

JAN 14 1994

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

DEPARTMENT OF INSURANCE

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In the Matter of )  
)  
PHILIP GORDON POSEY, aka )  
PHILIP GORDON, dba )  
INSURANCE RENEWAL SERVICES; )  
ARIZONA INSURANCE LOCATORS; )  
AIL INSURANCE, INC.; and )  
CHRIS LYNN WAKEFIELD, )  
)  
Respondents. )  
\_\_\_\_\_ )

Docket No. 8122

**PRELIMINARY FINDINGS OF  
FACT AND CONCLUSIONS OF  
LAW AND REQUEST FOR  
BRIEFS**

On October 26 and 27, 1993, a hearing was held in the above-captioned matter. The Arizona Department of Insurance ("Department") was represented by Kathryn Leonard, Assistant Attorney General. Respondents Posey and Wakefield were each present in propria persona. Respondent AIL Insurance, Inc. was not represented at the hearing and presented no defense.

Based upon the testimony, arguments and other evidence presented at the hearing, we make the following preliminary findings of fact and conclusions of law and request for briefs prior to entry of a final order:

DISCUSSION

The allegations against Respondent Wakefield were added by an Amended Notice filed on September 24, 1993. On October 14, 1993 Respondent Wakefield requested a continuance of the hearing to allow him time to prepare. Based on the Department's statement that the allegations in the original Notice, specifically Counts I through IV did not pertain to

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1 Respondent Wakefield,<sup>1</sup> the request to continue the  
2 hearing was denied.

3 The transactions which are the basis for the  
4 allegations in Counts I through IV occurred prior to the  
5 incorporation of Respondent AIL Insurance, Inc.

6 For the reasons stated above, all findings of fact,  
7 conclusions of law and any resulting order pertaining to Counts  
8 I through IV are solely against Respondent Posey. Only the  
9 allegations contained in Count V of the Amended Notice pertain  
10 to all Respondents listed herein.

11 FINDINGS OF FACT

12 1. Notice of this hearing was mailed to all  
13 Respondents at their last addresses of record.

14 2. Respondent Philip Gordon Posey ("Respondent  
15 Posey"), is currently licensed as a property and casualty agent  
16 and broker and a life and disability agent by the State of  
17 Arizona (License No. 714407). Respondent Posey does business  
18 under the assumed names Philip Gordon, Insurance Renewal  
19 Services and Arizona Insurance Locators.

20 3. Respondent AIL Insurance, Inc. ("Respondent AIL")  
21 is presently licensed as a property and casualty agent and a  
22 life and disability agent by the State of Arizona (License No.  
23 14410).

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27 <sup>1</sup>The statement was contained in "Objection to Motion  
28 to Continue" filed on October 15, 1993.

1           4.     Respondent Chris Lynn Wakefield ("Wakefield") is  
2 currently licensed as a property and casualty insurance agent  
3 and broker by the State of Arizona (License No. 810184).

4           5.     Respondents Posey and Wakefield were the original  
5 stockholders and officers of Respondent AIL when it was  
6 incorporated on February 26, 1993. Subsequently, in or about  
7 September, 1993 Respondent Wakefield resigned as an officer of  
8 AIL and gifted his stock to Respondent Posey.

9                           Count I

10           6.     On or about October 7, 1992, Gina Briles  
11 ("Briles") contacted Respondent Posey dba Arizona Insurance  
12 Locators' office to cancel the automobile insurance policies she  
13 had purchased there underwritten by Century National Insurance  
14 Company ("Century National") and Victoria Insurance. Briles'  
15 policy underwritten by Century National was financed by Emerald  
16 Finance Company ("Emerald").

17           7.     On or about October 29, 1992, Emerald mailed a  
18 refund check #50043, in the amount of \$269.40 made payable to  
19 Regina Briles and to Respondent Posey dba Arizona Insurance  
20 Locators.

21           8.     On or about January 13, 1993 as a result of not  
22 receiving her refund for the Century National policy, and as a  
23 result of Respondent Posey's office's nonresponsivness to her  
24 inquires, Briles filed a complaint with the Arizona Department  
25 of Insurance.

26           9.     On February 19, 1993 Respondent Posey issued  
27 Briles her premium refund check in the amount of \$269.40.  
28 Respondent Posey mailed Briles her refund check approximately

1 110 days or four months after Posey received the money from  
2 Emerald.

