

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 ABC 08455

N C Alcoholic Beverage Control Commission Petitioner, v. Osei Enterprises LLC T/A Osei Food And Beverage Respondent.	FINAL DECISION and ORDER
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This contested case was heard before the Honorable David F. Sutton, Administrative Law Judge, on March 8 and 9, 2016, in Charlotte, North Carolina.

APPEARANCES

FOR PETITIONER:

LoRita K. Pinnix, Assistant Counsel
North Carolina Alcoholic Beverage Control Commission
4307 Mail Service Center
Raleigh, North Carolina 27699

FOR RESPONDENT:

George B. Hyler
Hyler & Lopez, PA
38 Orange Street
Asheville NC 28801

EXHIBITS

Admitted for Petitioner:

EXHIBIT	DESCRIPTION
1	ABC Violation Check List Packet including copies of the following: -Violation Report – 06/16/2014 -Documents seized from premises of Respondent (Advertisement with contact telephone number; Location Rental Agreement – 03/19/2014; Attorney Opinion Letter – 07/30/2013; and Gift-Surplus.com receipts – 03/19/2014, 05/22/2014, 05/29/2014) -Detective Gulka handwritten notes -Report of Inspection of Licensed Establishment – 06/04/2014 -Variety of photographs

Admitted for Respondent:

EXHIBIT	DESCRIPTION
1	Citation – Defendant Amoateng – 06/04/2014
2	Citation – Defendant Mirekuua – 06/04/2014
3	Citation – Defendant Frimpong – 06/04/2014
4	Citation – Defendant Frimpong – 06/04/2014
5	Attorney George Hyler Opinion Letter – 07/30/2013
6	Copy of Gift-Surplus.com receipts – 03/19/2014, 05/22/2014, 05/29/2014)
7	Dr. Robert A. Robicheaux Curriculum Vitae
8	Gift-Surplus.com Brochure – August 2014
9	Gift-Surplus.com Brochure
10	Gift-Surplus.com Brochure – Autumn 2015
11	Nick Farley Curriculum Vitae
12	Gift-Surplus.com \$20 Gift Card
13	Gift-Surplus.com Sweepstakes Entry Voucher
14	Gift-Surplus.com Machine Printout – 03/09/2016
15	Gift-Surplus.com Machine Printout of Sweepstakes Award Voucher – 03/09/2016
16	Gift-Surplus.com Poster
17	N.C. Gen. Stat. § 14-306.4
18	Handout – Phase 1 and Phase 2 of Gift-Surplus.com Machine
19	Preliminary Injunction – <i>Sandhill Amusements, Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity, Onslow County case no. 13 CVS 3705 – November 4, 2013</i>
20	Dr. Neil Mulligan – Curriculum Vitae

WITNESSES

Called by Petitioner:

Detective Stephanie White
Officer David McCoy
Officer Edward Michael Gulka

Called by Respondent:

Dr. Robert Robicheaux
Nick Farley
Dr. Neil Mulligan

ISSUES

1. Whether the Respondent's employee knowingly possessed gambling equipment while on the licensed premises, on June 4, 2014, in violation of N.C. Gen. Stat. §18B-1005(a)(3).

STATUTES AND RULES INVOLVED

N.C. Gen. Stat. §§ 18B-1005(a)(3) and 14-306.4, et. seq.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

The undersigned has also reviewed the entire file, including but not limited to the proposals for final decision submitted by both the Petitioner and Respondent.

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 18B and 150B of the North Carolina General Statutes.

2. Pursuant to N.C. Gen. Stat. § 18B-200, et. seq., Petitioner has the authority to administer and enforce the Alcohol Beverage Control laws of the State of North Carolina as well as issue permits to various permittees which enable said permittees to sale alcohol on its licensed premises. Petitioner may also impose sanctions on its various permittees.

3. At all times relevant hereto, Osei Enterprises LLC T/A Osei Food and Beverage (hereinafter “Respondent” or “Osei”) held a permit issued by the Petitioner which allowed it to sale alcohol at its business located at 9001 Nations Ford Road in Charlotte, Mecklenburg County, North Carolina. (T. Vol. I, p.35)

4. Detective Stephanie White of the Charlotte-Mecklenburg Police Department, had worked as an undercover officer for approximately one year as of the date on which occurred the events giving rise to this contested case hearing, and had done undercover work at a number of locations with purported gambling devices for the Charlotte-Mecklenburg Police Department, Vice and Narcotics Department. (T. Vol. I, pp.8-9)

