

# **WEST VIRGINIA LEGISLATURE**

## **2022 REGULAR SESSION**

**Introduced**

### **House Bill 4442**

BY DELEGATES ESPINOSA, BARRETT, HOLSTEIN, CRISS,

CLARK, HOUSEHOLDER, AND HARDY

[Introduced January 31, 2022; Referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §3-7-3, §3-7-6 and §3-7-7 of the Code of West Virginia, 1931, as  
 2 amended, all relating to making procedures for election contests before a special court  
 3 applicable to contested elections of certain judges; changing jurisdiction of election  
 4 contests for county, district, and municipal elections to the circuit courts; requiring a  
 5 recount proceeding to be completed before filing certain election contests; providing  
 6 certain procedural requirements for election contests before circuit courts; providing for  
 7 appeals of a decision made by a circuit court in an election contest be made to the  
 8 Supreme Court of Appeals; granting rulemaking authority to the Supreme Court of Appeals  
 9 regarding election contests before circuit courts.

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

## **ARTICLE 7. CONTESTED ELECTIONS.**

### **§3-7-3. Contests before special court; procedure; enforcement.**

1 (a) Where the election of Secretary of State, Auditor, Treasurer, Attorney General,  
 2 Commissioner of Agriculture, ~~or of a judge~~ a justice of the Supreme Court of Appeals, a judge of  
 3 the Intermediate Court of Appeals, ~~or a judge~~ of a circuit court, or a judge of a family court is  
 4 contested, the case shall be heard and decided by a special court constituted as follows:

5 (1) The contestee shall select one, the contestant another, and the Governor a third  
 6 person, who shall preside in said court; and the three, or any two of them, shall meet at a time  
 7 and place within the state to be appointed by the Governor, and, being first duly sworn impartially  
 8 to decide according to law and the truth upon the petition, returns and evidence to be submitted  
 9 to them, shall proceed to hear, and determine the case and certify their decision thereon to the  
 10 Governor. They shall be entitled to \$10 a day each, and the same mileage as members of the  
 11 Legislature, to be paid out of the treasury of the state, and ~~such the special court is hereby given~~  
 12 ~~authority to~~ may employ a stenographer at a reasonable compensation, to be also paid out of the  
 13 treasury of the state.

14 (2) In all hearings or proceedings before ~~such the~~ special court, the evidence of witnesses

15 and the production of documentary evidence may be required at any designated place of hearing  
16 by ~~such the~~ special court, or any member thereof;

17 ~~(3) and in case of~~ If there is disobedience to a subpoena or other process of ~~such the~~  
18 special court, or any member thereof, ~~such the~~ special court, or any member thereof, or either of  
19 the parties to ~~such the~~ contest, may invoke the aid of any circuit court in requiring the evidence  
20 and testimony of witnesses and the production of papers, books, and documents. And ~~such the~~  
21 circuit court, in case of a refusal to obey the subpoena issued to any person, shall issue an order  
22 requiring ~~such that~~ person to appear before ~~such the~~ special court and produce all books and  
23 papers, if so ordered, and give evidence touching the matter in question. Any failure to obey ~~such~~  
24 the order of the circuit court may be punished by ~~such the~~ court as a contempt thereof. A written  
25 record shall be kept of all testimony and other proceedings before ~~such the~~ special court.

26 (4) Either party to ~~such the~~ contest feeling aggrieved by the final decision of ~~such the~~  
27 special court may present his or her petition in writing to the Supreme Court of Appeals, or a judge  
28 thereof in vacation, within 30 days after ~~such the~~ final decision is certified to the Governor, as  
29 hereinbefore provided, praying for the suspension, setting aside, or vacation of ~~such the~~ final  
30 decision. The applicant shall deliver, or cause to be delivered, a copy of ~~such the~~ petition to the  
31 other party to ~~such the~~ contest, or, in case of his or her absence from the state or from his or her  
32 usual place of abode, ~~he~~ the applicant shall mail, or cause to be mailed a copy of ~~such the~~ petition  
33 addressed to his or her last known post-office address, before presenting the ~~same~~ petition to the  
34 court, or the judge. The court, or the judge, shall fix a time for the hearing on the application, but  
35 ~~such the~~ hearing ~~shall~~ may not be held sooner than five days, unless by agreement of the parties,  
36 after the presentation of ~~such the~~ petition, and notice of the time and place of ~~such the~~ hearing  
37 shall be forthwith delivered to the other party to ~~such the~~ contest, or, in case of absence from the  
38 state or from his or her usual place of abode, ~~such the~~ notice may be given by mailing, or causing  
39 to be mailed, the ~~same~~ notice , or a copy thereof, addressed to him or her at his or her last known  
40 post-office address. If the court, or the judge, after ~~such the~~ hearing, ~~be~~ is of the opinion that a

