STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

JAMES P. GILPATRIC,

DETERMINATION

a Judge of the Kingston City Court,
Ulster County.

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore[1]
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
James E. Long for the Respondent

[1] Ms. Moore was appointed to the Commission on April 17, 2009. The vote in this matter was taken on January 28, 2009.

The respondent, James P. Gilpatric, a Judge of the Kingston City Court, Ulster County, was served with a Formal Written Complaint dated August 8, 2008, containing one charge. The Formal Written Complaint alleged that respondent failed to render decisions in a timely manner in 47 cases notwithstanding that he had previously been issued a letter of dismissal and caution for delayed decisions. Respondent filed a verified answer dated September 8, 2008.

By notice of motion dated September 8, 2008, respondent moved to dismiss the Formal Written Complaint. On October 6, 2008, the administrator of the Commission opposed respondent's motion and cross-moved for summary determination and a finding that Charge I of the Formal Written Complaint was sustained. Respondent replied in papers dated October 31, 2008, and the administrator filed a letter in response dated November 5, 2008. By decision and order dated December 16, 2008, the Commission denied the motion to dismiss, granted the cross-motion for summary determination and scheduled oral argument and briefs on the issue of sanctions.

Each side submitted memoranda as to sanctions. Commission counsel recommended censure, and respondent's counsel recommended a confidential disposition. On January 28, 2009, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has served as a Judge of the Kingston City Court since 1994. Until April 1, 2007, that position was part-time and respondent maintained a private law practice. Since April 1, 2007, respondent has been a full-time judge of the

court.

2. From July 2004 to March 2008, in 43 cases as set forth on the annexed Schedule A, respondent failed to render decisions within 30 days of final submission as required by Section 1304 of the Uniform City Court Act. Most of the cases were small claims actions; three were summary proceedings. In 25 of the matters, decisions were issued from two to six months after final submission; 16 decisions were issued from seven months to one year after submission; one decision was issued after 14 months; and in *Quick v. Viviani*, a consolidated civil case, respondent issued a decision approximately 31 months after final submission.

3. From March 2005 to February 2008, in four cases as set forth on the annexed Schedule A, respondent failed to render decisions on motions within 60 days of final submission as required by Section 1001 of the Uniform City Court Act and Section 4213(c) the Civil Practice Law and Rules. In three cases respondent's decisions were issued from four to five months after submission, and in one case respondent issued a decision eleven months after final submission.

4. In four cases, litigants or their attorneys wrote to respondent inquiring about the delayed decisions in their cases, as set forth below.

(A) In *Riviello v. Timeout Hair Salon*, which was fully submitted on February 3, 2006, the claimant sent a letter dated August 14, 2006, to respondent inquiring about the delayed decision. When respondent did not reply, the claimant contacted respondent's administrative judge, Honorable George B. Ceresia, Jr., who sent

two letters to respondent inquiring about the case (*see* Finding 5[C]). Respondent issued a decision in the case on November 3, 2006.

(B) In *Fabrico v. Eaton*, which was fully submitted on May 10, 2006, the defendant's attorney sent a letter dated July 10, 2006, to respondent inquiring about the delayed decision. Respondent issued a decision in the case on February 2, 2007.

(C) In *Nace v. Klein*, which was fully submitted on February 23, 2007, the claimant's attorney sent a letter dated July 23, 2007, to respondent inquiring about the delayed decision. Respondent issued a decision in the case on October 30, 2007.

(D) In *Rosenbaum v. Miller*, which was fully submitted on March 9, 2007, the claimant's attorney sent a letter dated February 18, 2008, to respondent inquiring about the delayed decision. Respondent issued a decision in the case on February 26, 2008.

5. In three cases, litigants wrote to respondent's administrative judge, Judge Ceresia, about the delayed decisions in their cases, and Judge Ceresia wrote to respondent inquiring about the delays, as set forth below.

(A) In *Morales v. Lopez*, which was fully submitted on November 5, 2004, Judge Ceresia sent a letter to respondent on June 22, 2005, inquiring about the status of the matter. Respondent did not reply to the letter from his administrative judge, and Judge Ceresia sent a second letter dated August 1, 2005. Respondent finally replied to Judge Ceresia by letter dated August 10, 2005, and issued a decision on that date.

(B) In *Austin v. Tota*, which was fully submitted on November 25, 2005,

Judge Ceresia sent a letter to respondent on March 30, 2006, inquiring about the status of the matter. Respondent issued a decision on April 5, 2006, and sent a letter to Judge Ceresia advising him of the decision.

(C) In *Riviello v. Timeout Hair Salon*, which was fully submitted on February 3, 2006, Judge Ceresia sent a letter to respondent on September 7, 2006, inquiring about the status of the matter. Respondent did not reply to the letter from his administrative judge, and Judge Ceresia sent a second letter dated October 2, 2006. A month later, on November 3, 2006, respondent issued a nine-page decision. This case was a small claims action which involved a $90 claim.

6. Respondent delayed in rendering decisions as set forth above notwithstanding that on February 5, 2004, the Commission issued a confidential letter of dismissal and caution to him for failing to render timely decisions in two cases and failing to report one delayed case as required to his administrative judge. The letter of dismissal and caution advised respondent that the letter "may be used in a future disciplinary proceeding based on a failure to adhere to the terms of the letter" and that the "Commission may also consider the letter…in determining sanction in any future disciplinary proceeding, in the event formal charges are sustained and misconduct is established."

