STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| STEPHEN E. PAZIAN, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 09-3367 |
| | ) | |
| FLORIDA PREPAID COLLEGE BOARD, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

## RECOMMENDED ORDER

An administrative hearing was conducted in this case on December 8, 2009, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

## APPEARANCES

For Petitioner: Stephen E. Pazian, pro se
11987 West Timberlane Drive
Homosassa, Florida 34448-7311

For Respondent: Robert J. Winicki, Esquire
Debbie K. Winicki, Esquire
The Winicki Law Firm, P.A.
4745 Sutton Park Court, Suite 401
Jacksonville, Florida 32224

## STATEMENT OF THE ISSUE

Whether the Florida Prepaid College Board (Respondent) is liable to Stephen E. Pazian (Petitioner) under the Participation Agreement for losses incurred in his investments in the Florida

Prepaid College Plan as a result of Respondent's failure to follow Petitioner's investment instructions.

## PRELIMINARY STATEMENT

In January 2009, by letter to the Chairman of the Florida College Prepaid Board, Petitioner requested retroactive adjustments in the allocation of his investments in the Florida College Investment Plan in accordance with allocation transfer forms Petitioner claimed were faxed to Respondent on February 5, 2007. After investigation, Respondent, through its Executive Director Thomas J. Wallace, sent a letter to Petitioner dated April 27, 2009, advising Petitioner that the Board was unable to approve his request. Thereafter, on June 3, 2009, Petitioner filed an "Amended Petition for Formal Hearing Pursuant to Section 120.57 Florida Statutes Applicable to Hearings Involving Disputed Issues of Material Fact" (Amended Petition), challenging Respondent's denial of his request and seeking, among other things, "consequential damages arising from Respondents' failure to execute Petitioner's investment instructions . . . ." Respondent referred the Amended Petition to the Division of Administrative Hearings (DOAH) on or about June 18, 2009. While the Amended Petition names a number of parties as respondents in addition to Respondent, at the administrative hearing in this case, Petitioner explained his

understanding that, in this proceeding, he was only claiming against Respondent.

At the administrative hearing held on December 8, 2009, Petitioner presented the testimony of six witnesses, testified on his own behalf, and offered 48 pre-marked exhibits received into evidence as Exhibits P-1 through P-48 without objection. Respondent presented the testimony of two witnesses, read portions of the deposition of Petitioner's wife into the record, played portions of Petitioner's video deposition, and offered 33 pre-marked exhibits received into evidence as Exhibits R-2 through R-34 without objection. In addition, the parties offered four joint exhibits which were received into evidence as Exhibits A through D. The proceedings were recorded and transcribed. The hearing concluded on December 8, 2009,[1/] and the parties were given 30 days from the filing of the transcript within which to file their proposed recommended orders. The transcript of the administrative hearing was filed on January 4, 2010. Petitioner and Respondent timely filed their respective Proposed Recommended Orders on February 3, 2010, which have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Respondent is a corporate entity created by Section 1009.971, Florida Statutes,[2/] responsible for administering the

Florida College Savings Program, also known as the Florida College Investment Plan (the Plan).

2. Petitioner is an individual with a Master's degree in Business Administration from the University Georgia. Petitioner and his wife have been residents of Homosassa, Florida, since 2003.

3. In October 2003, Petitioner opened two accounts with Respondent under the Plan and directed that the funds for both accounts be 100 percent invested in the U.S. Equity Investment Option. Petitioner opened the first account with an initial investment of $50,000 for his daughter, Jordan S. Pazian, Account Number 0079456. The other account Petitioner opened was for his son, Benjamin W. Pazian, Account Number 0079484, also with an initial investment of $50,000.

4. The contract between Respondent and an account owner under the Plan is the Participation Agreement. The Participation Agreement is incorporated by reference into Florida Administrative Code Rule 19B-16.003.

5. Respondent agreed to the terms of the Participation Agreement when he signed the applications opening the two accounts. In turn, Section 1 of the Participation Agreement provides that "the Florida College Investment Plan Application (the 'Application') that I completed, signed and submitted to

the Board and the Disclosure Statement is incorporated by reference and made a part of this Participation Agreement."

6. The Disclosure Statement provided to Petitioner at the time he opened the subject accounts, explained on page 28, that the Board "will mail to the Account Owner quarterly statements indicating: Contributions to each selected Investment Option made to your Account during the period. Withdrawals from each selected Investment Option from your Account made during the period. The total value of your Account at the end of the period." In addition, the Disclosure Statement explained that the fourth-quarter, year-end account statement would provide the same information for the preceding calendar year and the investment performance for each investment option.

7. The Application forms completed by Petitioner required Petitioner, as account owner, to provide "Contact Information" to the Board as part of the Application. Petitioner listed his address as "11987 W. Timberlane Dr., Homosassa, FL 34448-7311," on both Applications.