41 suspending order should issue, the court ~~in its~~, or the judge in his or her, discretion, may suspend  
 42 ~~such~~ the final decision and may require bond upon such conditions and in such penalty, and  
 43 impose such terms and conditions upon the petitioner, as are just and reasonable; and the court,  
 44 or the judge, shall fix a time for the final hearing on the application. The hearing of the matter shall  
 45 take precedence over all other matters before the court. For ~~such~~ the final hearing, and before  
 46 the day fixed therefor, the special court shall file with the clerk of the Supreme Court of Appeals  
 47 all papers, documents, testimony, evidence, and records, or certified copies thereof, which were  
 48 before it at the hearing resulting in the final decision from which the petitioner appeals, together  
 49 with a copy in writing of its final decision; and, after argument by counsel, the court shall decide  
 50 the matter in controversy, both as to the law and the evidence, as may ~~seem~~ determine to it to be  
 51 just and right.

52 (b) The Supreme Court of Appeals ~~is hereby given jurisdiction to~~ may enforce the  
 53 provisions of this section by writ of prohibition, mandamus, and certiorari, as may be appropriate.

**§3-7-6. County and district contests; notices; time.**

1 (a) In all cases of contested elections, the ~~county commission~~ circuit court shall be the  
 2 judge of the election, qualifications, and returns ~~of their own members and of all county, and~~  
 3 district, and municipal officers. ~~Provided, That a member of the county commission whose election~~  
 4 ~~is being contested may not participate in judging the election, qualifications and returns~~

5 (b) A person intending to contest the election of another to any county, ~~or~~ district, or  
 6 municipal office, including a judge of any magistrate court or any office that shall hereafter be  
 7 created to be filled by the voters of the county or of any magisterial or other district therein, shall,  
 8 within ~~ten~~ seven days after the result of the election is certified, ~~give the contestee notice in writing~~  
 9 ~~of such intention and a list of the votes he will dispute, with the objections to each, and of the~~  
 10 ~~votes rejected for which he will contend. If the contestant objects to the legality of the election or~~  
 11 ~~the qualification of the person returned as elected, the notice shall set forth the facts on which~~  
 12 ~~such objection is founded. The person whose election is so contested shall, within ten days after~~

13 ~~receiving such notice, deliver to the contestant a like list of the votes he will dispute, with the~~  
 14 ~~objections to each, and of the rejected votes for which he will contend; and, if he has any objection~~  
 15 ~~to the qualification of the contestant, he shall specify in writing the facts on which the objection is~~  
 16 ~~founded. Each party shall append to his notice an affidavit that he verily believes the matters and~~  
 17 ~~things set forth to be true. If new facts be discovered by either party after he has given notice as~~  
 18 ~~aforsaid, he may, within ten days after such discovery, give an additional notice to his adversary,~~  
 19 ~~with the specifications and affidavit prescribed in this section.~~

20 ~~The provisions of this section apply to all elections, including municipal elections, except~~  
 21 ~~that the governing body of the municipality is the judge of any contest of a municipal election~~  
 22 ~~initiate a civil action in the circuit court of a county wherein the election or any part thereof was~~  
 23 ~~held.~~

24 ~~(c) For an election contest challenging specific votes cast, votes rejected, or voters who~~  
 25 ~~participated in the election, a recount proceeding as set forth in §3-6-9 of this code is first required~~  
 26 ~~and shall be complete prior to the filing of an election contest on those grounds.~~

27 ~~(d) For an election contest challenging an elected candidate's eligibility, the legality of the~~  
 28 ~~election, or fraud, the person intending to contest the election may proceed directly with filing a~~  
 29 ~~civil action.~~

**§3-7-7. County Circuit court to hear county, and district, and municipal contests;  
 procedure; review.**

1 ~~(a) The county circuit court shall hear and decide election contests initiated pursuant to~~  
 2 ~~the provisions of the preceding section §3-7-6 of this code. Subpoenas for witnesses for either~~  
 3 ~~party shall be issued by the clerk of the county court, and served as in other cases, and the~~  
 4 ~~witnesses shall be entitled to the same allowances and privileges, and be subject to the same~~  
 5 ~~penalties, as witnesses attending a circuit court in a civil suit. The notice of contest shall be~~  
 6 ~~presented to the county court at its first term after the same is delivered to the person whose~~  
 7 ~~election is contested, and the same shall be docketed for trial in such court.~~

8           **(b)** At the trial of ~~such~~ the contest, the circuit court shall hear all ~~such~~ legal and proper  
9 evidence that may be brought before it by either party, and may, if ~~deemed~~ considered necessary,  
10 require the production of the poll books, certificates, and ballots deposited with ~~its~~ the county clerk  
11 or municipal recorder or clerk, and examine the same. ~~The hearing may be continued by the court~~  
12 ~~from time to time, if it be shown that justice and right require it, but not beyond three months from~~  
13 ~~the day of election.~~

14           **(c)** A contestant has the burden of proof in an election contest.

15           **(d)** At the ~~final~~ conclusion of the trial of ~~such~~ the contest, the circuit court shall ~~declare the~~  
16 ~~true result of such election, and cause the same to be entered on the records of the court. When~~  
17 ~~the result of the election is declared, as aforesaid, direct that~~ a certified copy of the order declaring  
18 ~~such~~ the result shall, if required, be delivered by the clerk of the circuit court wherein the contest  
19 was held to the person declared elected, if such be the result of the trial, and such copy shall be  
20 received in all courts and places as legal evidence of the result of the election therein declared  
21 parties. ~~Either the contestant or contestee shall have the right of appeal to the circuit court of the~~  
22 ~~county from the final order or decision of the county court in such proceeding, upon the filing of a~~  
23 ~~bond with good personal security, by the party desiring the appeal, to be approved by the county~~  
24 ~~court, in a sum deemed sufficient by such court, with condition to the effect that the person~~  
25 ~~proposing to appeal will perform and satisfy any judgment which may be rendered against him by~~  
26 ~~the circuit court on such appeal. But such appeal shall not be granted unless the party desiring~~  
27 ~~the appeal shall make application for such appeal, and file such bond, within thirty days from the~~  
28 ~~entering of the final order in such proceeding; and the circuit court may at any time require a new~~  
29 ~~bond or increase the penalty thereof when the court deems it necessary. When such appeal is~~  
30 ~~taken to the circuit court, as hereinbefore provided, it shall be heard and determined upon the~~  
31 ~~original papers, evidence, depositions and records filed before and considered by the county~~  
32 ~~court, and the circuit court shall decide the contest upon the merits. From the decision of the~~  
33 ~~circuit court, an~~

34           ~~(e) An appeal of the decision of the circuit court shall lie~~ be to the Supreme Court of  
35 Appeals. ~~as in other cases, but such appeal shall be heard upon the original papers and copies~~  
36 ~~of all orders made, without requiring the same to be printed~~

37           (f) The Supreme Court of Appeals, through its rule-making power in §51-1-4 of this code,  
38 may promulgate rules and regulations consistent with this article which govern the pleadings,  
39 practice, and procedure for the conduct of county, district, and municipal election contests in the  
40 courts of this state.

NOTE: The purpose of this bill is to make procedures for election contests before a special court applicable to contested elections of certain judges; changing jurisdiction of election contests for county, district, and municipal elections to the circuit courts; requiring a recount proceeding to be completed before filing certain election contests.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.