5. Officer Edward M. Gulka is employed by the City of Charlotte at the Charlotte-Mecklenburg Police Department assigned to the special investigative bureau, Alcohol Beverage Control unit. (T. Vol. I, p.35)

6. On June 4, 2014, at approximately 3:10 p.m., Detective White was instructed by Officer Gulka to enter Respondent’s business and play the games found on an electronic machine located at the licensed premises. (T. Vol. I, pp.8-9; Pet. Ex. 1)

7. After Detective White entered Osei, she went to the front of the store and told the two cashiers behind the cash register that she wanted to play one of the machines. One of the clerks told Detective White that they (one of the clerks) would have to put the money into the machine. Detective White was the only customer in the business at the time. (T. Vol. I p.11)

8. After an employee placed \$20.00 into the machine for Detective White, she started playing various games on the machine. Detective White determined which games she would play (Shamrock, Lucky Seven and other games) and how much she would bet out of the initial \$20.00 that had been placed in the machine. To play a hand of the game on the machine, Detective White would hit a button on the machine. Hitting the button caused the machine to start rolling and Detective White allowed the machine to stop rolling and reveal three rows of three separate symbols. Once she pressed the button to start play, Detective White had no control over the symbols which would appear on the machine's screen. (T. Vol. I pp. 12-14)

9. After each hand played on the machine by Detective White, the machine indicated if she won and how much she had won. (T. Vol. I pp. 15-16)

10. After the machine Detective White played indicated that she had won \$37.00, Detective White stopped playing the machine. Detective White pressed the print button on the machine she was playing to produce a ticket. (T. Vol. I p.16) Detective White then took the ticket to the cash register, one of the clerks directed the other clerk to give Detective White \$37.00. (T. Vol. I p.17; Pet. Ex. 1) Detective White left Osei after receiving the cash payout of \$37.00. (T. Vol. I p.17)

11. Based on information received from Detective White regarding the cash payout received and the game played in Osei on June 4, 2014, Officer Gulka entered Osei Food and Beverage on June 4, 2014, to conduct an inspection. (T. Vol. I, p.36)

12. Officer Gulka entered Osei and saw the electronic devices in Osei, took pictures of the four devices on the licensed premises of Osei and took the machines into custody. Officer Gulka issued two (2) citations against Mr. Osei Frimpong and citations were issued to the two clerks in the business, Mercy Amoateng and Adwoa Mirekuua. The charges were subsequently dismissed and the machines were ordered to be returned to Mr. Osei Frimpong. (T. Vol. I, p. 37-39, Pet. Ex. 1)

13. The four machines taken into custody by Officer Gulka were Gift Surplus sweepstakes kiosks. (T. Vol. I, p. 48; Pet. Ex. 1)

14. The four Gift Surplus kiosks had a statement on them indicating that the computer games were dependent on skill and dexterity. (Pet. Ex. 1)

15. The rules pertinent to the operation of the four Gift Surplus kiosks were posted on the walls of the Osei business. Also posted on the walls of the Osei business was a notice that no purchase is necessary to receive an entry for the Gift Surplus sweepstakes. In addition, the notice gave a post office box where a customer could mail and receive a Gift Surplus sweepstakes entry. (T. Vol. I, p. 54; Resp. Ex. 16)

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Onslow County, North Carolina - case no. 13 CVS 3705

16. As of June 4, 2014, a civil action in Onslow County, North Carolina, captioned as *Sandhill Amusements, Inc. and Gift Surplus, LLC, Plaintiffs, v. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity*, Onslow County case no. 13 CVS 3705 (hereinafter “*Sandhill Amusements, Inc.*”), had been filed. (Resp. Ex. 19)

17. The legality of the Gift Surplus kiosks is at issue in *Sandhill Amusements, Inc.* as well as this contested case. (Resp. Ex. 19)

18. As of June 4, 2014, the only judicial determination regarding the legality of the Gift Surplus kiosks had been made by Special Superior Court Judge Jack Jenkins. In an Order dated November 4, 2013, Judge Jenkins granted Plaintiffs a preliminary injunction and concluded as a matter of law that the “the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina Law.” (Resp. Ex. 19)

19. The terms of Judge Jenkins’ preliminary injunction were limited to Onslow County and only the parties involved in *Sandhill Amusements, Inc.* (Resp. Ex. 19)

Respondent’s Expert Witness Testimony

20. At the hearing of this contested case, Dr. Robert Robicheaux was tendered as an expert by Respondent; as to the issue of qualifying as an expert and the expert opinion provided by Dr. Robicheaux, the undersigned finds:

