# CONFIDENTIAL FINAL INVESTIGATION REPORT

Submitted: July 2, 2020 By: Brenda K. Baumgart, Stoel Rives LLP

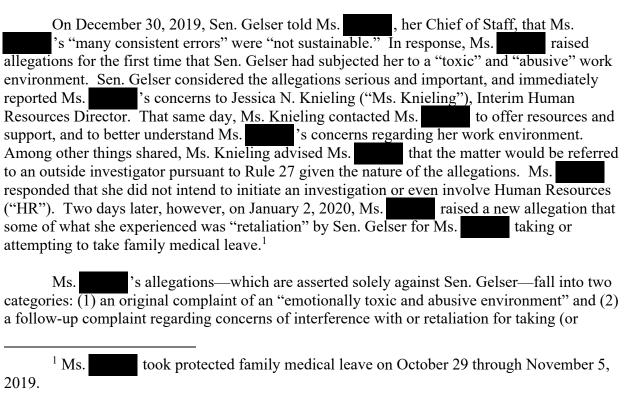
This is not to be distributed beyond the intended recipients.

Do not forward a copy of this report.

#### I. Introduction

This report summarizes the findings of my investigation into a Legislative Branch ("Branch") Personnel Rule 27 ("Rule 27") conduct report made by ("Ms. ") against Senator Sara Gelser ("Sen. Gelser"). Effective March 25, 2019, the Legislative Administration Committee ("LAC"), acting by and through the Legislative Administrator under ORS 173.720, engaged Stoel Rives LLP to perform services under the State of Oregon Contract for the Purchase of Services ("Contract"). Following appointment of the Acting Legislative Equity Officer ("LEO"), the Contract was amended in December 2019, to substitute the LEO for the LAC.

#### **II.** Executive Summary



As detailed below, after multiple interviews with the parties and an exhaustive review of extensive documentary evidence, this investigator did not find any substantiated fact or evidence that Sen. Gelser interfered with or acted in a discriminatory or retaliatory manner toward Ms.

in relation to her use of protected family medical leave or any attempt to exercise protected leave rights.

## III. Further Background Regarding Ms. Complaint

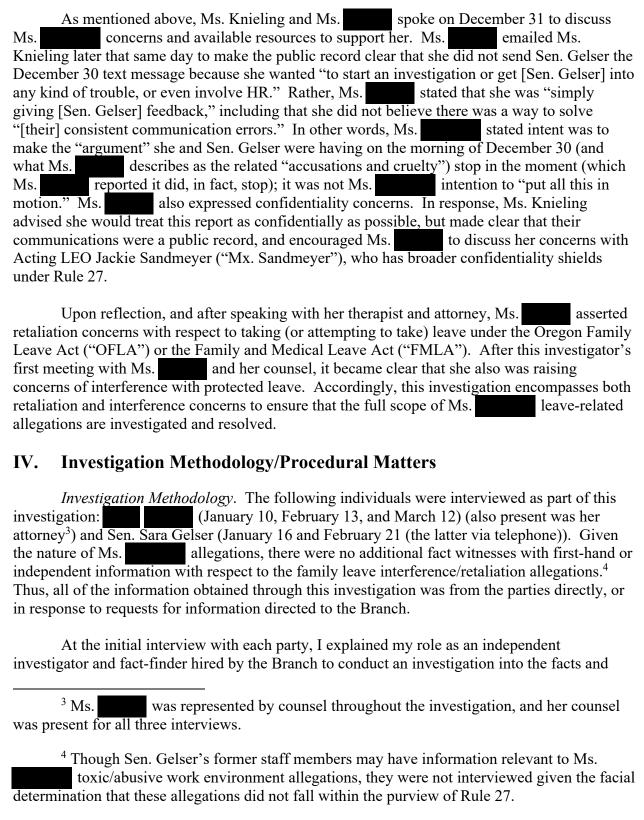
In addition to forwarding Ms. "'s concerns regarding a "toxic" and "abusive" work environment to Ms. Knieling on December 30, the following morning, December 31, Sen. Gelser sent the following email to Ms. and copied Ms. Knieling:



"Thank you for letting me know about your intentions for the future and about your frustrations in the office via text yesterday. The concerns you raise are serious and important. I want to be sure you have everything that you need to ensure they are appropriately addressed. Jackie Sandmeyer and Jessica Knieling (who is copied on this email) are resources that are available to you as you consider your options.

"I am committed to ensuring your work environment is safe and respectful. In order to be sure that happens, I am reaching out to Jessica to offer assistance to me in meeting your needs and addressing the challenges we are having in our office. I care very much about you in both a personal and professional capacity and wish only the best for you. It is my hope that Jessica will be able to help us find accommodations<sup>2</sup> to meet your needs and ensure your success."