3 10. Respondent Posey's testified that he was forced  
4 to cut back in office staff during the fall of 1992 because of a  
5 business slow down and that he eventually sold his book of  
6 business to Discount Insurance Group, Inc. on February 15,  
7 1993. Respondent Posey did not contest the fact that Briles  
8 experienced a long delay in the return of her premium.

9 11. Based on the evidence presented, we find that  
10 Respondent Posey took an excessive amount of time to refund  
11 Brile's premium and was nonresponsive to Briles' inquiries.

12 Count II

13 12. On or about October 18, 1992, Catherine Ludwig  
14 ("Ludwig") purchased an automobile insurance policy from  
15 Respondent Posey dba Arizona Insurance Locators underwritten by  
16 Sutter Insurance Company ("Sutter"). Ludwig completed an  
17 application and remitted a premium payment in the amount of  
18 \$168.00.

19 13. Approximately 3 days later, on or about October  
20 21, 1992, Ludwig cancelled her policy.

21 14. During the period from December, 1992 through  
22 March, 1993, Ludwig made numerous attempts to contact Respondent  
23 Posey's office regarding her refund, but was never able to speak  
24 to an agent.

25 15. On or about March 25, 1993, Ludwig filed a  
26 complaint with the Department of Insurance.

27 16. In May 1993, over six months after Ludwig's  
28 cancellation of the policy, Respondent received Ludwig's refund

1 in the amount of \$168.00 from Discount Insurance Group, Inc.  
2 (the agency which had purchased Respondent Posey's book of  
3 business).

4 17. Respondent Posey admitted that he should have  
5 refunded Ludwig's money as soon as Ludwig's original check  
6 cleared the bank. Posey did not forward Ludwig's application to  
7 Sutter because Ludwig had informed Posey that Ludwig wanted to  
8 cancel the policy approximately three days after Ludwig  
9 completed the application. Respondent Posey therefore treated  
10 Ludwig's application as if coverage was never bound, and he saw  
11 no reason to forward the cancelled application to Sutter at that  
12 point. Respondent Posey's broker agreement with Sutter requires  
13 Posey to forward the applications and premiums to Sutter within  
14 72 hours or three days of Posey's receipt of the application.

15 18. Respondent Posey further testified that Ludwig's  
16 file had been lost, that his office had experienced cut backs in  
17 staff and that he eventually sold his business (see Finding of  
18 Fact No. 10); and that all of this resulted in the delay of  
19 Ludwig's repayment.

20 19. Based on the evidence presented, we find that  
21 Respondent Posey took an excessive amount of time to refund  
22 Ludwig's premium and that Respondent Posey was nonresponsive to  
23 Ludwig's inquiries.

24 Count III

25 20. On or about October 16, 1992, Rosa A. Valdez  
26 ("Valdez") purchased an automobile insurance policy from  
27 Respondent Posey dba Arizona Insurance Locators underwritten by  
28

1 Empire Fire & Marine Insurance Company ("Empire"). Valdez  
2 remitted a premium payment in the amount of \$356.00.

3 21. On or about November 19, 1992, CenCal Insurance  
4 Services ("CenCal"), the managing general agent for Empire  
5 cancelled Valdez' policy because Valdez had not been a resident  
6 of the United States for three years as required in Empire's  
7 underwriting guidelines.

8 22. On or about November 30, 1992, CenCal issued a  
9 refund check (#060588) for Valdez in the amount of \$219.30  
10 payable to Arizona Insurance Locators.

11 23. On or about January 20, 1993, Valdez filed a  
12 complaint with the Department of Insurance against Respondent  
13 Posey dba Arizona Insurance Locators for failure to return her  
14 premium.

15 24. On January 23, 1993 Valdez received her refund,  
16 approximately two months after Respondent Posey had received the  
17 refund from CenCal. The refund was for \$53.70 more than Posey  
18 had received from CenCal. Posey calculated the refund amount he  
19 owed Valdez based on Respondent Posey's reconciliation of  
20 Valdez' account.

21 25. On or about February 16, 1993, the Department  
22 sent Respondent Posey dba Arizona Insurance Locators an inquiry  
23 regarding Valdez' complaint which ordered him to respond by  
24 March 15, 1993. Although Respondent Posey claims to have  
25 responded to the Department, he was unable to supply a copy of  
26 such response. We find Respondent Posey has failed to respond  
27 as ordered.  
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1           32. On or about January 15, 1993, Respondent Posey  
2 dba Arizona Insurance Locators issued Villegas a check in the  
3 amount of \$121.43. Villegas, believing he was due a larger  
4 refund, did not cash the check. Subsequently, on or about April  
5 12, 1993, Villegas attempted to cash the check. The check was  
6 returned by the bank as account closed.

