A PROPOSAL FOR THE UC STAFF PERSONNEL BOARD

I. Under present procedures as represented and administered by the Personnel staff of the University of California, an employee may enroll her/his legally-married spouse in one of the health plans with which the University contracts. The University, as part of its compensation to its employees, pays the cost of such benefits for the legally-married spouse of an employee.

However, under the laws of the State of California, a person may marry only if her/his choice of partner is of the opposite gender. All those persons who choose a partner of the same gender may never legally marry. Thus, any benefit granted only to those who are married is, in fact and in theory, a benefit granted to those who have made a heterosexual choice and denied to those who have made a homosexual choice. This is clearly a discrimination on the basis of choice of sexual partner according to gender.

Persons such as ourselves who have chosen partners of the same gender are not harmed directly by our exclusion from the status of marriage. The harm to us occurs when the University adopts marriage as the sine qua non for certain benefits.

In effect the University pays an additional amount of compensation to most of its heterosexual employees and fails to pay such an amount to any homosexual employees. Most heterosexual employees can and will eventually obtain the additional benefit. Under present procedures, no homosexual employee will ever obtain the same benefit.

We believe this fact requires immediate modification of present procedures. This absolute denial of a benefit on the basis of sexual orientation is contrary to good sense, contrary to University policy, contrary to prevailing community standards, and contrary to the equal protection provision of the California State Constitution.

We are not challenging the propriety of the University's payment for health coverage for the spouses and dependents of employees. We are challinging the total exclusion of same-gender spouses of employees from the coverage. We want you to recommend a policy which will provide us with an alternate means of qualifying for equal benefits.

II. The purpose and rationale for the marriage criterion established by the University is unclear at best. We presume it is intended to identify "serious", "long-term", "committed", and "financially interdependent" relationships. But marriage is no guarantee of the nature or quality of a relationship. A legal marriage could be short, selfish, and undertaken for base or ulterior motives. The University would now reward such a marriage while denying equal benefits to a long-term, mutually dependent, and intimate relationship between two persons of the same gender. As a governmental entity the University may be called upon in a court of law to justify this distinction by relating it to the conditions of employment.

We do not wish to disrupt the general pattern of distribution of health benefits. The University and its employees have determined that they wish the University to pay for health coverage for all "dependents" of the employees, regardless of the number of "dependents" associated with a particular employee. We only wish to have homosexual spouses qualified for the same benefit. The best protection for this current pattern is to expand it slightly to include the spouses of homosexual employees and thereby avoid litigation.

The University was not compelled by any higher authority to choose the marriage criterion in the implementation of its fringe benefits program. And it is not compelled to maintain it. The University may put aside the criteria altogether, or it may augment it.

The marriage criterion may work well to distinguish between "serious" and "non-serious" heterosexual relationships: it divides all heterosexual relationships into two categories. But the same criterion does not serve to divide homosexual relationships: it treats all homosexual relationships as "non-serious." The criterion is inadequate to cover all cases. It needs to be augmented.

III. The University should prepare procedures by which the de facto spouses of homosexual employees can obtain a benefit equal to that given to the spouses of heterosexual employees. The University should:

1) contract with the present health care providers to extend benefits to homosexual employees on an equal footing with heterosexual employees or establish temporary procedures for reimbursing the expense of enrolling the spouses of homosexual employees in a comparable health plan outside of the University's group plans.

2) establish criteria for the qualification of homosexual couples--such criteria having a due regard for the rights of all concerned parties and being no more restrictive than that established for heterosexual couples.

3) provide proper application forms reflecting the new criteria.

4) inform employees that equal benefits are available to homosexual and heterosexual employees alike.

Such corrective actions would not disrupt the present arrangements. No employee would lose any present benefits. Qualifying homosexual employees would obtain additional benefits up to the level now enjoyed by qualifying heterosexual employees.

IV. The University cannot shift the responsibility for the discrimination to the health care providers. The University is responsible for the actions of its contractors in the performance of the contract between them. The University must firmly negotiate with the health providers to have equal benefits extended to homosexual couples.

The University's obligation to us is fundamental--it is our constitutional right to be treated equally. If there is a conflict between our constitutional right and the preference of the health care providers, a constitutional right must and will prevail. If the contractors will not provide a program which does not discriminate, then the University must not contract with them.

Should the contractors refuse to implement non-discriminatory criteria, the University may take one of several courses to disassociate itself from the discrimination pending the outcome of further negotiations and litigation:

1) Since all the health care providers allow individuals to enroll directly in their general plans, the University may partially discharge its obligation by paying for the monthly fees of the newly-qualifying partners certified by the University but enrolled outside the University's group plan.

