

Ineffective enforcement of Food and Environmental Hygiene Department against obstruction of passageways by a market stall Investigation Report

In December 2020, a member of the public (“the Complainant”) complained to this Office against the Food and Environmental Hygiene Department (“FEHD”).

The Complaint

2. Allegedly, the Complainant telephoned the Sha Tin District Environmental Hygiene Office in October 2020 and complained that a stall in a market managed by FEHD had frequently placed goods beyond the Stall’s boundaries marked by yellow lines (“the Stall”), causing serious obstruction to the passageways. As the irregularity persisted, the Complainant complained to this Office against FEHD for failing to properly handle his complaint.

Our Findings

Relevant Legislation, Tenancy Terms and Enforcement Mechanism

3. Section 9 of the Public Markets Regulation (“the Regulation”) stipulates that except with lawful authority or excuse, no person shall, in a public market, so erect any structure, or so place any article, as to cause obstruction therein.

4. FEHD is responsible for enforcing the Public Health and Municipal Services Ordinance and its subsidiary legislation (including the Regulation). FEHD may prosecute market stall tenants for violation of the Ordinance/Regulation and terminate their tenancy agreement according to established mechanism.

5. During routine patrols, FEHD staff will first give verbal warnings to a market stall tenant who occupies common passageways with goods and causes obstruction. If the tenant fails to rectify the issue, FEHD will instigate prosecution. In cases of blatant obstruction, FEHD will instigate prosecution immediately without prior warning.

6. If a market stall tenant has been convicted of violation of the Ordinance/Regulation (see **para. 4**) four times within 12 months, FEHD will consider terminating his/her tenancy agreement.

7. The tenancy agreement between FEHD and the market stall tenant stipulates that the latter shall not place any articles beyond the stall, or extend, affix or attach any articles by whatever means outside it. Even if the goods placed on common passageways do not cause any obstruction, they may still constitute a breach of the tenancy agreement and FEHD may take enforcement action accordingly.

8. According to FEHD's Warning Letters System, if a tenant breaches the tenancy agreement, FEHD will first give a verbal warning, allowing him/her four days to rectify the breach. If the irregularity persists, FEHD will issue a warning letter urging for rectification again. Non-compliance will lead to a second warning letter. FEHD will consider terminating the stall's tenancy agreement if the tenant further breaches the tenancy agreement receiving three warning letters within six months.

9. Verbal warnings or warning letters issued under the Warning Letters System are valid for six months from their dates of issue. In the interim, if a tenant breaches the tenancy agreement again, FEHD may proceed with the enforcement action commenced earlier and issue a warning letter immediately without prior verbal warning.

Response from FEHD

10. FEHD has been concerned with the problem of passageway obstruction in its markets. Apart from routine patrols and enforcement actions, FEHD also deploys its Market Task Force for surprise operations against irregularities. If a market stall tenant is found causing obstruction with goods placed on market passageways, FEHD staff will first give verbal warnings. Tenants who ignore the warnings will be prosecuted.

11. The market concerned was closed between March and September 2020 for installation of air conditioning system and other upgrade projects. After its reopening in October 2020, FEHD had not received any complaint about obstruction of passageways by tenants in that month.

12. Upon the market's reopening, FEHD advised tenants not to place goods beyond the yellow lines and cause obstruction. In the surprise operations conducted by the Market Task Force between 19 October and 1 November 2020, six prosecutions were instituted against market stalls (the Stall was not among them) for causing obstruction.

13. Between November 2020 and 21 March 2021, FEHD staff gave a total of 21

verbal warnings (with the first one given on 10 December 2020) against the Stall for placing a small quantity of goods beyond its boundaries and occupying the passageways. On 19 March 2021, the Stall was prosecuted for breaching the Regulation by causing obstruction.

Our Site Visits

14. Our officer conducted site visits to the market concerned on various days, namely 11 February (at 9:15 am), 19 February (at 3:45 pm), 27 February (at 9:50 am) and 30 April 2021 (at 4:30 pm) and found the following:

- (1) the Stall was not operating on the date of our first visit; and
- (2) during the other three visits, one of the Stall's display counters was placed obviously beyond the yellow lines, causing obstruction when the market was crowded. Moreover, a number of styrofoam boxes for displaying and offering goods for sale were placed in an adjacent passageway, occupying at least eight feet of the passageway, but no obstruction was caused to passers-by.