<sup>&</sup>lt;sup>2</sup> In mid-December, Ms. texted Sen. Gelser about a recent medical diagnosis. Ms. confirmed with Ms. Knieling in their discussions on December 31 and January 2 that she was not seeking or requesting any accommodation.



provide a report pursuant to Rule 27. I encouraged confidentiality to the extent possible, including to help ensure the integrity of the investigation, but clearly explained that I could not guarantee confidentiality of the information provided to me and, ultimately, that this matter would be before the Conduct Committee. I solicited and answered the parties' (and Ms. counsel's) questions before the interviews commenced to be sure, to the best of my ability, everyone understood the procedure. Ms. and her counsel had procedural questions, including about the voluntariness of her participation in the interviews and investigatory process. For my part, I made clear that meeting with me was entirely voluntary as well as my understanding that the Branch did not compel her to meet with me. I also referred Ms. and her counsel to the Branch for further guidance, including to Mx. Sandmeyer, Acting LEO.
This investigation is document intensive and many of the records received and reviewed are material to this investigation and findings, as further explained below. In fact, Ms. relies almost exclusively on text and email exchanges with Sen. Gelser to support her claims of retaliation and interference. These documents also establish the necessary chronology and timeline of salient events. To that end, while the parties' accounts and recollections were duly considered, this investigation did not turn on either party's specific memory of events.
Both Sen. Gelser and Ms. desired to provide this investigator with as complete of a background as possible, which essentially covered the entirety of their approximate year of working together. Though not all of that information is dispositive to the below findings, it is the practice of this investigator to receive whatever documents and background information the parties deem appropriate to submit, and then weigh them for relevance and probative value of the issues that fall within the scope of the investigation. The same practice was followed here.
Though not an exhaustive list, I reviewed the following in the course of my investigation:
<ul> <li>Legislative Branch Personnel Rule 27: Harassment-Free Workplace (HCR 11; January 2019);</li> <li>Revisions to Rule 27 as promulgated by HCR 20 (enacted June 29, 2019);</li> <li>Complete text message thread between Sen. Gelser and Ms. (December 10, 2018)</li> </ul>
through January 5, 2020); • Additional text messages between or among Sen. Gelser, Ms. and Lina de
Morais; • Additional text messages provided by Ms. between Ms. and third parties;
<sup>5</sup> Sen. Gelser provided this investigator with complete access to all of her communications with Ms. including text messages, emails, and phone records. This is not to suggest in any way that Ms. was not forthcoming. Rather, it is to acknowledge that Sen. Gelser responded to these allegations in an open and non-defensive way, including allowing this investigator access to relevant information.

- Christmas card from Ms. to Sen. Gelser (December 24, 2019);
- Cell phone records between Sen. Gelser and Ms. (including but not limited to the time period from October 29, 2019 through November 5, 2019);
- Emails, including email "Daily Memos," between Sen. Gelser and Ms. tincluding but not limited to the following time periods: (1) October 29, 2019 through November 5, 2019; and (2) December 10, 2019 through January 6, 2020);
- Employee Services records regarding all requests by Ms. (or someone on her behalf) for OFLA/FMLA leave, and all related communication;
- Employee Services records reflecting communication with Sen. Gelser regarding Ms.

  performance or other employee relations matters involving Ms.

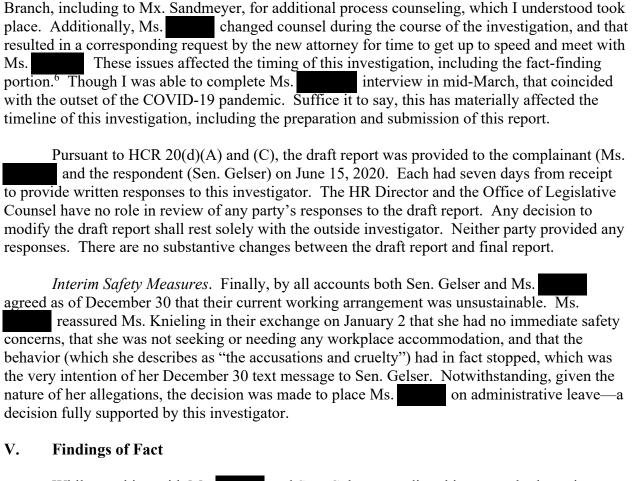
  including HR assistance sought by Sen. Gelser regarding Ms.

  in the December 2019 through January 2020 timeframe;
- Employee Services records regarding any reports, complaints, or concerns by Ms. about Sen. Gelser; and
- Review, including Branch IT review, of emails or other documents reported to be accessed, deleted, and/or forwarded by Ms. on January 6, 2020.

*Procedural Matters*. Procedural issues did affect the overall timing of this investigation, and particularly the delivery of this report, as further explained below.

