Memorandum to Presidents

Date: July 18, 1984

From: Office of the Vice Chancellor for Employee Relations
      and Educational Services

Office of the University Counsel and Vice Chancellor
for Legal Affairs

Subject: Nondiscrimination Policy Relating to Sexual Orientation II

To: Presidents, State-Operated Campuses

In Memorandum to Presidents, Vol. 84, No. 2, dated February 24, 1984, we advised you of Executive Order No. 28 which prohibits all State agencies from discriminating on the basis of sexual orientation in the provision of any services or benefits by a State agency and in any matter relating to employment by the State. The Executive Order also directed the Governor's Office of Employee Relations (OER) to develop implementing guidelines and procedures for the investigation of complaints of employment discrimination based on sexual orientation. In accordance with this directive OER has now established such guidelines and procedures. A copy of OER's memorandum on this matter is attached.

Special note should be taken of the following with respect to the attached guidelines and procedures:

-- The OER memorandum establishes a uniform complaint procedure for all State employees. Under these procedures, any "employee or representative" may file a sexual orientation discrimination complaint with OER, which will investigate and issue a determination with respect to the complaint. If OER determines that reasonable belief exists that employment discrimination or harassment on the basis of sexual orientation has occurred, it may require the agency to take appropriate corrective action. While the OER procedures refer only to "employees," we have been advised by OER that applicants for employment may also file complaints. The OER procedures, however, do not apply to students.

-- Secondly, the campus affirmative action officers were advised in a memorandum dated April 17, 1984 from Dolores Schmidt, Executive Assistant to the Chancellor for Affirmative Action, that the SUNY Internal
Discrimination Grievance Procedure should be used for both employee and student complaints involving sexual orientation discrimination unless a campus has developed a procedure specifically for the purposes of investigating these complaints. We continue to recommend that this grievance procedure be used for such complaints. However, employees should be advised that the OER procedure is available as an alternate mechanism if the employee chooses not to file a complaint under the SUNY Internal Grievance Procedure. As you know, the Internal Grievance Procedure provides that if an individual files a complaint with an external agency, the complaint shall not also be investigated under the SUNY Internal Grievance Procedure. Complaints filed with OER should be treated as complaints filed with external agencies.

We recommend that employees be advised of the OER guidelines and procedures through employee handbooks, articles in employee newsletters and posting on campus bulletin boards.

Questions relating to the implementation of OER's procedures should be addressed to Dolores Schmidt, Executive Assistant to the Chancellor for Affirmative Action (518-473-1091), or Carolyn Pasley, Associate Counsel (518-473-7591).

Sanford H. Levine
James S. Smoot

Attachment

cc: Affirmative Action Officers, State-Operated Campuses
Personnel Officers, State-Operated Campuses

Copies for information only sent to:
Presidents, Community Colleges
Deans, Statutory Colleges
President Coll
Vice Provost Spencer
On November 18, 1983, the Governor issued Executive Order No. 28 which prohibits discrimination based on sexual orientation in any matters pertaining to employment by all State agencies and departments. This Office has been charged by the Governor with promulgating policy, guidelines and a procedure to ensure that claimed violations of the Executive Order by State employees are promptly and thoroughly investigated. Copies of the policy, procedure and guidelines are enclosed with this memorandum.

The Governor's Office of Employee Relations is responsible for receiving employee complaints based on discrimination because of sexual orientation, investigating each complaint and issuing a final determination on each investigation. The State policy under the Executive Order stipulates that an agency will be deemed to have engaged in a prohibited employment practice if it "refuses to hire, appoint, promote, retain, grant permanent appointment, assign work or engages in other conduct which otherwise adversely affects the employment opportunity of applicants or employees on the basis of sexual orientation."

Executive Order No. 28 also prohibits discrimination on the basis of sexual orientation against any individual in the provision of any services or benefits by such State agencies and departments. The Governor will appoint a task force to study this particular aspect of the Order. We will keep you advised on a continuing basis on the composition and activities of the task force and the results of its inquiry.

It is the responsibility of each agency to ensure that employees are informed of the enclosed policy, guidelines and procedures. Walter J. Pilegriini, GORP Deputy Counsel, will be
happy to discuss these matters with you and answer any questions you may have; please feel free to contact him at 474-4093.

Enclosures

cc: Employee Relations Officers
POLICY AND GUIDELINES AGAINST 
DISCRIMINATION IN EMPLOYMENT 
BASED ON SEXUAL ORIENTATION

I. STATEMENT OF POLICY

A. No State agency or department shall discriminate against an applicant or employee because of sexual orientation. An agency or department will be deemed to have engaged in such a prohibited employment practice if it refuses to hire, appoint, promote, retain, grant permanent appointment or assign work, or engages in other conduct which otherwise adversely affects the employment opportunity of applicants or employees on the basis of sexual orientation of the employee or applicant.

B. No State agency or department shall discriminate on the basis of sexual orientation against any individual in the provision of any services or benefits by such State agency or department.

C. Harassment on the basis of sexual orientation will not be countenanced within the State service in the employment relationship. Sexual advances, requests for sexual favors and other verbal or physical conduct of a ridiculing or sexual nature constitute a prohibited employment practice when

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive working environment.

II. GUIDELINES

A. In determining whether alleged conduct constitutes a prohibited employment practice, the Governor's Office of Employee Relations will examine the totality of circumstances, such as the nature of the alleged violative conduct and the context in which the alleged incidents occurred. The determination of the propriety of a particular action will be made from the facts on a case by case basis.
B. An agency is responsible for such prohibited conduct between fellow employees in the workplace where the agency, or its supervisory employees, know or should have known of the conduct, except when it can show that it took immediate and appropriate corrective action.