8. On October 13, 2003, Petitioner signed both Applications and initialed the following two paragraphs contained on the final page of the Applications:

> I have read and understand the Florida College Investment Plan Disclosure Statement and the Participation Agreement, and consent to the policies, terms, and conditions of the Florida College Investment Plan, and the Participation

> Agreement. I understand that the Participation Agreement, which is incorporated into this application by reference, as it relates to enrollment in the Florida College Investment Plan, constitutes a legally binding agreement between me and the Florida Prepaid College Board. I understand that the policies, terms and conditions of the Florida College Investment Plan and Participation Agreement may be amended from time to time without prior notice, and I understand and agree that I will be subject to those amendments.
>
> I understand that enrolling in the Florida College Investment Plan and investing my funds in the investment options involves a high degree of risk, account values may fluctuate and there is no guarantee. I understand that I could lose all funds, including any earnings on those funds, deposited in the account, and investments in the Florida College Investment Plan are not deposits or obligations of, or insured or guaranteed by the State of Florida, the United States government, the Florida Prepaid College Board, the Federal Deposit Insurance Corporation, or any other governmental agency or financial institution.

9. Intuition Systems, Inc., is Respondent's contract provider of certain administrative services with respect to the Florida College Investment Plan, including processing forms from account owners that direct changes in the selection of investment options within the Plan.

10. On January 10, 2007, Petitioner telephoned Respondent. The call was answered by Intuition Systems, Inc. During the telephone call, Petitioner asked for a personal identification number (PIN) for online access to his two accounts. Petitioner also asked about the process for changing the direction of his investments in the Plan.

11. In his testimony, Petitioner recalled, or thought he recalled, receiving Respondent's facsimile number during the telephone call on January 10, 2007. That testimony, however, is not credited because, although Intuition Systems, Inc.'s business records reflect telephone contact from Petitioner on January 10, 2007, and that Petitioner ordered a PIN number and asked about changing his investments, there is no indication in the records that Petitioner asked for or received a facsimile number. Petitioner more likely received Respondent's facsimile number from either its appearance on the first page of quarterly statements of the accounts mailed to Petitioner's Florida residence, or from Petitioner's wife, who received the mail and opened the quarterly statements.

12. Petitioner testified that he did not personally receive his PIN, but conceded that it was probably sent to his home. Based upon Petitioner's testimony and Intuition Systems, Inc.'s records reflecting Petitioner's request for a PIN and that a PIN number was mailed to Petitioner's residence in Homosassa, it is found that, within five-to-seven days from January 10, 2007, until Petitioner closed the accounts in 2009, Petitioner had access to a PIN number for online, computer access to investment information to the Plan accounts he opened for his children.

13. Around the same time period (middle January 2007), Petitioner also received either online access to, or one or more copies in the mail of, a document entitled “Florida College Investment Plan Allocation Transfer Form” (Allocation Transfer Forms). Based upon Intuition System, Inc.’s records reflecting the January 10, 2007, telephone call, it is found that Petitioner was “advised of web-for-transfer form,” and the most likely scenario is that Petitioner printed Allocation Transfer Forms from Respondent’s website and provided copies of the forms to his wife.

14. Petitioner left Florida in late January 2007 to live, temporarily, in California to work as president and chief executive officer for Prismedical Corporation. While in California, Petitioner stayed in a large motor home near his work in Napa, California, from approximately late January 2007 until returning to Florida in the fall of 2008. During that time period, Petitioner made several trips back to his residence in Homosassa, Florida.

15. Petitioner is unaware of the exact dates he was in Florida during 2007 and 2008, but estimates he was in Florida on approximately the following dates: January 1 through January 28, 2007, May 31 through June 2, 2007, August 25 through September 3, 2007, September 28, 2007, October 7, 2007, November 21 through November 24,2007, December 23 through

December 31, 2007, January 1 through January 2, 2008, February 9 through February 17, 2008, and November 10, 2008, through the end of 2008.

16. During the time period that Petitioner was staying in California, Petitioner never updated his address on file with Respondent from Homosassa, Florida, as set forth in his Applications for the accounts, and there is no evidence that Petitioner otherwise advised Respondent or its administrator of an address change.

17. Prior to February 4, 2007, Respondent's wife, Barbara Pazian, filled out the top portion of two Allocation Transfer Forms for Petitioner's two Plan accounts: one for the investment account for their daughter, Jordan, and the other for the investment account for their son, Benjamin. The information Ms. Pazian wrote into the top portion of each of the two Allocation Transfer Forms included Stephen E. Pazian's name as the account owner, a daytime telephone number in Homosassa, Florida, the names of their two children as beneficiaries of the accounts, and the respective account numbers for the two accounts.

18. Petitioner obtained the two partially completed Allocation Transfer Forms from his wife either before or after he left for California.