2) Or, the University may partially discharge its obligation by contracting with new medical groups or individual doctors to provide for homosexual spouses.

3) Or, the University may partially discharge its obligation by paying to the employee an amount equal to the charge for the requested (but denied) benefit.

Since these three suggested courses of action are totally within the discretion of the University and would not cost more per person than the University presently spends for its established program, failure to adopt one of these courses would be a clear refusal by the University to desist from its discriminatory practice.

V. Criteria for membership in the health benefit plans serve two purposes: to define who deserves the benefits and to limit the obligation of the health care providers. Based on the University's policy of non-discrimination and the legal principle of equal protection under the law, the issue of whether or not homosexual employees deserve all available benefits must be decided in our favor. The University should support a modification which serves to bring its practice into conformity with established principles.

The criteria serve a second purpose, which is to safeguard the legitimate interest of the health care providers. These organizations contract, for a fixed fee, to provide health services as needed to groups of people. The health care providers must be able to predict the obligation they are undertaking. The criteria for enrollment may legitimately serve to prevent the <u>substitution</u> of ill persons who would make inordinate demands on the health care providers. This is the <u>only</u> legitimate concern that the health care providers have in this situation. The new criteria should serve to provide approximately the same stability in the membership as in the present case.

Counterbalanced to that consideration is the need for the new criteria to respect the rights of the employees. The criteria must not violate the right of privacy, nor be so difficult or cumbersome as to discourage enrollment.

There is no reason to presume that homosexuals are less honest than heterosexuals. We should not anticipate that there will be more attempts at substituting an ill "spouse" for a well one into the plans by homosexuals than there presently are by heterosexuals. At present the University and the health care providers assume the truthfulness of the bulk of applications from the employees. To change that assumption only when homosexuals press for equal treatment would be itself a discrimination against us.

VI. We propose that the current criteria for membership in the University's group health plans be augmented so that a homosexual employee may enroll her/his domestic partner in the University's health plans. A "domestic partner" would be defined as the person meeting certain requirements as certified on a sworn affidavit, signed by the employee, on file with the appropriate department of the University. The requirements would be as follows: a person is a domestic partner if (1) she/he would be qualified to marry the employee but for the fact that she/he is the same gender as the employee; (2) she/he resides with the employee; and (3) she/he is declared as the sole domestic partner of the employee.

The first requirement eliminates persons who are married to someone else and persons whose relationships fall under special prohibitions (such as persons who are too young, mentally incompetent, or related too closely by blood, etc.). The second requirement is actually more restrictive than that imposed on legally-married couples; they may live separately and still retain the benefits. But since cohabitation is a usual characteristic of two people who regard themselves as a couple, and since elimination of this criterion would invite widespread abuse, it would be proper to impose such a requirement. The third requirement prevents an employee from claiming more than one domestic partner. Moreover, it parallels the voluntary public declaration which is the essential act in a legal marriage. The affidavit may also contain a perjury clause and a clause requiring notification of the University in the event that the domestic partnership is dissolved, since these clauses are generally required within the application forms presently used.

Finally, there are several criteria which are absolutely <u>not</u> acceptable. The University and the health care providers may not require any of the following:

1) a contract between the domestic partners (such a document is an <u>internal</u> arrangement between them; the University has no more right to their contract than to a contract between legally-married spouses).

2) joint ownership of property (an invasion of privacy and discrimination against the poor).

3) a particular tax status (this is merely the marriage criterion stated in a different form).

4) testimony from friends or family (an invasion of privacy--even the friendless are entitled to equal treatment).

5) any offensive, embarrassing, difficult, or protracted requirement.

These proposed criteria are offered as an example. Neither the University nor the health care providers are obligated to use these particular arrangements. However, this proposal would eliminate the discrimination while protecting the legitimate interests of all parties. Alternate plans must do the same.

VII. We want to call this board's attention to the determinations in this area which have been made by other authorities.

1) President Saxon of the University has written that "the University does not and will not discriminate in its employment relationship with any individual based on any personal characteristics, including sexual orientation, which are not job related."

2) Governor Brown has issued an Executive Order that "(t)he agencies, departments, boards and commissions within the Executive Brance of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference."

3) The state-wide balloting in November of last year on Proposition 6 gave a clear indication that the voters reject the notion of discrimination on the basis of sexual preference even in the sensitive area of public shool employment.