- a. Dr. Robicheaux is employed as a professor and Marshall scholar at the University of Alabama at Birmingham. He has been teaching Retail Marketing since 1974 and is currently a Professor of Marketing and the Marketing program chairman. Also, he teaches a MBA class on Marketing Strategy, and occasionally teaches a Principals of Marketing class. (Resp. Ex.7)
- b. Dr. Robicheaux has testified and been received as an expert witness on numerous occasions since 1978. Over the past Four (4) years he has testified in approximately Sixty (60) cases in State and Federal Court. (T. Vol. II, pp. 7-8)
- c. Dr. Robicheaux was qualified and received by the undersigned as an expert in the field of in Market Strategy and Distribution. (T. Vol. II, p. 10)

- d. Over the last Five (5) years, Dr. Robicheaux has been heavily involved in research and activities in ecommerce, with about Twenty (20) to Twenty-five (25) percent of his time being spent on developments in ecommerce. (T. Vol. II, p. 11)
- e. In early October 2015, he was contacted by Gift Surplus, LLC and met with its principals at their offices in Atlanta, Georgia to review their business model for their ecommerce business. (T. Vol. II, pp. 12-13)
- f. Dr. Robicheaux explained that a kiosk used as a sweepstakes promotion through retail stores, which is a down line distribution channel, creates awareness of the site. Sweepstakes promotions do allow people to win prizes in a legitimate sweepstakes game. (T. Vol. II, p. 19) The main advantage of the sweepstakes program is that it is one of the best ways to obtain customers. One primary advantage is that sweepstakes is a form of sales promotion. Sweepstakes has an advantage over typical historical advertising; you know exactly the cost of your program in the sweepstakes. (T. Vol. II, pp. 25-26)
- g. In his opinion, the Gift Surplus system is an innovative distributional channel, and its ecommerce marketing program is an effective business model. (T. Vol. II, p. 31)

21. The dispositive issues in this contested case are the degree of skill and dexterity required to play the games on the Gift Surplus kiosk and the status of the law in North Carolina concerning the legality of the Gift Surplus kiosks the date on which the events giving rise to this contested case hearing occurred, and as such, the undersigned has not given the testimony of Dr. Robicheaux a significant amount of weight.

22. At the hearing of this contested case, Nick Farley was tendered as an expert by Respondent; as to the issue of qualifying as an expert and the expert opinion provided by Nick Farley, the undersigned finds:

- a. Mr. Farley is the owner of Nick Farley and Associates, Incorporated doing business as Eclipse Compliance Testing. Since 1987, he has been involved in testing and evaluating electronic gaming devices and systems with the New Jersey Division of Gaming Enforcement. (Resp. Ex. 11)
- b. Since 1987, Mr. Farley has been involved in the testing and evaluation of gaming device systems for compliance and has testified in State and Federal court cases throughout the United States more than twenty (20) times. (T. Vol. II, p. 43)

- c. Mr. Farley was qualified and received by the undersigned as an expert witness in game testing and game classification to determine their compliance with jurisdictional regulations and government requirements. (T. Vol. II, p. 44)
- d. Mr. Farley had previously tested the operating system of the Gift Surplus machines, performed an analysis of the Gift Surplus system and testified before the Honorable Judge Jenkins, in Onslow County, North Carolina in the *Sandhill Amusements, Inc.* case. (T. Vol. II, p. 45)
- e. The Gift Surplus system operates as follows: When a customer walks into a business to purchase Gift Surplus gift cards or gift certificates, customers insert their money in the machine and receive a printed gift certificate for the amount they put in. If twenty dollars (\$20.00) is put into the machine, the receipt printed will be for a twenty dollar (\$20.00) gift certificate, which can be redeemed by going to the Gift-Surplus.com website. That if no gift card is purchased, there are codes on the kiosk that can be scanned to lead the customer to another website where he or she receives a code to enter in at the kiosks for sweepstakes entries. He pointed out that the Gift Surplus system advises customers of the “no purchase necessary” method of obtaining a sweepstakes entry on the screen and in the Rules. (T. Vol. II, pp. 45-46, 63)
- f. Respondent brought into the courtroom a promotional kiosk. Mr. Farley identified the kiosk as a Gift Surplus promotional sweepstakes kiosk. Mr. Farley put a twenty-dollar (\$20.00) bill in the bill acceptor of the kiosk and identified the kiosk as the same used to run the same program that he previously tested and about which he testified in 2013 in Onslow County. He then received a printout and identified the alpha-numeric gift card code and the code on the receipt, which would allow him to go to the Gift-Surplus.com website, and be entitled to purchase twenty dollars (\$20.00) of product. There is no way, under the operating system, that if money is put into the machine as he tested it, you would not obtain a printout for a twenty dollar (\$20.00) gift card voucher after inserting twenty dollars (\$20.00) into the machine. (T. Vol. II, pp. 49-56)
- g. Mr. Farley opened the game and testified that you cannot win a prize by just pushing a button, as he demonstrated. The player has to engage in skill and dexterity to line up entries, recognize the symbols, and which one of the three symbols in the middle row to move up or down. (T. Vol. II, pp. 56-59) The movement of one of the three symbols up or down is a “nudge” (T. Vol. II, p. 76)