By way of relevant summary, Ms. Knieling, on behalf of the Branch, referred this matter to me on or about December 31, 2020, and made me aware of Ms. allegations on January 2, 2020. As appointing authorities, both Sen. Gelser and Ms. Knieling have mandatory reporting obligations under HCR 20(2)(b), (11)(b). This matter arose subsequent to the enactment HCR 20 (enacted on June 29, 2019), which made significant revisions to Rule 27. The majority of the amendments were not to take effect until the appointment of the LEO. The Branch appointed Mx. Sandmeyer as Acting LEO on November 11, 2019, and they commenced their role on December 2. Given that this matter arose subsequent to the LEO appointment, the assumption was that this matter would be governed both procedurally and substantively by HCR 20. Though I was not privy to the internal discussions at the Branch, to the best of my knowledge Rule 27 interpretation and application issues were under review by the Branch, including by Legislative Counsel's Office, in the December-January timeframe. In mid-January 2020, I received guidance from the Branch that the procedural aspects of the "new" Rule 27 (as amended by HCR 20) were to apply retroactively to all pending matters, but the substantive portions (e.g., definitions of prohibited conduct) of the version of Rule 27 in effect at the time the complaint is received shall apply. This guidance confirmed that HCR 20, in its entirety, applies to both the allegations raised in and the procedure of this investigation.

As mentioned above, at the outset and at various points throughout the investigation (including between the first and second interview), Ms. (or her counsel on her behalf) raised numerous procedural questions as well as confidentiality concerns. I did my best to address those contemporaneously, and also referred Ms.

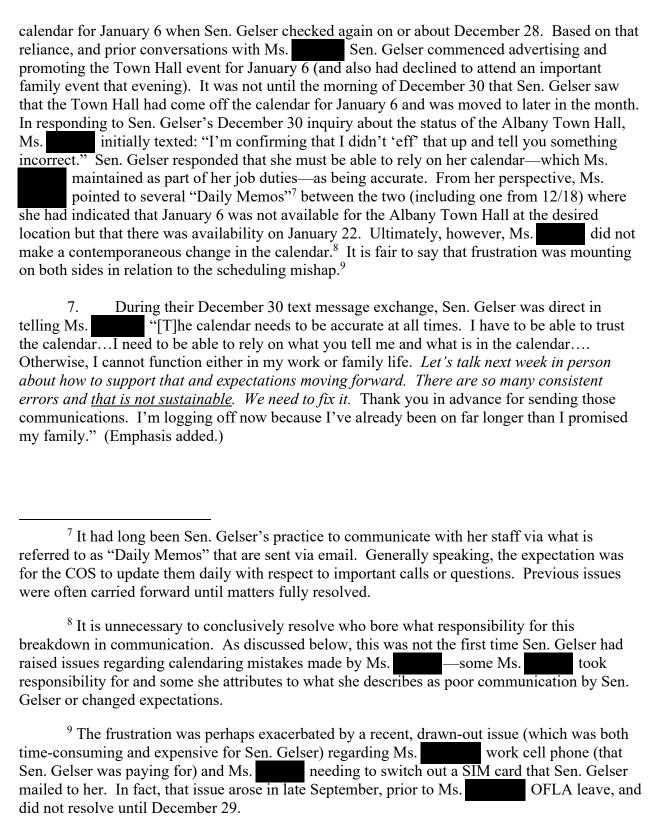


While speaking with Ms. and Sen. Gelser regarding this matter, both parties emphasized their respective desire for this investigator to understand the broader context of their working relationship. To that end, the information presented to this investigator—which was quite extensive—for the most part involved overlapping circumstances and background information relevant to both categories of allegations (those related to an "emotionally toxic and abusive environment" and those related to medical leave retaliation and interference). Accordingly, and given the inextricable overlap, this investigator examined Ms. allegations of medical leave interference and retaliation within the context of all information provided. This report, however, summarizes only those factual findings, many of which are established or corroborated by documentary evidence, germane to the matter before the Conduct Committee—medical leave retaliation and interference. Where this investigator resolved a material dispute or made a credibility determination, that is specifically noted.

<sup>&</sup>lt;sup>6</sup> Accordingly, the Acting LEO approved an extension of the investigatory timeline under HCR 20(14)(b). Regular status reports were provided to the parties.

