

**MINUTES OF THE MEETING OF
THE INDIANA STATE ETHICS COMMISSION
February 11, 2021**

I. Call to Order

A regular meeting of the State Ethics Commission (“Commission”) was called to order at 10:00 a.m. The meeting was held virtually using Microsoft Teams. Commission members present were Katherine Noel, chair; Corinne Finnerty; Sue Anne Gilroy; and Kenneth Todd. Staff present included David Cook, Inspector General; Tiffany Mulligan, Chief Legal Counsel, Office of Inspector General; Jennifer Cooper, State Ethics Director; Kelly Elliott, Staff Attorney, Office of Inspector General; Luba Gore, Staff Attorney, Office of Inspector General; Cindy Scruggs, Administrative Director, Office of Inspector General; Mark Mitchell, Director of Investigations, Office of Inspector General; Mike Lepper, Investigator, Office of Inspector General; and Nathan Baker, Legal Assistant, Office of Inspector General.

Others present were: Deana Smith, Ethics Officer, Indiana State Department of Health; Tamera Glickman, Deputy General Counsel, Indiana Department of Administration; Sylvia Watson, General Counsel and Ethics Officer, Indiana State Library; Latosha N. Higgins, Managing Attorney/Ethics Officer, Family and Social Services Administration; Mattheus Mitchel, Compliance & Ethics Specialist, Indiana Department of Revenue; Beth Green, General Counsel & Ethics Officer, Indiana Department of Workforce Development; Jessica Allen, Executive Secretary and Ethics Officer, Alcohol & Tobacco Commission; Kristi Shute, Deputy General Counsel and Ethics Officer, Indiana Department of Homeland Security; Amy Owens, Staff Attorney, Indiana Department of Health; Amber Nicole Ying, Special Counsel/Director, Compliance and Ethics and Ethics Officer, Department of Revenue; Rachel Russell, Interim General Counsel and Ethics Officer, Department of Child Services; David Johnson, Office of Attorney General; Lindsay Hyer, Commission Counsel, Alcohol and Tobacco Commission; Tamara Smith, Admissions & Policy Director/Ethics Officer, Indiana Veterans Home; Joby Johnson, Chief Mine Inspector, Department of Labor - Department of Mines; Ed Feigenbaum, Indiana Legislative Insight; Breanca Merritt, FSSA, Chief Health Equity and ADA Officer; Joseph B. Hoage, Commissioner, Department of Labor; and J. Anthony Hardman, General Counsel/Ethics Officer; Department of Labor.

II. Adoption of Agenda and Approval of Minutes

Commissioner Gilroy moved to adopt the Agenda and Commissioner Todd seconded the motion which passed (4-0).

Commissioner Finnerty moved to approve the Minutes of the January 21, 2021 Commission Meeting and Commissioner Gilroy seconded the motion which passed (4-0).

III. Consideration of Waiver of Post-Employment Restrictions for Joby Johnson

Joseph B. Hoage, Commissioner of the Department of Labor; and J. Anthony Hardman, General Counsel/Ethics Officer of the Department of Labor., presented the proposed Waiver of Post-Employment Restrictions in this matter to the Commission for their approval.

Commissioner Gilroy moved to approve the Waiver, and Commissioner Todd seconded the motion which passed (4-0).

IV. Request for Formal Advisory Opinion

2021-FAO-004

Dr. Breanca Merritt, Chief Equity and ADA Officer

Latosha N. Higgins, Managing Attorney and Ethics Officer

Family and Social Services Administration

Latosha Higgins is the Ethics Officer for the Indiana Family and Social Services Administration (FSSA). Ms. Higgins is requesting an advisory opinion on behalf of Dr. Breanca Merritt, the new Chief Equity and ADA Officer for FSSA. Specifically, Ms. Higgins is requesting an opinion from the Commission addressing whether it would be a conflict of interests for Dr. Merritt to continue her outside academic, community service and consulting activities while employed as the Chief Equity and ADA Officer for FSSA.