7           33. On or about February 1, 1993, Villegas filed a  
8 complaint with the Department of Insurance against Respondent  
9 Posey dba Arizona Insurance Locators for failure to return his  
10 premium down payment.

11           34. Respondent Posey testified that he had closed  
12 his business bank account when he sold his book of business to  
13 Discount Insurance Group, Inc. in February 1993. Although  
14 Respondent Posey testified he was personally unaware that the  
15 check had not cleared, his testimony was unpersuasive. When the  
16 bank account was closed, Posey would or should have known the  
17 account did not balance.

18           35. Based on the evidence presented, we find that  
19 Respondent Posey should have known that the check had not  
20 cleared and that he owed Villegas \$121.43.<sup>2</sup>

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24           <sup>2</sup>It appears from the evidence that Villegas paid fees  
25 to two separate premium finance companies and insurers because  
26 the liability coverage and comprehensive coverage were  
27 underwritten by two separate insurers and the two coverages  
28 separately financed. The Department did not allege  
misrepresentation, nor prove that Villegas is entitled to a  
refund in excess of \$121.43.



1  
2 Count V

3 36. On or about February 15, 1993, Respondent Posey  
4 sold his book of business to Discount Insurance Group, Inc.  
5 ("Discount").

6 37. Respondents Posey and Wakefield incorporated  
7 Respondent AIL in conjunction with the sale.

8 38. As terms of the sale, AIL was to share office  
9 space located at 1620 W. University, #2, Mesa, Arizona with  
10 Discount. The contract for the sale of the book of business  
11 between Respondent Posey and Discount outlined provisions for  
12 the payment to Respondent Posey for the book of business, the  
13 payment of shared overhead costs, and payment of commissions to  
14 Respondent AIL. The contract further provided that Respondent  
15 Posey and Respondent Wakefield were to submit all insurance  
16 business generated by Respondent AIL to Discount.

17 39. It is undisputed that a contractual dispute  
18 exists between Respondent AIL, Respondent Posey, and Respondent  
19 Wakefield on one side and Discount on the other.

20 40. Between August 13, 1993 and August 15, 1993,  
21 Respondent AIL received approximately 17 insurance applications  
22 and premium payments from various applicants requesting  
23 automobile insurance through Discount.

24 41. Respondent AIL forwarded the 17 applications  
25 together with a portion of the premium payments AIL received to  
26 Discount, but failed to forward to Discount the cash portion of  
27 the premium AIL had received, which amounted to \$3,237.00.

28 42. Respondent Posey admitted to failing to forward  
the \$3,237.00 in premium monies to Discount. Posey testified

1 that Discount owed AIL approximately \$26,168.73 pursuant to the  
2 terms of the buy/sell agreement for the purchase of Respondent  
3 Posey's book of business to Discount, and that Posey was keeping  
4 the premium money as an offset for monies Discount owed AIL.  
5 Respondent also testified that he (Posey) had no intention of  
6 paying the \$3,237.00 to either Discount or the appropriate  
7 insurers.

8 43. Discount from its own funds paid the correct  
9 premiums to the insurers. Discount through its owner Mr. Vander  
10 Molen testified that all the premium funds were routinely given  
11 to Discount by Respondent AIL on a daily basis.

12 44. Respondent Posey testified that he had no  
13 responsibility to the insureds to make sure their premium money  
14 was sent to the insurer. He testified that he wrote the  
15 policies in the name of Discount.

16 45. Respondent Wakefield testified that he was aware  
17 of Respondent Posey's actions as described in paragraphs 36  
18 through 44 and reasons for failing to forward the premium money.

#### 19 CONCLUSIONS OF LAW

20 1. The Director has jurisdiction in this matter  
21 pursuant to A.R.S. §20-142.

22 2. Notice of this hearing was proper to each  
23 Respondent pursuant to A.R.S. §§20-163 and 41-1061.

24 3. The Department has not shown by substantial  
25 evidence that Respondent Posey's conduct as alleged in Counts I  
26 through IV constitutes misappropriation, conversion, or illegal  
27 withholding of monies belonging to policyholders, insurers,  
28 beneficiaries or others in violation of A.R.S. §20-316(A)(4).