## I find the following:

1. Sen. Gelser serves District 8 and was elected to the Oregon State Senate in 2014. Prior to that, she served in the Oregon House of Representatives since 2005.
2. Sen. Gelser hired Ms. as her Chief of Staff ("COS"), effective December 2018. Though Ms. had previously worked for an elected official, this was her first position at the Capitol.
3. After Sen. Gelser notified Ms. that her "consistent errors" were "not sustainable," Ms. first raised concerns about an emotionally "toxic" and "abusive" working environment via text message to Sen. Gelser between approximately 10:30 a.m. and 11:00 a.m. on December 30, 2019. Ms. had not raised any prior allegations regarding Sen. Gelser—either to Sen. Gelser directly or to HR. The timeline of events on December 30 that immediately preceded Ms. allegations against Sen. Gelser is important, and specific findings are made below.
4. Sen. Gelser was scheduled out of the office on vacation on December 30; Ms. returned to work that day after being out the prior week. Sen. Gelser sent Ms. a text message at approximately 8:18 a.m. to check in and advise her that a priority list of tasks was forthcoming. Sen. Gelser emailed the priority list to Ms. at about 8:40 a.m., which included a "to do" list for a January 6 Town Hall in Albany. After Sen. Gelser received an email about a phone call that was not on her calendar, she texted Ms. again at about 9:09 a.m. to inquire whether Ms. was receiving Sen. Gelser's messages and asking Ms. to confirm whether someone was in fact expecting a phone call from her. At about 9:30 a.m., and after consulting her calendar and seeing that things had changed since she checked the prior Friday (including that the Albany Town Hall had moved to later in the month), Sen. Gelser reached out on a more urgent basis to Ms. via text in order to help clarify these timesensitive scheduling issues.
5. At 9:41 a.m., Sen. Gelser emailed Ms. Knieling to seek her assistance with respect to an HR matter. The two spoke almost immediately. Sen. Gelser told Ms. Knieling she was seeking HR assistance with respect to Ms. including to address what Sen. Gelser described as continuing performance concerns (e.g., calendar inaccuracies, timeliness, and responsiveness). This conversation occurred prior to Ms. raising concerns regarding her working environment.
6. Though her work day commenced at 8:00 a.m., Ms. first responded to Sen. Gelser's text messages at approximately 10:13 a.m. Back and forth messages ensued for approximately the next 15 minutes between Sen. Gelser and Ms. with respect to the scheduling issues, including the Albany Town Hall. Though not an exhaustive summary of that issue, in approximately mid-December, a hold was placed on Sen. Gelser's calendar for a Town Hall in Albany on January 6. As far as Sen. Gelser knew, that was the status when Sen. Gelser and Ms. wrapped things up for vacation over the holidays. The event was still on the
Confidential Final Report



### 8. Ms. wrote in response:<sup>10</sup>

"I don't think it's helpful to argue over text about what went wrong. I was told that I needed to take full responsibility for this event and to stop bothering you about it. We talked on the phone while we were both on vacation. I was trying to completely disconnect like you told me to (and how my doctor ordered me to)<sup>11</sup> and didn't know that you would take over the event over our mutually agreed upon holiday. I take full responsibility for the YMCA error. I am fine being blamed for other errors publicly because that's a staffer's job. But our other consistent communication errors are mutual errors over shifting expectations.

"You are correct that this is not sustainable. I'm not going to abandon you before or during such an important session, because my integrity is higher than that. But perhaps it would help our working relationship to let you know that I am actively looking for another position and will leave this job as soon as I am able to make a switch after session.

"I cannot successfully support you when what you tell me you want changes without warning. I can't be successful professionally in such an emotionally toxic and abusive environment. I believe that you are an incredible Senator, a fierce advocate for your district and for foster kids and marginalized people. When I took this position, and through the end of the 2019 session, I saw myself working with you for years—perhaps even into your next elected office. But you can't treat your staff like this. I firmly believe that if you saw another staffer being treated this way, you would burn down the Capitol in their defense. You're going to continue to lose staff if you don't change how you treat them moving forward. This is a toxic and emotionally abusive work environment and no one can be successful within it.

"I have almost no responsibility, no path forward to get more responsibility and am consistently 'failing' in my job for you, despite working harder in the interim than I did during session, because you consistently tell me you want one thing and then do the exact opposite. I accept full responsibility for a variety of mess-ups. *But when a staffer is* 

<sup>&</sup>lt;sup>10</sup> As this constitutes Ms. initial complaint, it is stated verbatim and in its entirety.

<sup>11</sup> Sen. Gelser stated that she was surprised by this statement because she had never received a doctor's note, and one was not provided to the Branch. As further outlined below, Ms. first requested a "mental health day" in the Daily Memo on December 17. Ms. does not recall telling Sen. Gelser prior to this December 30 text exchange that her health care provider "ordered" her to take time off of work. Had that expectation been communicated to Sen. Gelser, Sen. Gelser stated that she would have had no problem meeting that request.

working in such a high state of anxiety and emotional abuse, more mistakes are bound to happen.

"I hope the knowledge that I am actively trying to find a way out of this mess will help you in your frustration with the situation. Please know that I am more frustrated than you could ever be. And I hope that you never treat another staffer this way ever again.

