OPINION NO. 82-078

Syllabus:

1. If the Department of Youth Services reasonably finds that the sexual preference of a particular employee or a particular applicant for a job in the classified service bears a rational relation to the ability to perform a job and the efficiency of the Department's operations, it may consider sexual preference in dismissing such employee or in filling a vacant position from applicants certified by the Director of Administrative Services.

2. The Department of Youth Services, by rule or contract provision, may require private contractors to refuse to employ a particular individual on the basis of sexual preference if the Department finds that the sexual preference of such employee of a private contractor bears a rational relation to the employee's ability to perform such contractual services for the Department and the efficiency of the services so provided.

To: William K. Willis, Director, Department of Youth Services, Columbus, Ohio
By: William J. Brown, Attorney General, September 30, 1982

I have before me your request for an opinion on the following questions:

(1) May sexual preference be a determining factor, or be considered at all, in the hiring or discharge of employees of the Ohio Youth Commission?

(2) May the Youth Commission require, as a term of its contract for outside services, that no homosexual may be employed by the contractor to render services to Commission youth[?]

I note that the provisions of Am. Sub. H.B. 440, 114th Gen. A. (1981) (eff. Nov. 23, 1981), replaced the Ohio Youth Commission with the Department of Youth Services.

I have been advised that your request was prompted by a concern that problems may arise if a youth in the care or custody of the Department of Youth Services knows or suspects that a staff member may have other than a heterosexual orientation. Specifically, you have advised that a youth's knowledge that an employee has other than a heterosexual orientation may result in what psychiatrists term "homosexual panic," which is a combination of fear and hostility. In your request, you have advised that fifteen to twenty percent of youths served by the Department have the fear that they will be sexually molested, and that such fear may manifest itself in a "will kill if approached" attitude toward homosexual persons. You have advised that, in some cases, more sophisticated youths may use the knowledge of a staff member's homosexuality "to manipulate the individual, to the detriment of the therapeutic relationship."

You have not indicated that your concern is with any particular staff position. It is my understanding, however, that most employees of the Department are in the classified service of the state. See R.C. 124.01(A). In responding to your inquiry, therefore, I will specifically address whether the Department may consider sexual preference in the hiring and discharge of classified civil service employees.

Pursuant to R.C. 5139.01, the Director of the Department is an appointing authority as defined in R.C. 124.01(D). Pursuant to R.C. 5139.19, the managing officer of each institution under the jurisdiction of the Department, with the approval of the Chief of Correctional Services, has the power to appoint necessary employees and to remove them for cause. The managing officer also has the power to appoint an assistant managing officer who shall be in the unclassified service. The appointment and removal of classified employees by an appointing authority

must be accomplished in compliance with the provisions of R.C. 124.27, R.C. 124.32, R.C. 124.321-124.327, and R.C. 124.34. Thus, in hiring or discharging classified employees, the Department must comply with the applicable statutory requirements.

With these facts in mind, I turn now to a discussion of your first question. For purposes of clarity, I will consider the right to consider sexual preference in hiring an employee and the right to consider sexual preference in discharging an employee as two separate questions.

In appointing an individual to a position in the classified civil service, the appointing authority does not have total discretion but rather must make such appointment pursuant to R.C. 124.27. R.C. 124.27 requires that all positions in the classified civil service be filled by the appointment of one of three applicants certified by the Director of Administrative Services as "standing highest on the eligible list for the class or grade to which the position belongs."

The Director of Administrative Services may, pursuant to R.C. 124.25, refuse to examine or refuse to certify as eligible an applicant who:

> is found to lack any of the established preliminary requirements for the examination, who is physically so disabled as to be rendered unfit for the performance of the duties of the position which he seeks, who is addicted to the habitual use of intoxicating liquors or drugs to excess, who has been convicted of a felony, who has been guilty of infamous or notoriously disgraceful conduct, who has been dismissed from either branch of the civil service for delinquency or misconduct, or who has made false statements of any material fact, or practiced, or attempted to practice, any deception or fraud in his application or in his examination, in establishing his eligibility or securing his appointment.