19. On Sunday, February 4, 2007, while in his motor home in California, Respondent completed and signed the bottom portion of each of the two Allocation Transfer Forms. The Allocation Transfer Form Petitioner completed for the account in Jordan Pazian's name authorized Respondent to move 100 percent of the equity balance to the fixed income investment option. The Allocation Transfer Form Petitioner filled out for the account in Benjamin Pazian's name authorized Respondent to move 50 percent of the equity balance into the fixed income option.

20. The top pre-printed paragraph of the Allocation Transfer Forms provides:

> Return this form to:
>
> Florida College Investment Plan
> P.O. Box 6587 Tallahassee, Florida 32314-6567

21. Respondent's facsimile number is not provided on the pre-printed Allocation Transfer Forms.

22. Instead of mailing the Allocation Transfer Forms, Petitioner prepared a facsimile transmittal cover sheet on his computer and dated it February 5, 2007. The facsimile cover sheet was on Prismedical Corporation letterhead and was signed by Petitioner with a message to the Florida College Investment Plan Finance Department from Petitioner stating, "Please find attached two Investment Fund transfer requests for you to process. Please call me should there be any questions."

23. On Monday, February 5, 2007, Petitioner instructed Jennifer Teixeira, an office assistant at Prismedical Corporation in California, to transmit by facsimile the two completed Allocation Transfer Forms and the facsimile cover sheet Petitioner had prepared to Respondent at fax number 850-309-1766.

24. As shown by telephone records, Ms. Teixeira completed the task of transmitting by facsimile the three pages as instructed on February 5, 2007, at 9:28 a.m.

25. While there was evidence adduced at the final hearing that Respondent has acted upon investment instructions received by fax, it is clear that the instructions on the Allocation Transfer Forms require mailing and that it was Petitioner who decided to transmit the forms by facsimile instead of mail.

26. Petitioner received a printout from the transmitting facsimile machine in California indicating that the three pages faxed to Respondent on February 5, 2007, were received by Respondent. Other than review of that printout, Petitioner did not try to confirm with Respondent that his investment instructions were received and Petitioner did not communicate with Respondent regarding his faxed instructions for over one year and nine months.

27. The instructions contained in the two Allocation Transfer Forms transmitted to Respondent in that February 5,

2007, facsimile were never acted upon by Respondent or its administrator, Intuition Systems, Inc.

28. There are a number of possible explanations for Respondent's failure to follow the investment instructions on the two Allocation Transfer Forms. First, while telephone records show that three pages were transmitted, there could have been a problem with Respondent's fax machine which prevented actual receipt of the transmission.

29. It is also possible that the transmission was received, but the pages were never printed because of error or because of a confidentiality code on the sending machine in California.

30. Another plausible explanation is that the pages were received and printed out, but then lost or misplaced.

31. A possible, but less likely,[3/] scenario is that the three pages were transmitted upside down so that only blank pages were transmitted.

32. The person in charge of document management operations for Intuition Systems, Inc., went through all of the images of incoming correspondence, including faxes, received from February 2, 2007 through February 8, 2007, by Intuition Systems, Inc., on behalf of Respondent, and could not find the fax transmitted by Petitioner to Respondent on February 5, 2007.

33. Regardless of the actual reason, it is clear that the investment instructions contained in the Allocation Transfer Forms for Petitioner's accounts transmitted to Respondent on February 5, 2007, were never followed.

34. The quarterly account statements for both of Petitioner's accounts with Respondent for the four quarters of 2007 and first three quarters of 2008 were mailed to Petitioner's residence in Homosassa, Florida, no later than the following dates:

| Quarter | Mailing Dates |
|---|---|
| 1) First Quarter 2007 | May 1, 2007; |
| 2) Second Quarter 2007 | August 9, 2007; |
| 3) Third Quarter 2007 | November 7, 2007; |
| 4) Fourth Quarter 2007 | February 13, 2008; |
| 5) First Quarter 2008 | May 12, 2008; |
| 6) Second Quarter 2008 | July 31, 2008; |
| 7) Third Quarter 2008 | November 6, 2008. |

35. Petitioner's wife, Ms. Barbara Pazian, received all of the above-listed quarterly statements and filed them away at the Pazian's home in Homosassa.

36. The first paragraph of each quarterly statement mailed to Petitioner's residence specifically states:

> This statement summarizes your account activity for the previous quarter. Please review the information carefully. Changes

> to the account, *including a change of address*, must be in writing and be signed by the account owner. You may mark your changes directly on this statement, sign the statement and mail it to the address below or FAX to (850) 309-1766. Additional information about your account is available at www.florida529plans.com, Florida College Investment Plan, "Access My Account." If you have any questions, please call 1-800-552-GRAD (4723). (Emphasis added).

