Date: February 4, 1985

From: Offices of the
Vice Chancellor for Employee Relations and Educational Services; University Counsel and Vice Chancellor for Legal Affairs

Subject: Nondiscrimination Policy Relating to Sexual Orientation III

To: Presidents, State-Operated Campuses

In Memoranda to Presidents, Vol. 84, Nos. 2 and 6, dated February 24, and July 18, 1984, respectively, 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. Initial guidelines and procedures were distributed last July. OER, working with the Governor's Task Force, has refined the initial procedures. Attached you will find OER's Memorandum and the final version of the Policy, Guidelines, and Procedures for Executive Order No. 28.

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

-- The final Policy Statement contains only the first sentence of the interim policy statement provision which addressed harassment on the basis of sexual orientation. The detailed definition of harassment has been deleted (I. C.).

-- The final Guidelines add a statement that an agency's responsibility may continue if the prohibitive conduct continues (II. B.).

-- The final Procedure makes it clear that applicants for State employment as well as employees may file a claim of sexual orientation discrimination with OER (I. A.). This was not specified in the earlier version of the Procedure. As we advised you in Memorandum to Presidents, Vol. 84, No. 6, dated July 18, 1984, the SUNY Internal Discrimination Grievance Procedure can continue to be used for both student and employee complaints of sexual orientation discrimination. However, employees should be advised that the OER procedure is available as an alternative mechanism. If an employee chooses to file a claim with OER, the claim should not also be investigated under the SUNY Internal Grievance Procedure.
The final Procedure places greater emphasis upon and incorporates additional protections for the confidentiality of an individual who files a claim with OER (II. A; V. E.).

-- The OER investigator will make a recommendation based on the facts of a specific case. The designee of the Director of OER shall issue a final determination of the claim. If the OER designee determines that reasonable belief exists that discrimination or harassment in the employment relationship based on sexual orientation has occurred, appropriate corrective action will be ordered (VI. A. and B.).

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

The Memorandum from OER on the final Policy, Guidelines and Procedures also requires reporting of incidents of sexual orientation discrimination to OER and to the Governor's liaison to the gay community. To fulfill this reporting responsibility a section on incidents of discrimination on the basis of sexual orientation discrimination will be added to the semester reports on affirmative action progress filed by the State-operated campuses with Dolores Schmidt, Executive Assistant to the Chancellor for Affirmative Action, on March 15 and September 15 of each year, so that her office can provide this information centrally. The revised forms for including this information will be sent directly to the affirmative action officers.

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
December 17, 1984

TO: STATE DEPARTMENTS AND AGENCY HEADS
FROM: Thomas F. Hartnett
SUBJECT: Executive Order No. 28

On May 11, 1984, I issued copies of the policy, procedures and guidelines pursuant to the Governor's Executive Order No. 28. As you know, the Executive Order prohibits discrimination based on sexual orientation in any matters pertaining to employment by all State agencies and departments. Since May, this Office has worked with the Governor's Task Force to refine the initial procedures. Attached find the final version of the Executive Order No. 28 Policy, Guidelines and Procedures.

The Governor's Office of Employee Relations is responsible for receiving employee complaints based on discrimination because of sexual orientation, investigating each claim and issuing a final determination on each investigation. Incidents of such discrimination which are reported within each agency or department should be reported to the Governor's Office of Employee Relations and Peter Drago, the Governor's Liaison to the Gay Community. 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, train, 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 of any individual or group in the provision of any services or benefits by any State agencies or departments. The Governor's Task Force has planned statewide public hearings to receive testimony on this aspect.
of the Executive Order. Any complaints in this regard received internally should be reported to Peter Drago at (518) 473-0641.

It is the responsibility of each agency and department to ensure that every employee is informed of the rights provided by the Executive Order. This Office will be informing employees about their Executive Order 28 rights in the OER newsletter. Additionally, we have approached the unions with regard to their including similar information in their in-house newspapers to members. Please respond to Walter J. Pellegrini, OER Deputy Counsel at (518) 474-4093, regarding the manner in which your agency or department has distributed this information.

cc: Employee Relations Officers
    Affirmative Action 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, train, 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.

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 in accordance with established procedures.

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. However, responsibility may continue if the prohibitive conduct continues.

