

SB 588  
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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1996



# ENROLLED

SENATE BILL NO. 588

(By Senator Wooton, et al)



PASSED March 15, 1996

In Effect from Passage

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**ENROLLED**

**Senate Bill No. 588**

(BY SENATORS WOOTON, ANDERSON, BOWMAN, BUCKALEW,  
DEEM, DITTMAR, GRUBB, OLIVERIO, ROSS, SCHOONOVER,  
WAGNER, WHITE, WIEDEBUSCH AND YODER)

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[Passed March 15, 1996; in effect from passage.]

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AN ACT to repeal articles one and two, chapter fifty-eight of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section twenty-seven, article seven, chapter twenty-one-a of said code; to amend and reenact section four, article five, chapter twenty-nine-a of said code; to amend and reenact section seventeen, article one, chapter fifty-one of said code; and to amend and reenact article five, chapter fifty-eight of said code, all relating generally to procedural and administrative matters affecting the exercise of judicial authority; eliminating statutory provisions which have been superseded by court rules; eliminating a forum for review of contested administra-

tive cases; revising the duties of the director of the administrative office of the supreme court of appeals; reorganizing statutory provisions to conform to changes effected by the legislation; and establishing a procedure for the recusal or disqualification of justices of the supreme court of appeals.

*Be it enacted by the Legislature of West Virginia:*

That articles one and two, chapter fifty-eight of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section twenty-seven, article seven, chapter twenty-one-a of said code be amended and reenacted; that section four, article five, chapter twenty-nine-a of said code be amended and reenacted; that section seventeen, article one, chapter fifty-one of said code be amended and reenacted; and that article five, chapter fifty-eight of said code be amended and reenacted, all to read as follows:

**CHAPTER 21A. UNEMPLOYMENT COMPENSATION.**

**ARTICLE 7. CLAIM PROCEDURE.**

**§21A-7-27. Appeal to supreme court of appeals.**

1 The judgment of the circuit court shall be final unless  
2 reversed, vacated or modified on appeal to the supreme  
3 court of appeals in accordance with the provisions of  
4 section one, article six, chapter twenty-nine-a of this  
5 code.

**CHAPTER 29A. STATE ADMINISTRATIVE  
PROCEDURES ACT.**

**ARTICLE 5. CONTESTED CASES.**

**§29A-5-4. Judicial review of contested cases.**

1 (a) Any party adversely affected by a final order or  
2 decision in a contested case is entitled to judicial review  
3 thereof under this chapter, but nothing in this chapter  
4 shall be deemed to prevent other means of review,  
5 redress or relief provided by law.

6 (b) Proceedings for review shall be instituted by filing  
7 a petition in the circuit court of the county in which the

8 petitioner or any one of the petitioners resides or does  
9 business within thirty days after the date upon which  
10 such party received notice of the final order or decision  
11 of the agency. A copy of the petition shall be served upon  
12 the agency and all other parties of record by registered  
13 or certified mail. The petition shall state whether the  
14 appeal is taken on questions of law or questions of fact,  
15 or both. No appeal bond shall be required to effect any  
16 such appeal.

17 (c) The filing of the petition shall not stay enforcement  
18 of the agency order or decision or act as a supersedeas  
19 thereto, but the agency may stay such enforcement, and  
20 the appellant, at any time after the filing of his petition,  
21 may apply to such circuit court for a stay of or superse-  
22 deas to such final order or decision. Pending the appeal,  
23 the court may grant a stay or supersedeas upon such  
24 terms as it deems proper.