37. On May 8, 2007, Petitioner's wife called the Florida College Prepaid Board, through Intuition Systems, Inc., to inquire whether she could use some of the investment funds to purchase a new car for their daughter, Jordan, and was told that she could not. Ms. Pazian wrote a handwritten note stating "car not" on the original first 2007 quarterly report for Jordan's account.

38. If Petitioner had reviewed any of the above-listed quarterly statements or accessed the accounts on a computer using his PIN number, Petitioner would have seen that the instructions contained in the Allocation Transfer Forms he signed, dated February 4, 2007, had not been followed. The account summaries on the first page of each of the quarterly statements listed above clearly indicate that the only funded investment option in both accounts throughout the time period from 2007 through October 31, 2008, was the "U.S. Equity Investment Option."

39. According to Petitioner, however, he never bothered to review the quarterly statements or access the accounts by computer from January 2007 through October 2008. During the same time period, however, Petitioners regularly reviewed the performance of his non-Plan investments via online computer access.

40. At the final hearing, Petitioner explained that he did not follow his investments in the Plan because it was his understanding that he could only make investment changes in his Plan accounts once a year. Petitioner further testified that since his Plan investments could not be actively traded like his other investment accounts, he considered them "sort of set-it-and-forget-it accounts."

41. According to Petitioner, the first time he noticed that his investment instructions had not been followed and that all of his investments under the Plan were still invested in the U.S. Equity Investment Option was when he returned home in November 2008 and decided to review the quarterly statements that his wife had filed away.

42. In contrast, according to the testimony of Respondent's General Counsel Thomas McSwain, during a telephone conference with Petitioner in February 2009, Petitioner told him that, while Petitioner was in California, Ms. Pazian kept him informed of his Plan account balances each quarter from the

quarterly statements. Contemporaneous notes taken by Mr. McSwain are consistent with his recollection of that conversation with Petitioner in February 2009.

43. Based upon Mr. McSwain's testimony and corroborating notes, as well as Petitioner's self-reported practice of regularly following his other investments, the undersigned credits Mr. McSwain's testimony over that of Petitioner and finds that during the period of time that Petitioner was in California, Petitioner's wife kept him informed of the account balances of his Plan investments when she received quarterly statements for those accounts mailed to Petitioner's home in Homosassa, Florida.

44. While Petitioner might not have actually reviewed his quarterly statements for his Plan investments from 2007 through the third quarter of 2008, the fact that he was kept apprised of the account balances on a quarterly basis demonstrates that Petitioner had sufficient information to know that his investment instructions faxed to Respondent on February 5, 2007, had not been followed. If Petitioner's investment instructions had been followed, the quarterly statements would have revealed different account balances between his two Plan accounts. Instead, the account balances reflected on the quarterly statements for both accounts remained exactly the same throughout the time that Petitioner was in California.

45. A change of the investment option for Petitioner's Plan account for his daughter Jordan from a 100 percent allocation in the U.S. Equity Investment Option on February 5, 2007 to a 100 percent allocation in the Fixed Income Investment Option would have resulted as follows:

**Account Number: 0079456**
**Beneficiary: Jordan S. Pazian**

| | [Actual] U.S.EQUITY OPTION | | | [Adjusted] FIXED INCOME OPTION | | |
|---|---|---|---|---|---|---|
| ***Date*** | ***Shares*** | ***Price*** | ***Balance***[47] | ***Shares*** | ***Price*** | ***Balance***[57] |
| 2/5/2007 | 4,363.7302 | $15.83 | $69,083.82 | 6,083.7900 | $11.36 | $69,083.82 |
| 3/31/2007 | 4,363.7302 | $15.67 | $68,360.89 | 6,083.7900 | $11.50 | $69,989.40 |
| 6/30/2007 | 4,363.7302 | $16.51 | $72,059.87 | 6,083.7900 | $11.43 | $69,533.18 |
| 9/30/2007 | 4,363.7302 | $16.63 | $72,579.53 | 6,083.7900 | $11.76 | $71,530.65 |
| 12/31/2007 | 4,363.7302 | $16.11 | $70,292.97 | 6,083.7900 | $12.11 | $73,660.76 |
| 3/31/2008 | 4,363.7302 | $14.93 | $65,129.07 | 6,083.7900 | $12.29 | $74,761.00 |
| 6/30/2008 | 4,363.7302 | $14.59 | $63,647.65 | 6,083.7900 | $12.15 | $73,947.41 |
| 9/30/2008 | 4,363.7302 | $13.65 | $59,559.57 | 6,083.7900 | $12.12 | $73,737.68 |
| 12/31/2008 | 4,363.7302 | $10.76 | $46,946.07 | 6,083.7900 | $12.67 | $77,094.04 |
| 3/31/2009 | 4,363.7302 | $9.56 | $41,714.74 | 6,083.7900 | $12.78 | $77,756.03 |
| 4/30/2009 | 4,363.7302 | $10.58 | $46,188.98 | 6,083.7900 | $12.85 | $78,203.31 |
| 6/30/2009 | 4,363.7302 | $11.12 | $48,515.40 | 6,083.7900 | $13.03 | $79,290.58 |
| 7/10/2009 | 4,363.7302 | $10.62 | $46,342.01 | 6,083.7900 | $13.20 | $80,327.87 |

