P.D.

U.S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS
WASHINGTON, D.C. 20210

JUL 27 1970

24 AB 706.5
24 AB 703.1
24 AB 701.4

This is in further reference to your letter of February 17, 1970, concerning the application of the equal pay provisions of the Fair Labor Standards Act. Questions about the application of Title VII of the Civil Rights Act of 1964 are, of course, not within the jurisdiction of the Department of Labor and must be referred to the Equal Employment Opportunity Commission.

You state that as a result of an investigation under the Equal Pay Act your client, agreed to increase the hourly rate of four nurse's aides to equal that paid to male orderlies although the hospital did not agree that there had been a violation of the equal pay provisions. You state further that the hospital has now made the job requirements of the orderlies and nurse's aides identical and will probably prepare a single job description under one job title, eliminating the use of the titles "orderly" and "aide".

The nurse's aides concerned have been advised that their wage rates are being increased and that they will be expected to perform the identical duties required of the orderlies. You ask whether your client would be justified in reducing the rates of any of the nurse's aides if such an aide is unable or unwilling to perform some of the requirements of the revised job description.

The Equal Pay Act, of course, does not require the jobs to be identical in order for the equal pay provisions to apply. As the judicial decisions have now established, the Act requires only that the work must be "substantially equal". Therefore, the mere addition of some subsidiary duties to the job content would afford no basis for denying equal pay to employees who might be unable or unwilling to perform some of the additional subsidiary duties, if, in fact, the work they do perform is "substantially equal". If the work performed is "substantially equal" regardless of such subsidiary tasks, the burden would be on the employer to establish the economic value of such subsidiary duties in order to justify a lower wage rate for women (or men) unable or unwilling to perform such tasks. As has already been

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established, justification of a wage differential cannot be based on an "artificially created job classification." (See Shultz v. Wheaton Glass Co., C.A. 3, January 13, 1970, 421 F. 2d 259.)

In general, under the equal pay provisions, the fact that certain employees (whether men or women) do not perform, or might be unable or unwilling to perform, all the incidental requirements of a particular job does not, of itself, render otherwise equal work unequal within the meaning of the statute. The relevant question in such cases is whether the failure or inability to perform some of the subsidiary or incidental job duties is of a sufficiently substantial nature as to render the work unequal or to justify a wage differential as based on a "factor other than sex".

Although there is not enough information in your letter of February 17, 1970, and its enclosure, for us to be able to determine precisely how the Act would apply in the situation you outline, based on the circumstances described this office is not prepared to recognize the wage reduction plan contemplated by your client as one which would be permitted by the terms and provisions of the Equal Pay Act of 1963.

Regardless of any other factor, it is our opinion that your client cannot meet his obligations under the law by preparing a revised job description and then transferring formerly aggrieved employees (whose wage rates were raised in compliance with the equal pay provisions) to work covered by the revised job description, subsequently reducing their wage rates if they fail or are unable to perform all of the duties specified in the description. To allow this would only continue the inequities which the Act was intended to cure.

Sincerely,

ROBERT D. [redacted]

Robert D. Moran
Administrator

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