4) Many local jurisdictions surrounding the University's campuses, including the City of Berkeley, where we work and live, have adopted strong ordinances forbidding discrimination on the basis of sexual orientation.

5) The State Supreme Court has declared that "both the state and federal equal protection clauses clearly prohibit the state or any governmental entity from arbitrarily discriminating against any class of individuals in employment decisions...(T)his general constitutional principle applies to homosexuals..."--(from majority decision in Gay Law Students Association v. Pacific Telephone & Telegraph Co.: 24 Cal 3d 458).

VIII. If our plea for relief from this discrimination has not moved you, then we earnestly recommend your attention to the complete decision in the just cited Supreme Court case. We believe that the University's discretion in this matter would be severely curtailed by a court decision.

IX. The issue we have raised is new and complex. Undoubtedly, in this written statement we have not anticipated all questions and objections. We would like the opportunity to answer, verbally or in writing, any counterargument.

Respectfully submitted,

Barry Warren

Barry Warren
Employee--
UC Berkeley Personnel Office

September 10, 1979

October 22, 1979.

SUPPLEMENT TO A PROPOSAL TO END DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN EMPLOYEE HEALTH BENEFITS

I. At present the University effectively pays an additional amount of compensation in the form of fringe benefits to most of its heterosexual employees and fails to pay such an amount to any homosexual employees. The primary question before the board is, "Do you want to change this?" If the board and other responsible officers of the University want to end this discrimination, then the way can be found within the University's structure.

The complexities of the laws, regulations, and interests involved should not be allowed to obscure the essential issue: Is public discrimination on the basis of sexual orientation by the University right or wrong?

II. The California State Constitution provides the Regents of the University of California "with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds" and "...all powers necessary or convenient for the effective administration of its trust..."

The Regents have more than sufficient authority to eliminate discrimination on the basis of sexual orientation within the University's health benefits plans for its employees. This authority has either been delegated to various officials, or it remains with the Regents; it cannot be "lost."

III. The Berryhill Total Compensation Act provides for state funds for the cost of health benefits for state employees and their family members. Other sections of the Government Code define family members to include spouse and dependent children. We recognize that the Legislature has not provided funds for health benefits for the same-gender spouses of homosexual employees.

Nevertheless, the University may provide those benefits without contravening the law, and indeed, must provide them in order not to contravene good sense and the State Constitution. Nothing in the Code prevents the University from augmenting the health benefits of some homosexual employees up to the level enjoyed by most heterosexual employees.

The University derives its monies from numerous sources; for some of those sources there are "no strings attached." So long as the Regents do not violate "the terms of the endowments of the University and the security of its funds," neither the Legislature nor any other power can constrain the Regents from the expenditure of this money.

IV. We have tried to research the flow of Berryhill money from the State through the University to the University's employees. We naively thought that it would be a simple matter of public record to discover the particular amounts of money derived from a particular law going to the University for a particular purpose. We have only been able to gather enough information to raise some pertinent questions.

The figures we have indicate that only some of the money presently spent by the University for employee health benefits is provided by the State. We think the board should inquire of the University staff for the total amounts expended for health benefits for all employees and for the origin of all of that money for the last five years. If the University may pay <u>all</u> of some employees' health benefits from non-state monies, then it may certainly pay <u>some</u> of some employees' health benefits from those same sources.

We are aware that the University makes certain exceptions to its rules in the matter of health benefits in cases of "hardship." We think this is fit and proper, but we cannot find the legislative authorization for it. How are such exceptions funded?

We do not wish to be an "exception"; we want a solution which will apply to the whole class of persons who are suffering this discrimination. But we have no objection to having our benefits temporarily <u>funded</u> as a category of "exceptions" rationalized by "hardship." Clearly, homosexual couples do suffer under the "hardship" of institutionalized exclusion. As long as the procedures which interface with the employees provide for equal treatment, we do not care what accounting procedures are used.

V. The Berryhill legislation provides that "Benefit program recommendations submitted pursuant to Sections 18850.1 and 18850.2 shall be based upon the principle that program objectives are to provide for employee needs, support state personnel policies, provide benefits equitably, provide benefits economically, and promote efficient administration."

Consider each of these clauses:

1. "Provide for employee needs"--Homosexual persons need health care as much as heterosexual persons.

2. "Support state personnel policies"--See Governor Brown's Executive Order and the State Supreme Court decision quoted in our earlier submission.

3. "Provide benefits equitably"--The essence of our proposal!