25 (d) Within fifteen days after receipt of a copy of the  
26 petition by the agency, or within such further time as the  
27 court may allow, the agency shall transmit to such  
28 circuit court the original or a certified copy of the entire  
29 record of the proceeding under review, including a  
30 transcript of all testimony and all papers, motions,  
31 documents, evidence and records as were before the  
32 agency, all agency staff memoranda submitted in con-  
33 nection with the case, and a statement of matters offi-  
34 cially noted; but, by stipulation of all parties to the  
35 review proceeding, the record may be shortened. The  
36 expense of preparing such record shall be taxed as a part  
37 of the costs of the appeal. The appellant shall provide  
38 security for costs satisfactory to the court. Any party  
39 unreasonably refusing to stipulate to limit the record  
40 may be taxed by the court for the additional costs  
41 involved. Upon demand by any party to the appeal, the  
42 agency shall furnish, at the cost of the party requesting  
43 same, a copy of such record. In the event the complete  
44 record is not filed with the court within the time pro-  
45 vided for in this section, the appellant may apply to the  
46 court to have the case docketed, and the court shall order

47 such record filed.

48 (e) Appeals taken on questions of law, fact or both,  
49 shall be heard upon assignments of error filed in the  
50 cause or set out in the briefs of the appellant. Errors not  
51 argued by brief may be disregarded, but the court may  
52 consider and decide errors which are not assigned or  
53 argued. The court or judge shall fix a date and time for  
54 the hearing on the petition, but such hearing, unless by  
55 agreement of the parties, shall not be held sooner than  
56 ten days after the filing of the petition, and notice of  
57 such date and time shall be forthwith given to the  
58 agency.

59 (f) The review shall be conducted by the court without  
60 a jury and shall be upon the record made before the  
61 agency, except that in cases of alleged irregularities in  
62 procedure before the agency, not shown in the record,  
63 testimony thereon may be taken before the court. The  
64 court may hear oral arguments and require written  
65 briefs.

66 (g) The court may affirm the order or decision of the  
67 agency or remand the case for further proceedings. It  
68 shall reverse, vacate or modify the order or decision of  
69 the agency if the substantial rights of the petitioner or  
70 petitioners have been prejudiced because of the adminis-  
71 trative findings, inferences, conclusions, decision or  
72 order are:

73 (1) In violation of constitutional or statutory provi-  
74 sions; or

75 (2) In excess of the statutory authority or jurisdiction  
76 of the agency; or

77 (3) Made upon unlawful procedures; or

78 (4) Affected by other error of law; or

79 (5) Clearly wrong in view of the reliable, probative and  
80 substantial evidence on the whole record; or

81 (6) Arbitrary or capricious or characterized by abuse of

82 discretion or clearly unwarranted exercise of discretion.

83 (h) The judgment of the circuit court shall be final  
84 unless reversed, vacated or modified on appeal to the  
85 supreme court of appeals of this state in accordance with  
86 the provisions of section one, article six of this chapter.

## **CHAPTER 51. COURTS AND THEIR OFFICERS.**

### **ARTICLE 1. SUPREME COURT OF APPEALS.**

#### **§51-1-17. Administrative office of supreme court of appeals — Duties of director.**

1 The director shall, when authorized by the supreme  
2 court of appeals, be the administrative officer of said  
3 court and shall have charge, under the supervision and  
4 direction of the supreme court of appeals, of:

5 (a) All administrative matters relating to the offices of  
6 the clerks of the circuit and intermediary courts and of  
7 the magistrate courts, and all other clerical and adminis-  
8 trative personnel of said courts; but nothing contained in  
9 this act shall be construed as affecting the authority of  
10 the courts to appoint their administrative or clerical  
11 personnel;

12 (b) Examining the state of the dockets of the various  
13 courts and securing information as to their needs for  
14 assistance, if any, and the preparation of statistical data  
15 and reports of the business transacted by the courts;

16 (c) The preparation of a proper budget to secure the  
17 appropriation of moneys for the maintenance, support  
18 and operation of the courts;

19 (d) The purchase, exchange, transfer and distribution  
20 of equipment and supplies, as may be needful or desir-  
21 able;

22 (e) Such other matters as may be assigned to him by  
23 the supreme court of appeals. The clerks of the circuit  
24 courts, intermediate courts and magistrate courts shall  
25 comply with any and all requests made by the director or  
26 his assistants for information and statistical data bearing

27 on the state of the dockets of such courts, or such other  
28 information as may reflect the business transacted by  
29 them; and

30 (f) *Annual report of activities and estimates of expendi-*  
31 *tures.* — The director, when required to do so by the  
32 supreme court of appeals, shall submit annually to the  
33 court a report of the activities of the administrative  
34 office and of the state of business of the courts, together  
35 with the statistical data compiled by him, with his  
36 recommendations.