- h. The operating system chooses the sweepstakes entries from a finite pool, which are either winning or non-winning (zero value) entries. The number of winning entries in the pool are predetermined. It is placed upon the video screen and then the user must make a skilled move to reveal any sweepstakes entry that is a winner. This random selection of sweepstakes entries is the first phase of the computer program (“Phase I”). The owner or operator of the business location (in this case Mr. Osei) could not go into the program and alter the program. (T. Vol. II, p. 65 – 67; Resp. Ex. 18)

- 23. At the hearing of this contested case, Dr. Neil Mulligan was tendered as an expert by Respondent; as to the issue of qualifying as an expert and the expert opinion provided by Dr. Neil Mulligan, the undersigned finds:
 - a. Dr. Mulligan is a professor in the Department of Psychology and Neuroscience at the University of North Carolina at Chapel Hill and the director of the PhD program in cognitive psychology. He has worked and written extensively in the field of psychology. (Resp. Ex. 20)
 - b. He has testified as an expert witness in State and Federal courts on at least three (3) occasions. (T. Vol. II, p. 88)
 - c. Dr. Mulligan was qualified and received as an expert witness in the field of cognitive psychology and human memory, which includes skill acquisition. (T. Vol. II, p. 89)
 - d. Dr. Mulligan was engaged by Gift Surplus to evaluate the skill and dexterity required to play the video game in Phase II of the program. (T. Vol. II, pp. 89-90)
 - e. In Dr. Mulligan’s opinion, the Gift Surplus games require skill and dexterity as the Gift Surplus kiosk that was displayed in the courtroom did require the use of cognitive reasoning and skill. Dexterity generally refers to tasks that require visual and physical coordination and refers to the fine motor control of the hands. The Gift Surplus kiosk do require a requisite amount of dexterity as players must use visual agility in finding and recognizing symbols, and use fine motor controls to move the symbols. Skill is measured on whether a novice player would improve with practice of playing the games and in their accuracy and speed of advancing in the game. The more an individual plays the games at the Gift Surplus kiosk, the individual will improve in their accuracy and speed of advancing in the game. (T. Vol. II, p. 90-95)

BASED upon the foregoing FINDINGS OF FACT, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the issue in this contested case pursuant to Chapter 18B and Chapter 150B of the North Carolina General Statutes.

2. The parties are properly before the Office of Administrative Hearings and there is no issue of improper procedure.

3. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

4. Pursuant to N.C. Gen. Stat. § 18B-200, et. seq., Petitioner has the authority to administer and enforce the Alcohol Beverage Control laws of the State of North Carolina as well as issue permits to various permittees which enable said permittees to sale alcohol on its licensed premises. Petitioner may also impose sanctions on its various permittees.

5. As of June 4, 2014, Respondent held a permit issued by the Petitioner which allowed it to sale alcohol at its business located at 9001 Nations Ford Road in Charlotte, Mecklenburg County, North Carolina, thereby making it subject to the enforcement of the Alcohol Beverage Control laws of the State of North Carolina as found in N.C. Gen. Stat. § 18B, et. seq.

6. N.C. Gen. Stat. § 18B-1005 (a)(3) provides, “Certain Conduct. It shall be unlawful for a permittee or his agent or employee to knowingly allow any of the following kinds of conduct to occur his licensed premises ... (3) Any violation of the controlled substances, gambling, or prostitution statutes, or any other unlawful acts.” (2016).

7. The gambling statute that is at issue in this contested case is N.C. Gen. Stat. §14-306.4, et. seq., which prohibits the use of electronic machines and devices for sweepstakes unless the outcome is dependent upon the skill or dexterity of the individual sweepstakes entrant.