Supplemental Findings:

7. Respondent reported all of the delayed matters on his quarterly reports to his administrative judge as required by the Rules of the Chief Judge (22

NYCRR §4.1).

8. All but two of the delayed cases were submitted to respondent while he was serving as a part-time judge. Respondent attributes the delays primarily to a lack of adequate resources afforded to him while he was a part-time judge.

9. Respondent states that upon becoming a full-time judge on April 1, 2007, he addressed the backlog of cases and decided all the delayed matters, and that he now has no delayed decisions pending. The record indicates that in the eleven matters pending on April 1, 2007, respondent issued decisions in three cases in April 2007 and issued decisions in the remaining eight cases between August 2007 and February 2008. The record also indicates that respondent had delays in two new matters after April 2007; in a small claims case, *Robles v. Anson*, which was fully submitted to respondent in June 2007, he did not issue a decision until nine months later.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(A), 100.3(B)(1) and 100.3(B)(7) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Within 18 months of receiving a confidential letter of dismissal and caution from the Commission in February 2004 for failing to issue decisions in a timely manner,

respondent developed a sizeable backlog of delayed cases that persisted over several years. Respondent's failure to render timely decisions in 47 cases over a period of three and a half years constitutes a pattern of "persistent or deliberate neglect of his judicial duties" (*Matter of Greenfield*, 76 NY2d 293, 295 [1990]), which is aggravated by numerous factors, including that: (1) respondent failed to heed the Commission's previous cautionary warning about such delays; (2) respondent received numerous letters from litigants or their attorneys inquiring about the delayed decisions; (3) in three cases in which litigants or their attorneys had written to him about the delays, respondent did not issue a decision until several months after receiving such letters; (4) respondent received letters from his administrative judge inquiring about the delayed decisions in three cases; (5) in two of the cases in which he was contacted by his administrative judge, respondent failed to issue a decision promptly after receiving such letters or even to respond to his administrative judge's inquiry, which necessitated a follow-up letter from the administrative judge; and (6) respondent did not eliminate his persistent backlog of delayed cases and continued to have delays in subsequent cases after his administrative judge's intervention. These persistent delays evidence deliberate neglect that warrants public discipline.

Respondent's delays were contrary to ethical standards and statutory mandates. A judge is required to "dispose of all judicial matters promptly, efficiently and fairly" (Rules, §100.3[B][7]). In 43 cases respondent failed to issue decisions within 30

days of final submission as required by Section 1304 of the Uniform City Court Act.[2] Contrary to the 30-day time limit imposed by law, respondent's decisions in 25 cases were issued from two to six months after final submission; 16 decisions were issued from seven months to one year after submission; one decision was issued after 14 months; and in *Quick v. Viviani*, a consolidated civil case, respondent issued a decision approximately 31 months after final submission. In four additional cases, in which statutory mandates required decisions on motions to be issued within 60 days of final submission (CPLR §4213[c][3]), respondent issued decisions from four to eleven months after final submission.

Decisions in these 47 cases were issued an average of five to six months beyond the statutorily mandated period. Throughout this period, from November 2004 to March 2008, it appears that respondent had an average of six delayed matters pending at a given time, ranging from as few as two to as many as 13 cases.

We view such delays as serious misconduct because of the adverse consequences on individual litigants, who are deprived of the opportunity to have their claims resolved in a timely manner, and on public confidence in the administration of

[2] "Time for rendering judgment or decision. If a jury trial is not demanded or directed as provided in §1303, the court must render judgment within thirty days from the time when the case is submitted for that purpose, except when further time is given by the consent of the parties."

[3] "Time for decision. The decision of the court shall be rendered within sixty days after the cause or matter is finally submitted or within sixty days after a motion under rule 4403, whichever is later, unless the parties agree to extend the time."

justice. Most of the delayed matters were small claims actions, which generally involve relatively simple issues. The "informal and simplified" procedures for small claims are intended to provide litigants with an efficient and just resolution to their legal disputes (Uniform City Court Act §1804). This goal is thwarted and litigants are adversely affected when decisions are unduly delayed. Litigants in such matters, who are often unrepresented and are hoping to receive a prompt adjudication of their claims, have little recourse when months pass without a decision; understandably, they may be concerned that if they complain about the delay, they risk antagonizing the judge who will be deciding their case.

The cases depicted in this record offer a vivid cross-section of the kinds of disputes that the "informal and simplified" procedures of small claims are intended to resolve expeditiously: tenants seeking the return of security deposits, landlords seeking damages for apartments left in poor condition, a homeowner seeking compensation for a "botched" bathroom renovation, a website designer who was unpaid after performing the contracted work, a car owner unhappy with repairs that were done. In cases where the law required a decision to be issued within 30 days, a tenant had to wait 14 months to recover $200 on a claim against his former landlord; an unhappy customer had to wait four months for a decision awarding her $2,000 for slipcovers that did not fit; a man owed $1,400 by a relative had to wait seven months for a judgment. To the litigants who filed these claims, the sums at issue were significant and the delays onerous. Moreover, for some litigants such cases may represent their only personal involvement with the

courts, and an unduly delayed resolution of their dispute would necessarily have the effect of leaving them with the impression that our judicial system is inefficient and insensitive to their concerns.

