

FILED

September 27, 2022

**OFFICE OF
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

A22-1112

Christine Marie Fischer, et al.,

Petitioners,

vs.

Steve Simon, in his official capacity as
Minnesota Secretary of State, Keith Ellison,
in his official capacity as Minnesota Attorney General,
Torrey Westrom, current candidate for Senate District 12,
Michelle Knutson, in her official capacity as
Big Stone County Auditor, Vicki Doehling,
in her official capacity as Douglas County Auditor,
Stephanie Rust, in her official capacity as Pope County
Auditor, Randy R. Schreifels, in his official capacity as
Stearns County Auditor, Stephanie Buss, in her official
capacity as Stevens County Auditor, Kim Saterbak,
in her official capacity as Swift County Auditor,

Respondents.

O R D E R

On August 8, 2022, Christine Fischer and Ashley Klingbeil, appearing pro se, filed this petition, pursuant to Minn. Stat. § 204B.44 (2020), asking us to order the removal of respondent Torrey Westrom from the November 8, 2022, general election ballot as a candidate for Senate District 12. The petition alleges that Westrom, the current State Senator for District 12 who is running for reelection, is not eligible for election to that office. According to the petition, Westrom cannot satisfy the residency requirement of the

Minnesota Constitution because he will not have resided in Senate District 12 for the required 6-month period prior to the November 8, 2022, general election.¹ To meet that requirement, Westrom must have started living in the district no later than May 8, 2022.

Some key facts in this matter are undisputed. The boundaries of District 12 changed as a result of redistricting that was announced in February 2022. Before the 2022 redistricting, Westrom and his family lived in a house in Elbow Lake (Elbow Lake property) that Westrom owns. Based on the new boundaries of District 12, the Elbow Lake property is no longer located in District 12. On May 6, 2022, Westrom bought a home in Lake Mary (Lake Mary property), which is located in the new boundaries of District 12.

We appointed a court of appeals judge to sit as a referee, hold an evidentiary hearing, and submit findings of fact regarding Westrom's residency. We also granted Victoria Guillemard's motion to intervene as a petitioner. The referee held a hearing on August 24 and 25, 2022, at which 13 witnesses testified and many exhibits were admitted into evidence.

Following the hearing, the referee filed her findings of fact and conclusions of law. The referee found that petitioners failed to prove that Westrom has not resided in Senate District 12 since May 8, 2022, and that the preponderance of the evidence showed that Westrom did live in the district. Therefore, the referee concluded that petitioners failed to prove that Westrom is ineligible to run for state legislative office in District 12 in the

¹ In his response to the petition, respondent Minnesota Attorney General Keith Ellison argued that he should be dismissed from this matter.

November 8, 2022, general election. Petitioners filed objections to the referee’s findings and conclusions.

We conclude that because petitioners failed to order a transcript of the proceedings, we are unable to review petitioners’ objections to the referee’s factual findings and conclusions regarding Westrom’s eligibility to run in the general election for Senate District 12. No transcript is required to review the purely legal objections of petitioners; upon review on the merits, we conclude that these objections fail. Further, because the petition makes no allegations about the Attorney General, we conclude that the Attorney General should be dismissed from these proceedings. As a result, we deny the petition and grant the Attorney General’s request to be dismissed from this matter.

To understand the referee’s findings and conclusions, as well as petitioners’ objections, a brief discussion of the relevant law is necessary. The Minnesota Constitution dictates that “[s]enators and representatives shall be qualified voters of the state, and shall have resided one year in the state and six months immediately preceding the election in the district from which elected.” Minn. Const., art. IV, § 6. The Legislature has codified this requirement. *See* Minn. Stat. § 204B.06, subd. 4a(4) (2020). For the 2022 general election, the required 6-month residency period is May 8, 2022, through November 8, 2022.

In deciding whether a legislative candidate has resided in the district from which elected, we “focus on physical presence and intent.” *Piepho v. Bruns*, 652 N.W.2d 40, 44 (Minn. 2002); *see also Studer v. Kiffmeyer*, 712 N.W.2d 552, 557 (Minn. 2006). “[T]he factors that establish residency ‘are largely questions of fact, and we therefore defer to the

findings of the referee who heard the witnesses testify.’ ” *Studer*, 712 N.W.2d at 558 (quoting *Piepho*, 652 N.W.2d at 44–45).