46. A change of the investment option for Petitioner's Plan account for his son Benjamin from a 100 percent allocation in the U.S. Equity Investment Option on February 5, 2007, to a 50 percent allocation in the Fixed Income Investment Option and a 50 percent allocation in the U.S. Equity Investment Option would have resulted as follows:

**Account Number: 0079484**
**Beneficiary: Benjamin W. Pazian**

| | [Actual] | | [Adjusted] | | | | | |
|---|---|---|---|---|---|---|---|---|
| | U.S.EQUITY OPTION | | 50% U.S. EQUITY OPTION + 50% FIXED | | | | | |
| INCOME OPTION | | | | | | | | |
| ***Date*** | ***Shares*** | ***Balance***[6/] *(prices same as above)* | ***U.S. Equity Shares*** | ***Balance*** *(prices same as above)* | **+** | ***Fixed Income Shares*** | ***Balance***[7/] *(prices same as above)* | ***Total*** |
| 2/5/2007 | 4,363.7302 | $69,083.82 | 2,181.8650 | $34,541.91 | + | 3,041.8950 | $34,541.91 | $69,083.82 |
| 3/31/2007 | 4,363.7302 | $68,360.89 | 2,181.8650 | $34,180.44 | + | 3,041.8950 | $34,994.70 | $69,175.15 |
| 6/30/2007 | 4,363.7302 | $72,059.87 | 2,181.8650 | $36,029.93 | + | 3,041.8950 | $34,766.59 | $70,796.52 |
| 9/30/2007 | 4,363.7302 | $72,579.53 | 2,181.8650 | $36,289.76 | + | 3,041.8950 | $35,765.33 | $72,055.09 |
| 12/31/2007 | 4,363.7302 | $70,292.97 | 2,181.8650 | $35,146.48 | + | 3,041.8950 | $36,830.38 | $71,976.86 |
| 3/31/2008 | 4,363.7302 | $65,129.07 | 2,181.8650 | $32,564.53 | + | 3,041.8950 | $37,380.50 | $69,945.03 |
| 6/30/2008 | 4,363.7302 | $63,647.65 | 2,181.8650 | $31,823.83 | + | 3,041.8950 | $36,973.70 | $68,797.53 |
| 9/30/2008 | 4,363.7302 | $59,559.57 | 2,181.8650 | $29,779.78 | + | 3,041.8950 | $36,868.84 | $66,648.63 |
| 12/31/2008 | 4,363.7302 | $46,946.07 | 2,181.8650 | $23,473.03 | + | 3,041.8950 | $38,547.02 | $62,020.05 |
| 3/31/2009 | 4,363.7302 | $41,714.74 | 2,181.8650 | $20,857.37 | + | 3,041.8950 | $38,879.02 | $59,735.38 |
| 4/30/2009 | 4,363.7302 | $46,188.98 | 2,181.8650 | $23,094.49 | + | 3,041.8950 | $39,101.65 | $62,196.14 |
| 6/30/2009 | 4,363.7302 | $48,515.40 | 2,181.8650 | $24,257.70 | + | 3,041.8950 | $39,645.29 | $63,902.99 |
| 7/10/2009 | 4,363.7302 | $46,342.01 | 2,181.8650 | $23,171.00 | + | 3,041.8950 | $40,163.93 | $63,334.94 |

47. Although Petitioner had sufficient information since at least May 2007, to know that his February 2007 investment instructions had not been followed, the first time that Petitioner contacted Respondent regarding those investment instructions was on November 13, 2008, when Petitioner made a telephone call to Respondent through Intuition Systems, Inc.

48. During that telephone call, Petitioner complained that he sent the Allocation Transfer Forms in February 2007, but that the accounts were never updated. The Intuition Systems, Inc., representative who took the call advised Petitioner that the forms were never received and therefore, the Plan accounts could not be updated. Petitioner then spoke to a supervisor at

Intuition Systems, Inc., who advised Petitioner that there was no record that the Allocation Transfer Forms had been received.

49. In January 2009, Petitioner sent a letter addressed to Mr. Hoepner, Chairman of the Florida College Prepaid Board, which was received by Respondent on January 12, 2009. In that letter, Petitioner requested that his investments be retroactively changed to reflect the investments and earnings as they would have been for each of the accounts had his investment instructions dated February 5, 2007, been followed.