## CHAPTER 58. APPEAL AND ERROR.

### ARTICLE 5. APPELLATE RELIEF IN SUPREME COURT OF APPEALS.

#### §58-5-1. When appeal lies.

1 A party to a civil action may appeal to the supreme  
2 court of appeals from a final judgment of any circuit  
3 court or from an order of any circuit court constituting  
4 a final judgment as to one or more but fewer than all  
5 claims or parties upon an express determination by the  
6 circuit court that there is no just reason for delay and  
7 upon an express direction for the entry of judgment as to  
8 such claims or parties. The defendant in a criminal  
9 action may appeal to the supreme court of appeals from  
10 a final judgment of any circuit court in which there has  
11 been a conviction or which affirms a conviction obtained  
12 in an inferior court.

#### §58-5-2. Certification to supreme court of appeals.

1 Any question of law arising upon the sufficiency of a  
2 summons or return of service, upon a challenge of the  
3 sufficiency of a pleading or the venue of the circuit  
4 court, upon the sufficiency of a motion for summary  
5 judgment where such motion is denied, or a motion for  
6 judgment on the pleadings, upon the jurisdiction of the  
7 circuit court of a person or subject matter, or upon  
8 failure to join an indispensable party, may, in the  
9 discretion of the circuit court in which it arises, be  
10 certified by it to the supreme court of appeals for its

11 decision, and further proceedings in the case stayed until  
12 such question shall have been decided and the decision  
13 thereof certified back.

14 The procedure for processing questions certified  
15 pursuant to this section shall be governed by rules of  
16 appellate procedure promulgated by the supreme court  
17 of appeals.

#### **§58-5-3. Presentation of petition.**

1 A party desiring to appeal may file a petition in  
2 accordance with the provisions of rules of appellate  
3 procedure promulgated by the supreme court of appeals.

#### **§58-5-4. Time for appeal.**

1 No petition shall be presented for an appeal from any  
2 judgment rendered or made more than four months  
3 before such petition is filed with the clerk of the court  
4 where the judgment being appealed was entered: *Pro-*  
5 *vided*, That the judge of the circuit court or the supreme  
6 court of appeals may, prior to the expiration of such  
7 period of four months, by order entered of record extend  
8 and reextend such period for such additional period or  
9 periods, not to exceed a total extension of two months,  
10 for good cause shown.

#### **§58-5-5. Stay of proceedings; supersedeas bond.**

1 At the instance of any person who desires to present  
2 such petition, the court in which the judgment was  
3 entered may, upon notice in writing to the opposite  
4 party, make an order suspending the execution of such  
5 judgment for a reasonable time to be specified in such  
6 order, when such person gives bond before the clerk of  
7 such court, in such penalty as the court or judge may  
8 require, with a condition reciting such judgment and the  
9 intention of such person to present such petition, and  
10 providing for the payment of all such damages as any  
11 person may sustain by reason of such suspension in case  
12 supersedeas to such judgment should not be allowed, and  
13 that the bond will be effective during the time so speci-



14 filed.

**§58-5-6. Filing of petition.**

1 Petitions for appeal shall be filed and processed in  
2 accordance with the provisions of rules of appellate  
3 procedure promulgated by the supreme court of appeals.

**§58-5-7. Contents of transcript of record.**

1 The contents of the transcript of record shall be  
2 governed in accordance with the provisions of rules of  
3 appellate procedure promulgated by the supreme court  
4 of appeals.