C. Employees who have engaged in a prohibited practice may be subject to appropriate agency or department action.

III. DEFINITIONS

A. Sexual Orientation - A private preference of an individual protected by Executive Order No. 28 for heterosexuality, homosexuality or bisexuality; or a history of such a preference; or an identification with having such a preference.

B. Discrimination - Any conduct which has the purpose or effect of making sexual orientation the basis for an employment decision, or which interferes with an employee's work performance, or which creates an intimidating, hostile or offensive work environment.
PROCEDURE FOR PREVENTION OF SEXUAL DISCRIMINATION OR HARASSMENT BASED ON SEXUAL ORIENTATION

1. SUBMISSION OF INFORMATION OR CLAIMS

Under Executive Order No. 28, the Governor's Office of Employee Relations ("GOER") shall receive complaints concerning discrimination in the employment relationship on the basis of sexual orientation from any State employee. Any State employee or representative may file a complaint seeking inquiry into individual or systemic discrimination.

2. CLAIMS

A claim that any person has engaged in or is engaging in discrimination or harassment on the basis of sexual orientation may be made by or on behalf of any State employee claiming to be aggrieved. A claim made on behalf of a State employee claiming to be aggrieved may be made by the employee or representative. If the claim is not made by the aggrieved, the claim must contain the name, current address and telephone number of the State employee on whose behalf the claim is made. Any such employee may request that OER shall keep his or her identity confidential. Pursuant to an investigation under Section 5 herein, depending on the facts of the claim, the identity of the claimant may be divulged.

3. FILING OF CLAIMS

(a) A claim shall be in writing or typed and signed.

(b) A claim may be made by mail to the Governor's Office of Employee Relations, P.O. Box 2133, Albany, NY 12220.

(c) A claim filed by an employee or on that employee's behalf may be withdrawn only by the employee claiming to be aggrieved; however, such claim may be deemed withdrawn and administratively closed if response or information is not received or refused from the employee upon request from OER.

4. CONTENTS OF CLAIM

(a) Each claim should contain the following:

1. The full name, current address and telephone number of the person making the claim;

2. The full name, address and appropriate telephone number (if known) of the department or agency and its representatives against which the charge is made (hereinafter referred to as the respondent);
3. A clear and concise statement of the facts, including pertinent dates and where possible, places, persons and times of the activity, constituting the prohibited activity;

4. Identification of the facility location and building location (if applicable) in which the activity alleged occurred;

5. A statement disclosing whether proceedings involving the alleged violative activity have been commenced before any State, Federal or local agency or any court and, if so, the date of such commencement and the name of the agency or court. A copy of the complaint filed should be attached.

(b) A claim filed pursuant to Executive Order No. 28 must be received within 90 days of the alleged violation.

(c) A claim may be amended within 30 days of filing to cure technical defects or omissions, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute violations of Executive Order No. 28 related to or growing out of the original claim will relate back to the date of the claim that was first received.

5. INVESTIGATIVE AUTHORITY

(a) An investigator from the Governor's Office of Employee Relations will conduct an investigation of the claim.

(b) As part of the investigation, the investigator may require the person claiming to be aggrieved to provide information which includes:

1. a statement of each specific incident that the employee alleges has occurred and the date on which each incident occurred;

2. for each incident, a statement specifying the act, policy or practice which is alleged to be discriminatory;

3. for each adverse act, policy or practice alleged to have occurred by the employee claiming to be aggrieved, a statement of the facts which leads the employee so claiming to believe that the act, policy or practice is discriminatory.

(c) The investigator, in his or her discretion, may require a conference with the aggrieved and respondent together or separately and may determine that witnesses will be heard.
(d) The investigator's authority to investigate a claim is not limited to the procedures outlined in paragraphs (a), (b) and (c) of this section.

(e) Depending on the facts of the claim, an investigation may be impractical if strict confidentiality is maintained. In such a situation, the claimant or representative will be contacted regarding the consequences of confidentiality on the investigation. Claimant may choose to waive confidentiality for the investigation. Such waiver will be strictly for the purpose of investigation and only in connection with the claim filed. Such waiver must be in writing before the investigation can proceed.

6. REASONABLE BELIEF DETERMINATION

(a) Where OER, after an investigation, determines that reasonable belief exists that discrimination or harassment in the employment relationship based on sexual orientation has occurred, it shall require the agency or department to take appropriate corrective action. A determination of reasonable belief is based on, and limited to, evidence obtained by the investigator and does not reflect any judgment on the merits of allegations not addressed in the determination.

(b) The Governor's Office of Employee Relations shall provide notification of its determination to the employee who filed the claim or the representative, if any, and the respondent.

(c) The Governor's Office of Employee Relations' determination is final when issued.

7. DISMISSAL OF CLAIM

(a) OER may dismiss a claim and close its file on one or more of the following bases:

1. it does not find reasonable belief that Order No. 28 has been violated; or

2. the claimant who files the claim or on whose behalf the claim is filed fails or refuses to provide information requested by the OER investigator without which the investigation cannot be resolved; or

3. a written settlement offer which is satisfactory to OER to resolve the claim is refused by the claimant.

(b) The claimant shall be given a written notice of the dismissal of a claim by OER. The notice shall contain the basis upon which the claim was dismissed.
6. CONSTRUCTION OF PROCEDURE

(a) This procedure shall be liberally construed to effectuate the purposes of Executive Order No. 28.