50. Petitioner's January 2009 letter also stated, in reference to his investment instructions transmitted February 5, 2007, "The cover sheet for this request as well as the request forms and other relevant documents are attached for your reference." The attached fax cover sheet was in color, was dated February 5, 2007, and signed by Petitioner, but had no initials of Ms. Teixeira, who had sent the original fax cover sheet on February 5, 2007. Later, during his November 19, 2009, deposition, Petitioner admitted that he had printed out that fax cover sheet in color from his computer and signed it in late 2008 or early 2009, but backdated it to February 5, 2007.

51. Later, Petitioner produced the original fax cover sheet which he had sent on February 5, 2007, which had the initials of Ms. Teixeira on the front. According to Petitioner,

his wife found the original. Petitioner's wife, however, did not remember finding it.

52. Regardless of who found the original, the fact that Petitioner was able to print out, back-date, and sign a copy that appears to be the original fax cover sheet demonstrates the mischief that could be achieved had Petitioner desired to misrepresent the facts regarding his February 5, 2007, facsimile. The undersigned finds that Petitioner did not intend to misrepresent the facts regarding that facsimile, but rather finds that Petitioner was overenthusiastic in his attempt to demonstrate to Respondent what had happened on February 5, 2007, through use of identical copies of the original fax cover resident in his computer. This incident, however, was considered in assessing the credibility of Petitioner's other assertions in this case.

53. As indicated above, Petitioner spoke to Mr. McSwain on the telephone in February 2009. During that call, Petitioner told Mr. McSwain that he did not want the February 5, 2007, Allocation Transfer Forms implemented until the matter was resolved.

54. Respondent's executive director sent Petitioner a letter dated April 27, 2009, informing Petitioner that Respondent was unable to approve his request, and offering Petitioner another opportunity to implement changes to his Plan

accounts and including forms for that purpose. Petitioner never submitted the forms and no allocation changes took place.

55. After filing the Amended Petition for Formal Hearing dated June 1, 2009, initiating this case, Petitioner's Plan accounts were closed and rolled over into another 529 college investment plan at his request on or about July 10, 2009. On that date, the balance of each account was $46,292.01, after deduction of a $50.00 rollover fee for each account.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. See §§ 120.569, 120.57(1), Fla. Stat.; see also § 120.52 (definition of "agency" under the Administrative Procedure Act includes departmental units described in § 20.04, Fla. Stat.); § 20.04, Fla. Stat. (includes State Board of Administration); § 1009.971, Fla. Stat. (Florida Prepaid College Board administratively housed within the State Board of Administration).

57. While contract disputes between private parties and a state agency are traditionally settled in circuit courts, see, for example, State Road Dept. v. Cone Brothers Contracting, 207 So. 2d 489 (Fla. 1st DCA 1979), in this case, as in Dept. of Heath & Rehabilitative Servs. v. E.D.S. Federal Corp., 631 So. 2d 353 (Fla. 1st DCA 1994), the applicable statute expressly

gives the contracting state agency the power to contract, and the contractual agreement between the parties contains a clause subjecting contract disputes to administrative resolution under Chapter 120, Florida Statutes. Id. at 355; § 1009.971(4)(d), Fla. Stat. (Florida Prepaid College Board has power to "[m]ake and execute contracts and other necessary instruments"); Participation Agreement, ¶ 16.

58. Specifically, paragraph 16 of the Participation Agreement provides:

> Any controversy or claim arising out of or relating to this Participation Agreement, or the breech, termination or validity thereof, shall be resolved in an administrative proceeding conducted pursuant to the provisions of Chapter 120, Florida Statutes.

59. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dept. of Health & Rehabilitative Services, 348 So. 2d 349(Fla. 1st DCA 1977). And, as is usual for the standard of proof applicable to questions of fact in administrative hearings, the standard of proof which Petitioner must meet in this case is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.; Haines v. Dept. of Children & Families, 983 So. 2d 602 (Fla. 5th DCA 2008). Therefore, the issue is whether Petitioner established by a preponderance of the evidence that Respondent is liable to Petitioner under the Participation Agreement for

losses incurred in his investments as a result if Respondent's failure to follow Petitioner's investments instructions.[8/]

60. A review of the terms of the Participation Agreement, in light of the facts and law, demonstrates that Petitioner failed to meet his burden in this case.

61. The Participation Agreement requires Respondent to provide Petitioner with quarterly reports for his Plan accounts to the address provided by Petitioner. The Participation Agreement also requires Petitioner to provide his address to Respondent. The initial paragraph of each quarterly statement sent to Petitioner instructed Petitioner to "review the information carefully" and provided the manner in which Petitioner could update his address. Respondent fulfilled its contractual obligation to send quarterly reports to Respondent's reported address. Petitioner never updated his address.

