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Auditor General DePasquale Discovers Inconsistencies, Puzzling Decisions in Business Waiver Process

Releases status update on ongoing audit of DCED

HARRISBURG – Auditor General Eugene DePasquale today released a status update on his ongoing audit of the Pennsylvania Department of Community & Economic Development’s (DCED) waiver process for businesses that appealed Gov. Wolf’s COVID-19 closure order.

“So far, we’ve found that more than 500 businesses received answers from DCED that later changed,” DePasquale said. “The waiver program appeared to be a subjective process built on shifting sands of changing guidance, which led to significant confusion among business owners.”

On March 19, Gov. Wolf ordered that businesses that were not categorized as “life-sustaining” had to close to slow the spread of COVID-19, but allowed business to request a waiver that would allow them to remain open.

Numerous business owners and legislators complained that that DCED’s waiver process lacked transparency, moved too slowly and provided inconsistent or changing answers.

Business owners typically received one of three answers from DCED: an approval of the request to remain open, a denial or a statement that a waiver was not required to remain open. So far, auditors have found:

- 171 waiver applications were changed from “No” to “Yes”
- 151 waiver applications were changed from “No” to “Not Required”
- 73 waiver applications were changed from “Yes” to “No”
- 48 waiver applications were changed from “Not Required” to “No”

“Some owners of small businesses may not have had the knowledge to use the right ‘buzzwords’ in their justification for remaining open, or realized they could ask a legislator for help to navigate the process,” DePasquale said, noting that some businesses submitted multiple waiver requests.

DePasquale also called on the Wolf Administration to provide copies of any emails and other communications it may have received from legislators and lobbyists regarding specific businesses involved in the waiver process.

“I’ve asked the Governor’s Office to provide details on its communication with legislators and lobbyists about waiver requests,” he added. “Pennsylvanians deserve answers about the role that outside influence may have played in whether businesses were treated fairly and consistently.”

DePasquale said DCED has cooperated with his audit team, but there are still outstanding issues that must be resolved before the audit can be completed and the results released to the public.

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Editor's Note: Following is a detailed update on the audit that began in May and is currently underway.

Status Update: DCED Business Closure Waiver Process

The Pennsylvania Department of the Auditor General is auditing the process used by the Department of Community and Economic Development (DCED) to grant waivers to businesses that were ordered by Gov. Tom Wolf in March 2020 to close physical locations to help slow the spread of COVID-19. This is an update on the audit that is currently underway. Formal findings and recommendations will be included in the final audit report, when complete.

Timeline

- On March 19, Gov. Tom Wolf ordered all non-life-sustaining businesses in Pennsylvania to close their physical locations.
- The administration released a list of life-sustaining business categories allowed to remain open and created a process for businesses to seek a waiver (exemption) from the closure order. Applicants could receive one of three answers:
 - an approval (“Yes”) to continue in-person operations,
 - a denial (“No”) resulted in the business receiving notification that it must remain closed, or
 - a “Not Required” notification, which allowed the business to continue in-person operations since it already met the criteria of a life-sustaining business as listed in the PA Industry Operation Guidance.
- DCED received 42,380 exemption requests during the waiver application period, which ran from March 20 to April 3, 2020.
- Auditor General Eugene DePasquale announced he would audit DCED’s waiver process on April 30, 2020.

Status of Key Focus Areas

What are we reviewing?

Since the audit began, auditors have so far submitted a dozen separate requests, with numerous follow-ups for information from DCED related to the business waiver program. We received copies of some of the information used by DCED to track and respond to 42,380 waiver applications as well as copies of the various life-sustaining business guidance issued and revised during the waiver process.

Why were decisions changed for some business waiver applications?

Our review thus far determined that at least 523 businesses in five categories included in this update received responses that changed throughout the two-week window for the business waiver application process and in the subsequent weeks. Some waiver applications were approved only to be later rescinded, while others were initially rejected and later approved. For the majority of the changes, DCED provided no explanation about the reason for the change except to say that there had been some type of further review performed. Based on the information provided by DCED, there is no way to determine why statuses were changed.

Based on our current review of information received from DCED, we know that at least 101 of the businesses that received changing responses submitted more than one waiver application, including one business that submitted eight and another that submitted 10 applications. Many of the businesses that submitted multiple applications received different responses from DCED for each application, with the latest response superseding the decision of earlier responses.

