The Administrative Tribunal,

Considering the complaint filed by Mr M. O. against the International Atomic Energy Agency (IAEA) on 10 May 2007, the IAEA's reply of 6 September, the complainant's rejoinder of 17 October 2007, the Agency's surrejoinder of 28 January 2008, the complainant's letter of 15 February and the Agency's comments thereon of 10 March, corrected on 17 March 2008;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgments 2604 and 2656. Suffice it to recall that the complainant, a national of Iceland born in 1954, currently holds the grade D-1 position of Director of the Division of Conference and Documents Services at the IAEA. In November 2004 a staff member in the complainant's Division – Mr M.R. – alleged misconduct against him and two other staff members. The complainant subsequently wrote to the Director of the Division of Personnel requesting that an investigation into the "recent behaviour" of Mr M.R. be undertaken to determine whether it constituted misconduct and that Mr M.R. be suspended with immediate effect.

On 3 December 2004 the Acting Director of the Division of Personnel asked the Director of the Office of Internal Oversight Services (OIOS) to conduct, in accordance with paragraph 2 of Appendix G to section 1 of part II of the IAEA's Administrative Manual, an investigation into the matters raised by the complainant as well as the allegations of misconduct brought against him. The OIOS issued its final investigation report on 31 May 2005 and submitted it to the Division of Personnel, which in turn sent it to the complainant on 23 June, requesting him to provide his comments thereon. The complainant replied on 8 July that he was pleased to note that the allegations of misconduct made against him were rejected but nevertheless indicated that the investigation process was procedurally flawed and was tainted with errors of fact.

By a letter of 25 August 2005 the Director of the Division of Personnel informed the complainant that, following consideration of the final investigation report as well as the complainant's observations thereon, the Deputy Director General in charge of the Department of Management, had decided that he should receive a "letter of warning, which shall not be considered to be a disciplinary measure", in respect of four allegations of misconduct outlined in the report respectively concerning his statements that Mr M.R. needed professional help and that another person was a better staff member, his mismanagement of the transfer of Mr M.R. and his incorrect reporting of misconduct.
He explained that a letter of warning was needed to remind the complainant of his responsibility as a manager to treat his subordinates with the "appropriate level of respect", to ensure that he strictly adheres to the Agency's administrative procedures and that allegations of misconduct are accurately reported. The complainant wrote to the Deputy Director General on 30 August 2005, asking him whether the decision to issue him with a letter of warning was based on the conclusion that the facts described in that decision constituted "misconduct", or whether they amounted to "unsatisfactory performance", within the meaning of Staff Rule 3.06.4, or to something else. The Deputy Director General replied, on 2 September, that he had closed the case with respect to all but four allegations and that he had concluded that these allegations did not warrant convening a Joint Disciplinary Board but a letter of warning.

On 14 October 2005 the complainant requested a review of the decision of 25 Auguston the grounds that it was procedurally flawed and tainted with errors of fact. His request having been rejected, he filed an appeal with the Joint Appeals Board on 20 December. In its report of 30 August 2006, the Board concluded that the letter of warning was inappropriate, given the relatively minor nature of the unsatisfactory conduct described therein, and it recommended that the Director General reverse the decision to issue the complainant with a letter of warning.

By a letter of 8 March 2007 the Director General informed the complainant that, having considered the Board's report, he had decided that a letter of warning was not justified with respect to the statement advising Mr M.R. to seek "professional help", but that the appeal should be dismissed concerning the remaining three allegations which were not, in his view, either reported accurately or characterised adequately. Thus, by a letter of 19 March 2007, which is the impugned decision, the Acting Director of the Division of Personnel forwarded to the complainant the revised letter of warning and indicated that a copy of that letter would be placed in his personal file.