In certifying an individual, the Director of Administrative Services, in effect, determines that the individual is fit and qualified to fill the position for which he is certified. The courts have, therefore, held that the appointing authority has no authority to refuse to consider, or to reject, an applicant who has been certified, on the basis that the applicant is unfit or unqualified. See State ex rel. Hoskins v. Board, 92 Ohio St. 457, 111 N.E. 283 (1915) (since the commissioner (now director of administrative services) determines fitness, the appointing authority may not exclude an applicant as unfit); Tiernan v. City of Cincinnati, 18 Ohio N.P. (n.s.) 145 (Sup. Ct. Cincinnati 1915) (the civil service commission and not the appointing authority determines fitness; therefore, the appointing authority must appoint one of the three certified individuals even if the appointing authority feels that all three are immoral, incompetent or inefficient). The discretion of the appointing authority is limited to a determination of which of the three applicants certified is most fit and qualified. See State ex rel. King v. Emmons, 128 Ohio St. 216, 190 N.E. 468 (1934); State ex rel. Hoskins, supra.

There is no statute similar to R.C. 124.25 which expressly enumerates the factors which may be considered by the appointing authority in determining which of the three certified applicants is most fit and qualified to fill the position in question. Although the courts have held that the appointing authority may consider the criteria enumerated in R.C. 124.25 in determining which individual is most fit, I am not aware of any Ohio cases in which the courts have attempted to delimit the criteria which may be considered by the appointing authority. Moreover, I am not aware of any Ohio cases in which your specific question as to whether sexual preference may be considered as a factor in hiring has been considered. Several federal courts, however, have considered this question in the context of the federal civil service system.

Prior to 1973, federal law, like current Ohio law, did not expressly provide whether sexual preference could be considered in determining an applicant's fitness

for governmental employment.[1] It was alleged, however, by job applicants that consideration of sexual preference in employment violated Title VII of the Civil Rights Act of 1964 and the first and fourteenth amendments to the United States Constitution.

In DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979), and Smith v. Liberty Mutual Insurance Co., 395 F. Supp. 1098 (N.D. Ga. 1975), aff'd, 569 F.2d 325 (5th Cir. 1978), the courts were faced with the issue of whether an employer's rejection of a job applicant on the basis of sexual preference violated Title VII of the Civil Rights Act of 1964. The courts in DeSantis and Smith concluded that Title VII, which prohibits an employer from considering an applicant's "race, color, religion, sex, or national origin" in determining whether to hire the applicant, was intended to eliminate sex discrimination on the basis of gender and thus did not prohibit discrimination on the basis of sexual preference. It was held by the courts in DeSantis and Smith that an action for denial of employment on the basis of sexual preference may not be maintained under Title VII.

Although a denial of employment on the basis of sexual preference has been held not to violate Title VII of the Civil Rights Act of 1964, the courts have held that such action by a governmental employer, in certain circumstances, may violate the first and fourteenth amendments to the United States Constitution.

In Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965), the Civil Service Commission had disqualified for federal government employment an applicant who had passed a civil service examination which qualified him for such employment on the grounds that the applicant had engaged in "immoral conduct." The conclusion that the applicant had engaged in "immoral conduct" which rendered him unfit for government service was supported by unsubstantiated statements that the applicant was a "homosexual" and had engaged in "homosexual conduct." The applicant refused to comment upon his alleged "homosexuality."

Each member of the three-judge panel in Scott filed a separate opinion. Judge Bazelon, in his opinion, espoused the view that, although an individual has no statutory right to governmental employment, such individual is nevertheless entitled to equal protection against arbitrary and discriminatory government treatment and may not be excluded from government employment except by means consonant with due process of law. In reversing the decision of the district court, which had upheld the Commission's action, Judge Bazelon stated that "[t]he Commission may not rely on a determination of 'immoral conduct,' based only on such vague labels as 'homosexual' and 'homosexual conduct,' as a ground for disqualifying appellant for Government employment." Id. at 185. Judge Bazelon went on to conclude that, in order for the Commission to exclude an applicant on the basis of homosexuality and "immoral conduct," "[t]he Commission must at least specify the conduct it finds 'immoral' and state why the conduct related to 'occupational competence or fitness'." Id. at 185.

In reaching his decision, Judge Bazelon distinguished the facts in Scott, where the allegations of "homosexuality" and "homosexual conduct" were totally

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[1] In 1973, the federal Civil Service Commission instructed supervisors that:

> [Y]ou may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt. You, are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal Service.