**§58-5-8. Appeal bond generally.**

1 When required by the court, an appeal shall not take  
2 effect until bond is given by the appellants or petition-  
3 ers, or one of them, or some other person, in a penalty to  
4 be fixed by the court or judge by or in which the appeal  
5 is allowed or entered with condition: If a supersedeas be  
6 awarded, to abide by and perform the judgment, and to  
7 pay to the opposite party, and to any person injured all  
8 such costs and damages as they, or either of them, may  
9 incur or sustain by reason of said appeal, in case such  
10 judgment, or such part, be affirmed, or the appeal be  
11 dismissed, and also, to pay all damages, costs and fees,  
12 which may be awarded against or incurred by the  
13 appellant or petitioners; and if it be an appeal from a  
14 judgment dissolving an injunction, or dismissing a bill of  
15 injunction, with a further condition, to indemnify and  
16 save harmless the surety in the injunction bond against  
17 loss or damage in consequence of his suretyship; and  
18 with condition when no supersedeas is awarded to pay  
19 such specific damages, and such costs and fees as may be  
20 awarded or incurred: *Provided*, That whenever an appeal  
21 be awarded in any action or suit wherein a judgment for  
22 the payment of money has been entered against an  
23 insured in an action which is defended by an insurance  
24 corporation, or other insurer, on behalf of the insured  
25 under a policy of insurance, the limit of liability of which  
26 is less than the amount of said judgment, execution on

27 the judgment to the extent of the policy coverage shall be  
28 stayed until final determination of such appeal, and no  
29 execution shall be issued, or action brought, maintained  
30 or continued against such insured, insurance corpora-  
31 tion, or other insurer, for the amount of such judgment  
32 so stayed, by either the injured party, the insured, or the  
33 legal representative, heir or assigns of any of them,  
34 during the pendency of such proceeding, provided such  
35 insurance corporation, or other insurer, shall:

36 (1) File with the clerk of the court in which the judg-  
37 ment was entered, a sworn statement of one of its  
38 officers, describing the nature of the policy and the  
39 amount of coverage thereof;

40 (2) Give or cause to be given by the judgment debtor or  
41 some other person for him a bond in a penalty to be fixed  
42 by the court or judge by or in which the appeal is al-  
43 lowed or entered, not to exceed the amount of such  
44 insurance coverage set out in the sworn statement above  
45 required, with condition to pay the amount of such  
46 coverage upon said judgment if the judgment or such  
47 part be affirmed or the appeal be dismissed, plus interest  
48 on said sum and cost;

49 (3) Serve a copy of such sworn statement and bond  
50 upon the judgment creditor or his attorney; and

51 (4) Deliver or mail to the insured at the latest address  
52 of the insured appearing upon the records of such  
53 insurance corporation, or other insurer, written notice  
54 that execution on such judgment to the extent that it is  
55 not covered by such insurance is not stayed in respect to  
56 the insured: *Provided*, That the filing of a bond by the  
57 insured or someone for him, conditioned upon the  
58 payment of the balance of the judgment and interest not  
59 stayed by the insured as aforesaid if the judgment be  
60 affirmed or the appeal be dismissed, shall stay execution  
61 on the balance of said judgment not covered by such  
62 insurance: *Provided, however*, That the filing of such  
63 statement and bond hereunder by an insurance corpora-  
64 tion or other insurer shall not thereby make such insur-

65 ance corporation or other insurer a party to such action,  
66 either in the trial court or in the appellate court.

**§58-5-9. Appeal by state of judgment quashing indictment.**

1 Whenever in any criminal case an indictment is held  
2 bad or insufficient by the judgment of a circuit court, the  
3 state, on the application of the attorney general or the  
4 prosecuting attorney, may appeal such judgment to the  
5 supreme court of appeals. No such appeal is allowed  
6 unless the state presents its petition therefor to the  
7 supreme court of appeals within thirty days after the  
8 entry of such judgment. No such judgment finally  
9 discharges, or has the effect of finally discharging, the  
10 accused from further proceedings on the indictment  
11 unless the state fails, within such period of thirty days,  
12 to file a petition for appeal with the clerk of the court in  
13 which the judgment is entered, but after the entry of  
14 such judgment or order, the accused may not be kept in  
15 custody or required to give bail pending the hearing and  
16 determination of the case by the supreme court of  
17 appeals.