B. The complainant submits that the decision to issue him with a written warning was taken without authority. According to Staff Regulation 11.01 and paragraph 7(i) of section 2 of part II of the Manual, the Director General has authority to take decisions concerning alleged misconduct. However, paragraph 4(c) of Appendix G, which provides that the Deputy Director General in charge of the Department of Management has been conferred authority to issue letters of warning and reprimands, contravenes section 2 of part II of the Manual. He argues that had he been a director in a department other than the Department of Management, he could have relied on his line manager, i.e. the Deputy Director General in charge of the Department of Management**,** for support and guidance, but since his line manager was the one who took the contested decision he could not request his support and, consequently, has suffered unequal treatment. In his opinion, paragraph 4(c) contravenes the principle of equality.

The complainant alleges an error of law insofar as the Agency mistakenly applied paragraph 4(c) of Appendix G, according to which a letter of warning may be issued in case of misconduct. Indeed, the Administration had concluded that he was not guilty of misconduct; consequently it should have applied paragraph 4(d) of Appendix G which allowed the Administration to close the case.

According to the complainant, the impugned decision is procedurally flawed on several grounds. He alleges inter alia that neither the impugned decision nor the Director General's decision of 8 March 2007 that the letter of warning was justified with respect to three allegations are substantiated. Indeed, the Agency indicated that the decision to issue the complainant with a letter of warning was based on the findings made by the OIOS, but the latter had recommended, on the contrary, that the Director General should reverse his decision to issue such a letter. Moreover, the Administration concluded that, in dealing with the transfer of Mr M.R., the complainant breached the "administrative procedures" without specifying the procedures in question. In his view, these procedures did not exist. He also alleges breach of due process. Thus, when he requested a copy of a "key document" – the recommendation submitted by the Director of the Division of Personnel to the Deputy Director General in charge of the Department of Management, before the latter took his decision on the allegations of misconduct, as required by paragraph 4 of Appendix G – he was told that he was not entitled to consult it. Subsequently, the document was forwarded to the Joint Appeals Board but not to him. He asks the Tribunal to order the IAEA to produce the document in question. According to the complainant, the Agency further acted in breach of Appendix G by not informing him in writing of the allegations to which he was asked to respond. Indeed, he was merely provided with a copy of the final investigation report which, though it referred to the transfer of Mr M.R. and to his statement that Mr M.R. threatened to "put into [a] coffin" other staff members, did not identify these facts as allegations of mismanagement and incorrect reporting of misconduct. He adds that the Joint Appeals Board did not consider his claim concerning procedural irregularities.

The complainant submits that there was an inordinate delay in processing his internal appeal. He filed his appeal on 20 December 2005 and the Board issued its report on 30 August 2006, i.e. far beyond the three-month period provided for in Staff Rule 12.01.1(D)(9). Moreover, the Director General forwarded his final decision to the complainant more than six months after the Board had taken its decision, instead of within 30 days as provided for in Staff Rule 12.01.1(D)(10).

In addition, he claims that he has suffered moral injury due to the uncertainty surrounding his career prospects. He points out that his contract is due to end on 31 August 2008 and that he fears non-extension for having brought the case to the Tribunal. He adds that the Agency did not treat him with dignity and respect for his professional reputation.

The complainant asks the Tribunal to set aside the impugned decision and to award him 36,000 euros in moral damages. He seeks punitive damages for the Agency's "extensive violations of due process and its disrespect for [the] Tribunal's rulings". He also claims costs in the amount of 6,000 euros.

C. In its reply the IAEA asserts that a written warning does not constitute a disciplinary measure; it explains that oral and written warnings are "standard managerial messages" from supervisors, which aim at drawing staff

members' attention to possible shortcomings and to encourage them to improve their performance. It maintains that the letter of warning was justified, as the complainant was found by the OIOS to have mismanaged the transfer of Mr M.R., to have spoken disparagingly of that staff member in front of others and to have attributed to him unsubstantiated death threats against another staff member.

The Agency rejects any breach of the principle of equality. In its view, paragraph 4(c) of Appendix G sets out an efficient way of dealing with alleged misconduct. Indeed, it requires the Deputy Director General in charge of the Department of Management to look carefully at the facts giving rise to an investigation and to take action regardless of the department to which the staff member concerned belongs.