DCED reported that at least:

- **171 waiver applications were changed from “No” to “Yes”**

Particularly puzzling is why some of the “No” to “Yes” applications were ever denied in the first place, including eight applications that clearly stated that they were manufacturing or selling hand sanitizer, masks, or other PPE, or providing temporary personnel for a variety of life-saving businesses.

- **151 waiver applications were changed from “No” to “Not Required”**

Five of the 151 applications were for a single business in York County that submitted five waiver applications, each with slightly different justifications. The business received one “Not Required,” two “Yes,” and two “No” responses. This is an example of potential confusion by a business that received multiple different responses to the multiple waivers that it submitted.

- **73 waiver applications were changed from “Yes” to “No”**

Most concerning about these changes is that DCED provided no reason for the change or redacted the reason before providing us with the information. In addition, once again, multiple submissions often yielded different responses.

For example, one business in Lackawanna County had a total of three applications listed: two had responses changed from “Yes” to “No,” the third application had an initial response of “No.” The justification submitted indicated that the businesses not only sold tobacco but also food, beverage, grocery, personal and household items. The third waiver application indicated that they were applying again because they had not received a response to the first two applications. The information provided by DCED does not include the dates that the first two application notifications were made to compare to the date of the third application.

- **48 waiver applications were changed from “Not Required” to “No”**

DCED noted that one of the 48 waiver applications from Allegheny County was changed from “Not Required” to “No” based on the agency’s inability to confirm information submitted in the waiver request. For the majority of these applications, DCED noted that the change occurred based on “further review” with no additional reasons provided to support why the change was made.

We did not analyze the changes that went from “Yes” to “Not Required” (there were 44), or from “Not Required” to “Yes” (there were 36) since the change did not affect the result – the business was allowed to remain open.

Was there outside influence on DCED decisions?

That question is still being analyzed as part of the audit process. Auditors are combing through 574 pages of emails, texts and other communications sent from legislators or lobbyists to DCED staff regarding business waiver applications submitted to the system between March 20 and April 3, 2020. Communications between legislators or lobbyists and the Governor’s Office are not part of the information DCED provided. The Department of the Auditor General is requesting copies of correspondence received by Governor’s Office staff related to applications for business waivers. Once received, that information will be analyzed as part of the ongoing audit process.

What standard was used to determine if a business could remain open?

According to the National Governors Association, as of March 23, 2020, at least 37 governors had taken action to close or recommend closure of nonessential businesses and at least 24 governors had taken formal executive action to implement statewide business closures that designate essential businesses.

The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) told state and local officials to "use their own judgment" when deciding on an approach that would work best for their specific situations. Based on those facts, Gov. Wolf established a system to identify life-sustaining businesses because no formal guidelines or mandates were issued by the federal government. The Department is looking at how Pennsylvania's approach differed from the CISA guidance.

The federal CISA advisory listed 14 industry sectors as life-sustaining, whereas the PA Industry Operation Guidance (PA IOG) issued by DCED listed 21 sectors, which were then broken down into 106 subsectors and 317 industry groups.

DCED made it clear that the criteria and guidelines used for evaluating waiver requests were "developed, updated, and maintained outside of DCED." The agency managed the closure waiver process using criteria and guidelines established by the Governor's Office. According to DCED, the original guidance listing life-sustaining businesses that could remain open was based on a March 24, 2020, memo issued by the National Governors Association¹.

Were waivers granted consistently?

One of the major flaws of the rapidly deployed waiver-processing system is that it appears to be remarkably subjective. Initial review indicates a lack of consistency because decisions to grant or deny a waiver to keep a business open were being made by multiple individuals based on constantly changing guidelines and reliance on justification statements provided by businesses without being able to verify all of the information being submitted on behalf of businesses across the state.

A business that wrote a persuasive argument fared much better than a business in the exact same sector that did not have as strong of a written justification statement in its application. For example, the Department of the Auditor General was contacted about why two garden centers in Cumberland County were allowed to be open while two other similar businesses in nearby towns were not.

We researched the waiver applications of these four businesses and found the justification statements for the two initially allowed to operate included lengthy lists of reasons why they should be granted a waiver. In contrast, the two other businesses provided fewer specific reasons to justify receiving a waiver. However, on May 4, 2020, the waivers for the two garden centers initially allowed to remain open were rescinded by DCED, and they were notified they would have to close. The information provided by DCED did not explain the reason for the change.