Here, the record indicates that in several cases litigants or their attorneys who finally wrote to respondent inquiring about the delayed decisions did not receive any response from the court and still had to wait months for a decision. In three cases, litigants in delayed matters were constrained to contact respondent's administrative judge, who wrote to respondent; yet, in two of these cases, even after hearing from his administrative judge, respondent did not issue a decision or even reply to the administrative judge's letter, and a follow-up letter from the administrative judge was required before respondent finally issued a decision. While one litigant who complained received a decision a short time thereafter, others who complained – and many who did not complain – had to wait for longer periods. Significantly, the inquiries from respondent's administrative judge, which occurred in the summer of 2005 and in the spring and fall of 2006, had no apparent effect in reducing respondent's persistent backlog of cases over that period; nor did they spur respondent to avoid delays on the new matters he handled.

Although respondent attributes these delays primarily to a lack of sufficient resources available to him as a part-time judge, this does not excuse the pattern of persistent delay depicted in this record. "The judicial duties of a judge take precedence over all the judge's other activities" (Rules, §100.3[A]). Every judge, whether part-time

or full-time, is obligated to perform his or her duties appropriately with the resources provided and to establish priorities to ensure that decisions are not unduly delayed. "The law is a learned profession but it is also a practical one" (*Matter of Greenfield*, *supra*, 76 NY2d at 298). A judge's desire to produce a lengthy, detailed decision must be balanced against the need to issue timely decisions on a consistent basis and the litigants' desire for a prompt adjudication of their claims. Moreover, most of the delayed cases were small claims actions, involving relatively simple issues that did not require a lengthy analysis. In this case, the record of delayed decisions speaks for itself and rises to a level of misconduct that cannot be condoned.

In making this determination, we are mindful of *Matter of Greenfield*, *supra*, in which the Court of Appeals rejected a Commission determination that a Supreme Court justice had engaged in misconduct by failing to render timely decisions in eight civil cases. Although the judge's delays were "lengthy and inexcusable," the Court in *Greenfield* dismissed the misconduct charge, stating that "ordinarily delays do not constitute misconduct" and that generally such matters "can and should be resolved in the administrative setting" (*Id*. at 297, 298). Citing recently adopted rules designed to identify delays and emphasizing the role of court administrators in addressing such problems, the *Greenfield* decision makes clear that in most cases involving delays, administrative correction would likely be sufficient and, thus, delayed decisions should not form the basis for a misconduct finding. In that context, the Court warned the Commission against "interven[ing] in the administrative process whenever it believes that

a judge has failed to dispose of pending matters within unspecified time limits in an unspecified number of cases and on a case-by-case basis" (*Id*. at 297).

Despite such language, the Court in *Greenfield* recognized that in some cases involving delays, disciplinary action may be both appropriate and necessary. For example, if a judge "fails to comply with administrative orders, his conduct must necessarily be deemed an appropriate subject for disciplinary action" (*Id*. at 298). The Court indicated certain situations in which disciplinary sanctions might be required, including instances "when the judge has defied administrative directives or has attempted to subvert the system by, for instance, falsifying, concealing or persistently refusing to file records indicating delays" (*Id*.). *See also*, *Matter of Washington*, 100 NY2d 873 (2003) (judge was removed for failing to render timely decisions despite repeated administrative intervention, failing to report the delays to court administrators and failing to cooperate with the Commission).[4]

In light of these guidelines, we have carefully considered the facts presented in this case. Based on the number of delayed decisions as well as the factors noted above (*i.e*., respondent's failure to heed the Commission's cautionary warning, his failure to issue a decision promptly even after litigants had contacted his court about the delays, his failure in two cases to issue a decision promptly after receiving a letter from his administrative judge or even to respond to the administrative judge's inquiry, and his

[4] In response to the dissent's view that the Commission lacks jurisdiction even to investigate delays, we note that in *Washington*, as the Court observed, the Commission's investigation began with an inquiry into an allegation that the judge had a single 16-month delay in issuing a decision.

inability to eliminate his persistent backlog of delayed cases or to avoid further delays after his administrative judge's intervention), we find that respondent's behavior falls within the parameters of misconduct established in *Greenfield*.

In *Greenfield*, which involved delayed decisions in eight cases (some of which included delayed decisions on several motions), the Court found that there was "no persistent or deliberate neglect" of judicial duties and that "[i]n the context of [the judge's] over-all performance these were isolated incidents" (*Id*. at 295, 299). In sharp contrast, the instant case involves a sustained pattern of delayed decisions in 47 cases over a period of three and a half years. Those delays were neither isolated nor inadvertent. There is no claim that respondent was unaware of the delayed matters; indeed, he reported all of the delayed cases, as he was required to do, on his quarterly reports to his administrative judge. Yet, notwithstanding that he had identified the delayed cases, respondent permitted numerous cases to linger for an additional three-month reporting period – and, in some cases, for several such periods – before finally disposing of the matters. This pattern of neglect persisted for more than three years, in disregard of the specific time limits imposed by law.

Further, as we have noted, most of the delayed matters here were small claims actions, involving relatively simple issues. In contrast, the cases in *Greenfield* were complex real estate and admiralty cases with multiple parties.

Of particular significance is respondent's failure to heed a Commission letter of dismissal and caution for similar misconduct, which was issued in February

2004. The Commission's directive addressed not only respondent's failure to render timely decisions in two cases, but also his failure to report a delayed case as required on his administrative reports. The letter of dismissal and caution specifically warned respondent that the letter "may be used in a future disciplinary proceeding based on a failure to adhere to the terms of the letter." Thereafter, although respondent did comply with the cautionary warning by reporting delays as required, he failed to adhere to the same specific statutory guidelines for issuing decisions that were cited in the Commission's letter, *i.e*., the requirements that decisions be issued within 30 days and that motions be decided within 60 days of final submission. A judge's disregard of a prior warning in a letter of dismissal and caution that his or her conduct was contrary to the Rules is a significant aggravating factor in disciplinary proceedings. *Matter of Cerbone*, 2 NY3d 479 (2004); *Matter of Assini*, 94 NY2d 26, 30-31 (1999) ("[r]ather than scrupulously following the letter and spirit of the Commission's caution, [the judge] continued the [prohibited activity]"); *Matter of Robert*, 89 NY2d 745, 747 (1997).