The IAEA denies any breach of due process. Concerning the alleged lack of reasons, it reiterates that the aforementioned Deputy Director General and the Director General based their decision on the OIOS findings, and that the Administration would be expected to provide further reasons only if it had decided to depart from those findings. It also asserts that the complainant had received full notice of the allegations and points out that he had provided comments on the OIOS draft and final reports, which referred inter alia to the allegation of mismanagement of Mr M.R.'s transfer and incorrect reporting of alleged misconduct. The defendant further explains that the "key document" requested by the complainant, which it produces as an annex to its reply, was not forwarded to him when he first requested it because it was classified as privileged information. In light of the Tribunal's case law, it has decided that in future documents equivalent to that "key document" will be supplied to staff members during the internal appeal proceedings.

With regard to the delay in hearing his appeal, the IAEA points out that the complainant submitted a "significant volume of material" to the Joint Appeals Board, which may have contributed to the delay. Moreover, the Board had to wait for the complainant's written remarks on the various comments provided by other staff members.

According to the Agency, the complainant has not established that he has suffered any injury. It adds that the Director General has recently offered the complainant another exceptional extension of his appointment until 31 August 2009; an offer that the complainant has accepted. The complainant's allegation that his career has suffered or might suffer in the future owing to the letter of warning is
therefore groundless. In addition, it requests that the Tribunal ask the complainant to pay costs in a nominal amount for abuse of procedure in that he withheld evidence related to the alleged death threats formulated by another staff member.

D. In his rejoinder the complainant indicates that since the terms "unsatisfactory conduct" appeared in the impugned decision, heassumed that he had been found guilty of misconduct. He submits that, according to Staff Regulation 11.01, "misconduct" equates with "unsatisfactory conduct". In his view, the IAEA should have informed him during the internal appeal proceedings that he was labouring under a misapprehension; failure to have done so has caused him "enormous injury". He amends his pleas accordingly.

Citing the case law, he points out that complainants are ordered to pay costs only in exceptional situations, namely for frivolous, vexatious and repeated complaints; his complaint was not of such nature. Lastly, having read the "key document" submitted by the Agency, he maintains that the impugned decision is tainted with errors of fact and law.

E. In its surrejoinder the IAEA submits that any claim based on alleged negligence on the part of the Agency for letting the complainant believe that he was guilty of misconduct is irreceivable for failure to exhaust internal remedies. It also submits that since the complainant was not found guilty of misconduct, there had been no affront to his dignity; the claim for damages is consequently moot. It adds that the complainant could not have been unaware that he had not been found guilty of misconduct, since he referred in his brief to Appendix G, which provides that a letter of warning does not constitute a disciplinary measure,as well as to the Joint Appeals Board's report according to which there was no misconduct on his part. Lastly, it indicates that "misconduct" and "unsatisfactory conduct" are different concepts. While misconduct always implies unsatisfactory conduct, unsatisfactory conduct will not always rise to the level of misconduct. It otherwise maintains its position.

CONSIDERATIONS

1. In November 2004, Mr M.R., a staff member of the IAEA, alleged misconduct on the part of the present complainant, the Director of the Division of Conference and Documents Services, and two other staff members.

Shortly thereafter, the complainant wrote to the Director of the Division of Personnel, asking for an investigation into the recent conduct of Mr M.R. and, also, for his immediate suspension from duty. The background facts as they relate to Mr M.R., who was suspended from duty and ultimately dismissed, are to be found in Judgments 2604 and 2656. For present purposes, it is sufficient to note that the situation that developed in November 2004 had its origins in a proposal made by the complainant in March 2004 to transfer Mr M.R. from the Publishing Section to the Conference Services Section. Although the staff member concerned was initially happy with the proposal, it was ultimately abandoned when agreement could not be reached on a job description requiring him to coordinate part of his work with another person.