Civil Service Bulletin Dec. 21, 1973.

unsubstantiated, from the facts in Dew v. Halaby,[2] 317 F.2d 582 (D.C. Cir. 1963), wherein the court had upheld the dismissal of an air-traffic controller on the grounds of admitted homosexual acts. In Dew v. Halaby, the appellant had been dismissed from government service on the grounds that homosexual acts and drug use, which occurred prior to appellant's employment, constituted "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct." The court, after considering the delicate nature of appellant's duties as an air-traffic controller and the fact that the charges against him had been substantiated and admitted, concluded that it lacked "the background and experience to say, contrary to the agency's judgment, that efficiency will not be promoted by removing one from such a post as was held by appellant, when his questioned 'conduct or capacity' in the past did not demonstrate qualities of character, stability, and responsibility." Id. at 588 (emphasis added). In essence, the court in Dew appears to have concluded that it is constitutionally permissible to dismiss a government employee where the proven conduct of the employee is found to impact upon the employee's job performance and the efficiency of the agency's operations.

In Scott, the disqualification of the applicant was overturned on the basis that the allegations of homosexuality upon which Scott's disqualification was predicated were totally unsubstantiated. However, the fact that Judge Bazelon found it necessary to distinguish the facts of Scott from those of Dew seems to indicate that Judge Bazelon was in agreement with the opinion espoused by the court in Dew that it is constitutionally permissible to disqualify an applicant for government employment, or to dismiss a federal government employee, where the proven conduct of the applicant or employee is found to relate to job performance and the efficiency of the agency's operations.

In 1969, in Norton v. Macy,[3] 417 F.2d 1161 (D.C. Cir. 1969), the D.C. Court of Appeals again considered the question of homosexuality and its relationship to government employment. The appellant in Norton was a budget analyst for the National Aeronautics and Space Administration who sought review of his discharge for "immoral conduct." NASA alleged that the appellant, Norton, had made homosexual advances to a man whom he had picked up in Lafayette Square. In an interview with NASA officials, Norton denied having made such advances, but admitted to having homosexual experiences while in high school and to experiencing homosexual desires when drinking. When confronted with the proposed notice of dismissal, Norton denied that he was a homosexual, that he had made a homosexual advance on the night in question and that he had knowingly engaged in homosexual conduct during his adult life.

In upholding the authority of the courts to review the dismissal of federal civil servants, the court stated as follows:

> The Government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious. These constitutional limits may be greater where, as here, the dismissal imposes a "badge of infamy," disqualifying the victim from any further Federal employment, damaging his prospects

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[2]It should be noted that the holding of the court in Dew v. Halaby that the appellant's conduct bore a relationship to the efficiency of the employing agency's operations has been questioned in later court decisions. See Norton v. Macy, 417 F.2d 1161, 1166 (D.C. Cir. 1969). The Supreme Court granted certiorari in Dew. 376 U.S. 904 (1964). The writ subsequently was dismissed by agreement of the parties when the FAA rescinded its adverse action against the appellant, reinstated him, and granted him full back pay. 379 U.S. 951 (1964). However, the fact that the standard for reviewing dismissals of federal employees enunciated in Dew has been cited in subsequent court decisions indicates the continued validity of that standard.

[3]Although Norton v. Macy concerned dismissal of an employee, the rationale of the court would appear to be equally applicable to cases involving a refusal to hire on the basis of homosexuality.

> for private employ, and fixing upon him the stigma of an official defamation of character. The Due Process Clause may also cut deeper into the Government's discretion where a dismissal involves an instrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections. Whatever their precise scope, these due process limitations apply even to those whose employment status is unprotected by statute.

Id. at 1164.

Having so established the courts' jurisdiction to review dismissals of federal civil servants, the court proceeded to outline the standard to be used in determining whether dismissal of federal civil servants is constitutionally permissible. The court in Norton stated, in this regard, as follows:

> Congress has provided that protected civil servants shall not be dismissed except "for such cause as will promote the efficiency of the service." The Civil Service Commission's regulations provide that an appointee may be removed, inter alia, for "infamous. . . , immoral, or notoriously disgraceful conduct" and for "any. . . other disqualification which makes the individual unfit for the service." We think—and appellant does not strenuously deny—that the evidence was sufficient to sustain the charge that, consciously or not, he made a homosexual advance to Procter. Accordingly, the question presented is whether such an advance, or appellant's personality traits as disclosed by the record, are "such cause" for removal as the statute requires.

Id. at 1163 (emphasis added). The court further noted that "[i]n other cases, we have recognized that, besides complying with statutory procedural requirements, the employer agency must demonstrate some rational basis for its conclusion that a discharge will promote the efficiency of the service." Id. at 1164 (emphasis added).