As the majority in *Greenfield* recognized, the circumstances in that case were "unique" since "the reporting rules were in their infancy when most of the delays occurred" (*Id*. at 299). The Court made clear its view that in the future, those requirements would be consistently applied and enforced in order to avoid persistent, unacceptable delays. Those requirements have now been in effect for more than twenty years. Indeed, the Commission in its letter of dismissal and caution drew respondent's attention to the reporting rules and the statutory time limits for rendering decisions.

Despite these circumstances, despite receiving numerous inquiries from litigants about delays and despite the involvement of his administrative judge, respondent continued to have persistent delays that evidence deliberate neglect. Therefore, based on the particular facts presented here, we conclude that respondent's conduct was contrary to the ethical rules and warrants a disciplinary sanction.

In considering an appropriate sanction, we note that some months after receiving the Commission's letter of dismissal and caution, respondent suffered a relapse of the disease of alcoholism, which required extended treatment (*see*, *Matter of Gilpatric*, 2006 Annual Report 160 [Comm on Judicial Conduct]). While the record indicates that some delays began soon after respondent returned to the bench after a three-week absence in October 2004 and that by the following summer he had at least eleven cases pending in which decisions were overdue, we note that by early 2006 respondent had reduced the backlog to just two cases. Then, inexplicably, the number of delayed matters increased again. He did not decide nine cases heard in March 2006 until July and August 2006, and he did not decide four cases heard in July 2006 until February 2007. Thus, it is clear that his three-week absence in 2004 cannot excuse the three years of delays that followed.

Further, we note that respondent's administrative judge was compelled to intervene in three cases by inquiring about the delays and, in two cases, was constrained to send a second letter a month later since respondent neither replied to the initial inquiry nor issued a decision. In one case in which the administrative judge's second letter had

requested a response "immediately," respondent did not issue a decision until a month later, nine months after final submission of the case.

We have also considered several mitigating factors. Significantly, respondent reported all the delayed matters as required on his quarterly reports. Thus, there is no indication that he attempted to conceal the delays or to subvert the efforts of court administrators to monitor the delayed matters. Compare, *Matter of Washington*, *supra*.

We also note that during this period it appears that respondent assumed additional adjudicative responsibilities, including instituting a domestic violence court, and eliminated a backlog of cases that had accrued in the vehicle and traffic part, which averaged 5,300 filings a year.

Finally, we note that respondent states that upon becoming a full-time judge, he addressed the backlog of delayed cases, disposed of all the delayed matters and no longer has any delayed decisions.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Judge Klonick, Mr. Coffey, Mr. Emery, Ms. Hubbard, Mr. Jacob, Judge Konviser and Judge Ruderman concur. Mr. Emery files a concurring opinion.

Mr. Harding dissents only as to the sanction and votes that respondent be issued a letter of caution.

Mr. Belluck dissents and votes to dismiss the charge in an opinion.

Ms. Moore and Judge Peters did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: June 5, 2009

Jean M Savanyu

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

SCHEDULE A

SMALL CLAIMS CASES

Case	Final Submission	Date of Decision	How Long Pending
Quick v. Viviani (civil case consolidated with small claims)	6/10/04	1/31/07	31.5 months
Aluminum House v. Renfrow	10/29/04	10/28/05	1 year
Morales v. Lopez	11/5/04	8/10/05	9 months
Little v. Herdman	1/28/05	4/22/05	3 months
Leong v. Scilabro	2/18/05	8/10/05	6 months
Rosacker v. Lightfoot	3/11/05	10/15/05	7 months
McCausland v. Sands and Rizzo	3/18/05	8/10/05	5 months
Colden v. Fowler	4/14/05	10/15/05	6 months
Hanowitz v. Troeger	4/15/05	8/10/05	4 months
Moshonas v. Prokopuk	4/15/05	10/15/05	6 months
Faircloth v. Monroe	4/29/05	10/28/05	6 months
Peppers v. Mehl	9/30/05	1/31/06	4 months
Mathis v. Olen	1/20/06	3/21/06	2 months
McMahon v. Wilke	1/27/06	3/21/06	2 months
Riviello v. Timeout Hair Salon	2/3/06	11/3/06	9 months
Sullivan v. Leonard	3/3/06	8/16/06	5.5 months

Rogers v. Ellenridge	3/10/06	7/14/06	4 months
Horowitz v. Chernick	3/10/06	7/17/06	4 months
Bohan v. Koltz	3/24/06	8/11/06	4.5 months
Miller v. Terpening	3/24/06	8/8/06	4.5 months
Cammarata v. Malik	3/31/06	7/17/06	3.5 months
Clarke v. White	3/31/06	7/14/06	3.5 months
Dinoris v. Vandermark	3/31/06	7/14/06	3.5 months
Puffer v. Gokey	4/12/06	7/13/06	3 months
Fabrico v. Eaton	5/10/06	2/2/07	9 months
Guido v. Hinson	7/7/06	2/2/07	7 months
Guido v. Holmes	7/7/06	2/2/07	7 months
Woitasek v. Rucci	7/7/06	2/16/07	7 months
Lawson v. Tim's Automotive	7/28/06	2/2/07	6 months
Goralewski v. Brewer	11/24/06	4/6/07	4.5 months
Goralewski v. Kingston Pontiac	11/24/06	4/6/07	4.5 months
Hamberger v. Winkler	12/1/06	3/29/07	4 months
Kapilevich v. E3, Inc.	12/6/06	4/30/07	5 months
Tripp v. Meehan	12/8/06	2/8/08	14 months
Glass v. Krakle	2/23/07	11/1/07	8 months