Dr. Merritt joined FSSA in January 2021 as the first Chief Health Equity and ADA Officer, a recently-created position that reports directly to FSSA's Secretary, Dr. Jennifer Sullivan. Dr. Merritt's responsibilities include leading the FSSA Office of Healthy Opportunities, providing leadership in the evaluation of policy decisions that affect race equity, building metrics for agency accountability, ensuring agency adherence to the Americans with Disabilities Act (ADA) and serving at the executive level, working to build a culture of equality across the agency. Her role also may include activities such as assisting with identifying contractors or developing language for requests for proposals during the procurement process; however, other staff in the FSSA executive office who do not report to Dr. Merritt would oversee procurements. Dr. Merritt's role in this situation would be to serve as a subject matter expert.

Before joining FSSA, Dr. Merritt served as the founding director of the Center for Research on Inclusion and Social Policy at Indiana University Purdue University - Indianapolis (IUPUI). She was also a clinical assistant professor in IUPUI's O'Neill School of Public and Environmental Affairs and adjunct faculty for the Africana Studies program. She continues to have an affiliation with IUPUI, serve on external boards and serve as a paid consultant. Except for one existing contract with the Urban League, Dr. Merritt's activities generally do not include any compensation.

Dr. Merritt is a frequently sought-after speaker because of her expertise in the areas of social policy, vulnerable populations and racial equity. While many of her speaking requests may be directly related to her FSSA work, she likely will receive requests unrelated to her work with FSSA. Dr. Merritt would like to accept future offers to speak. Dr. Merritt has advised Ms.

Higgins that the speaking engagements seldom include an honorarium. She is aware of the need to be cognizant of potential conflicts of interests when accepting speaking engagements.

Dr. Merritt is also interested in continuing her involvement with the Indianapolis Public Schools (IPS) and Central Indiana Community Education Foundation. Her involvement includes participating in regular meetings to discuss equity and policy making among students and families with IPS and discussing the criminal justice system and equity with the Central Indiana Community Foundation. Although she committed to these obligations before joining FSSA in the context of her prior role, the responsibilities intersect with her current role as they relate to equity and public policy. Dr. Merritt is not compensated for her involvement with IPS or the Central Indiana Community Education Foundation.

FSSA has an agreement with IPS in which IPS provides educational services to school-age students who are residents at the Neuro Diagnostic Institute. Dr. Merritt was not involved in the negotiation of this agreement nor is she involved in the oversight of the agreement. FSSA entered into the agreement with IPS before Dr. Merritt joined FSSA. FSSA's Division of Mental Health and Addiction administers the agreement. FSSA does not have any business relationship with the Central Indiana Communication Education Foundation.

Dr. Merritt's other obligations include serving on the board of the following organizations: Fair Housing Center of Central Indiana, Hawthorne Community Center (Hawthorne), Blueprint Council Continuum of Care Indianapolis and the Thomas Gregg Neighborhood School. Except for the Blueprint Council Continuum of Care for Indianapolis and Thomas Gregg Neighborhood School, the board meetings for these organizations occur outside of her regular work hours. For meetings that occur during her regular work hours, Dr. Merritt will either join the meeting later or make up the time by working later those days. Dr. Merritt does not receive any compensation for serving on any of these boards.

Of the organizations where Dr. Merritt serves on the board, only Hawthorne has a business relationship with FSSA. In July 2019, Hawthorne received a grant from FSSA to be used for its School Age Care Project. The grant award is administered by the FSSA Office of Early Childhood and Out of School Learning. FSSA made the award to Hawthorne before Dr. Merritt joined FSSA. Furthermore, Dr. Merritt is not involved with the administration of this grant.

Dr. Merritt also would like to continue in her role as an associate member of the faculty in the IUPUI School of Liberal Arts Africana Studies Program and Community Scholar for the Africana Studies Program and to serve on the advisory board of their new Center for Africana Studies and Culture.

Dr. Merritt's appointment as a Community Scholar is a renewable three-year honorary appointment that commenced on January 1, 2021. Community Scholars are expected to make contributions to meeting educational objectives for IUPUI students through community-based learning activities, research or professional service, such as being a guest speaker. It is an unpaid appointment where she will be entitled to participate in research and to access other university facilities. The appointment does not involve any instructional or financial

commitments. It is not tenured, and it does not confer any voting rights or other benefits accruing to other faculty. Although the Community Scholar appointment does not require teaching, Dr. Merritt is interested in teaching. Any potential teaching obligations would require 1.5 hours a week during the work week for 13 weeks. She would ensure future courses were scheduled outside work hours.

