

August 21, 1979
2139 Grant St., #6
Berkeley, CA 94703

To whom it may concern:

I am submitting my application to the City of Berkeley, as my employer, to enroll my domestic partner, Barry Warren, in the city's group health coverage with the Kaiser Foundation Health Plan. I believe the City of Berkeley has erred in not providing me with equal means and opportunity to enroll my partner in a health plan.

Believing that a very substantial right is involved in this application, I am including this detailed letter in support of my application. A second, separate letter is also attached which discusses the crucial issue of detailed criteria for enrollment in the City's health benefits plan. Copies of these letters are being sent to some persons within the City government.

I. Under present procedures as commonly represented and administered by the staff of the City, an employee may enroll her/his legally-married spouse in one of the health plans with which the City contracts. The City, 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 California only heterosexual couples may marry. Thus, any benefit granted on the basis of marriage is in fact and in theory a benefit granted only to heterosexual couples and denied to all homosexual couples.

In effect the City 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 will eventually obtain this additional benefit. Under present procedures, no homosexual employee will ever obtain the same benefit.

This absolute denial of a benefit on the basis of sexual orientation is contrary to the equal protection provision of the California State Constitution, contrary to Ordinances of the City of Berkeley, and contrary to the "Memorandum Agreement between the City of Berkeley and the United Public Employees Local 390 for Representation Unit K-1."

The City, bound as it is by the State Constitution, by its own Ordinances, and by the Memorandum Agreement, has erred in not preparing procedure by which the de facto spouses of homosexual employees can obtain a benefit equal to that given to the spouses of heterosexual employees.

II. To correct its error, the city 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 city'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.

III. The City cannot evade its responsibility to me and other homosexual employees by shifting blame to the health care providers. The city is responsible for the actions of its contractor in the performance of the contract between them.

The City should firmly negotiate with the health providers to have equal benefits extended to homosexual couples. The City has made no serious attempt to do so. The City has not given the health care providers a proposed set of new criteria for membership and asked for the cost of such an extension of benefits. Until that is done there is no reason to believe that the health providers will not be willing to implement new criteria.

The City's obligation to me is fundamental--it is my constitutional right to be treated equally. If there is a conflict between my 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 city must not contract with them.

Should the contractors refuse to implement non-discriminatory criteria, the City 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 city may partially discharge its obligation by paying for the monthly fees of the newly-qualifying partners certified by the City but enrolled outside the City's group plan.
- 2) Or, the City may partially discharge its obligation by contracting with new medical groups or individual doctors to provide for homosexual spouses.
- 3) Or, the City 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 City and would not cost more per person than the

City presently spends for its established program, failure to adopt one of these courses would be a clear refusal by the City to desist from its discriminatory practice.

IV. The City's failure to establish procedures under which homosexual employees may receive a benefit equal to that enjoyed by heterosexual employees has created a massive barrier to any individual homosexual employee who wishes to obtain this benefit. The rule, established by the health care providers, whereby employees may only add a spouse to the health plan during a 30-day period (1) at the beginning of employment, (2) at the beginning of a "marriage," or (3) at an annual open-enrollment period, would be reasonable under most circumstances. In light of the systematic discrimination on the basis of sexual orientation, however, the City and the health care providers must set aside that rule with respect to all persons who are suffering the discrimination.

In my particular case, I have waited until the end of my six months' probationary period before making this formal application. I have done so for a sufficient reason: to challenge systematic discrimination requires information, preparation, standing, and security. I could not secure the first two within the first 30 days of employment. For the second two, I have waited until the conclusion of that period of time when I could have been discharged without cause or appeal. A very substantial question is involved in this application. Now, as a permanent employee, I not only have but can keep my legal standing to press for a just answer to this question.

The 30-day rule cannot properly apply in this situation because of the unreasonable additional burdens placed on me. Indeed, the 30-day period will rightfully begin for homosexual employees only when new procedures are in place which give us equal treatment. A refusal by the health care providers to waive the 30-day rule in no way relieves the City of its responsibility to provide immediate equal treatment. The City is responsible for the performance of its contractors, and the City has the ability to provide temporary relief without the cooperation of the health care providers.

In this letter I have asserted ten major points:

- 1) Present procedures grant a health benefit to the legally married spouse of an employee of the City of Berkeley.
- 2) Every legally married spouse is a member of a heterosexual couple.
- 3) No homosexual spouse of an employee may obtain a health benefit through the City's group plans.
- 4) Discrimination on the basis of sexual orientation is contrary to the State Constitution, to the policies and ordinances of the City of Berkeley, and to the current labor agreement.
- 5) Denial of a benefit to all homosexual spouses which is routinely given to most heterosexual spouses is discrimination on the basis of sexual orientation.
- 6) The City of Berkeley has the authority and obligation to abolish this discrimination in its own procedures.
- 7) The City of Berkeley has the authority and obligation to require non-discrimination on the basis of sexual orientation from its contractors in the performance of the contracts with respect to the employees of the City.
- 8) The City of Berkeley has the means to provide the benefits temporarily even in the face of persistent discrimination on the part of the contractors.
- 9) The established procedures are a formidable barrier for any individual homosexual employee wishing to obtain the benefit.
- 10) The City and/or the health care providers must waive the 30-day rule for homosexual employees until the discrimination is eliminated.

I would appreciate the City's response to these ten assertions. If this application is rejected, I request a detailed written explanation of the reason(s). I would like full copies of all rules, regulations, ordinances, resolution, or contracts which may be cited as a basis for any denial of my application. I wish to be fully advised of all appeal procedures available to me.

The City of Berkeley has built an impressive record of support for the rights of homosexuals. On numerous occasions the City Council has passed resolutions, proclamations, and ordinances on behalf of gay people. In November of last year the City Council adopted the strongest Gay Rights Ordinance in this country.

One of the provisions of that ordinance requires all employers to post in conspicuous places a notice that "discrimination on the basis of sexual orientation is prohibited by law." It is symbolic of the present

situation that the City of Berkeley itself does not have a single such notice posted anywhere in any of its offices. After the tremendous effort to put together that piece of legislation, no one has taken the least step to implement it within the City offices.

In the substantial issue of employee benefits, no one has taken the responsibility to bring current practices into conformity with the theory of the law. This application challenges that neglect. I hope the City will work with all interested parties to eliminate discrimination on the basis of sexual orientation within the City's benefit system.

Sincerely,

Tom Brougham