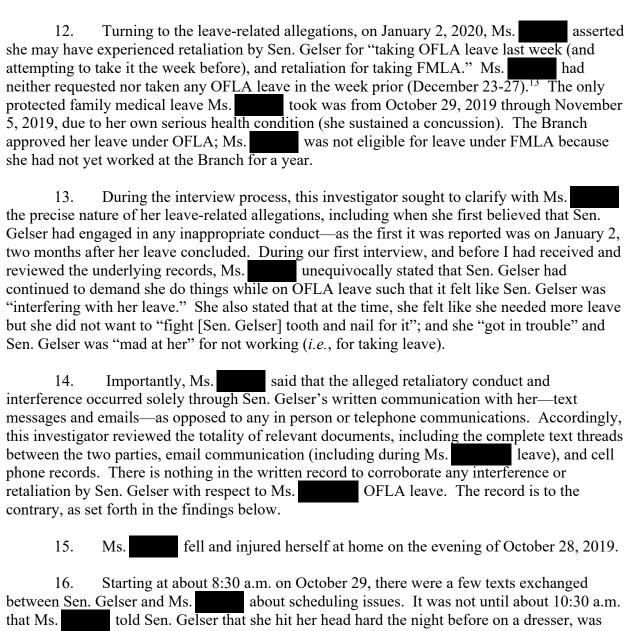
"Like I said above, I'm not going to leave until I find another position, and if I find one before or during session, part of my acceptance will be contingent upon my staying with you through session.

"I'll continue to send you the information you requested via email. Have a great day and see you next week."

(Emphasis added.) This concluded the December 30 text message thread.

- 9. Upon receipt, Sen. Gelser copied Ms. above text message into an email and forwarded it in its entirety to Ms. Knieling at 11:02 a.m., asking for Ms. Knieling's help. As set forth in Section III, above, Sen. Gelser responded to Ms. the next morning to advise her that her concerns were serious and important, and encouraged the assistance of HR and the Acting LEO.
- intent in sending Sen. Gelser the text message on 10. In her own words, Ms. December 30 wherein she alleged an "emotionally toxic and abusive" work environment among other things, was to give Sen. Gelser "feedback," and to try and stop their argument over text as "accusations and cruelty") in the moment. According to messages (described by Ms. it did stop at that instant (in fact, Sen. Gelser had closed out the conversation prior Ms. responding). During the interviews, Ms. also mentioned other to Ms. precipitating events where she believed that Sen. Gelser was "micromanaging" her and other staff; sending her texts correcting her or telling her things needed to be different; "berating" her over texts and sending her a "barrage" of text messages; having to be on call "24/7"; and "punishing" her for small mistakes. Ms. described this as an increasingly stressful situation causing her a heightened state of anxiety. She felt Sen. Gelser was questioning everything she did, and was constantly saying she was doing everything wrong.
- During the interview process, I probed these issues to examine whether Ms. was stating allegations that, if true, could rise to the level of harassment or a hostile work environment. Ms. did not proffer any facts that would link the allegations of an "emotionally toxic and abusive working environment," and the other precipitating events summarized in paragraph 10, above, to any protected status to bring these allegations within the scope of Rule 27. Ms. attorney did not assert that Sen. Gelser's actions rose to the level of harassment. Their position did not change after I advised Ms. and her counsel of my facial review analysis (that her "toxic" and "abusive" workplace allegations, even if true,

could not state a violation of Rule 27), and that only the leave-related allegations would be before the Conduct Committee. 12