2. The allegations by and against Mr M.R. were referred to the OIOS for investigation. During the course of the investigation, Mr M.R. made further and very serious allegations against the complainant and certain other staff members, including the person with whom the proposed job description required him to coordinate part of his work. These further allegations were investigated along with those earlier made by Mr M.R. and by the complainant.

3. The very lengthy final investigation report of the OIOS was provided to the complainant on 23 June 2005. The report which dealt with 21 allegations by Mr M.R. and three against him was accompanied by a covering letter from the Director of the Division of Personnel, stating:

"In accordance with the Procedures to be Followed in the Event of Reported Misconduct ([…] Appendix G [of the Manual]), I would request your written report and your observations on the allegations raised, to be forwarded to me by close of business on 8 July 2005. I would note that you have the right to request the advice of another staff member or retired staff member to assist you in making your response."

The aforementioned Appendix G is headed "Procedures to be Followed in the Event of Reported Misconduct". Paragraph 3 relevantly provides that, after receiving an OIOS report, the Director of the Division of Personnel shall:

"(a) inform the staff member in writing of the allegations and his/her right to respond;

(b) provide him/her with a copy of the documentary evidence of the alleged misconduct;

(c) notify the staff member of his/her right to the advice of another staff member or retired staff member to assist in his/her responses; and

(d) request from the staff member concerned a written statement and his/her observations on the allegations raised."

The letter of 23 June 2005 did not mention misconduct and did not specify the allegations to which the complainant was required to respond.

4. The complainant provided his response on 8 July, noting that the allegations made by him against Mr M.R. had been confirmed and those that Mr M.R. had made against him had been "explicitly or implicitly rejected". He also stated that, although he "ha[d] been cleared of any suspicion of misconduct", there were serious mistakes in the final investigation report. He then proceeded to deal with several matters in his response of which it is necessary to note only one.

5. When seeking Mr M.R.'s suspension, the complainant had stated:

"My immediate concern is for the physical and psychological health of various innocent staff members […] who have become victims of [his] harassment during the past few months. Th[e] harassment takes various forms, ranging from explicit threats to harm individuals (words like 'kill' or 'put into a coffin' are used), implicit threats (give his supervisor a Christmas present 'which he will remember all of his life time' […])".

In relation to this matter, the OIOS indicated in its report that it had verified the allegation of explicit threats but could not find the phrase "put into [a] coffin" in any of the e-mails submitted by the complainant. It noted that another staff member who said she had been threatened did not recall that particular phrase and had not used it herself. It also stated that Mr M.R. had "resorted to verbal abuse" but that it could not confirm that "the alleged death threats were explicitly made". The complainant strongly criticised this part of the report contending, amongst

other things, that the threats had not been properly investigated and that only one of the six staff members who had reported the threats had been interviewed.

6. Other matters that were referred to in the report were dealt with by the complainant in two annexes to his response of 8 July 2005. It is necessary to mention three. The first is that, at a meeting on 7 May 2004 when the proposal to transfer Mr M.R. was finally abandoned, the complainant told him that the other person, with whom the proposed job description required him to coordinate part of his work, was a better staff member than he. The OIOS said of that statement that "the negative comments about the performance of Mr [M.R.] were neither documented nor supported by the performance assessment or prior formal communications from his supervisors". The second matter concerns a statement at a meeting in June 2004 when the complainant told Mr M.R. that he needed "professional help". It was noted in the report that this comment was made at a meeting at which Mr M.R. had complained of stress, sleeplessness and weight loss. The report of the incident concluded with the statement that Mr M.R. had "left the meeting in what could be interpreted as a protest to this remark as shown in the Draft Minutes of the Meeting".

7. In the second annex to his response, the complainant replied to that section of the report dealing with the two matters outlined above, stating that, as the allegations could "not be construed as contending that any particular measure was unlawful, so they w[ould] be dealt with swiftly". He said that the reason why he had made the first statement was that Mr M.R. "had continuously belittled and humiliated [the other person's] professional competence". The complainant explained the second statement on the basis that he would have been negligent had he not responded to Mr M.R.'s statements regarding his health.