According to the referee in this case, “[t]he totality of the evidence establishes by a preponderance that Westrom was physically present at the Lake Mary property after he and his family moved there on May 7, 2022.” The referee based this conclusion on credible testimony from Westrom and his wife that they moved to the Lake Mary property on May 7, 2022, and have lived there since. The evidence presented at the hearing established that Westrom is blind and relies on others for transportation. The referee also credited the testimony of seven witnesses who testified that on 21 different days since May 7, 2022, they drove Westrom to or picked him up at the Lake Mary property. In addition, the referee relied on the testimony of Westrom’s father, who said that he visited Westrom at the Lake Mary property many times since May 7, 2022. Finally, photographs Westrom submitted into evidence show him and his family members engaging in various activities at the Lake Mary property during May, June, and July, 2022.

The referee further concluded that “[a] preponderance of the evidence shows that Westrom intends to remain at the Lake Mary property.” The referee based this conclusion on testimony that the Westroms changed their homestead designation from the Elbow Lake property to the Lake Mary property, that Westrom changed his Minnesota identification card to list his address as the Lake Mary property on May 6, 2022, that Westrom set up utility accounts for the Lake Mary property, that the Westroms changed their church membership from a church in Elbow Lake to one in Alexandria, closer to the Lake Mary property, and that the Westroms took action to ready the Elbow Lake property for sale.

Finally, the referee found that petitioners offered “thin” evidence that Westrom did not reside at the Lake Mary property after he bought it. The referee discredited their evidence because the testimony established that only petitioner Fischer visited the Lake Mary property, that her visits occurred on four days within a short timeframe in July, and that she never knocked on the door or rang the doorbell. The referee further noted that petitioners admitted during their testimony that they did not see Westrom at the Elbow Lake property when they visited it. And the referee credited the testimony of Westrom and his wife, which provided reasons why they still own the Elbow Lake property and must maintain it until they sell it, why vehicles were at the Elbow Lake property when petitioners visited, and why the lawn at the Lake Mary property was overgrown when petitioner Fischer visited.

Many of petitioners’ objections challenge the factual findings upon which the referee based her conclusions about Westrom’s residency. They object to the referee’s determination that Westrom and his witnesses provided “credible” testimony about Westrom’s residency. According to petitioners, the testimony of these witness is not credible because they made many contradictory statements during their testimony. Petitioners also contend that the referee made her findings and conclusions without considering key evidence, including testimony from the hearing.

Petitioners, however, did not order a transcript. “It is elementary that a party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented.” *State v. Carlson*, 161 N.W.2d 38, 40 (Minn. 1968); *see also Custom Farm*

Servs., Inc. v. Collins, 238 N.W.2d 608, 609 (Minn. 1976) (“An appellant has the burden of providing an adequate record for appeal.”). When there is an evidentiary hearing, we are not able to review a party’s argument that the other party did not prove its claims if no transcript is ordered. *See In re Montez*, 812 N.W.2d 58, 66 (Minn. 2012) (explaining that in an attorney discipline case, the court does not review the referee’s findings and conclusions about whether the attorney committed misconduct when no party ordered a transcript “ ‘because [it] cannot review the evidence supporting’ them without a transcript.” (quoting *In re Dedefo*, 781 N.W.2d 1, 7 (Minn. 2010))); *Custom Farm Servs.*, 238 N.W.2d at 609 (stating that “[b]ecause of the absence of a transcript of the district court proceedings, we cannot consider” several errors that the appellants contend occurred, including “sufficiency of the evidence”).

Here, 13 witnesses testified at the hearing before the referee. The referee based her findings on that testimony. Petitioners’ objections rely on the testimony before the referee. Without a transcript, we cannot review petitioners’ objections to the referee’s factual findings and her conclusions based on those findings about Westrom’s residency.