In essence, the court in Norton held that there must be a rational relationship between the nature of the employee's misconduct and the legitimate needs of the employing agency in order for dismissal to be permissible. Additionally, the court, in finding that vague characterizations of conduct as immoral do not suffice to establish the required nexus between conduct and the legitimate needs of the employing agency, stated as follows:

> Accordingly, a finding that an employee has done something immoral or indecent could support a dismissal without further inquiry only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service. The range of conduct which might be said to affront prevailing mores is so broad and varied that we can hardly arrive at any such conclusion without reference to specific conduct. Thus, we think the sufficiency of the charges against appellant must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do.

Id. at 1165-66 (emphasis added).

In reversing the NASA's dismissal of Norton, the court distinguished the facts of Norton from those of Dew v. Halaby. The court held that the dismissal in Dew was based upon a consideration of the special demands of the position of air-traffic controller and a finding that the employee's misconduct bore a relationship to the employee's ability to efficiently perform his duties. The court held that there was no evidence that Norton's conduct, in any way, bore a relationship to his job performance or the efficiency of NASA's operation. In fact, NASA officials had admitted that they were not concerned with Norton's ability to perform his job efficiently.

The judicial decisions in Dew v. Halaby, Scott v. Macy and Norton v. Macy

basically establish a constitutional standard for the exclusion of an applicant from federal government employment. These cases establish that a federal government employer may exclude an applicant from federal government employment only where there is a rational nexus between the applicant's conduct and the efficiency of the employing agency's operations. Basically, then, the standard imposed by the courts for the exclusion of an applicant is similar to the standard adopted by the Federal Civil Service Commission in Civil Service Bulletin of Dec. 21, 1973 (footnote #1, infra): a federal government employer may exclude an applicant from federal government employment only where the existence of a rational nexus between the applicant's conduct and the efficiency of the employing agency's operations is established.

With these concepts in mind, I turn to a discussion of whether the Department of Youth Services may consider sexual preference in the appointment of an applicant for a position in the classified civil service.

As previously discussed, the courts have held that the authority invested in the appointing authority, pursuant to R.C. 124.27, is not to "reject" an applicant who has been certified by the Director of Administrative Services, but rather to determine which of the applicants certified is most fit and qualified. There are no statutory provisions which prescribe or delimit the factors which may be considered by the appointing authority in making such a determination. The authority of an appointing authority under the Ohio civil service system differs in this regard from the authority of an appointing authority under the federal system.

At the time the above mentioned federal cases were decided a federal government appointing authority had the authority pursuant to 5 C.F.R. §2.106 to refuse to appoint or to reject an applicant, rather than the authority merely to determine which applicant was most fit. The federal appointing authority, however, could deny appointment to an applicant only on the basis of the factors enumerated in 5 C.F.R. §2.106.[4]

The issues involved in your first question are, therefore, somewhat different from those considered by the federal courts in Scott v. Macy, Norton v. Macy, and Dew v. Halaby. It must be recognized, however, that the basis of the courts' decisions in Scott v. Macy and Norton v. Macy was a finding that the rejection of an applicant, or the dismissal of an employee, absent a finding of a rational nexus between the applicant's or employee's conduct and the efficiency of the service, is an arbitrary and capricious exercise of discretion by the appointing authority and as such violates the first and fourteenth amendments. The provisions of the first and fourteenth amendments to the United States Constitution are applicable to the states and to state agencies. Cooper v. Aaron, 358 U.S. 1 (1958); Buchalter v. New York, 319 U.S. 427 (1943). Moreover, in making an appointment pursuant to R.C. 124.27, the appointing authority is exercising discretion on behalf of the state. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (action by administrative and regulatory agencies is state action).

In light of these factors, I am of the opinion that the constitutional considerations which were the basis of the courts' decisions in Scott v. Macy and Norton v. Macy are applicable to the question at hand, despite the subtle differences in the issues considered in the aforementioned cases and the issues involved herein.