8. The third matter to which the complainant replied in the second annex to his response was a section of the report entitled "Additional Investigation Findings" in which it was said that the attempt to transfer Mr M.R. "was not properly handled". In reaching that conclusion, the OIOS noted that Mr M.R.'s furniture had been moved to the Conference Services Section before a job description was drafted. It also indicated that there was some error in the fact that it took approximately a month to present Mr M.R. with the draft job description and that it had not previously been given to the Division of Personnel.

9. On 25 August 2005 the complainant was informed that the Deputy Director General in charge of the Department of Management had determined that he should receive "a letter of warning, which shall not be considered to be a disciplinary measure" in respect of four allegations in the final investigation report but that the case against him should be closed "regarding all other allegations of misconduct". The first two matters attracting a letter of warning were the statements that the staff member needed professional help and that another person was a better staff member. The purpose of the warning in relation to these statements was said to be "to remind [him] of [his] responsibility as a manager to treat [his] subordinates with the appropriate level of respect and in accordance with the standards of conduct expected of an international civil servant". The second warning was in relation to "mismanagement in connection with Mr [M.R.]'s planned transfer". Its purpose was "to ensure that [the complainant] and relevant […] staff strictly adhere to the Agency's administrative procedures in connection with any proposed transfer". The third warning was with regard to the "incorrect report that Mr [M.R.] threatened to 'put into a coffin' other staff members". Its purpose was said to be "to ensure that any allegations of misconduct are accurately reported".

10. The complainant wrote to the Deputy Director General in charge of the Department of Management on 30 August 2005 and asked specifically:

"Is your decision based on the conclusion that my acts […] are 'misconduct' or are they 'unsatisfactory performance' in the spirit of Rule 3.06.4, or possibly something else?"

The Deputy Director General replied on 2 September 2005, stating that, "operating in accordance with […] Appendix G […], paragraph 4(d) – [he] closed the case concerning all but four of the allegations". He added that he concluded that those four did not warrant convening a Joint Disciplinary Board. However, he did not expressly answer the complainant's question.

11. Two further communications were addressed by the complainant to the Deputy Director General in which he, the complainant, referred to a decision to give him a warning with respect to four allegations of misconduct and the finding that he had been guilty of misconduct, respectively. The Deputy Director General replied on 6 October 2005, referring to both communications from the complainant and advising that, if he wished to challenge the

decision, he should lodge an internal appeal. He did not deny that there had been a finding of misconduct.

12. The complainant appealed to the Director General on 14 October 2005. In his letter, he made it clear that he was of the view that he had "been found guilty of misconduct". The Director General replied on 21 November, maintaining the decision that the complainant should receive a letter of warning. He did not controvert the complainant's understanding that he had been found guilty of misconduct. The complainant lodged an appeal with the Joint Appeals Board on 20 December 2005. He categorised the subject of the appeal as "a written warning for misconduct". There was further correspondence during the course of the appeal between the complainant and the Director General in which the former referred to his having been found "guilty of […] misconduct". The first time that it was suggested otherwise was in a response, dated 31 March 2006, by the Deputy Director General in charge of the Department of Management to questions asked by the Joint Appeals Board, in which it was said that "[w]arnings are not administered for disciplinary reasons, nor does the giving of a warning mean that the staff member has engaged in misconduct". He added:

"I can state that in this particular case, I did not conclude that [the complainant] was guilty of misconduct, but determined that the issuance of a letter of warning was appropriate."

The complainant commented on this response in a letter to the Joint Appeals Board dated 18 May 2006, stating:

"the line taken by [the Deputy Director General] to find me not guilty of misconduct […] and, at the same time, penalize me for unsatisfactory conduct […] is an error of law."