Nace v. Kline	2/23/07	10/30/07	8 months
Velez v. Birchwood	3/7/07	1/30/08	11 months
Rosenbaum v. Miller	3/9/07	2/26/08	11.5 months
Rose v. Lockwood	3/12/07	10/30/07	7.5 months
Robles v. Anson	6/14/07	3/28/08	9.5 months

SUMMARY PROCEEDINGS

Case	Final Submission	Date of Decision	How Long Pending
Ford v. Novick	3/18/05	10/28/05	7 months
Kingston Housing v. Faggins	4/7/06	2/2/07	10 months
Malik v. Pease	2/07	8/6/07	6 months

MOTIONS

Case	Final Submission	Date of Decision	How Long Pending
Boyd v. Oakley	1/14/05	6/7/05	5 months
Ulster Credit Union v. Baker	3/7/06	8/9/06	5 months
Rieker v. Encompass Insurance	3/16/07	2/11/08	11 months
Fairjohn Realty v. IPE	6/25/07	10/25/07	4 months

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

JAMES P. GILPATRIC,

a Judge of the Kingston City Court,
Ulster County.

CONCURRING OPINION BY MR. EMERY

– –

The debate between the dissent and the Commission's determination focuses on the niceties of the almost 20 year-old *Greenfield* decision and engages in an exhaustive comparison between the facts underlying Judge Gilpatric's misconduct and Justice Greenfield's excused neglect. Both analyses miss the forest for the trees. The issue posed by this case is whether the Court of Appeals will adhere to its *Greenfield* proclamation that even long delays of sub judice decisions, absent defiance of administrative directives or nondisclosure of pending delayed cases, are NOT judicial misconduct. It seems clear that *Greenfield's* holding is too broad and not in service of the canon of judicial ethics that requires every judge to "dispose of all judicial matters promptly, efficiently and fairly" (22 NYCRR §100.3[B][7]).

One need not be a strict constructionist to see clearly that Judge Simons' dissent in *Greenfield* is correct that the *Greenfield* majority expanded on the plain words

and meaning of the rule:

> The rule is not violated, [the majority] holds, unless there is delay coupled with other derelictions [citations omitted]. The rule contains no such qualifying conditions and nothing should be added to it. To require delay plus some other misconduct, such as falsification of records or insubordination, is to proscribe the other conduct, not to proscribe delay. (76 NY2d at 304-05)

But delay is itself proscribed by the rule. Therefore, the issue should not be, as the Commission's determination and the dissent exhaustively debate, whether administrative actions or disclosure requirements or even prior private cautionary warnings talismanically obviate the prejudicial effect of delays which are not de minimis. Rather, the issue for the Court of Appeals and the Commission, 20 years after *Greenfield*, is what is de minimis or harmless delay as opposed to delay which rises to the level of misconduct.

I understand that we are saddled with *Greenfield* and that is why this obtuse debate is unavoidable. But to carry on this debate without recognizing that it is ultimately irrelevant is too Talmudic for me.

The challenge is straightforward. The Commission, the Court of Appeals and all parties agree that not every delay is misconduct. It should not be an elusive task to define when delay is misconduct. We know that this does not depend on how administrative judges react or whether judges disclose their delayed matters. We know that applicable statutes and rules define deadlines for decisions on motions and matters submitted to the courts for rulings. We know that especially complicated matters warrant

flexibility. We know that exigencies such as illness are valid excuses. Obviously, the judicial canon is subject to reasonable objective exceptions. The Court of Appeals should define them to guide us and the judiciary.

What is plainly not tolerable is unexplained, persistent patterns of delayed decision-making which eviscerate any perception of fairness and confidence the public, litigants and counsel are promised by the constitutional guarantees of meaningful access to the courts. Judges who cannot or will not decide, should not. Each judge has this responsibility first. And no rationalization or deflection of that responsibility can shift the focus away from an appropriate finding of misconduct. In the end, if judges are to preserve their independence and respect, they must do their job and accept the burden of judging. If they do not, it is the Commission's and the Court of Appeals' constitutional responsibility to protect the public from this corrosive form of neglect and to impose disciplinary sanctions that are appropriate.

Because the record in this case clearly demonstrates that respondent failed to uphold his end of his vocational bargain, I concur in the result.

Dated: June 5, 2009

Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

– –

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

JAMES P. GILPATRIC,

a Judge of the Kingston City Court,
Ulster County.

DISSENTING OPINION
BY MR. BELLUCK

– –

"Delay is preferable to error" (Thomas Jefferson, Letter to George Washington, May 16, 1792).