In essence, the courts in Scott v. Macy and Norton v. Macy held that the employing agency must show that there is a rational nexus between the conduct of the applicant and the efficiency of the service. In your request, you have stated that the employment of an individual known to have other than a heterosexual orientation may result in a reaction termed "homosexual panic" in a youth, which

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[4]Provisions similar to 5 C.F.R. §2.106, which has been repealed, may now be found in 5 C.F.R. §332.406. Section 332.406 permits an appointing authority to object to the appointment of an otherwise eligible applicant for the reasons set forth in 5 C.F.R. §332.406(a). Such objection is subject to the approval of the Office of Personnel Management.

would have a detrimental effect upon the relationship of the youth with the individual. I must assume, for the purposes of this opinion, that the facts regarding "homosexual panic" and its effect upon job performance presented in your request are correct. Assuming this, it may be concluded that, where the Department finds that "homosexual panic" which will have a detrimental effect upon the youth/staff member relationship will result from the employment of a particular applicant with other than a heterosexual orientation, a rational nexus exists between sexual preference and job performance. Consequently, it is my opinion that if the Department finds, in light of all factual circumstances including the nature of the position to be filled and the likelihood that the sexual preference of a particular applicant is known or would readily become known, that such a rational nexus exists between the sexual preference of that applicant and that applicant's ability to perform the job to be filled and the efficiency of the Department's operations, the Department may consider sexual preference in determining which of the three applicants certified by the Director of Administrative Services is most fit to fill a position in the classified service.

In the second part of your first question, you have inquired whether the Department of Youth Services may consider sexual preference in the discharge of Department employees.

As previously discussed, the majority of Department employees are in the classified civil service of the state. Any discharge or dismissal of such a Department employee, therefore, must be accomplished in compliance with the provisions of R.C. 124.34. R.C. 124.34 provides, in pertinent part, as follows:

> [N]o such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

I am not aware of any Ohio cases in which the courts have decided whether homosexuality may be grounds for dismissal of a classified employee. The federal courts, however, have considered whether homosexuality may be grounds for dismissal from the federal civil service on the basis that homosexuality constitutes "immoral conduct."

In Norton v. Macy, which was discussed previously, the court was faced with a determination of whether a federal government employee could be dismissed on the grounds that homosexuality in itself constitutes "immoral conduct" pursuant to 5 C.F.R. 731.201(b).[5] In that case, the court held that dismissal of a civil servant on the basis of immorality, absent a finding of specific immoral or indecent conduct and a showing that such conduct would have an ascertainable deleterious effect upon the employee's job performance and the efficiency of the service, violates the first amendment and the due process clause of the fourteenth amendment to the United States Constitution.

Other federal courts in cases dealing with the dismissal of federal employees on the basis of homosexuality have recognized a distinction, similar to the one enunciated by the court in Norton v. Macy, between dismissal on the grounds of vague allegations of immorality and dismissal on the grounds of specific conduct bearing upon the efficiency of the service. See Schlegel v. United States, 416 F.2d 1372 (Ct. Claims 1969), cert. denied, 397 U.S. 1039 (1970); Society for Individual Rights v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), aff'd, 528 F.2d 905 (9th Cir. 1975).

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[5] 5 C.F.R. 731.201 (1968) provided that an appointee could be removed for "infamous, . . .immoral, or notoriously disgraceful conduct." (Emphasis added.)

In light of the similarities between the grounds for dismissal in R.C. 124.34 and 5 C.F.R. 731.201 and in light of the fact that the first and fourteenth amendments to the United States Constitution are applicable to the states and to state agencies, it must be concluded that the standards for the dismissal of a civil servant espoused by the court in Norton v. Macy are applicable to the dismissal of a Department of Youth Services employee in the classified service. It is, therefore, my opinion that the Department may dismiss a particular employee in the classified service on the basis of homosexuality if it is established that the conduct of that employee bears a rational relation to the employee's job performance and to the efficiency of the Department's operations, and constitutes grounds for dismissal under R.C. 124.34.

Whether an act committed by a Department employee bears a rational nexus to the efficiency of the Department's operations and also constitutes a ground for dismissal under R.C. 124.34 is a factual question which must be decided on a case by case basis. Generally, it is simpler to determine whether the act constitutes an infraction pursuant to R.C. 124.34 than it is to determine whether the act bears a sufficient nexus to the efficiency of the agency.

In dismissing governmental employees for the commission of specific homosexual acts, the employing agencies have generally alleged that such acts constitute "immoral conduct." See Norton v. Macy, supra. In your request, however, you have not expressed concern with any specific conduct which might constitute "immoral conduct" under R.C. 124.34. Rather, you have expressed the concern that knowledge of an employee's homosexuality may lead to "homosexual panic" in youths, which would have a detrimental effect upon the youth/employee relationship.