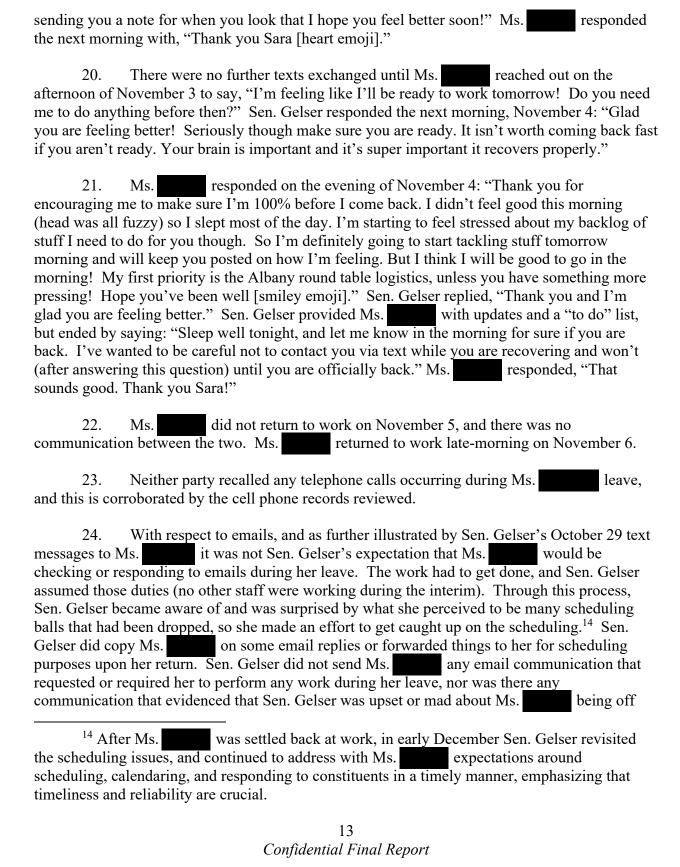


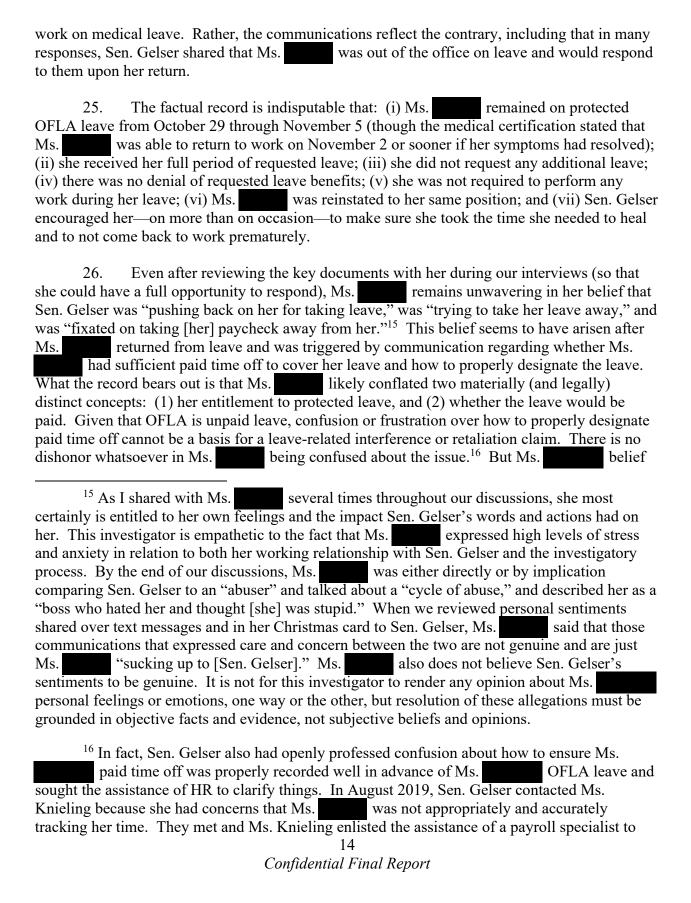
<sup>&</sup>lt;sup>12</sup> See discussion in Section VI, infra, for concluding comments.

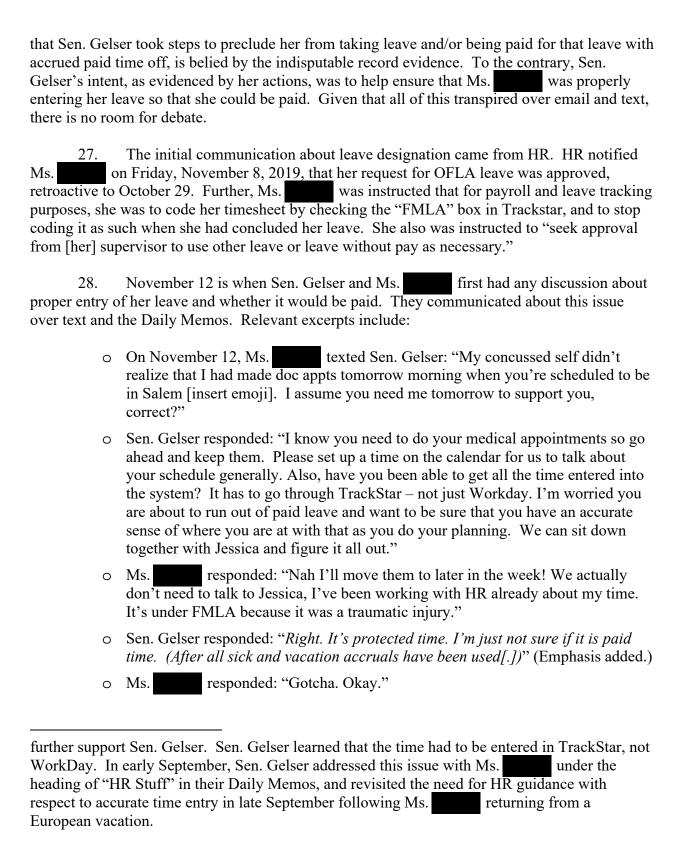
also took what was self-described as a "mental health day" on December 20, 2019, and received paid sick leave. This was unrelated to her prior OFLA leave and was not otherwise OFLA-qualifying.