I respectfully disagree with the determination to admonish Judge Gilpatric and therefore dissent. Absent specific aggravating circumstances, the handling and correction of judicial delays should be an administrative function of the courts. The Court of Appeals made this clear in *Matter of Greenfield* by holding in unambiguous language that this Commission does not have jurisdiction to discipline judges for delays in rendering decisions – unless, as an aggravating factor, the judge "has defied administrative directives or has attempted to subvert the system" (76 NY2d 290, 298 [1990]). From my personal examination of this entire record, there is no evidence of any such conduct here. The majority's reliance on a prior letter of dismissal and caution as a bootstrap for finding misconduct is inconsistent with both the letter and spirit of

Greenfield, which plainly states that it is the role of court administrators, not the Commission, to monitor a judge's delays in disposing of cases and to intervene when necessary to address delays. By admonishing Judge Gilpatric, the Commission ignores the clear dictates[1] of *Greenfield* and disciplines a judge for conduct for which the Court of Appeals has made clear we have no jurisdiction.

In *Greenfield*, the Court rejected the Commission's effort to discipline a judge for delays, stating emphatically that the Commission's urging of discipline for such matters was an impermissible intrusion into the administrative functions of the courts:

> Basically [the Commission's argument] would permit the Commission to intervene in the administrative process whenever it believes that a Judge has failed to dispose of pending matters within unspecified time limits in an unspecified number of cases and on a case-by-case basis.
>
> In our view a clearer line must be drawn between the role of the Commission and court administrators in order to avoid confusion and provide adequate notice to members of the judiciary as to when and under what circumstances delays in disposing pending matters ceases to be a purely administrative concern and becomes a matter warranting punitive sanctions. **We have concluded that generally these matters can and should be resolved in the administrative setting and that the more severe sanctions available to the Commission should only be deemed appropriate and necessary when the Judge has defied administrative directives or has attempted to subvert the system** by, for instance, falsifying, concealing, or persistently refusing to file records indicating delays. (*Id*. at 298) (Emphasis added.)

[1]In dissenting, I distinguish the circumstance here, where, on a more egregious record of delays, the Court of Appeals concluded that the Commission had no jurisdiction over the subject matter, from instances where I believe we should refrain from disciplining judges who violate rules and

Notably, while stating that "the more severe sanctions available to the Commission" should be reserved for instances involving aggravating circumstances, the Court, having concluded that no such factors were present, did not impose a reduced sanction, but dismissed the charge outright. The holding in *Greenfield* could not be clearer: delays in issuing decisions – even "inexcusable" delays of up to nine years in deciding motions, even when there was administrative intervention, and even when, in four separate cases, litigants were constrained to initiate Article 78 proceedings to compel a decision – do not constitute misconduct and are a matter for court administrators, not the Commission.

Following the *Greenfield* decision, the Commission, as evidenced by its annual reports and disciplinary decisions, has attempted to chip away at the Court's holding that the Commission's exercise of its disciplinary function does not extend to delayed decisions. The Commission has continued to investigate allegations of delays. According to the Commission's annual reports, in the last five years 99 complaints alleging delays were investigated and 14 judges were issued cautionary letters for delays in disposing of cases. In several cases the Commission has held that delays in issuing decisions constitute misconduct warranting discipline (*e.g.*, *Matter of Scolton*, 2008 Annual Report 209 [delays in issuing decisions in two small claims cases as well as in scheduling hearings]; *Matter of Baldwin*, 2009 Annual Report 88 [delays in three small claims cases, in which the judge never issued a decision]).[2] Perhaps significantly, in

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laws that place unconstitutional or unreasonable restrictions on judges.

[2] In two other cases, *Matter of Washington*, 100 NY2d 873 (2003) and *Matter of Robichaud*,

Scolton and *Baldwin* the discipline was the result of a negotiated disposition in which the unrepresented respondents concurred. Commission Counsel relies on those cases in arguing that, notwithstanding *Greenfield*, delays in issuing decisions can constitute misconduct. This is, in my view, misleading and disingenuous.

Since the Court of Appeals has held that delays, standing alone, do not constitute misconduct, in my view the Commission lacks jurisdiction to investigate allegations of delay, let alone to issue cautionary letters, absent aggravating factors.[3] The incremental steps taken by the Commission to expand its jurisdiction in this area, I believe, are completely contrary to *Greenfield*. First, investigating allegations of delay to determine whether aggravating factors exist is a fishing expedition unless the Commission, prior to investigation, has direct *prima facie* information of concealment or failure to follow administrative directives. (By the same logic, the Commission could investigate every judge who reports any delayed cases on his or her reports to court administrators.) Second, issuing cautionary letters to judges for simple delays in issuing decisions is contrary to *Greenfield*, which, in stating that delays should be addressed

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2008 Annual Report 205, the Commission found misconduct for delays that were squarely within the parameters of *Greenfield* since the judges, *inter alia*, had concealed the delays from court administrators by failing to report the delayed cases as required. Notably, in *Washington* the Court underscored its holding in *Greenfield*, stating: "Unquestionably, delays in deciding pending cases should be addressed administratively" (*Id*. at 877).

[3] On these issues, I respectfully disagree with the majority. These differences may remain unresolved until the Court of Appeals has an opportunity to address whether the Commission has authority to investigate allegations of delay in issuing decisions without *prima facie* evidence of aggravating factors, to issue confidential letters of dismissal and caution in such circumstances, and to discipline a judge for delays in issuing decisions in the absence of the aggravating factors cited in *Greenfield*.

administratively and not in a disciplinary framework, makes no exception for confidential cautionary letters. In this case, the Commission is using a cautionary letter as an aggravating factor to ratchet subsequent delays to the level of misconduct.