As I discussed in regard to the consideration of sexual preference in filling a position in the classified service, it must be assumed that the facts concerning "homosexual panic" and its results, as presented in your request, are correct. Thus, if the Department finds that the employment of a particular person with other than a heterosexual orientation has resulted in, or is likely to result in, such "homosexual panic" adversely affecting the employee/youth relationship, then the Department reasonably may conclude that there is a rational nexus between the employee's sexual preference and his ability to perform his job.[6] Therefore, it is my opinion that, if the Department finds the existence of such a rational nexus between an employee's sexual preference and the employee's job performance, and if the Department finds that one of the grounds for dismissal enumerated in R.C. 124.34 is present, the Department may consider sexual preference in dismissing an employee in the classified service on the basis of sexual preference.

In your second question you have inquired whether the Department of Youth Services may require as a term of its contracts for outside services that no homosexual may be employed by the contractor to render services to the Department.

Pursuant to statute, the Department may contract with providers who care for youth in privately operated group homes and foster care facilities. See R.C. 5139.06, 5139.08, 5139.39. The Director of the Department may, in compliance with the provisions of R.C. 5139.04(F), promulgate rules and regulations governing standards maintained by such group homes and foster care facilities. See 7 Ohio Admin. Code Ch. 5139-11 and Ch. 5139-13.

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[6]The Department should keep in mind in making any such factual determination that it would have to be made as to a particular individual, e.g., it is possible that a particular employee might confide his sexual preference to a supervisor but that such employee's character is such that it is unlikely that his sexual preference would ever become known to the Department's wards and thus be the source of homosexual panic. Or it is possible that a particular employee's sexual preference, even if widely known, may not in fact cause "homosexual panic" because of other character attributes of the particular employee, or because of the nature of the position which he holds.

In determining whether the Department may require that contracting agencies not employ homosexuals, it must be initially recognized that states and state agencies are limited in their exercise of authority by both the United States Constitution and their respective state constitutions. United States v. Raines, 362 U.S. 17 (1960). Any exercise of authority by a state agency, therefore, must be constitutionally permitted.

As I advised in response to your first question, the Department of Youth Services may refuse to employ, or dismiss, an individual on the basis of homosexual conduct only upon the finding of a nexus between specific conduct and the efficiency of the service. Since exclusion of an employee upon the establishment of such a nexus is constitutionally permitted, the Department may require private contractors to comply with similar standards in the employment of individuals who will render services to the Department. In other words, the Department may, pursuant to its rulemaking powers, require private contractors to refuse to employ particular individuals who are homosexuals if it can be established that there is a rational nexus between the conduct of such individuals and the efficiency of the service.

The Department, however, may not impose upon private contractors standards which are more restrictive than the Department itself could constitutionally employ in the hiring and discharge of its own employees. See Reitman v. Mulkey, 387 U.S. 369 (1967) (the fourteenth amendment is applicable where government policies or regulations encourage private discrimination or allow private discrimination to exist).

Although the fourteenth amendment does not apply to private persons, the courts have held that the fourteenth amendment is applicable where there is significant state involvement in private actions. Reitman v. Mulkey, supra; Robinson v. Florida, 378 U.S. 153 (1964). Thus, while there may be no right to employment with private government contractors, a government agency may not require private contractors to exclude persons from such employment except by means consonant with due process and equal protection of the law.

In light of the language of Scott v. Macy and the requirements of the due process and equal protection clauses, it is my opinion that the Department, by rule or contract provision, may require private contractors to refuse to employ a particular individual on the basis of sexual preference if the Department finds that the sexual preference of such employee of a private contractor bears a rational relation to the employee's ability to perform such contractual services for the Department and the efficiency of the services so provided.

In conclusion, it is my opinion, and you are advised, that:

1. If the Department of Youth Services reasonably finds that the sexual preference of a particular employee or a particular applicant for a job in the classified service bears a rational relation to the ability to perform a job and the efficiency of the Department's operations, it may consider sexual preference in dismissing such employee or in filling a vacant position from applicants certified by the Director of Administrative Services.

2. The Department of Youth Services, by rule or contract provision, may require private contractors to refuse to employ a particular individual on the basis of sexual preference if the Department finds that the sexual preference of such employee of a private contractor bears a rational relation to the employee's ability to perform such contractual services for the Department and the efficiency of the services so provided.