Petitioners have provided no compelling reason for their failure to order a transcript. Petitioners could have ordered a transcript even though they had only a few days to file their objections to the referee’s findings.² We acknowledge that some of the petitioners are pro se, but the transcript requirement also applies to self-represented parties. *See*

² A transcript was provided when a party objected to the referee’s findings in the following section 204B.44 petitions challenging the residency of a legislative candidate: *Monaghan v. Simon*, No. A16-1252; *Piepho v. Bruns*, No. C4-02-1354; *Lundquist v. Leonard*, No. C9-02-1351; and *Olson v. Zuehlke*, No. C2-02-1353.

Noltimier v. Noltimier, 157 N.W.2d 530, 531 (Minn. 1968) (stating that a pro se appellant is not relieved “of the burden to provide an adequate record and preserve it in a settled case to enable us to review questions he desires to raise on appeal”). Accordingly, we are unable to review petitioners’ objections to the referee’s factual findings and conclusions regarding Westrom’s eligibility to run in the general election for District 12.

Even when no transcript is ordered, we can still review purely legal issues. *See Montez*, 812 N.W.2d at 66 (“We will, however, review the referee’s interpretation of the Rules of Professional Conduct, and other conclusions of law that do not rely on the referee’s factual findings, de novo, whether or not a transcript is part of our record on review.”); *Duluth Herald and News Trib. v. Plymouth Optical Co.*, 176 N.W.2d 552, 555 (Minn. 1970) (stating in a case where the appellant did not order a transcript that the court could “dispose of this appeal upon the basis of [appellant’s] contention that it is only challenging the conclusions of law”). Petitioners raise two purely legal objections. First, they contend the referee applied the incorrect burden of proof. Second, they argue the referee erroneously considered the short time frame available to Westrom to complete the move required by redistricting. We consider these objections in turn.

As to the burden of proof, petitioners contend that the referee should not have required them to prove Westrom’s ineligibility by clear and convincing evidence. Although the parties disputed the burden of proof that should apply to petitioners in this proceeding before the referee, the referee did not conclude that petitioners had to prove their claim by clear and convincing evidence; instead, the referee concluded that even if the preponderance of the evidence standard applies, petitioners failed to prove their claims

as required by law. Additionally, petitioners now appear to argue, for the first time before us, that language in Minnesota Statutes section 204B.44 places the burden on the candidate, rather than the challenger, to prove residency. We need not decide this issue. Even if Westrom had the burden to prove he resided in District 12 for the required 6-month period, the referee concluded that he met the burden. She expressly found that “the evidence establishes by a preponderance that Westrom has resided at the Lake Mary property since May 7, 2022.”

Petitioners also object to the referee’s conclusion that she could consider the short period of time in which Westrom had to move, due to redistricting, when determining where he resided. There was no error by the referee in so concluding. We have acknowledged that the limited time a legislative candidate has to move due to redistricting may be taken into account when determining that candidate’s residency. *See Piepho*, 652 N.W.2d at 45 (stating that “[r]edistricting provides further context for the referee’s findings” and that “it is reasonable to expect that the candidate’s accommodations may appear temporary in light of the difficulty of finding housing on short notice” due to redistricting). Petitioners ask us to overrule this case law, but they provide no compelling reason for us to do so. *See Schuette v. City of Hutchinson*, 843 N.W.2d 233, 238 (Minn. 2014) (“We are extremely reluctant to overrule our precedent absent ‘a compelling reason.’ ” (quoting *State v. Martin*, 773 N.W.2d 89, 98 (Minn. 2009))).

Finally, we turn to the argument advanced by the Attorney General that he should be dismissed from these proceedings because petitioners have not alleged any improper action or inaction on his part. Although the petition lists the Attorney General as a

respondent in the caption, the petition itself does not refer to the Attorney General. The petition makes no allegations concerning the conduct of the Attorney General, even when identifying the parties to the litigation. Thus, we agree that the Attorney General should be dismissed from this matter.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The petition asking the court to order the removal of Torrey Westrom from the November 8, 2022, general election ballot as a candidate for Senate District 12 is denied.
2. Respondent Minnesota Attorney General's request to be dismissed from this matter is granted.

Dated: September 27, 2022

BY THE COURT:



Lorie S. Gildea
Chief Justice