In my view, this is a most uncompelling case for the Commission to assert that a case for misconduct can be made under the *Greenfield* guidelines. The facts here provide absolutely no evidence that the judge "defied administrative directives" or "attempted to subvert the system," which would provide a basis for disciplinary action under *Greenfield*. Over a period of four years, Judge Gilpatric, who, according to his counsel's statements during oral argument, handled at least 3,000 cases during this period, had delays in issuing decisions in only 47 cases. In 28 of those cases, decisions were issued in six months or less (some decisions were only a month or two late). In 17 matters, decisions were issued from seven months to a year after final submission. In only two cases were the delays longer than one year: in one case, the decision was issued after 14 months, and in the other case – a consolidated civil case which involved numerous counterclaims and had a 1,000-plus page record – there was a 31-month delay. In sum, it appears that the judge had some delays in issuing decisions in about a dozen cases out of 700-800 cases per year, and the average delay in those 12 cases was less than six months. This pales beside the egregious delays in *Greenfield*, which were held not to constitute misconduct (including a seven-year delay in issuing a decision after a trial and delays ranging from five to nine ***years*** in issuing decisions on seven motions [in total, Judge Greenfield had 15 delayed decisions]). While no delays at all would be preferable,

it is simply not realistic to expect there to be no judicial delays given the heavy workload of most judges.

Most significantly, perhaps, Judge Gilpatric reported all of the delayed cases as required on his quarterly reports to his administrative judge. Reporting delays to court administrators permits those officials to monitor a judge's caseload and, when necessary, to take appropriate corrective action. Indeed, the requirement that judges report delayed matters to court administrators on a regular basis (22 NYCRR §4.1) indicates that the system recognizes that some delays, although regrettable, do occur. In this case, there was no concealment of the delays, no falsifying of reports, and no indication whatsoever that respondent tried to subvert administrative monitoring of his delayed cases. To the contrary, the record indicates that the system implemented and overseen by court administrators worked precisely as it was designed to do. Judge Gilpatric's delays were fully disclosed and monitored; beyond the inquiries by his administrative judge in three cases, there is no indication in the record of any remedial action or corrective measures by court administrators – perhaps because, in their view, none were necessary. Moreover, as noted below, the record reflects that the issues that contributed to Judge Gilpatric's delays, including insufficient support staff while he was a part-time judge, no longer exist, and he no longer has delays.

Mindful of the *Greenfield* holding that delayed decisions do not constitute misconduct in the absence of specific aggravating factors, the Commission finds that several aggravating factors exist in this case, most notably: (1) the intervention of

respondent's administrative judge in three cases, and respondent's alleged failure to timely decide cases despite these administrative inquiries; (2) the fact that the judge had previously been issued a letter of dismissal and caution for delays in two cases; and (3) the judge's purported "persistent neglect" of his duties. Upon close scrutiny, none of these claims provides a convincing basis for a finding of misconduct.

With respect to the administrative judge's intervention, the Court of Appeals stated in *Greenfield* that litigants who face delays should seek the assistance of an administrative judge, which is precisely what happened in this case. The record shows that in response to inquiries from litigants in three cases, respondent's administrative judge wrote to him inquiring about the status of the matters, and thereafter respondent issued decisions – in one case within a week, and in two cases within two months. (When respondent did not reply to the administrative judge's inquiry in two cases, a follow-up letter was sent; the record indicates that in response to one follow-up letter, respondent advised the administrative judge that he had been on vacation and had misplaced the first letter, and he issued a decision a week later.) From this record, it certainly cannot be concluded that Judge Gilpatric "defied administrative directives" or was not responsive to administrative intervention. Rather, it appears that he was entirely cooperative with court administrators and that the system of administrative oversight worked precisely as the Court of Appeals anticipated it would work in most instances.

The Commission's conclusion that the intervention of the administrative judge, by itself, is a sufficiently aggravating factor to elevate this case to misconduct is

completely contrary to the letter and spirit of *Greenfield*, which encourages active administrative oversight. Indeed, in *Greenfield*, the Court of Appeals found no misconduct despite finding that court administrators had spoken to the judge on numerous occasions about his delays in rendering decisions (*Id*. at 296; *see also, Id*. at 303).[4] (*Compare*, *Matter of Washington*, decided after *Greenfield*, in which the Court, in removing the judge for delays, found that in addition to filing "late, incomplete and false" reports of delayed cases, the judge had defied the strenuous efforts of her administrative judge to assist her in reducing a persistent backlog of delayed matters [*supra*, 100 NY2d at 877].) The argument here that any delays that occurred subsequent to the administrative judge's inquiries constitute a defiance of court administrators is simply another attempt at bootstrapping.

Nor does the fact that four litigants or their attorneys[5] sent letters to respondent inquiring about the delays constitute an aggravating factor that distinguishes this case from *Greenfield*. In *Greenfield*, the record indicates that the judge ignored repeated inquiries from litigants about the delays – one litigant communicated with the judge's chambers 24 times to request a decision! Four litigants in *Greenfield* commenced Article 78 proceedings to compel a decision. By those measures, Judge Gilpatric's case is

[4] The Commission had found that Judge Greenfield's administrative judges "spoke to him six to twelve times concerning delays" (*Matter of Greenfield*, 1990 Annual Report 104).