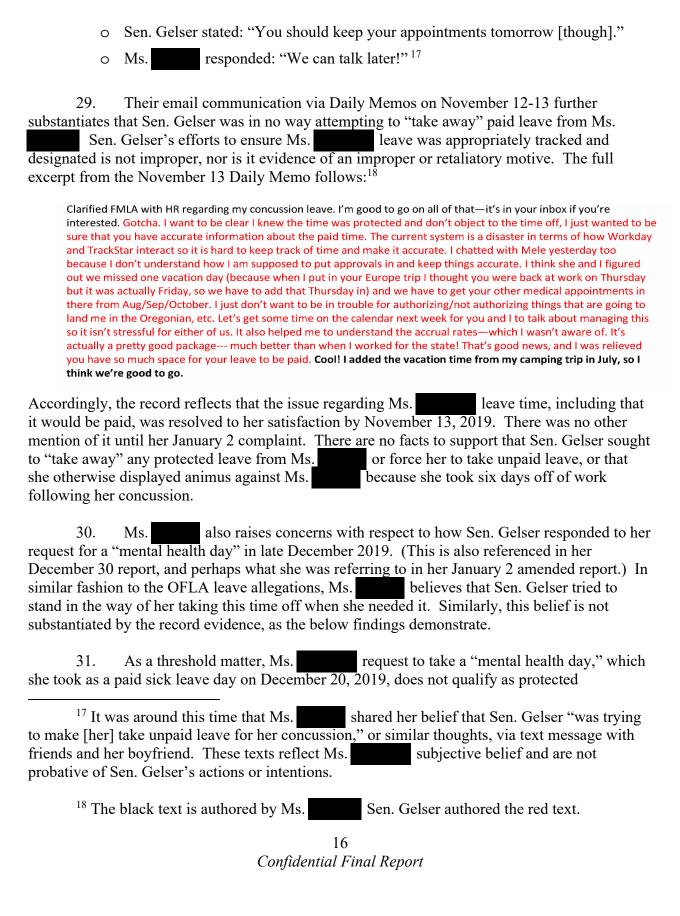
feeling dizzy and nauseous, and was going to urgent care. Sen. Gelser responded, "Hope you feel better soon!" There were a few minutes of other back and forth exchanges (initiated by Ms.

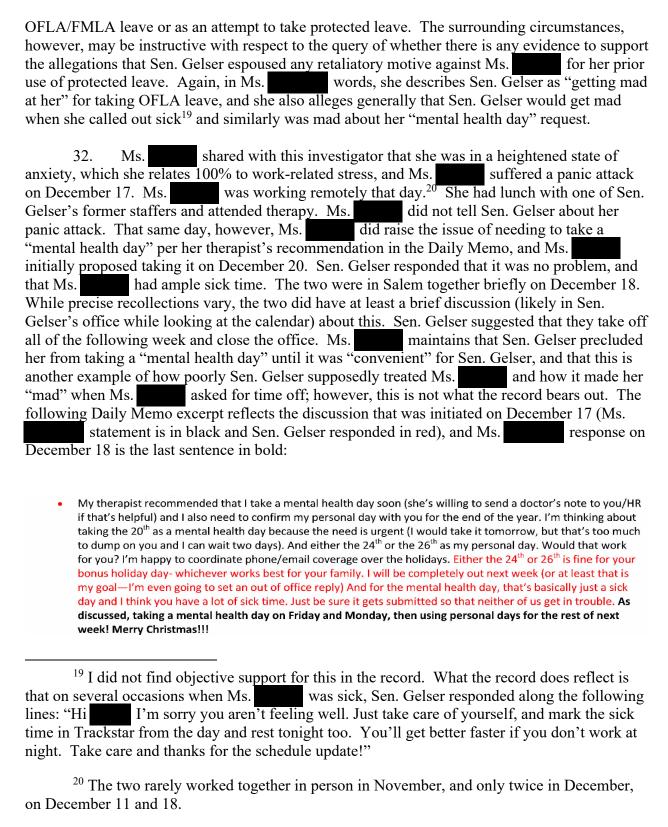
- 17. No further text exchange transpired until about 12:15 p.m. when Ms. advised Sen. Gelser she was at the ER and then about 15 minutes later when Ms. "Well, I have a concussion!" At about 3:30 p.m., Sen. Gelser texted: "Sorry to bug you but do you have the call in details for the DHS meeting tomorrow?" (they were not included on her promptly responded, stating she was putting the information together and also said, "I just got back from the hospital and they don't want me looking at a computer or working until the 2nd, but I'm ignoring their orders to make sure you're covered the rest of the week. I'll have it to you soon [smiley emoji]. I am really sorry for the inconvenience of this. When I am back I'll put in a request for sick leave." Sen. Gelser responded, "Ok thanks. Just please get me the number for tomorrow. But you are gone until the 2nd?" Ms. a picture of her medical certification, and Sen. Gelser gave her a thumbs up emoji and said, "Get better. I will try to track down the phone number." Ms. immediately responded that she was "on it" and "didn't want to leave [Sen. Gelser] hanging," and that she would stop once she got Sen. Gelser set up for her meeting the next day. Sen. Gelser said, "Thank you, but you need to follow directions from your doc."
- 18. After a few more exchanges sorting out the details of the meeting, their thread concluded as follows:
  - o Ms. "I'm sorry I got hurt."
  - O Sen. Gelser: "I'm sorry you got hurt, too. Take care of yourself and get better. Avoid dressers! They can't be trusted. Also, don't look at your screens!!!! The need for brain rest is a real thing and you will feel worse for longer if you don't do it. Early rest is the most important. (Spoken as the mother of two concussed children, including 1 with two high impact concussion that led to long term challenges). Have Logan download books and tape and podcasts for you. TV is bad for your too unfortunately. But your ears can be active."
  - o Ms. "Ugh thank you Sara. You're the best. I feel particularly bad because I feel like our working relationship has been off lately and I was determined to make it better. :( You'll laugh though when you hear how I got hurt." (Ms. then detailed how she fell.)
  - o Sen. Gelser: "Ouch! Okay, turn off your phone and get better. I'll see you next week."
  - o A few minutes later, Ms. initiated a text about scheduling, Sen. Gelser sent a brief response, and their exchange concluded about 3:50 p.m.
- 19. There were no further text exchanges until Sen. Gelser reached out on the evening of October 31 to say, "Hope you are not looking at screens and letting your brain rest, but just