1 The Department did not present any evidence as to the length of  
2 time within which Posey was legally required to return premiums  
3 received from the premium finance companies to the  
4 policyholders. While there were substantial delays by  
5 Respondent Posey in refunding these premiums, the Department did  
6 not show that Respondent Posey misappropriated or converted  
7 these monies or that he illegally withheld them.

8 4. The Department has not shown by substantial  
9 evidence that Respondent Posey's conduct as alleged in Counts I  
10 through IV constitutes a record of dishonesty in business or  
11 financial matters pursuant to A.R.S. §20-290(B)(2) or that  
12 Respondent Posey's conduct constitutes the existence of any  
13 cause for which original issuance or any renewal of an insurance  
14 license could have been refused such that Respondents' licenses  
15 may be suspended or revoked under A.R.S. §20-316(A)(1), together  
16 with §20-290(B)(2).

17 5. The Department has shown by substantial evidence  
18 that conduct by Respondent Posey as alleged in Counts I through  
19 IV constitutes a conduct of affairs under his licenses showing  
20 him to be incompetent or a source of injury and loss to the  
21 public or any insurer, in violation of A.R.S. §20-316(A)(7). As  
22 a result of Respondent Posey's conduct, policyholders  
23 experienced significant delays in receiving premium refunds and  
24 had to make repeated requests to obtain these refunds. Further,

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1 . . . .  
2 as of the hearing date Villegas had still not received his  
3 refund.<sup>3</sup>

4           6. If Respondent AIL has a legal right to reduce the  
5 amount he would otherwise be legally obligated to forward to  
6 Discount by offsetting such amount by a sum Discount owes Posey,  
7 then Posey has not misappropriated, converted, or illegal  
8 withheld monies as set forth in A.R.S §20-316(A)(4), and Posey's  
9 acts do not constitute a conduct of affairs under a license  
10 showing the licensee to be incompetent or a source of injury and  
11 loss to the public or any insurer, in violation of A.R.S.  
12 §20-316(A)(7). However, if Respondent AIL does not have a legal  
13 right to offset as described above, then the Department has  
14 shown by substantial evidence that the conduct described in  
15 Count V by Respondents Posey and AIL constitutes  
16 misappropriation, conversion, or illegal withholding of monies  
17 belonging to policyholders, insurers, beneficiaries or others in  
18 violation of A.R.S. §§20-316(A)(4), and that Posey's acts  
19 constitute a conduct of affairs under a license showing the  
20 licensee to be incompetent or a source of injury and loss to the  
21 public or any insurer, in violation of A.R.S. §20-316(A)(7).

22           7. The Department has not shown by substantial  
23 evidence that the conduct by Respondent Wakefield as alleged in  
24 Counts V constitutes violations of A.R.S. §20-316(A)(4),  
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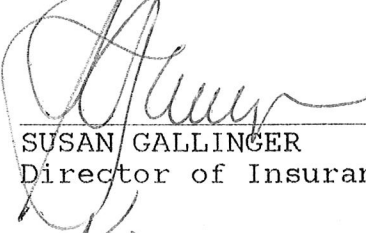
26                           <sup>3</sup>In Respondent Posey's closing brief, he states that  
27 Villegas has, since the hearing, received his refund but no  
28 proof was presented.


1 A.R.S. §20-290(B)(2), A.R.S. §20-316(A)(1) or A.R.S.  
2 §20-316(A)(7).

3 The record will be held open and the Assistant  
4 Attorney General and Respondent shall submit legal briefs  
5 regarding the right of an agent to offset debts owing from his  
6 principal by taking premium monies received from insureds. The  
7 parties shall file simultaneous briefs on or before January 28,  
8 1994 and responsive briefs shall be filed on or before February  
9 8, 1994.

10 Final findings of fact and conclusions of law and the  
11 final order will be issued after the briefs are considered.

12 DATED this 14th day of January, 1994.

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15 \_\_\_\_\_  
16 SUSAN GALLINGER  
17 Director of Insurance

18   
19 \_\_\_\_\_  
20 KATRINA ROGERS  
21 Chief Hearing Officer

22  
23 COPY of the foregoing mailed/delivered  
24 this 14th day of January, 1994, to:

25 Chris Herstam, Deputy Director  
26 Charles R. Cohen, Assistant Deputy Director  
27 Jay Rubin, Assistant Director  
28 Arnold Sniegowski, Investigator  
Maureen Catalioto, Supervisor  
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