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

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

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

I SUBMISSION OF INFORMATION OR CLAIMS

A. 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 or applicant for State employment (hereinafter referred as "claimant"). Any claimant or representative may file a complaint seeking inquiry into individual or systemic discrimination.

II CLAIMS

A. A claim that any person has engaged in or is engaging in discrimination or harassment in the employment relationship on the basis of sexual orientation may be made by or on behalf of any aggrieved claimant. If the claim is not made by the aggrieved, the claim must contain the name, current address and telephone number of the claimant on whose behalf the claim is made. All information submitted in connection with a claim will be kept confidential. However, pursuant to Section V herein, depending on the facts of the claim, a claimant may be informed that a meaningful investigation of the claim may require that the identity of the claimant be divulged to certain persons in certain circumstances. In such a case, these circumstances will be explained, and a claimant will have the option of waiving confidentiality to the extent and in the manner indicated. A claimant will be asked to waive confidentiality only as to those disclosures that are necessary to a thorough investigation of the claim. A claimant may withdraw a claim at any time.

III FILING OF CLAIMS

A. A claim shall be in writing or typed and signed. Information regarding whether or not a claim may lie or general information regarding the Executive Order can be obtained at (518) 474-4094.

B. A claim may be made by mail to the Governor's Office of Employee Relations, P.O. Box 2133, Albany, NY 12220, or in person at the same office, 12th Floor, Agency Building No. 2, Empire State Plaza, Albany, New York.

C. A claim filed by a claimant or on that claimant's
behalfof may be withdrawn only by the claimant; however, such claim may be deemed withdrawn and administratively closed if response or information which is known or should reasonably be known by the claimant is not received or refused from the claimant upon request by an investigator assigned by OER.

IV 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. Requested remedy (if applicable);

6. 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 discovery of the alleged violation. However, a claimant shall not be limited to only the event which triggers the 90 day filing period but may submit facts of other relevant events.

C. The appointed investigators may allow the initial claim to be amended upon request of the claimant or upon their own request 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.

V INVESTIGATIVE AUTHORITY

A. Investigators will be appointed from the Governor's
Office of Employee Relations to conduct an investiga-
tion of any 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. Similarly, the investigators may require state agency
or department personnel to cooperate in all or part
of an investigation conducted pursuant to Executive
Order No. 28.

D. The investigator, in his or her discretion, may
require a conference with the aggrieved or respondent
separately and may determine that witnesses will be
interviewed subject to the dictates of confidential-
ity requests. The investigator with the consent of
the parties may also conduct conferences with both
the aggrieved and respondent present.

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 and provided an
explanation regarding the possible limiting
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, only to certain persons
necessary for a thorough investigation and only in
connection with the claim filed. Such waiver must be
in writing before the investigation can proceed. In
all cases, all individuals contacted by an investi-
gator pursuant to an investigation in order to insure
confidentiality to a claimant shall be informed and warned of the provisions and requirements of the Personal Privacy Protection Act, i.e., that information obtained pursuant to this investigation may not be disclosed outside the investigation.

F. The investigator's authority to investigate a claim is not limited to the procedures outlined in paragraphs A through E of this section.

G. It is the intended that in all possible circumstances the investigator will abide by strict confidentiality afforded the claimant by these procedures in the effort to conduct a thorough investigation.

VI REASONABLE BELIEF DETERMINATION

A. At the conclusion of an investigation, the investigators will review the facts and make a recommendation. The designee of the Director of the Governor's Office of Employee Relations will review the recommendation and issue a final determination of the claim.

B. Where the OER designee, after the investigation and review, determines that reasonable belief exists that discrimination or harassment in the employment relationship based on sexual orientation has occurred, the agency or department will be ordered to take appropriate corrective action. A determination of reasonable belief shall be based on, and limited to, the evidence obtained by the investigators.

C. The Governor's Office of Employee Relations shall provide notification and a copy of its detailed determination to the claimant or the representative, if any, and the respondent.

D. The Governor's Office of Employee Relations' determination is final when issued.

VII 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 on or whose behalf the claim is filed refuses to provide information which is known or should reasonably be known by the claimant requested by the
investigators without which the investigation cannot be resolved; or

3. a reasonable written settlement offer which provides the claim's requested remedy (if applicable) or is determined by OER to be the maximum that it can order as remedy (should a reasonable belief determination be found) 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 detailed record and basis upon which the claim was dismissed.

VIII CONSTRUCTION OF PROCEDURE

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