8. The terms skill and dexterity are not defined in the North Carolina General Statutes. However, as *Sandhill Amusements, Inc.*, has evolved through the appellate system, a determination of what constitutes the skill and dexterity required to successfully play the games on the Gift Surplus kiosks in order for them to be legal has been defined.

9. The Defendants in *Sandhill Amusements, Inc.*, appealed Judge Jenkins’ preliminary injunction order to the North Carolina Court of Appeals. In a split decision in its opinion filed on September 5, 2014, the Court of Appeals vacated and struck those portions of the preliminary injunction which affected a substantial right of Plaintiff Sheriff Ed Brown. *Sandhill Amusements, Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his*

official capacity, 762 S.E.2d 666 (2014). Specifically, the Court of Appeals vacated that portion of the preliminary injunction wherein Judge Jenkins concluded as a matter of law that “the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina Law” and struck the word “valid” from a portion of the decretal section. *Id.* at 676.

10. Judge Ervin wrote a dissenting opinion wherein he concluded that the entirety of Judge Jenkins’ preliminary injunction affected a substantial right of Defendant Sheriff Ed Brown and the appeal concerning the validity of all of the terms of the preliminary injunction was properly before the Court of Appeals. Judge Ervin then concluded that in order to determine the validity of the preliminary injunction, the Plaintiffs likelihood of success on the merits would have to be determined. In evaluating the Plaintiffs likelihood of success, Judge Ervin made the determination that the critical issue to be resolved was whether the Gift Surplus kiosks utilized games ‘dependent on skill or dexterity’. Ultimately, Judge Ervin decided that the games in the Gift Surplus kiosks were not dependent upon skill or dexterity, that the Gift Surplus kiosks were not legal under N.C. Gen. Stat. § 14-306.4, that Plaintiff was not likely to prevail on the merits, and as such, Judge Jenkins’ preliminary injunction should be reversed. *Id.* at 683-686. (internal citations omitted)

11. In a per curium opinion filed on June 11, 2015, The North Carolina Supreme Court reversed and remanded the decision of the North Carolina Court of Appeals for reasons stated in Judge Ervin’s dissenting opinion. *Sandhill Amusements, Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Hans J. Miller, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity*, 368 N.C. 91, 773 S.E.2d 55 (2015).

12. Nick Farley identified the Gift Surplus kiosk utilized by Respondent during the presentation of its evidence as the same used to run the same program that he previously tested and about which he testified in 2013 in Onslow County in *Sandhill Amusements, Inc.* Since the same Gift Surplus kiosks were at issue in *Sandhill Amusements, Inc.* as are at issue in the contested case before the undersigned, in making a determination in the instant case whether the Gift Surplus kiosks are lawful, the undersigned adopts the analysis set forth in Judge Ervin’s dissent.

13. Judge Ervin summarized the pertinent statute as follows:

According to N.C. Gen. Stat. § 14–306.4(b), ‘it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to ... [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.’ An ‘electronic machine or device’ for purposes of N.C. Gen.Stat. § 14–306.4(b) is a piece of equipment ‘that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information on a screen or other mechanism.’ N.C. Gen. Stat. § 14–306.4(a)(1). Similarly, an ‘entertaining display’ is defined as ‘visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play,’ including ‘[a] video game based on or

involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player' and '[a]ny ... video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.' N.C. Gen. Stat. § 14–306.4(a)(3). Finally, a 'sweepstakes' is defined as 'any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance.' N.C. Gen. Stat. § 14–306.4(a)(5). As a result, given that the equipment and activities protected by the preliminary injunction clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which Plaintiffs' equipment and activities can avoid running afoul of N.C. Gen. Stat. § 14–306.4(b) is in the event that the game or simulated game involved is 'dependent on skill or dexterity.'