13. The Board did not accept the complainant's argument that it was an error of law to find him not guilty of misconduct and yet issue him with a written warning. In this regard, it stated in its report of 30 August 2006 that the Staff Regulations and Staff Rules provide for the issue of a letter of warning in such a case. Presumably, that was a reference to Article XI of the Staff Regulations and Staff Rules. Regulation 11.01, which is headed "Misconduct", provides:

"The Director General may impose such disciplinary measures as are in his/her opinion appropriate on staff members whose conduct is unsatisfactory. He/she may summarily dismiss a staff member for serious misconduct."

Staff Rule 11.01.1 defines "misconduct" and Staff Rule 11.01.2(A) provides that disciplinary measures shall include "written censure".

14. The Board concluded that "given the relatively minor nature of the unsatisfactory conduct described in the letter of warning, […] it was not appropriate". In the result, it recommended that the decision to issue the letter of warning be reversed. The Director General allowed the complainant's appeal to the extent of the written warning with respect to the statement advising Mr M.R. to seek "professional help". In this regard, the Board had concluded that the statement could well have been made to provide assistance rather than to offend. On 8 March 2007 the Director General dismissed the appeal in respect of the other three matters. By a letter of 19 March the Acting Director of the Division of Personnel forwarded to the complainant the revised letter of warning and indicated that a copy of the letter would be placed in his personal file. That is the impugned decision.

15. The Tribunal exercises only a limited power of review in the case of warnings or reprimands which are not of a disciplinary nature. As pointed out in Judgments 274 and 403:

"the Tribunal will not interfere unless the measure was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts."

In Judgment 274 it was also explained that "[a] warning or reprimand must be based on unsatisfactory conduct since what it is saying in effect is that if the conduct is repeated a disciplinary measure may be taken".

16. The complainant challenges the decision to issue him with a written warning on various grounds of which it is necessary to mention only three. The first is lack of authority, the second is error of law and the third is procedural irregularity, including want of due process. Although these matters were all raised in the internal appeal, the Board dealt only with the argument that it was an error of law to issue a written warning under Appendix G in the absence of a finding of misconduct. The complainant also contends that there was inordinate delay in the disposition of his appeal.

17. It is argued that the decision to issue the complainant with a written warning was taken without authority on the basis that Appendix G is inconsistent with the relevant staff regulations and rules. In this regard, the complainant points out that Staff Regulation 11.01 confers authority on the Director General to impose disciplinary measures and that by paragraph 7(i) of section 2 of part II of the Manual the "imposition of all types of disciplinary measures and suspension pending investigation" is reserved to the Director General. He contends that Appendix G is contrary to these provisions insofar as it purports to delegate authority to the Deputy Director General in charge of the Department of Management to impose disciplinary measures. The argument is misconceived. Apart from issuing a letter of warning, which is expressed in paragraph 4(c) of Appendix G "not [to] be considered [to be] a disciplinary measure", and the closing of a case, the only power conferred on the Deputy Director General is to refer a matter to the Director General or to the Joint Disciplinary Board.

18. Before dealing with the complainant's argument based on error of law, it is convenient to note the submission of the Agency that written warnings are standard administrative measures by which "a staff member's attention is drawn to possible shortcomings, and are reminded to improve their performance". Additionally, the Agency contends that such measures may follow an Appendix G process when it is determined that "staff members [are] not guilty of misconduct, but that administrative action [is] appropriate". In its surrejoinder, the Agency says that "[w]arnings for unsatisfactory conduct are regularly given to staff members […] but these are provided as a reminder to improve performance […], not as a punishment". Of the warning in issue in this matter, the Agency states it "was a proper exercise of managerial discretion in addressing the complainant's shortcomings". It adds that "[w]hile ordinarily a warning would be issued orally, the procedures of Appendix G required the warning to be in writing". Two things are clear from these statements. The first is that the Agency regards the actions that formed the basis for its letter of warning as no more than shortcomings in the complainant's performance as a manager. Indeed, his actions could not be characterised as misconduct. Nor are they properly characterised as "unsatisfactory conduct" for the purposes of Staff Regulation 11.01 which deals with misconduct. The second is that the Agency considers that the action was authorised, if not necessitated, by Appendix G.