To further illustrate the inconsistency, a food truck business in Dauphin County filed two waiver applications with the justification on one application listing it as a convenience store on wheels; the other application listing it as a food truck. While both applications describe delivering food, both applications received "No" responses from DCED. Later, DCED changed the "No" responses to "Yes" responses. We agree with the final decision, but we can find no explanation why both applications were initially rejected or what led to the change when we saw other food trucks listed in the database that initially received a "Yes" response.

Another example is from a construction company in Allegheny County that submitted 10 applications for various construction projects. The responses this company received illustrate that multiple applications

submitted by a single business for multiple projects were evaluated on an individual basis. There were inconsistencies in responses provided by DCED during the waiver process:

- 2 applications were for roof renovations at two different hospitals. One received a “Not Required” response and the other a “Yes” response. In this case, both responses resulted in work continuing, but if the rules were consistently applied, both applications would have received the same response.
- 3 applications were for renovations at a communications provider’s installations at 3 different locations. Two received “No” responses and one received a “Yes” response. There is no explanation from DCED why, when the justification for the waiver requests was the same, the responses were different.

To explore further, we reviewed the applications for waivers in five industry sectors and determined that it appears waivers were not granted consistently.

Notaries

Notaries are an example of one of the grey areas in how the DCED waiver process worked. According to DCED guidance, a notary could continue to operate if they were participating in “court functions deemed essential by a judge.” However, if after further review by DCED staff, it was determined that the notary’s business was, for example, transportation related and not court related, the waiver application’s response may have been changed to “No.”

Despite this guidance, we found five notaries that DCED either granted waivers or determined waivers were not required even though the justification statement on the application indicated their primary business was transportation related. None of the justifications claimed to be providing court-related functions.

There were 223 notary businesses from 52ⁱⁱ counties that submitted 262 applications for waivers.

- 202 notaries received “No” responses.
- 10 notaries in Blair, Clearfield, Crawford, Dauphin, Erie, Lancaster(2ⁱⁱⁱ), Philadelphia, Tioga and Warren counties received “Yes” responses that we need to follow-up with DCED on to determine if they appear reasonable.
- 5 notaries in Adams, Crawford, Jefferson, Luzerne and Tioga counties received “Not Required” responses.
- DCED records show that 3 notaries from Allegheny, Berks and York counties applied for waivers, but DCED’s data did not indicate which response they received; therefore it is unclear if these notaries could continue to operate.
- 1 business in Erie County filed two applications. It appears they received a “Not Required” response, then subsequently filed another application which received a “No” response. The “No” response would have superseded the first application’s “Not Required” response. Clearly, there was some miscommunication or confusion since we do not understand why the business would have filed a subsequent application after DCED’s “Not Required” response would have allowed them to continue operating.
- 1 business in Lancaster County filed four applications for its two business locations (listed both business addresses on two of the four applications instead of applying separately for each location). All four applications originally received a response of “Not Required”; however, one application was reviewed and later changed to a “No” response. We would have to confirm with

DCED, but we believe that “No” response would have superseded the other three “Not Required” responses.

- 1 business in Lawrence County filed two applications. It appears they received a “Yes” response, then subsequently filed another application which received a “No” response. The “No” response would have superseded the first application’s “Yes” response. We are unclear why the business filed a subsequent application after DCED issued the first “Yes” response.

Hair Salons

There were 506 salons that submitted 529 applications in 60^{iv} counties. This industry sector provides several examples of the inconsistency in responses.

- 497 salons received “No” responses.
- 4 salons in Bucks, Dauphin, Lehigh and Susquehanna counties received “Yes” responses. One received a waiver to sell hand sanitizer. The other three received waivers for hair replacement and/or salon services that we need to follow-up with DCED to determine if they appear reasonable.
- 3 salon businesses — two in Allegheny County and one in Beaver County — received “Not Required” responses:
 - One was for a salon providing lice removal service
 - Two were for salons selling essential products such as toilet paper, face masks, etc.
- For 2 salons in Bradford and Huntingdon counties, DCED’s data shows there was no information indicating if the waiver application was approved or rejected, but the file indicated these salons received a “construction notification,” which we believe was done in error since construction-type work is not related to these salon businesses.