62. It is also evident that the Participation Agreement requires Respondent to carry out investment instructions received from Petitioner. While Petitioner established by a preponderance of the evidence that he transmitted investment instructions by facsimile to Respondent on February 5, 2007, the evidence was insufficient to show that Respondent is liable to Petitioner under the Participation Agreement for its failure to carry out those instructions.

63. As noted above, there are a number of possible scenarios that could explain why Petitioner's investment instructions were not carried out, including loss or misplacement of the instructions, equipment failure, a confidentiality code on the sending machine, or even error in the manner the pages were transmitted. While Petitioner proved that he transmitted the instructions, he failed in his burden to show that they were received by Respondent.

64. Whatever the reason that Respondent did not act on the instructions, it is evident that Petitioner was the one who decided to send the Allocation Transfer Forms to Respondent by facsimile, a manner contrary to the instructions on the form, and without any follow-up for over a year and a half. Therefore, Petitioner bore the risk that the transmittal would not be received by Respondent. As noted by the United States Sixth Circuit Court of Appeals in Clow Water Systems Co. v. National Labor Relations Bd., 92 F.3d 441 (6th Cir. (1996), in finding that a facsimile transmission did not provide timely notice:

> Communication by facsimile has simplified and streamlined the way in which business is conducted in this country. This technological advance provides a valuable service and benefit, and our holding should not be taken as an indication that parties should not use facsimiles to conduct their affairs. Certain attributes of facsimiles warrant precautionary measures to ensure

> that the intended recipient actually receives the transmission, however. Unlike mail or courier deliveries, which generally arrive predictably at certain times during the work day, facsimiles can arrive, unsolicited and unnoticed, at any time, day or night.

92 F.3d at 446. In that case, the Sixth Circuit found that, even though a union's unconditional offer to return to work generally does not require actual notice on the part of an employer when delivered by conventional means, such offer required actual notice and therefore was not effective when sent by facsimile to the employer because that mode of communication was different than normally used between the parties. The court explained:

> In the end, however, the key to this case is not the fact that a facsimile transmission was used. The key to this case is, simply, fair notice. If the parties expressly or by conduct, agree to a method of communication, and use the agreed-upon method, we will not require actual knowledge of the communication on the part of the recipient. If the parties did not agree to the method of communication utilized, and if there is no pattern of conduct reflecting acquiescence to the method of communication utilized, we will not impute notice of the communication to the recipient. This is the situation presented here. [Appellee] departed from the course of conduct he had established with [appellant] in several ways. His use of an unannounced facsimile, without additional communication by the methods regularly utilized by him in the past, does not allow us reasonably to infer that the offer to return to work was effectively communicated to [appellant].

> Under the circumstances, therefore, the union's unconditional offer to return to work was not timely communicated prior to [appellant's] hiring of permanent replacements.

Id. In Clow Water Systems Co., quoted supra, as in the facts of this case, the parties had previously communicated by telephone and U.S. mail, not facsimile. And, as was the case for the appellee in Clow Water Systems Co., supra, there is no evidence that Petitioner attempted "additional communication by the methods regularly utilized by him in the past," Id., to verify that Respondent had received the facsimile. In fact, there is no evidence that Petitioner made any effort whatsoever for over 20 months to confirm whether Respondent received his investment instructions.

65. The conclusion that Petitioner bore the risk of assuring that Respondent received his faxed instructions is also consistent with the risk allocation for facsimile filings found in Florida Administrative Code Rule 28-106.104(7)(b), which provides:

> Any party who elects to file any document by electronic mail or facsimile transmission shall be responsible for any delay, disruption, or interruption of the signals and accepts the full risk that the document may not be properly filed with the clerk as a result.

66. Moreover, long before any investment losses were incurred by Petitioner as a result of his investment

instructions not being carried out, Petitioner was provided with information sufficient to notify him that Respondent had not acted upon his instructions. Throughout the time Petitioner was in California, he had actual notice of the quarter-end balances of his Plan accounts through his wife, had the ability to obtain online access to his accounts, and had numerous quarterly statements mailed to his home address, each of which indicated that no investment allocation changes to his Plan accounts had been made.

67. Under analogous circumstances, both Florida and federal law would impute knowledge to Petitioner of the information contained in the quarterly account statements, thus insulating Respondent from liability for Petitioner's investment losses. For example, in affirming summary judgment denying recovery under a fire insurance policy, the Florida Third District Court of Appeal in Foerch v. Atlantic Mutual Fire Insurance Co., 303 So. 2d 345 (Fla. 3d DCA 1974), found that an insurance company had given proper notice of policy cancellation by mailing a copy of the notice to the policy holder's Florida address. In that case, the policy holder had moved to New Jersey more than three months before without arranging to have her mail forwarded or notifying the insurance company of her new address.