19. The first question that arises is whether performance shortcomings are properly the subject of a warning under paragraph 4 of Appendix G. That paragraph authorises the Deputy Director General to determine whether:

"(a) the alleged offence is serious and manifest enough to warrant summary dismissal, without prior reference to the Joint Disciplinary Board;

(b) it warrants the convening of the Joint Disciplinary Board to consider appropriate disciplinary measures to be imposed under the provisions of Staff Rule 11.01.2;

(c) the alleged offence merely warrants the issuance of a letter of warning or reprimand, which shall not be considered to be a disciplinary measure; or

(d) the case should be closed."

20. Appendix G is concerned with the investigation of allegations of misconduct, the procedures to be pursued in relation to those allegations and the steps to be taken before the imposition of disciplinary measures. In that context and, as a matter of ordinary language, the expression "alleged offence" in paragraph 4(c) refers to alleged misconduct. Indeed, it would be surprising if it bore a different meaning from that in paragraph 4(a) where it clearly refers to misconduct.

21. As it is now clear that it is not contended that the complainant's actions constituted misconduct, there was no basis upon which the letter of warning could be issued. Rather, the case should have been closed in its entirety. So far as there were concerns about the complainant's performance as a manager, they should have been dealt with in accordance with the Staff Regulations and Staff Rules relating to performance matters. Thus, it was an error of law to issue the complainant with a letter of warning under paragraph 4(c) of Appendix G. Accordingly, the Director General's decision dated 8 March 2007 must be set aside to the extent that it dismissed the complainant's appeal, and the revised letter of warning of 19 March must be removed from his personal file.

22. Because it is relevant to his claim for moral damages, it is necessary to consider the complainant's argument relating to procedural irregularities. In this regard it is pertinent to recall that the first time it was said that the complainant had not been found guilty of misconduct was in the reply of the Deputy Director General in charge of the Department of Management to the Joint Appeals Board on 31 March 2006. In dismissing his appeal, contrary to

the recommendation of the Board, the Director General twice characterised the complainant's actions as "unsatisfactory conduct" which, in the context of Appendix G and Staff Regulation 11.01 and without further explanation, would ordinarily be understood to mean "misconduct". That being so, the complainant was entitled to have proper procedures observed. Moreover, and even though it is now clear that the letter of warning was based solely on performance matters, the letter was issued under Appendix G and, thus, the Agency was obliged to follow the procedures that it requires.

23. The first procedural matter to be considered is the requirement in paragraph 3(a) of Appendix G that the Director of the Division of Personnel, should "inform the staff member in writing of the allegations". In this case, the complainant was provided only
with the lengthy OIOS final investigation report. As the complainant pointed out in his response of 8 July 2005, the report "explicitly or implicitly" cleared him of the numerous allegations made by Mr M.R. Although the statements relating to "professional help" and another person being a "better staff member" were identified as allegations in the report, it clearly was not obvious to the complainant that they were matters to which he should provide answers. So much appears from his statement in the annex to his response that they could not "be construed as contending that any particular measure was unlawful". Similarly, it is not apparent that the other two matters upon which the letter of warning was based were "allegations" requiring a response. The report merely noted that no evidence could be found of the use of the expression "put into a coffin" and the assertion that the transfer had not been "properly handled" was an additional finding by the OIOS, not an allegation that had been referred to it for investigation. In the circumstances, the mere transmission of the report cannot be regarded as satisfying the requirement in paragraph 3(a) of Appendix G that he be informed of the allegations. Certainly, he was not informed of the allegations to which he was required to respond, a requirement that is implicit in paragraph 3(a). Moreover, it is a fundamental requirement of due process.