Garden centers

Based on the information provided by DCED, from the day the waiver process opened on March 20 until April 1, 2020, there was no specific guidance related to garden centers provided to DCED and businesses. On April 1, the following language regarding garden centers was added to the FAQs used by DCED and businesses (emphasis added):

May garden centers maintain in-person operations?

Garden centers are not authorized to maintain in-person operations, and this applies to both independent garden centers, as well as those attached to large retail chain or grocery stores. This prohibition does not apply to establishments primarily engaged in retailing farm supplies, such as animal (except pet) feed.

In total, 236 garden center businesses in 49^v counties submitted 261 waiver applications. This industry sector provides an example of how the constantly changing guidance and directives created confusion and contributed to the inconsistency in responses.

As a result of the changing guidelines, 29 of the 261 applications received a correction response change, effectively shutting them down. Meanwhile, based on firsthand knowledge, media reports and tips from the public, the garden centers located inside big-box retailers remained open, attracting crowds of shoppers making in-person purchases and directly violating the DCED guidance of April 1.

Of the 236 garden center businesses that applied for waivers:

- 177 received “No” responses.
- 10 garden centers in Bucks, Clearfield, Franklin, Montgomery, Montour, Philadelphia, Somerset, Tioga, and York(2) counties received “Yes” responses. We would need to follow-up with DCED to determine if they appear reasonable.
- 46 garden centers in Adams, Allegheny(2), Berks(4), Blair(2), Bradford, Bucks(4), Butler, Centre, Chester, Columbia, Cumberland(2), Dauphin, Delaware(2), Erie, Fayette, Lackawanna(2), Lancaster, Lawrence, Lebanon, Lehigh(2), Luzerne(2), Mercer, Monroe, Montgomery(2), Northampton(2), Philadelphia, Snyder, Wayne, Westmoreland and York(2) counties received a “Not Required” response, allowing them to remain open. We would need to follow-up with DCED to determine if they appear reasonable.
- 3 garden center businesses that experienced the following illustrate the inconsistency of how the guidelines were applied to this industry:
 - A garden center business in Allegheny County filed two applications prior to receiving any response from DCED. One application’s final response was “Not Required” and the other was “No.” It appears that the “No” response was the last one received and should therefore supersede the “Not Required” response, closing the business.
 - In Lancaster County, a garden center business filed two applications prior to receiving any response from DCED. One application’s final response was “No,” and the other was “Not Required.” It appears that the “Not Required” response was the last one received and should therefore supersede the “No” response, allowing the business to remain open.
 - A garden center business in Chester County filed three applications. It appears that they received a “Yes” then subsequently filed two more applications in which both received a “No” response. These “No” responses should have superseded the first application’s “Yes” response, closing the business. It is unclear from the information provided by DCED why the business filed subsequent applications after it received a “Yes” response.

Pet groomers

There were 495 pet grooming businesses in 60^{vi} counties that submitted 577 waiver applications. DCED guidance was clear from the beginning that pet stores could remain open solely to sell pet supplies, provide veterinary services, and maintain kennel and boarding operations. Although DCED updated its guidance for pet groomers on March 24 to specifically state that pet grooming services are not essential, we found two cases where DCED issued waivers to allow pet groomers to remain open.

- 488 pet groomer businesses received “No” responses.
 - However, 10 applications initially received “Yes” responses and 10 applications initially received “Not Required” responses. These were later changed to “No” responses. Comments about the reason for the change in the response to the applications were not provided by DCED.
- 3 pet groomer businesses in Bucks, Clarion and Dauphin counties received “Yes” responses.
 - The justification for one of the waiver requests was for a pet boarding operation. We take exception with the other two application requests, which were for grooming operations. We would need to follow-up with DCED to determine if they appear reasonable.

- 4 pet groomer businesses in Adams, Chester, Lawrence and Montgomery counties received “Not Required” responses.
 - Based on information provided by DCED these waivers fit the criteria as they were for either boarding operations, selling pet food, or completing repairs that had already begun rather than provide grooming services.

Massage therapists

There were 126 massage therapist businesses in 40^{vi} counties that submitted 132 applications for waivers. From the beginning, it appears that there was confusion in this industry because the NAICS code that covers massage therapists was included in the list of life-sustaining businesses. When we asked for clarification, DCED stated that “massage therapists were never permitted to operate” because massage is an elective procedure. Despite that explanation, DCED allowed 16 massage therapists to continue operating.