From: Date: Thursday, December 19, 2019 at 5:18 PM To: Sen Gelser Subject: Memo 12/19 No phone calls today! See below for updates on the CAT town hall and responses to your other questions. I offered time to everyone in the scheduling folder and everyone you had forwarded to me to schedule and put holds for those meetings and calls in your calendar. It'll be easy to confirm those meetings when we're both back. I'm going to take my mental health day tomorrow, but will work for an hour or two in the morning or midday to finalize the Albany library room (again, see below for an update there) and make sure no one needs anything before our holiday week. I'll also change the office voicemail to our out of office message. Feel free to text me tomorrow if you have any questions. I'll just be at the doctor and am getting a massage, but I'll be available if you need me. Accordingly, the circumstances surrounding the "mental health day" do not evince anything other than Sen. Gelser supporting Ms. request, her agreeing to the date Ms. proposed, and Ms. taking a paid sick leave day as agreed upon. A few final points of note with respect to their working relationship. Sen. Gelser acknowledged awareness of Ms. frustrations, including around the fact that Ms. wanted more responsibility. In Sen. Gelser's opinion, however, Ms. delivering on her assigned tasks. Many examples grounded in objective record evidence (primarily irrefutable documentary evidence) support this view as reasonable. Sen. Gelser also acknowledged to Ms. at various points (including in August 2019), that her adjustments to how she wanted things tracked by way of the calendar and memos also likely were frustrating Moreover, Sen. Gelser began having some concerns about Ms. to Ms. performance in the late-August/September 2019 timeframe, which predated Ms. leave. These included Ms. being frequently late to work, calendaring and scheduling snafus and missed appointments (including with respect to constituents), which ultimately lead to a lack of trust.<sup>21</sup> Sen. Gelser believes she tried to reiterate instructions and expectations in a nice and professional way. Ms. stated that she kept trying to get Sen. Gelser's attention to talk about these issues but that did not happen. In hindsight, however, Sen. Gelser realizes she probably could have raised the performance concerns more directly with Ms. and that is why she was seeking HR's help on December 30. But there is nothing in the record to suggest that any decisions Sen. Gelser made with respect to assigning duties to Ms. or any performance related frustrations, had any relation whatsoever to the fact Ms. had utilized a week of protected family medical leave. <sup>21</sup> Again, it is not within the scope of this investigation to reach any conclusions about work performance.

> 18 Confidential Final Report

Then, the final exchange on the topic was on December 19:

34. After an exhaustive analysis of the facts and evidence obtained during this investigation, which in large part consists of text and email records, this investigator does not identify any comments, conduct, or action that would be necessary to establish a retaliatory motive by Sen. Gelser toward Ms. or interference with Ms.
VI. Resolution of Allegations Falling Outside of Rule 27
Based on the facial review, Ms. allegations that Sen. Gelser subjected her to an "emotionally toxic and abusive environment" are outside the scope of Rule 27 and thus not before this Conduct Committee for resolution. Rather, they are the type of concerns more appropriately addressed under a respectful workplace policy. As provided in HCR 20(11)(i)(A) (D), in this situation this investigator is vested with discretion to directly engage in coaching, recommend training, or take any other action warranted to achieve the policy objectives of a respectful workplace policy.
Having evaluated what essentially comprises the comprehensive history of the working relationship between Sen. Gelser and Ms