18 Except as herein otherwise provided, all the provisions  
19 of the other sections of this article shall, so far as appro-  
20 priate, be applicable to a petition for an appeal under  
21 this section, and to all subsequent proceedings thereon  
22 in the supreme court of appeals in case such appeal is  
23 granted.

**§58-5-10. Recusal or disqualification of justices.**

1 (a) The Legislature's purpose in enacting the provisions  
2 of this section is to provide, consistent with an under-  
3 standing and respect for the separation of powers  
4 doctrine and the provisions of article VIII of the Consti-  
5 tution of West Virginia, a procedure for the recusal or  
6 disqualification of justices of the supreme court of  
7 appeals in the rare instances, consistent with the code of  
8 judicial conduct, where a person's right to an impartial  
9 tribunal might be jeopardized or appear to be jeopar-  
10 dized by a justice's involvement in a particular appellate

11 matter.

12 (b) A justice of the supreme court of appeals may be  
13 disqualified whenever:

14 (1) The justice has a personal bias or prejudice con-  
15 cerning a party or a party's lawyer, or personal knowl-  
16 edge of disputed evidentiary facts concerning the pro-  
17 ceedings;

18 (2) The justice has served as a lawyer in the matter in  
19 controversy, or a lawyer with whom the justice previ-  
20 ously practiced law served during such association as a  
21 lawyer concerning the matter, or the justice has been a  
22 material witness concerning it;

23 (3) The justice knows that he or she, individually or as  
24 a fiduciary, or the justice's spouse, parent or child  
25 wherever residing, or any other member of the justice's  
26 family residing in the justice's household, has an eco-  
27 nomic interest in the subject matter in controversy or in  
28 a party to the proceeding or has any other more than  
29 deminimis interest that could be substantially affected  
30 by the proceeding;

31 (4) The justice has been made aware of facts or circum-  
32 stances involving the case which are not public record or  
33 contained within the pleadings;

34 (5) The justice has publicly expressed his or her  
35 personal opinion regarding a matter or matters peculiar  
36 to the matter in which disqualification is sought; or

37 (6) The justice or the justice's spouse, or a person  
38 within the third degree of relationship to either of them,  
39 or the spouse of such person:

40 (i) Is a party to the proceeding, or an officer, director  
41 or trustee, of a party;

42 (ii) Is acting as a lawyer in the proceeding;

43 (iii) Is known by the justice to have a more than  
44 deminimis interest that could be substantially affected  
45 by the proceeding; or

46 (iv) Is to the justice's knowledge likely to be a material  
47 witness in the proceeding.

48 (c) A justice may voluntarily recuse himself or herself  
49 based upon the existence of any of the foregoing grounds  
50 for disqualification.

51 (d) Whenever an attorney on behalf of a litigant with a  
52 matter pending before the supreme court of appeals or a  
53 litigant acting on his or her own behalf has reasonable  
54 cause to believe that any of the foregoing grounds for  
55 disqualification exist, the attorney or the litigant acting  
56 on his or her own behalf may file, under seal, with the  
57 justice whose disqualification is sought and the clerk of  
58 the supreme court of appeals, a written motion, along  
59 with any supporting documentation, seeking the justice's  
60 disqualification and setting forth the grounds therefor.

61 (e) When a motion to disqualify a justice is filed and  
62 the justice whose disqualification is sought deems the  
63 motion to disqualify to be without merit the matter shall  
64 be referred to the other justices for a decision on the  
65 motion. A retired justice or present or retired circuit  
66 judge may be named where necessary to reach a majority  
67 decision on a motion to disqualify.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Andy Schorover*

.....  
Chairman Senate Committee

*Rudy Seaint*

.....  
Chairman House Committee

Originated in the Senate.

In effect from passage.

*Harrell Collins*

.....  
Clerk of the Senate

*Bugay W. Day*

.....  
Clerk of the House of Delegates

*Earl By Tomblini*

.....  
President of the Senate

*Hub Collins*

.....  
Speaker House of Delegates

The within *is disapproved* this the *1st*  
*April* day of ....., 1996.

*Winston Caputo*

.....  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/22/96

Time 2:52 pm