Our Comments

15. As can be seen in **paragraph 13**, the Stall had breached the tenancy agreement by placing goods beyond its boundaries. In this regard, FEHD had given verbal warnings and prosecuted the Stall's proprietor for breaching the Regulation by causing obstruction.

16. During our site visits on 19 February, 27 February and 30 April 2021, a display counter of the Stall was found obviously beyond the yellow lines, and the Stall occupied at least eight feet of a common passageway. Both acts were in breach of the tenancy agreement.

17. According to FEHD's records, the times and results of the patrols on the above three days are as follows:

Patrol date	Patrol time	Patrol results
19 February	10:15 am	The Stall was not found to have occupied the passageways with goods.
27 February	10:00 am and 4:10 pm	The Stall was not found to have occupied the passageways with goods.
30 April	8:40 am and 3:15 pm	The Stall had placed a small quantity of goods on the passageways, and immediately removed the goods upon verbal warning.

18. We note that FEHD’s patrol of the market on 27 February 2021 was conducted at around the same time of our site visit (see **paras. 14 and 17**). However, it is not shown in FEHD’s records that the Stall was found to have occupied the adjacent passageway that day, or enforcement action was taken by FEHD staff about it. We have reviewed the market’s CCTV footage recorded on that day. Unfortunately, as the CCTV system was mainly for monitoring the market’s entrances/exits, the Stall and the occupation of its adjacent passageway had not been captured in the footage. As such, we are unable to ascertain the Stall’s situation during FEHD’s patrol that day. Yet, we reckon that if FEHD’s market management staff had inspected the Stall at that time, they should have found the situation as observed during our site visit. We find it inexplicable that FEHD’s patrol records did not show the breach committed by the Stall.

19. As for the situation on 30 April 2021, FEHD found a small quantity of goods placed on the passageways, and the Stall promptly removed them upon verbal warning (see **para. 17**). Nevertheless, during our site visit conducted around one hour after FEHD’s patrol, i.e. 4:30 pm, we found that the Stall was still occupying the passageways with goods (see **para. 14(2)**). Besides, during three of our site visits, we found that the Stall occupied at least eight feet of a passageway with quite a lot of goods. In the circumstance, we have doubts about FEHD’s patrol records for 30 April and its response to our enquiry that during numerous patrols it had only found a small quantity of the Stall’s goods in the passageways (see **para. 13**).

20. Moreover, we also note that among the 21 verbal warnings issued by FEHD to the Stall (see **para. 13**), 15 were given after 6 March 2021, i.e. after the commencement of our full investigation into this case. Meanwhile, after issuing verbal warnings, FEHD staff found time and again that the Stall's goods still occupied the passageways, but they only repeatedly issued verbal warnings rather than any warning letter according to the Warning Letters System (see **para. 8**). Owing to the lax enforcement action, the Stall remained recalcitrant in continuing with its breach. Such flawed enforcement is a cause of disturbance.

21. As for the Complainant's allegation that he had complained to FEHD in October 2020, FEHD had no such records (see **para. 11**). In the absence of any corroborative evidence, we are unable to ascertain the actual situation and thus would not make comments on this point. However, it is indisputable that FEHD had failed to take stringent enforcement action against the Stall's unauthorised occupation of market passageways.

Conclusion

22. Based on the analysis in **paragraphs 15 to 21**, The Ombudsman considers the complaint against FEHD **substantiated**.

Recommendations

23. We recommend that FEHD:

- (1) continue to closely monitor the Stall and other stalls in the market concerned, and take enforcement actions rigorously according to the existing mechanism against unauthorised obstruction of market passageways by stalls with their goods; and
- (2) step up supervision and training of frontline market staff to ensure their strict adherence to the established enforcement mechanism whilst carrying out their duties.

Office of The Ombudsman
June 2021