement." Id. § 4916c(e). We, in turn, review the Board's decision for abuse of discretion. See K.G. v. Dep't of Soc. & Rehab. Servs., 171 Vt. 529, 530 (2000) (mem.) (applying abuse-of-discretion standard to Board's expungement decision). An abuse of discretion may be found if the Board's ruling is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." In re R.H., 2010 VT 95, ¶ 21, 189 Vt. 15 (quotation omitted).

We first address DCF's argument that we may only review the Board's decision on the motion to reopen because petitioner did not appeal the Board's initial decision denying expungement within thirty days of the date it was issued. DCF claims that petitioner's motion to reopen did not toll the running of the appeal period even though it sought relief similar to that provided by Vermont Rules of Civil Procedure 59 or 60 because those rules do not apply to

administrative hearings. We disagree. The Board's rules permit a party to file a motion to reopen and reconsider any order within thirty days of issuance. Vt. Human Servs. Bd. Fair Hearing Rules § 1000.4(K), https://humanservices.vermont.gov/sites/ahsnew/files/fair-hearing-rules-1.pdf [https://perma.cc/KF34-Z2FX]. In the absence of authority to the contrary, we view this type of motion as akin to a Rule 59 motion to alter or amend the judgment.[*] The timely filing of such a motion tolls the running of the appeal period until the entry of an order disposing of the motion. V.R.A.P. 4(b)(5). To hold otherwise would create a trap for unwary litigants who file motions to reopen in good faith, believing that they will have a subsequent opportunity to appeal an adverse decision to this Court. Given that many litigants appealing Board decisions are unrepresented by counsel, we decline to interpret the rule in the manner suggested by the Department.

We turn to petitioner's arguments on appeal. Petitioner claims that the Board abused its discretion in affirming the decision of the Commissioner's reviewer because it was based on erroneous factual findings. Specifically, petitioner challenges the reviewer's findings regarding petitioner's truthfulness about her past and present circumstances at the review hearing. Petitioner argues that she has met her burden of proving that a reasonable person would believe that she no longer presents a risk to the safety or well-being of children.

We agree that both decisions below must be reversed because the Commissioner's reviewer improperly relied on facts contained in confidential family court records from the CHINS case, and the error was not harmless. By statute, records of CHINS proceedings are confidential, with certain listed exceptions. 33 V.S.A. § 5117; In re H.H., 2020 VT 107, ¶ 16. The only exception that could potentially permit the reviewer to inspect petitioner's son's CHINS file in the context of this expungement proceeding is 33 V.S.A. § 5117(b)(1)(F), which states that "any other person who has a need to know may be designated by order of the Family Division of the Superior Court." It is undisputed that the family court did not make such an order in this case. The reviewer therefore could not use facts contained in the CHINS records as a basis for denying expungement. See In re H.H., 2020 VT 107, ¶ 22 (holding that absent need-to-know designation from family court, Board erred in considering facts from CHINS case in separate substantiation proceeding).

Although admission of the evidence was error, the error is harmless, and does not warrant reversal, if it "does not affect the substantial rights of the parties." Riess v. A.O. Smith Corp., 150 Vt. 527, 533 (1988). We conclude the error was not harmless. Even considering the evidence from the CHINS proceedings, the evidence that petitioner continues to present a risk to the safety or well-being of children is weak, even if sufficient. Moreover, the reviewer's conclusion that petitioner had not addressed the circumstances that led to the substantiation was based in significant part on the inconsistency between some of her responses and facts contained in the CHINS records relating to her substance-abuse history, compliance with counseling requirements, and temporary loss of custody over her child. The Board's decision, in turn, was based on the reviewer's erroneous findings and thus cannot stand. We therefore reverse and remand for the

[*] The Board rule permits a motion to reopen to be filed within thirty days of judgment, while a Rule 59 motion must be filed within twenty-eight days. V.R.C.P. 59(b). We need not decide how or whether this discrepancy affects the running of the appeal period because petitioner filed her motion one week after the Board's initial decision and it therefore was timely under either rule.

Commissioner's reviewer to reconsider petitioner's expungement request without the CHINS records.

Reversed and remanded for further proceedings consistent with this appeal.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice