



# MUNICIPAL ELECTIONS CONTEST GUIDE

WEST VIRGINIA SECRETARY  
OF STATE'S OFFICE

ELECTIONS DIVISION

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## Legal Disclaimer: This Guide is not a Substitute for the W. Va. Code or Code of State Rules

**This guide is provided to municipal election officials by the Secretary of State's Office pursuant to its general authority set forth in W. Va. Code § 3-1A-6.<sup>1</sup> However, this guide is not a full and complete copy of the elections laws of the State of West Virginia and shall not be substituted as such. Intended as only a resource, under no circumstances shall any provision of this guide be relied upon without first consulting the appropriate provisions of law or administrative rules.**

### What is an Election Contest?

An election contest resembles a civil court case. Election contest procedures include proper service of process, presenting evidence, issuing subpoenas, a hearing in front of the municipal governing body, and appellate procedures.

### Who May Contest a Municipal Election?

When the election contest involves election results between candidates, the contest may only be brought about by a candidate.<sup>2</sup>

When the election contest is for the purpose of having the election declared “void” in its entirety, the contest may be brought by any candidate, individual citizen, or taxpayer of the municipality where the election was held.<sup>3</sup>

### Who are the “Parties” in an Election Contest?

The person contesting an election is the “**contestant**,” who initiates (*i.e.* submits or files) the contest notice. The contestant is the equivalent to a “petitioner” in a civil court case.

The person whose election is contested is the “**contestee**,” who is the adverse party against the contestant. The contestee is the equivalent to a “respondent” in a civil court case.

If a party to the election contest is also currently serving as a member of the municipal governing body, such as an incumbent City Council Member, the candidate “may not participate in judging the election, qualifications and returns” of the election contest.<sup>4</sup>

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<sup>1</sup> “The Secretary of State shall be the chief election official of the state . . . [and] shall also advise with election officials[.]” W. Va. Code § 3-1A-6(a), (c).

<sup>2</sup> *Pridemore v. Fox*, 59 S.E. 2d 899, 902 (W. Va. 1950).

<sup>3</sup> Syl. Pt. 1, *Pridemore v Fox*, 59 S.E.2d 899 (1950).

<sup>4</sup> W. Va. Code § 3-7-6; see also *Johnson v. Nancy Singleton Case*, 243 W. Va. 382, 393 (2020).

## What May Be Contested?

The following claims may be brought in an election contest:

1. Challenging the final election results;
2. Challenging the qualifications or eligibility of the person elected;
3. Challenging specific votes cast; and
4. Objecting to the overall legality of the election resulting from, for example, matters such as fraud or misconduct.<sup>5</sup>

Certain claims may be brought immediately after the results are certified at canvass. However, some claims can only be brought *after* a recount is demanded and held. These are discussed below.

### Claims not requiring recount:

Claims of fraud, legality of the election, or the elected candidate's eligibility do not require a recount; the candidate may proceed directly with a contest as long as any recount initiated has been terminated.<sup>6</sup>

#### Irregularities, Fraud, or Misconduct

Irregularities not shown to have an effect on the result have not historically resulted in overturned elections when there is no showing of "fraud or misconduct on the part of election officers, preventing a free expression of the will of the voters, and affecting the result of the municipal election."<sup>7</sup>

When no indication of fraud affecting the results of the election, with undisputed assertion that the ballots were carefully preserved and accurately counted, some admitted irregularities have not been enough to void the election. Some examples include:

- voters not signing the poll books;
- ballots not being regularly preserved by seal with the signature of the poll clerks and other election officials written across the flap of the envelope; or
- election officers who failed to subscribe to a written oath, but took oaths as such before commencing the discharge of their duties.<sup>8</sup>

However, when a contestant claims "fraud" of specific ballots, and not fraud of the election (or the manner the election was conducted) altogether, they must first demand a recount before proceeding to an election contest.<sup>9</sup>

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<sup>5</sup> W. Va. Code §3-7-6.

<sup>6</sup> Syl. Pt. 5, *Miller v. County Commission of Boone County*, 208 W. Va. 263 (2000).

<sup>7</sup> Syl. Pt. 1, *Pridemore v Fox*, 59 S.E.2d 899 (1950).

<sup>8</sup> *Pridemore v Fox*, 59 S.E.2d 899, 904 (1950).

<sup>9</sup> *Banister v. Town of Rowlesburg*, No. 11-1655, 2012 W. Va. LEXIS 850, \*19 (2012)

## Qualifications of the Person Deemed Elected

When grounds for contest are based on the contestee's qualification to hold the office, it is sufficient to set forth facts in the notice which shows such disqualification, and for the contestant to state they were a candidate for the office.<sup>10</sup> It is not required to list specific votes or state facts that the contestant is entitled to the office.<sup>11</sup>

### Claims requiring recount:

A contest related to specific votes cast in the election can only be called after a recount as been demanded and held pursuant to W. Va. §3-6-9; the recount must be demanded within 48 hours of the last declaration of results.<sup>12</sup>

### Failure to demand a recount will result in a denial of the election contest proceeding.

If it can be "reasonably ascertained" that the "voter was entitled to vote," the vote "shall be counted" and any "technical errors, omissions, or oversights," such as an error resulting in an incorrect address, shall be disregarded.<sup>13</sup>

Provisional ballots that have been positively determined as valid shall be counted, pursuant to W. Va. Code § 3-1-41(e). Only counting the previously counted votes, and none of the positively determined provisional ballots that were challenged based on erroneous record, denies those citizens their right to vote.<sup>14</sup>

When a contestant claims "fraud" of specific ballots, and not fraud of the election (or the manner the election was conducted) altogether, they must first demand a recount before proceeding to an election contest.<sup>15</sup>

Even if a recount may appear to be futile, it is necessary because it places all interested candidates on notice that problems may exist with specific votes.<sup>16</sup> This provides the opportunity for these candidates to:

1. Observe the manner in which the recount is conducted;
2. Notify the board, in writing, of their intention to preserve their right to demand a recount of precincts not requested to be recounted by the candidate originally requesting a recount of ballots cast; and
3. Identify votes cast which may be challenged as irregular or illegal.<sup>17</sup>

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<sup>10</sup> *Slater v. Varney*, 136 W. Va. 406, 415 (1951) (citing *Dryden v. Swinburn*, 15 W. Va. 234 (1879)).

<sup>11</sup> *Slater* at 136 W. Va. 412 (1951).

<sup>12</sup> *Miller v. County Commission of Boone County*, 208 W. Va. 263, 269 (2000); W. Va. Code §3-6-9.

<sup>13</sup> W. Va. Code § 3-1-41(e); *Johnson v. Nancy Singleton Case*, 243 W. Va. 382, 390 (2020).

<sup>14</sup> *Johnson v. Nancy Singleton Case*, 243 W. Va. 382, 390 (2020).

<sup>15</sup> *Banister v. Town of Rowlesburg*, No. 11-1655, 2012 W. Va. LEXIS 850, \*19 (2012)

<sup>16</sup> *Banister v. Town of Rowlesburg*, No. 11-1655, 2012 W. Va. LEXIS 850, \*19 (2012)

<sup>17</sup> *Miller v. County Commission of Boone County*, 208 W. Va. 263, 269 (2000).

## What Are the Basic Requirements to Contest an Election?

The full list of requirements may be found in W. Va. Code §§ 3-7-6 and 3-7-7. Please review those laws prior to filing any election contest, as this guide provides only a summary of the requirements.

In sum, two main documents are required: (1) a written notice, and (2) an affidavit.

The written notice must be provided by the contestant to both the contestee and the municipal governing body.

All notices (both initial and reply) from all parties must be accompanied by an affidavit stating that he or she believes the matters and facts set forth are true.<sup>18</sup> An affidavit does not require notarization, but is subject to criminal false swearing penalties under W. Va. Code § 3-9-3.

The written notice must specify all grounds upon which the contestant wishes to dispute.

If the contestant wishes to assert that the entire election should be declared void, written notice must include a list of facts to support the objection. However, not *all* facts, every illegal act, illegal vote, or instance of fraud must be listed.<sup>19</sup> The WV Supreme Court has noted it would be an “intolerable technicality” to require every fact, and that the general principle is that only “certainty to a common intent is all that is required.”<sup>20</sup>

In the notice, the individual contesting the election should affirmatively state whether he or she was an elector (*i.e.* voter) in the election, or another candidate for cases involving the overall legality of the election, or a candidate for the office in question for cases involving election results.<sup>21</sup>

The facts must be provided so that there would be a duty to vacate the election or declare another was elected if the facts are sustained by proof.<sup>22</sup>

After receiving the notice, the contestee must provide the required information in writing to the contestant within ten (10) days of receipt. This reply notice must include (1) a list of votes to be disputed, (2) objections to each, and (3) any rejected votes he or she plans to contend.

If there are questions regarding the qualifications or eligibility of the contestant, the contestee must specify, in writing, the facts on which the claim is based.

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<sup>18</sup> W. Va. Code § 3-7-6

<sup>19</sup> *Mullens v. Dunman*, 80 W. Va. 586, 593 (1917)

<sup>20</sup> *Mullens v. Dunman*, 80 W. Va. 586, 593 (1917) (adopting *In re Election Cases*, 1 Brewst. 1, 36 (Pa. 1870).

<sup>21</sup> W. Va. Code § 3-7-6; *Slater v. Varney*, 136 W. Va. 406, 412 (1951).

<sup>22</sup> Syl. Pt. 1, *Halstead v. Rader*, 27 W. Va. 806 (1886)

If new facts are discovered after the parties have filed their individual notices, the contestee and contestant may provide an additional notice within ten (10) days of the discovery.<sup>23</sup>

## When Must Notice be Filed?

A person intending to contest a municipal election must do so within ten (10) days after the election results have been certified.<sup>24</sup> Results are certified after the Board of Canvassers signs the Certificates of Election following the close of the recount period. If a recount was demanded, the results are not certified for the recounted specific race until after the recount is conducted and the Certificates of Election are signed.

Below is an example of an election contest calendar with both required and recommended timelines:

### Example Election Contest Calendar

### Example dates

<b>Election Day</b>		<b>June 8</b>
<b>Canvass</b>	<i>5 days after election*</i>	<b>June 14 @5pm</b>
<b>Recount period</b>	<i>48 hours after close of canvass</i>	<b>June 14-16 @5pm</b>
<b>Certification</b>	<i>Any time after 48-hour recount period ends**</i>	<b>June 17 @9am</b>
<b>Contest period starts</b>	<i>After results are certified</i>	<b>June 17 @9:01am</b>
<b>Contestant notice filing</b>	<i>Must be filed within 10 days after certified results***</i>	<b>June 27 @9:01am</b>
<b>Contestee notice filing</b>	<i>Within 10 days of receiving contestant's notice</i>	<b>By July 7</b>
<b>Election contest hearing</b>	<i>At the earliest possible time****</i>	<b>By July 12</b>
	<i>At final hearing, true election will be declared</i>	<b>August 2</b>
<b>Appeal</b>	<i>Within 30 days of final order</i>	<b>By September 1</b>

**Notes:**

\*If falling on a weekend or holiday, Canvass moves forward to the next business day; see W. Va. Code §2-2-1(d).

\*\*Results may be certified any time after 48 hours; 48 hours is the earliest results may be certified.

\*\*\*10 calendar days, unless landing on a weekend or holiday, then the deadline moves forward to the next business day; see W. Va. Code §2-2-1(d).

\*\*\*\*Within 25 days of election certification (see scheduling rec.); may not extend longer than three (3) months from the day of the election.<sup>25</sup>

<sup>23</sup> W. Va. Code § 3-7-6

<sup>24</sup> W. Va. Code § 3-7-6

<sup>25</sup> W. Va. Code § 3-7-7

## Detailed Process for Contesting a Municipal Election

### Step 1: Written Notice to All Parties

#### Notice to the Contestee:

The contestant must deliver to the contestee a written notice of intent to contest the election, as well as a signed affidavit. These notices must be given within 10 days after results are certified.<sup>26</sup>

#### Notice to the Municipal Governing Body:

The contestant must also deliver the notice and affidavit to the county court at the next scheduled meeting after the notice is delivered to the contestee.<sup>27</sup> If the next scheduled meeting is not within the 10-day period, the notice should be delivered to the municipal governing body as soon as possible within the period so the contest can be docketed for a hearing. Contact the city/town recorder or clerk for local requirements.

#### Serving the Notice:

The notice shall be provided to all parties in writing. However, the law does not definitively prescribe how the notice is to be served to the parties.<sup>28</sup>

*Recommendation:* It is recommended that the notice and affidavit be served according to the WV Rules of Civil Procedure. Under Civil Procedure Rule 4(c), service may be delivered by:

1. The sheriff;
2. Certified mail or first-class mail (proof of receipt is recommended);
3. A statutory attorney-in-fact; or
4. Any individual who is at least 18 years of age and is **not** a party in the election contest.<sup>29</sup>

The manner of service for delivering a copy of the notice of contest and affidavit with any attachments is recommended to be made:

1. To the contestee personally;
2. To the contestee's dwelling place (or usual place of abode/home) to the contestee *or* the contestee's family member who is above the age of sixteen (16) years and by advising such person of the election contest;

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<sup>26</sup> W. Va. Code § 3-7-6

<sup>27</sup> W. Va. Code § 3-7-7

<sup>28</sup> W. Va. Code § 3-7-6

<sup>29</sup> W. Va. Rules of Civil Procedure Rule 4(c)(2), 4(c)(3)(A) – 4(c)(3)(C)

3. To the contestee's attorney-in-fact authorized by appointment or statute to receive or accept service of legal documents;
4. To the contestee via certified mail, return receipt requested and delivery restricted to the contestee; or
5. To the contestee by first-class mail, together with two (2) copies of the notice of contest and affidavit with any attachments, together with an acknowledgement conforming substantially to the WV Supreme Court's Form 14 and a return envelope, postage prepaid, to the municipal governing body.

Although the manners of service listed above are recommendations, some form of proof should be provided that sufficiently indicates the notice was properly delivered and received (*e.g.* a Certificate of Service signed by the person who delivered the notice and affidavit).

If the service was made by a person other than the sheriff or certified mail, proof of service should be made by affidavit.<sup>30</sup> Otherwise, proof of service can be made by filing a Certificate of Service with the municipal governing body.<sup>31</sup>

#### Scheduling the Contest Hearing:

The municipal governing body shall schedule the election contest hearing at the same meeting during which the notice of contest was delivered. If no meeting is scheduled when the notice is delivered within the recommended timeframe, a meeting should be called as soon as possible for scheduling the hearing.

To ensure that the contestee has a full 10 days to prepare his or her written response to the contestant, the hearing may not be scheduled to proceed prior to 10 days following receipt by the municipal governing body of the notice.

*Scheduling Recommendation:* Although the law does not prescribe a specific time frame to schedule a hearing, it is recommended that the hearing be scheduled as closely to 25-days after the date of the certification of election results.

This gives the contestant the full 10 days to file notice of the contest, while also granting the contestee an additional 10 days to file a response. Together, both parties will have 5 days to prepare for the contest hearing.

#### Notice Requirements:

The criteria below must be included in a written notice of election contest. Requirements vary depending on which type of contest is initiated, whether that be a contest of specific **votes**, election **legality**, or question of a candidate's **qualifications or eligibility**. The chart below

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<sup>30</sup> W. Va. Rules of Civil Procedure, Rule 4(i)

<sup>31</sup> W. Va. Rules of Civil Procedure, Rule 5(d)(1)

summarizes the information that must be included for each type of election contest, but shall not be followed without first consulting W. Va. Code § 3-7-6:

		Type of Contest		
		Contests of specific <b>votes/voters</b>	Contests of the <b>legality</b> of the election	Contests of the winning candidate's <b>qualifications/eligibility</b>
Requirements	The contestant's intent to contest the election	Required	Required	Required
	Grounds for contest	Required	Required	Required
	List of votes/voters to be disputed	Required		
	Specific objection to each vote counted (if any)	Required		
	Specific objection to rejected votes (if any)	Required		
	A signed affidavit stating that the contestant believes all matters set forth are true	Required	Required	Required
	Facts that detail why the election should be overturned		Required	
	Facts that detail why the contestee is not qualified or eligible to hold office			Required

Reply Notice to Contestant:

Within ten (10) days after receiving the written notice from the contestant, the contestee must deliver a written response to the contestant that includes:

1. A corresponding list of counted votes he or she will dispute with objections to each;
2. Rejected votes he or she will contend;
3. Any objections to the qualifications or eligibility of the contestant and specific facts on which these assertions are made; and

4. A signed affidavit that states the contestee “verily believes the matters and things set forth to be true.”<sup>32</sup>

#### Additional Evidence Following Notice:

If new facts are discovered by either party after the original notice was given and within ten (10) days of discovery, an additional written notice may be sent.<sup>33</sup> Notices of additional evidence must include the appropriate specifications as outlined in W. Va. Code § 3-7-6, as well as a signed affidavit.

#### Step 2: The Election Contest Hearing

##### Judges of the Election Contest:

The municipal governing body in office at the time of the hearing will preside as the judge of the election contest.<sup>34</sup> If a contest is scheduled prior to the newly elected municipal governing body taking the oath of office and assuming official duties, then the outgoing governing body shall be the judge of the election contest. Otherwise, the newly elected governing body will preside over the hearing with the exception of any conflicts of interest, as described below.

##### Conflicts of Interest:

No member of the municipal governing body whose election is being contested may participate in judging the election, qualifications and returns at the contest hearing.<sup>35</sup>

*Recommendation:* Although the law does not prohibit a contestant’s or contestee’s family member from judging an election contest, it is recommended that such family members recuse themselves from participating as a judge to avoid the appearance of impropriety. Furthermore, it is recommended that the municipal governing body consult the WV Ethics Commission for an opinion on potential conflicts of interest.

##### Hearing Process and Procedures:

At the election contest hearing, the municipal governing body will hear all legal and proper evidence presented by the parties.

The municipal governing body has authority to require the production of poll books, certificates, and ballots deposited with its recorder or clerk for further examination.<sup>36</sup> The recorder or clerk may issue subpoenas to hear witnesses for either party.

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<sup>32</sup> W. Va. Code § 3-7-6

<sup>33</sup> W. Va. Code § 3-7-6.

<sup>34</sup> W. Va. Code § 3-7-6

<sup>35</sup> W. Va. Code § 3-7-6; *Johnson v. Nancy Singleton Case*, 243 W. Va. 382, 393 (2020).

<sup>36</sup> W. Va. Code § 3-7-7

Just like witnesses attending circuit court in a civil suit, witnesses in an election contest are entitled to the same allowances and privileges, and are subject to the same penalties.<sup>37</sup>

The hearing may be continued if necessary. However, it shall not extend longer than three (3) months from the day of the election.<sup>38</sup>

At the final hearing of the contest, the municipal governing body shall declare the true election results, which must be entered accordingly on the records of the municipality.<sup>39</sup> If required, a certified copy of the order declaring the results will be delivered to the person recognized as the winner, if such be the result of the contest. A certified copy of the results shall also be received by the same public bodies required to receive the certification of the election results.<sup>40</sup>

### Step 3: Appeal

#### Who Can Appeal?

Both the contestant and contestee have the right to appeal the final decision to the circuit court in the same county. The appeal must be filed within thirty (30) days of the municipal governing body's final order, and must agree that any judgement rendered by the circuit court will be performed and satisfied.<sup>41</sup>

The circuit court will utilize the original papers, evidence, depositions, and records that were filed and reviewed by the county court. Upon those merits and consideration, the circuit court will issue a judgement.<sup>42</sup>

The circuit court's decision may be appealed to the WV Supreme Court of Appeals. If the appeal is heard, the court will analyze the original papers, evidence, records, and depositions used in the previous hearing.<sup>43</sup>

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### **ACKNOWLEDGEMENT**

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<sup>37</sup> W. Va. Code § 3-7-7

<sup>38</sup> W. Va. Code § 3-7-7

<sup>39</sup> W. Va. Code § 3-7-7

<sup>40</sup> W. Va. Code § 3-7-7

<sup>41</sup> W. Va. Code § 3-7-7

<sup>42</sup> W. Va. Code § 3-7-7

<sup>43</sup> W. Va. Code § 3-7-7



**Specific facts supporting the grounds for this Election Contest – refer to “Type of Contest” table for required information (a separate sheet may be attached if more space is required):**

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		Type of Contest		
		Contests of specific votes/voters	Contests of the <b>legality</b> of the election	Contests of the winning candidate’s <b>qualifications/eligibility</b>
	List of votes/voters to be disputed	Required		
	Specific objection to each vote counted (if any)	Required		
	Specific objection to rejected votes (if any)	Required		
	Facts detailing why election should be overturned		Required	
	Facts that detail why the contestee is not qualified or eligible to hold office			Required

**EXAMPLE AFFIDAVIT**

I, \_\_\_\_\_(name), hereby affirm under penalty of false swearing, that I believe all matters set forth in in this Election Contest Notice to be true, that I am qualified to initiate this Election Contest, and that I either participated in the municipal election as a candidate, a voter, or am otherwise eligible to file this Notice under local Charter or ordinance.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date