4. "Provide benefits economically"--If the system has been deemed "economical" for heterosexuals, then it must be "economical" for homosexuals as well.

5. "Promote efficient administration"--We have offered a workable plan.

We do not believe that the present law requires the University to discriminate. But even if that is the position that the University will take, it does not end the matter.

The University has a moral and legal obligation under the provisions of the Berryhill legislation to advance proposals which will "provide benefits equitably" to homosexual employees. It would be hypocritical for the University to claim that its hands are tied unless it is struggling to free them. Whether or not current state law precludes the University from unilaterally solving the situation, the University must still take a position on the merits of the case.

The University influences the state legislation directed at it.

VI. Some concern has been expressed about whether the health plan carriers would "allow" such a change. We would like to call to the board's attention the following statement which appeared in an article dealing with our proposal in the Berkeley Independent Gazette of September 17, 1979:

> "Although [Bob] Hughes [Director of Public Relations for the Kaiser Foundation Health Plan] said that Kaiser has no intention of changing its present policy, he did say that if UC or Berkeley City officials demanded a change in policy, 'it would mean we would sit down and negotiate whether we would make an exception or a change.'"

VII. The case of employee health benefits is but one of a number of instances of discrimination on the basis of sexual orientation within the University. We have focused on health benefits because it represents a "middle." It is neither the most nor the least important example; neither the easiest nor the hardest to solve.

Wherever words like "spouse", "family member", or"marriage" occur in University regulations, there is discrimination. The discrimination will continue until those words are augmented or redefined.

The legal spouses of heterosexual employees are eligible to receive numerous "petty" benefits from the University, either immediately or after the payment of a fee. On the Berkeley campus, Strawberry Canyon recreational area, the Hearst and Harmon Gymnasiums, the Faculty Club, the employees' Credit Union, and numerous organizations effectively based on the campus all discriminate in this manner. We presume that comparable situations exist on the other campuses.

All of the voluntary group insurance plans which the University offers its employees effectively discriminate. And most importantly and outrageously, the mandatory retirement plans--which withhold deductions from an employee's paycheck--provide tremendous direct benefits to the surviving spouses of heterosexual employees but <u>none</u> to the surviving de facto spouses of homosexual employees.

We suggest that one of the primary virtues of the solution which we have proposed is that it may also serve as the solution to all these instances of discrimination. We intend to challenge <u>all</u> instances of such discrimination in the future.

VIII. We estimate the financial cost of adopting our proposal will be minimal for the foreseeable future. This financial cost is negligible compared to the social cost of continued discrimination.

We believe that it would be roughly a decade before more than one per cent of the total work force would be drawing benefits under our plan. We estimate that not more than five per cent of the work force has chosen persons of the same gender as sexual and social partners to the degree that they might be potential users of our proposal; we believe that social pressures will continue to keep artificially low the numbers of persons who

might otherwise choose persons of the same gender. Only a portion of that five per cent will have serious, long-term relationships at any one time, and a much smaller number will reside together. Finally, we believe that social pressures at the job will inhibit many employees from claiming the benefits. We expect that older employees will be reluctant to change their "status" but that new employees will take advantage of the new benefits if they are readily available. Whatever the actual number of homosexual employees claiming new benefits, we can be sure that it will be less than the real need.

Homosexual employees represent a bargain to the University--they draw less in fringe benefits on average than do heterosexual employees. If our proposal is adopted, they will be somewhat less of a bargain but will still draw less in fringe benefits on average.

The controls now exercised over the inclusion of family members into the health plans are so lax that we believe our proposal could be totally financed from the savings generated by rudimentary documentation. There are probably more non-married heterosexual couples in the health plans than there would be homosexual couples if our proposal were adopted. We do not object to their inclusion; but if the University is going to claim it cannot afford to implement our proposal, we would claim to have a more pressing need.

The cost of failing to stop the discrimination cannot be calculated in dollars. Such discrimination adversely affects all homosexual employees, whether they would or could claim the benefits or not. Equitable treatment for once would undoubtedly lift the working morale of all homosexual employees.

It would be silly to claim that continued discrimination of this type will drive away valuable employees who are homosexual. Presently this kind of discrimination is universal; there is no place to go. Is it idle, then, to appeal to social conscience?

Institutionalized discrimination has long-term social costs. They can never be accurately calculated, but they must eventually be paid with interest. The University can be the first major institution in the nation to end its participation in this kind of discrimination. And it can do it now while it is still a voluntary and meaningful act.