Dr. Merritt also has a few manuscripts under review by peer-review journals and under her affiliation with IUPUI. Any minor work Dr. Merritt completes on those projects after submission will be completed after hours and on weekends. She also has a team of students and staff leading work on a project that she passed on to them before joining FSSA. She likely will need to meet with them monthly until August 2021. She will limit her interactions with this team to after hours.

Lastly, Dr. Merritt is a contracted consultant with the Urban League Indianapolis African American Quality of Life Initiative team. As with her other outside activities, she plans to complete the work required under this one-year agreement outside of her regular work hours. Her compensation for this work does not come from any state contract or grant.

Dr. Merritt understands that she is not to use her FSSA position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government. She also understands and agrees to abide by the Code governing conflicts of interests, ghost employment, use of state property and confidential information.

Based on the information presented, Ms. Higgins has determined that Dr. Merritt's outside activities do not appear to be incompatible with her duties. Rather, Dr. Merritt's outside activities will help maintain and build upon her professional skills such that she may better be able to meet the essential functions of her position such as developing and expanding community collaborations related to racial equity; learning about equity-related innovations relevant to FSSA; and developing increased knowledge about trends across the State of Indiana.

The analysis stated the following:

Ms. Higgins' request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Use of State Property, Ghost Employment, Honoraria and Benefitting from and Divulging Confidential Information. The application of each provision to Dr. Merritt is analyzed below.

A. Outside employment

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or

critical to the performance of her official duties that her ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

The Commission generally defers to an agency's ethics officer regarding outside employment opportunities because these individuals are in a better position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment opportunity. Based on the information and opinion provided by Ms. Higgins, Dr. Merritt's employment as a consultant with the Urban League of Indianapolis, African American Quality of Life Initiative team would not create a conflict under this provision. According to Ms. Higgins, Dr. Merritt's responsibilities under this contract would not conflict with her responsibilities in her position at FSSA and would not require her to recuse herself from matters that are critical to the performance of her FSSA duties.

Her other outside employment/professional activities would not provide Dr. Merritt with compensation of substantial value. There is the possibility that Dr. Merritt could receive an honorarium for a speaking engagement on occasion. If that is the case, she will need to be mindful of the honoraria rule (42 IAC 1-5-) discussed later in this opinion.

The Commission confirmed that Dr. Merritt would not be required to disclose confidential information that she may have access to by virtue of her state employment in any of her outside positions.

Further, Ms. Higgins provides that Dr. Merritt is aware that she must not use or attempt to use her state position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government.

The Commission finds that Dr. Merritt's outside employment/professional activities in serving as a consultant, as a board member for the various organizations for which she volunteers, in her academic position and affiliation with IUPUI, and in working on her manuscripts would not create a conflict of interests for her under IC 4-2-6-5.5.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits Dr. Merritt from participating in any decision or vote, or matter relating to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits Dr. Merritt from participating in any decision or vote, or matter relating to that decision or vote, if a business organization in which she serves as an employee or member has a financial interest in the matter.

IC 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interests notify her agency's appointing authority and ethics officer in writing and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the OIG.

Dr. Merritt serves as the Chief Equity and ADA Officer for FSSA and wishes to continue her outside employment/professional activities with various organizations, including IPS and Hawthorne, both of which have a business relationship with FSSA through a contract and grant, respectively. Dr. Merritt had no involvement in the contract negotiations with IPS, and she will not be involved in the administration/oversight of this contract at FSSA. The contract is administered by FSSA's Division of Mental Health and Addiction. Dr. Merritt also was not involved in the FSSA grant award to Hawthorne, and she is not involved in its administration at FSSA.

Based on Ms. Higgins' description of Dr. Merritt's role as Chief Equity and ADA Officer for FSSA, it appears that Dr. Merritt's responsibilities will be focused on creating policy and a culture of equality at FSSA at the executive level and that she would not be involved in decisions/votes in which any of the organizations with which she has an outside employment/professional activity position would have a financial interest.

Accordingly, the Commission finds that Dr. Merritt does not have an identified potential conflict of interests at this time; however, if a potential conflict of interests is identified in the future, Dr. Merritt must meet the disclosure and notification requirements in IC 4-2-6-9(b).