[5] Many of the parties in these cases were represented by counsel; indeed, some parties were corporations or municipal agencies.

far less egregious than *Greenfield*, where no misconduct was found.[6]

With respect to the prior letter of dismissal and caution, I respectfully submit that it should not be considered an aggravating factor under *Greenfield*, for the reasons stated above. The misconduct referred to in the letter of dismissal and caution was that the judge delayed issuing decisions in two cases and failed to report one delayed case as required to his administrative judge. Notably, after receiving the cautionary letter, the judge assiduously reported every case that exceeded the applicable time limits. To focus solely on the issue of delays and to allow the Commission to create an aggravating circumstance by first issuing a cautionary letter for one or two delays and then using the letter to circumvent *Greenfield* when the judge has delays in the future is completely circular. By such logic, a judge who has even one delayed decision might be cautioned, and then any future delays could be deemed as violating or ignoring the caution, in order to bring the delay to the level of misconduct. Moreover, since the Court of Appeals has stated that "unquestionably" delays should be addressed administratively, it seems clear that the Commission has no jurisdiction to caution a judge for delays without aggravating circumstances in the first place. By issuing cautionary letters for delays (and then arguing that subsequent delays constitute a "defiance" of its "directives" that warrants discipline), the Commission in my view is usurping the role that, according to the *Greenfield* court, is the domain of court administrators.

[6] Nor is it a distinguishing factor in this case that Judge Gilpatric's delays were contrary to statutorily mandated time periods for issuing a decision. In *Greenfield*, as the dissent noted, the judge's delays were also contrary to a specific statutory mandate (CPLR 2219[a]) (*Id*. at 301).

Finally, Commission counsel argues that in contrast to Judge Greenfield, who had "no persistent or deliberate neglect of his judicial duties rising to the level of misconduct" (76 NY2d at 294), Judge Gilpatric's neglect was "persistent," as evidenced by the numbers of delayed matters. As noted above, that argument is simply not borne out by the numbers of cases that were delayed. Moreover, in *Greenfield* the Court expressly warned the Commission against "interven[ing] in the administrative process" by deciding arbitrarily that a particular number of delays in issuing decisions, or delays of a particular length, constitute misconduct (*Id*. at 297). Equally important, there is no indication in this record that Judge Gilpatric was anything other than a hard-working, conscientious judge, that he was not devoting sufficient time to his judicial duties or that he was indifferent to his responsibilities as a judge. To the contrary, it appears that he is a dedicated, productive jurist whose administrative judge assigned him additional responsibilities during this same period (including establishing a domestic violence part).

Several other factors are compelling in this case. In each of the delayed cases, Judge Gilpatric issued a written decision, and his opinions averaged three pages in length. Faced with a heavy caseload and minimal support staff during most of this period, he could have quickly disposed of all the delayed matters simply by issuing a one-sentence decision. Instead, it appears that he attempted in each case to write a thoughtful, detailed opinion that would give the parties a sense that their concerns were carefully and fully considered. Also, a review of Judge Gilpatric's decisions indicates that almost all of the cases involved multiple exhibits, testimony by witnesses, and, in many cases,

complex or novel legal claims requiring citation to statutes and codes.

To be sure, as the majority points out, delays are unfair to litigants, and perhaps the litigants would have preferred a shorter decision if it were issued more promptly. But as the Court of Appeals stated in *Greenfield*, in an eloquent twist on Jefferson's statement quoted herein: "Litigants should not be put to the added expense of having to appeal erroneous decisions hastily made when the court could have prevented the error if it had devoted additional time to reviewing the case and researching the applicable law" (*Id*. at 298).

The majority, in an attempt to support its discipline of Judge Gilpatric, points out that litigants had to wait for judicial decisions that were of great importance to the litigants. I would certainly never trivialize any delay that a litigant has to endure -- any time a litigant is involved in the legal system, it is important that decisions are made as timely as possible and that the burdens of the judicial process are minimized. Every case is important to the litigants involved. However, the fact that certain litigants were forced to encounter delays does not in and of itself translate into misconduct that we should be disciplining. I also note that while the record indicates that in six of the 47 cases litigants or their attorneys contacted Judge Gilpatric or the administrative judge to inquire about the delay, there is scant evidence in the record as to the particular impact of the delays on parties. In twelve of the small claims cases, the claims were ultimately dismissed.

The evidence in the record is that during most of the relevant time period,

when Judge Gilpatric's position was part-time, he had minimal support staff, had no assistant or law clerk, was forced to work in a courthouse undergoing renovation, and operated out of temporary facilities at a former jail. At one point, the Chief Clerk and Deputy of his court retired and no replacements were immediately appointed. No secretarial staff was available to type, copy or distribute his decisions. Upon becoming full-time, Judge Gilpatric addressed the backlog of cases and decided all the delayed matters. The judge maintains that he now has no delayed matters pending.

Although there is no detailed evidence in the record as to the judge's total caseload during the period at issue, it appears to be substantial. During oral argument, Judge Gilpatric's attorney indicated that the judge handled at least 3,000 cases over the period at issue.

Finally, as the majority points out, near the start of this period the judge had a relapse of the disease of alcoholism, for which he was treated in an in-patient facility. Throughout this period, his recovery was no doubt a priority.

In light of all these factors, even if the majority believed that there were aggravating factors in addition to delays – and I find no such factors in this record – they should be mitigated significantly by the above circumstances.

The preamble to the Rules Governing Judicial Conduct underscores that the "rules of reason" should be applied in disciplinary proceedings:

> The rules governing judicial conduct are rules of reason... It is not intended … that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed,

> should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

Applying these principles, I believe Judge Gilpatric's delays do not warrant disciplinary action and that the harsh result here is unjust and incorrect as a matter of law. I respectfully dissent and vote to dismiss.

Dated: June 5, 2009

Joseph W. Belluck, Esq., Member
New York State
Commission on Judicial Conduct