- 110 massage therapists received “No” responses.
- 6 massage therapist businesses in Berks, Bucks, Erie, Lebanon, Susquehanna and Westmoreland counties received “Yes” responses that we need to follow-up with DCED to determine if they appear reasonable.
- 10 massage therapist businesses in Cumberland(2), Dauphin, Erie, Lancaster(2), Lycoming, Montgomery(2) and Westmoreland counties received “Not Required” responses, effectively allowing them to operate.

One massage therapist from Philadelphia who contacted the Department of the Auditor General directly, said that he read the governor’s guidance and understood that based on his NAICS code (*6213 - office of other health care practitioners*) he was listed as essential and included in the list of life-sustaining businesses, so he remained open without submitting a waiver request. It wasn’t until he watched a news conference on May 2, 2020, where Department of Health Secretary Rachel Levine made the statement that “massage would not be allowed during the ‘red’ or ‘yellow’ phases” that he realized he was violating the order. That was nearly a month after the April 3 deadline to apply for a waiver.

Were calls to DCED handled consistently?

Throughout the waiver process, guidance from DCED changed multiple times, affecting tens of thousands of businesses. Businesses that submitted applications received an official response — Yes, No, Not Required — in writing from DCED. At the same time, DCED staffed a call center to answer questions about the process. During the busiest week, March 30 to April 3, 2020, the call center averaged 1,690 live calls per day. DCED also indicated that between March 20 and April 6, 2020, they received 31,244 calls, as well as 4,150 emails. However, due to not having time to establish a tracking mechanism, DCED did not track the purpose of the calls, so we are unable to determine how many of the calls and emails were waiver related. Staffing at the call center ranged from five to 95 people at its peak, with many employees taking on new roles and some being trained sometimes within 24 hours.

Call center staff received a multi-page “script” covering numerous topics from updates to the life-sustaining business list and guidance for specific business types, to handling upset employees and tax-related questions. However, the script was changed at least five times between March 20 and April 2, 2020, to reflect changes in overall guidance related to the business waiver program.

Despite efforts to provide clear guidance to callers, information in the script related to food trucks illustrates how some callers may have received less than clear guidance. The food truck guidance in the script from April 2 reads as follows (emphasis added):

Food Trucks

There isn't any specific language to "food trucks" but it does state "businesses that offer carry-out, delivery, and drive-through food and beverage service may continue to do so, but eating and drinking inside restaurants and bars is temporarily prohibited." Food trucks don't offer dine-in and are specifically carry-out only, so I'd think they'd fall under that premise and be allowed to operate as long as they follow the specific health guidelines pushed out and to outside carry-out only.

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Please note that the information contained in this status update should not be interpreted as audit findings. Formal findings and recommendations will be included in the final audit report, when complete. Learn more about the Department of the Auditor General online at www.PaAuditor.gov.

ⁱ NGA memo from March 24, 2020: https://www.nga.org/wp-content/uploads/2020/03/Memorandum-on-Overview-of-State-Actions-on-Business-Closure-and-Personal-Movement-Restrictions-in-Response-to-COVID-19_3.25.pdf

ⁱⁱ 15 counties without a notary business that applied for a waiver are Bedford, Butler, Cameron, Centre, Clarion, Columbia, Forest, Greene, Lackawanna, Potter, Schuylkill, Snyder, Susquehanna, Wayne and Wyoming.

ⁱⁱⁱ Numbers after a county name indicate that more than one business from this county is involved.

^{iv} 7 counties without a hair salon business that applied for a waiver are Cameron, Forest, Greene, Mifflin, Montour, Tioga and Wyoming.

^v 18 counties without a garden center that applied for a waiver are Armstrong, Bedford, Cameron, Carbon, Crawford, Elk, Forest, Huntingdon, Indiana, Juniata, McKean, Mifflin, Perry, Potter, Sullivan, Susquehanna, Union and Venango.

^{vi} 7 counties without a pet groomer business that applied for a waiver are Cameron, Forest, Jefferson, Montour, Pike, Potter and Susquehanna.

^{vii} 27 counties without a massage therapist that applied for a waiver are Armstrong, Beaver, Blair, Bradford, Butler, Cameron, Carbon, Clinton, Elk, Forest, Fulton, Jefferson, Juniata, Monroe, Montour, Northumberland, Perry, Philadelphia, Pike, Potter, Sullivan, Tioga, Union, Venango, Warren, Wayne and Wyoming.