Sandhill Amusements, Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity, 762, S.E.2d 666, 683 (2014). (internal citations omitted)

14. The machines located on the premises of Osei and seized by Officer Gulka on June 4, 2014 require 'the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize' *Id.* at 683. (Internal Citations Omitted), and as such, the only way that the machines located on the premises of Osei and seized by Officer Gulka on June 4, 2014, would be legal under 'N.C. Gen.Stat. § 14–306.4(b) is in the event that the game or simulated game involved is 'dependent on skill or dexterity.' *Id.* at 683. (internal citations omitted)

15. When evaluating 'skill or dexterity', Judge Ervin reasoned as follows:

Although the term 'skill or dexterity' as used in N.C. Gen. Stat. § 14–306.4 has not been statutorily defined, the meaning of the term in question, as used in Article 37 of Chapter 14 of the General Statutes, a set of provisions governing gambling-related activities that includes N.C. Gen. Stat. § 14–306.4, has been addressed by this Court... Thus, in order to determine whether the trial court correctly found that Plaintiffs' equipment and activities were lawful, we must first ascertain the difference between a game of skill and a game of chance as those terms are used in our gambling statutes and then determine which side of the resulting line Plaintiffs' equipment and activities fall on. *Id.* at 685. (internal citations omitted)

A game of chance is ‘such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance.’ ‘A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory.’ In *State v. Stroupe*, a case involving the legality of the game of pool, our Supreme Court stated:

‘It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.’

‘In light of this understanding of the meaning of the relevant statutory language, this Court considered whether a video poker game was one of skill or of chance, and determined that the game in question was one of chance rather than one of skill because, at least in part, almost all of the skill-related elements in an in-person poker game, including the use of psychological factors such as bluffing to prevail over an opponent, were absent from video poker.’ In addition, we stated that:

‘although a player's knowledge of statistical probabilities can maximize his winnings in the short term, he cannot determine or influence the result since the cards are drawn at random. In the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element.’ As a result, the essential difference between a game of skill and a game of chance for purposes of our gambling statutes, including N.C. Gen. Stat. § 14–306.4, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill.

Id. at 685 (internal citations omitted).

16. In applying the case precedent to the Gift Surplus system, Judge Ervin reasoned:

As was the case with the video poker game at issue in *Collins Coin Music*, the machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits. In addition, use of the equipment at issue here

will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays. Finally, the extent to which the opportunity arises for the ‘nudging’ activity upon which the trial court's order relies in support of its determination that the equipment in question facilitated a game of ‘skill or dexterity’ appears to be purely chance-based. Although Mr. Farley persuaded the trial court that the outcome of the games facilitated by Plaintiffs' equipment and activities depended on skill or dexterity, the only basis for this assertion was the player's ability to affect the outcome by ‘nudging’ a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this ‘nudging’ process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. In light of these inherent limitations on a player's ability to win based upon a display of skill and dexterity, an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to ‘determine or influence the result over the long haul.’ As a result, for all of these reasons, I am compelled by the undisputed evidence to ‘conclude that the element of chance dominates the element of skill in the operation’ of Plaintiffs' machines. *Id.* at 685-686. (internal citations and footnotes omitted)

17. The undisputed evidence presented during the hearing of this contested case is that the Gift Surplus operating system chooses the sweepstakes entries from a finite pool, which are either winning or non-winning (zero value) entries. The number of winning entries in the pool are predetermined. Phase I of the entry is placed upon the video screen consisting of three row of symbols in a line and then the user must make a skilled move (Phase II) to reveal any sweepstakes entry that is a winner. The player has to engage in skill and dexterity to line up entries, recognize the symbols, and determine which one of the three symbols in the middle row to move up or down.

18. While there is a degree of skill and dexterity involved in playing the games on the Gift Surplus kiosk, the undersigned concludes, as did Judge Ervin “that the element of chance dominates the element of skill in the operation”. *Id.* at 686. As such, the Gift Surplus program and the Gift Surplus machines seized on June 4, 2014 by Officer Gulka from Osei are prohibited under N.C. Gen. Stat. § 14–306.4, et. seq.

19. Despite the status of the law in North Carolina at the time of the entry of the final decision in this contested case, as of June 4, 2014, the only judicial determination regarding the legality of the Gift Surplus kiosks had been set forth in Special Superior Court Judge Jack Jenkins’ preliminary injunction order filed November 4, 2013, wherein Judge Jenkins concluded as a matter of law that the Gift Surplus program and the Gift Surplus machines were legal.

20. Given the status of the law regarding the Gift Surplus program and Gift Surplus machines on June 4, 2014, the Petitioner has not proven, by a preponderance of the evidence, that on June 4, 2014, Osei's employee knowingly possessed gambling equipment while on the licensed premises in violation of N.C. Gen. Stat. §18B-1005(a)(3).

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that on June 4, 2014, Respondent's employee **DID NOT** knowingly possess gambling equipment while on the licensed premises in violation of N.C. Gen. Stat. §18B-1005(a)(3).

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 2nd day of June, 2016.

David F Sutton
Administrative Law Judge