24. Further, the letter of warning was entirely silent as to the reasons for the decision that the warning should be issued. When the complainant requested reasons for the decision, he was informed, unhelpfully and one month later, that the reasons were as stated in the letter of warning and that the "decision was based on [the final investigation] report and in consideration of [his response] dated 8 July 2005". The complainant's subsequent request for review by the Director General elicited a response to three of his arguments relating to procedural and other irregularities, but again he was not informed of the reasons for the decision to issue him with a warning. Although Appendix G does not expressly require that reasons be given, the duty to explain a decision is a general principle of administrative law (see Judgment 1369). At the very least, there must be a sufficient statement of the reasons to enable the person affected to defend his rights, including, if necessary, by pursuing an internal appeal in a timely manner.

25. By memorandum of 27 September 2005 the complainant requested a copy of the recommendation made by the Director of the Division of Personnel as required by paragraph 4 of Appendix G. He was told that he was not entitled to a copy of the document. However, the document, which is annexed to the Agency's reply in these proceedings, was produced before the Joint Appeals Board at its request and for reasons that are not explained, was not then provided to the complainant. The Agency accepts that this was an error but argues that it did not result in a denial of due process.

26. A consideration of the recommendation by the Director of the Division of Personnel, shows that the basis for the recommendation relating to the "better staff member" statement was not that identified in the final report, namely, that the performance shortcomings of the staff member had not previously been documented. Rather, the Director of the Division of Personnel accepted that the statement was made because of Mr M.R.'s criticism of the other person's work but considered that it was made in an inappropriate forum because of the presence of two other staff members. This emerged for the first time in the response to questions by the Joint Appeals Board. So, too, the basis for the recommendation with respect to the "professional help" statement was that the Director of the Division of Personnel believed it was not made out of "genuine concern" for Mr M.R.'s overall health, but specifically for his mental health and that it should not have been made at a "meeting focused on other issues and involving other staff members". In this, the recommendation went beyond what was contained in the report.

27. The basis for the recommendation with respect to the transfer of Mr M.R. was substantially based on the final investigation report but referred to the process required by section 3 of part II of the Manual and unspecified administrative practices and procedures. Greater particularity was provided in the response to the Joint Appeals Board's question when reference was made to paragraphs 15 and 16 of section 3. The basis for the recommendation with respect to the "put into a coffin" statement was, essentially, that the use of the phrase was neither confirmed

by a person who was interviewed by the OIOS nor contained in the e- mails submitted to the OIOS by the complainant.

28. Appendix G does not require that a staff member be provided with the recommendation of the Director of the Division of Personnel. Moreover, it is arguable that the recommendation was privileged by reason of section 8 of part II of the Manual. However, the complainant was entitled to know the precise basis on which it was claimed that he had transgressed, information that was available in the recommendation. Without that information, he was not in a position to make a proper response to the allegations. And in the absence of reasons for the decision to issue a letter of warning, he was not in a position properly to advance his internal appeal. The first time that any of the information came to the complainant's attention was when he was provided with the answers to the questions raised by the Joint Appeals Board. This was a serious failure of due process.

29. The unlawfulness of the decision to issue the complainant with a letter of warning, the failure to make it clear to him that he had not been found guilty of misconduct until answers were provided to the Joint Appeals Board in March 2006, some seven months after he had been issued with a written warning, the procedural irregularities noted above, particularly the failure to provide information as to the basis on which it was claimed he had transgressed and the reasons for the decision to issue him with a written warning, together with the delay of almost 15 months in finalising his internal appeal, warrant an award of moral damages which the Tribunal fixes at 10,000 euros. Additionally, the complainant is entitled to costs in the amount of 500 euros.

30. It is unnecessary to deal with other matters raised by the complainant as they are performance issues and they would not, in any event, add to the moral damages to be awarded. Moreover and contrary to the complainant's contention, this is not an appropriate case for an award of punitive damages.

DECISION

For the above reasons,

1. To the extent that it dismissed the complainant's appeal, the decision of the Director General dated 8 March 2007 is set aside.

2. The Director General shall remove the revised letter of warning of 19 March 2007 from the complainant's personal file.

3. The IAEA shall pay the complainant moral damages in the amount of 10,000 euros.

4. It shall also pay him costs in the amount of 500 euros.

5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 16 May 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.