68. Similarly, in affirming summary judgment against the plaintiff in a securities fraud case on statute of limitations grounds, the United States Eighth Circuit Court of Appeals found that confirmation slips and monthly account statements sent to the plaintiff "were sufficient to require the initiation of an inquiry," and therefore the two-year statute of limitations period was triggered when the plaintiff received those statements. See Koke v. Stifel, Nicolas & Co., 620 F.2d 1340, 1343 (8th Cir. 1980).[9/] Although the plaintiff did not understand the statements, the Eighth Circuit found, "[e]ven if [the plaintiff] did not understand them, she was not free to ignore them, and that is what she did; she did not examine them carefully and did not ask anyone to explain them." Id. at 1344. The Eighth Circuit further found:

> [The plaintiff] simply did not exercise the care and diligence reasonable under the circumstances to understand what was happening to her account. Had she examined the confirmation slips and compared them with each other, she would have discovered that bonds were being sold at substantial losses . . . . The same kind of simple comparison and examination of the monthly account statements would have revealed the same information.

Id.

69. As observed in The Jordan (Bermuda) Investment Co. v. Hunter Green Investments, LLC, No. 00 Civ 9214, slip op. at 56-57 (S.D.N.Y. Oct. 3, 2007), in dismissing an action against

investment firms because the loss could have been avoided by review of account statements:

> In this case, plaintiff's injury was proximately caused by the Trust's own failure to review its monthly account statements, not by any purported misrepresentation made by the any defendants. Indeed, by Plaintiff's own admission, had the Trust read the statements, it immediately would have redeemed its Class J shares and avoided the loss it suffered on its investments.

70. Likewise, if Petitioner had bothered to review his quarterly statements, or taken the time to consider the implication of identical account balances in his Plan accounts while he was in California, he could have averted any loss he now attributes to the fact that his investment instructions were not followed.

71. In sum, it is concluded that Petitioner failed to prove by a preponderance of the evidence that Respondent is liable to Petitioner under the Participation Agreement for failure to follow Petitioner's investments instructions regarding funds invested in the Florida Prepaid College Plan.

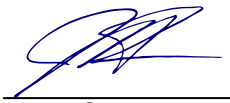
## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Prepaid College Board enter a Final Order finding that the Florida Prepaid College Board is

not liable to Petitioner, Stephen E. Pazian, under the Participation Agreement and dismissing Petitioner's Amended Petition with prejudice.

DONE AND ENTERED this 9th day of March, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of March, 2010.

## ENDNOTES

[1/] After the hearing, another short hearing was held on January 25, 2010, during which, by agreement of the parties, redacted copies of certain exhibits were exchanged for original exhibits to protect from disclosure social security numbers or other confidential information in the original exhibits. The original exhibits which were replaced include exhibits "R-7," "R-9," "R-10," "R-16" through "R-18," "R-25," "R-31," "R-32," "R-34," and exhibit "C." In addition, one or more pages from exhibits "P-12," "P-16," "P-24," "P-29," "P-30," and "P-44" were replaced with redacted copies.

[2/] Unless otherwise indicated, all references to the Florida Statutes are to the 2007 version.

[3/] The scenario of faxing blank pages is less likely because the fax time of one minute twenty-four seconds reflected on the telephone records for the subject transmission corresponds to

the time required to fax three typed pages as opposed to blank pages, which would require less transmission time.

[4/] The balances reflected herein are not derived by merely multiplying the number of shares times the share price as one might expect. Rather, the balances are the result of stipulated facts that apparently take into consideration other factors.

[5/] See endnote 3, supra.

[6/] See endnote 3, supra.

[7/] See endnote 3, supra.

[8/] In addition to investment losses under the Participation Agreement, Petitioner's Amended Petition also seeks punitive damages, interest, costs and attorney fees. Those remedies, however, are beyond the scope of the Participation Agreement, and not otherwise cognizable in this proceeding. See, e.g., Avallone v. Board of County Commissioners of Citrus County, 493 So. 2.d 1002, 1004 (Fla. 1986)(§ 768.28(5), Fla. Stat., precludes punitive damages and interest before judgment against state agency). While Section 57.111, Florida Statutes, authorizes costs and attorney fees to be awarded to prevailing small business parties in administrative cases, the statute does not apply to individuals. See Daniels v. Fla. Dept. of Health, 898 So. 2d 61 (Fla. 2005); see also § 1009.981(7), Fla. Stat. ("All amounts obligated to be paid from the savings fund are limited to amounts available for such obligation").

[9/] Florida courts have looked to federal decisions for guidance in cases involving Florida securities law. See, e.g., Ward v. Atlantic Security Bank, 777 So. 2d 1144, 1147 (Fla. 3d DCA 2001). While there are no actual securities law issues presented in this proceeding, securities cases relating to the effect of receipt of periodic statements or owner account information are analogous and were useful in this analysis.

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## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.