C. Conflict of interests – contracts

Pursuant to IC 4-2-6-10.5, a state employee may not knowingly have a financial interest in a contract made by an agency. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between the state and a third party.

This prohibition, however, does not apply to an employee that does not participate in or have contracting responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

Although Dr. Merritt would receive compensation for her outside consulting work with the Urban League of Indianapolis, Ms. Higgins provides that Dr. Merritt would not be compensated from any funds derived from any state contract or grant.

Accordingly, the Commission finds that Dr. Merritt would not have a financial interest in a state contract.

D. Honoraria

The honoraria rule, 42 IAC 1-5-3, prohibits state employees from personally accepting an honorarium for any activity that may be considered part of the state employee's official duties. The definition of "honorarium" includes a payment of money for an appearance, a speech or an article but excludes payment or reimbursement for travel expenses.

The general prohibition on honoraria does not apply to employees for activities not done in connection with the employee's official duties and that are prepared on the employee's own time and without the use of state resources; however, regardless of whether the activity is done in connection with the state employee's official duties, the employee may not accept an honorarium from a person who has a business relationship or seeks to influence an official action with the employee's agency.

To the extent that Dr. Merritt is ever offered an honorarium for any of her public speaking engagements or articles, she could not personally accept the honorarium if it was for an activity that is part of her official duties. She could, however, accept the honorarium on behalf of the State and remit the funds to the Treasurer of State.

If the honorarium was offered for an appearance, speech or article that falls outside of her official duties, Dr. Merritt could personally accept the honorarium so long as the person offering it does not have a business relationship with or is seeking to influence an official action from FSSA.

The Commission requested that Dr. Merritt and FSSA keep a written record of any honoraria received by Dr. Merritt that relate to any of her outside employment/professional activities for transparency purposes.

E. Confidential information

Dr. Merritt is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits Dr. Merritt from accepting any compensation from any employment, transaction or investment which is entered into or made as a result of material information of a confidential nature. The term "person" is defined in IC 4-2-6-1(a)(13) to encompass both an individual and an organization. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

To the extent Dr. Merritt is exposed to or has access to such confidential information in her position as Chief Equity and ADA Officer for FSSA, she is prohibited not only from divulging that information but from ever using it to benefit any person, including any of her outside employers, in any manner.

F. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits Dr. Merritt from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental or institutional policy or regulation that the Commission has approved. Likewise, 42 IAC 1-5-13 prohibits Dr. Merritt from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental or institutional policy or regulation.

Due to the significant number of outside employment/professional activity positions that Dr. Merritt wishes to continue to hold, and the fact that Ms. Higgins provided that some of these positions will require her time/attention during her normal FSSA working hours, the Commission determined that Dr. Merritt should keep an accurate and detailed record (e.g. a log) of the time she spends volunteering or working in her outside positions to minimize any appearance that she may be completing this work on state time and to minimize or eliminate any confusion as to which role she is fulfilling at any given time.

To the extent that Dr. Merritt observes these provisions regarding her outside employment/professional activities, her outside positions would not violate these ethics laws.

Commissioner Todd moved to approve the Commission's findings, and Commissioner Gilroy seconded the motion which passed (4-0).

V. Director's Report

State Ethics Director, Jen Cooper, stated that since the last Commission meeting, the Office of Inspector General had issued 10 informal advisory opinions with the majority of opinions on the subjects of post-employment restrictions, conflicts of interests, outside employment, and gifts.

Director Cooper also reported that the Financial Disclosure Statement filing period for required filers for 2020 has been completed with all required filers accounted for as of this meeting.

Additionally, it was announced that David Cook had been appointed by Governor Holcomb as the new Inspector General. Inspector General Cook took a moment to introduce himself to the Commissioners. He also praised the OIG staff and expressed his gratitude for the opportunity to serve as Inspector General.

Finally, Commissioner Gilroy expressed the Commission's gratitude for the OIG team for how smoothly the SEC meetings have gone since the beginning of the Covid-19 pandemic.

VI. Adjournment

Commissioner Todd moved to adjourn the public meeting of the State Ethics Commission and Commissioner Finnerty seconded the motion, which passed (4-0).

The public meeting adjourned at 10:21 a.m.