A Review of the Government Intervention in Labor Relations through Guidelines

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I. Administrative rulemaking and informal administrative action

The matters concerning the rights and duties of people shall be determined by Acts enacted by the National Assembly, the representative of the people. However, since it is actually impossible to specify all of the details on a case-by-case basis by Acts, the executive branch cannot but supplement the abstractness of Acts in the process of enforcing them. Because of this need, the Constitution recognizes administrative rulemaking.[1]

Administrative rulemaking refers to the action of establishing a general or abstract rule in the form of provisions by administrative agencies, and administrative rules refer to norms established by the action. The reason why administrative rulemaking cannot be denied is that the administration is highly complex, specialized and technologized, and the deliberation of the administrative agencies is more appropriate than the deliberation of the National Assembly. Also, the need for flexible statutes to cope with the rapid changes in administrative phenomena has increased in modern countries.[2] For this reason, Acts stipulate only the outlines of the administrative functions or the stems of the purpose, and the requirements and the contents of the policies, and the details are mostly delegated to the executive authority so that the administrative agencies can regulate.[3]

Therefore, administrative rulemaking should have certain limits. If administrative rulemaking is abused arbitrarily with ignoring such limits, it will erode parliamentary legislation and threaten the foundation of the principle of separation of powers and rule of law, which are the basic principles of the Constitution. To recognize administrative rulemaking as to what extent systematically and practically, and to place it as to what limits are always concerns in terms of control for the administration.[4]

The main agents of the administrative rulemaking are the executive branches. The executive branches mean the central administrative bodies that actually enforce the policies determined by the President through deliberation of the Cabinet and other matters belonging to the executive agencies. The head of each administrative ministry, namely minister, shall be the person in charge of directing and supervising the executive departments as prescribed by the Constitution, and shall have authorities to supervise jurisdictional affairs, to issue various ministerial ordinances and to carry out other administrative tasks.[5] In addition to the authority to enact ministerial ordinances, the ministers may revise and enforce internal

1 Donghee Kim, *Administrative Law I* (22nd ed.), Parkyoung Publishing & Company, 137 (2016) (S. Kor.).
2 *Id*. at 138.
3 *Id*.. In addition, in Constitution, Articles 75 and 95 are also the bases.
4 Sunjin Kim, "Parliamentary Control of Administrative Rulemaking," *Sogang Law Review* Vol.3 No.2, Sogang Law Institute, 102 (2014) (S. Kor.).
5 Jongsup Chong, *Constitutional Law* (8th ed.), Parkyoung Publishing & Company, 1346-1347 (2013) (S. Kor.).

guidelines necessary for the enforcement of jurisdictional Acts and the interpretation standards of relevant Acts and subordinate statutes. This is the same for the Ministry of Employment and Labor (MOEL).

MOEL, as one of the central administrative ministries, enacts the enforcement regulations, namely, ministerial ordinances of each Act under the delegation of the Acts related to labor law. In addition, MOEL enacts and implements a number of regulations under various names such as 'guidelines, examples, instructions, directives, rules, bulletins, manuals and the like' (hereinafter collectively referred to as 'guidelines') for establishing criteria for internal affairs treatments, administrative supervisions, and administrative guidance. There are even hundreds of guidelines that are currently being implemented in the area of labor-management. Among the guidelines, there are administrative rules for the enforcement of Acts and subordinate statutes, but there are also many whose legal basis and legal character are not clear. It is the former, the guidelines as administrative rules, that these guidelines are enacted and enforced by the delegation of Acts and subordinate statutes. However, in the latter case, the guidelines whose legal basis and legal character are not clear, have nothing to do with the delegation. The latter case is as follows. If the Acts and subordinate statutes don't grant any authority to the Minister of Employment and Labor or public officials, then there will be no affairs to be carried out by them. Even in this case, guidelines are also created. These guidelines do not basically impose a certain duty to do or not to do something on a particular person, but they may induce him/her to act in accordance with the expectation of the administrative agencies by influencing the formation of his/her intention. This type of administration function belongs to an informal administrative action. This kind of informal administrative action is enforced to the labor and management parties especially in the name of administrative guidance. In other words, MOEL distributes these guidelines to the workplace and instructs labor and management to follow them. Besides that, MOEL provides administrative guidance to labor and management for implementation of the guidelines.

After the collapse of the industrial structure during the Japanese Colonial Period and the Korean War, South Korea's (hereafter, Korea) industrialization was pursued for economic development under the dictatorship regime from the 1960s to the 1980s. In this process, labor relations were not autonomously established, but formed by government's orientation. The oppression of labor autonomy was carried out in a way of suppressing the labor movement under the name of national reconstruction and economic development. Anyway, Korea's present economy grew amazingly through development dictatorship. Nevertheless, there seems to be an intention of the government to intervene in labor relations and to form the order of labor relations in a certain direction. However, the way to achieve such a goal has been refined in a way through administrative rulemaking such as guidelines. It is not appropriate for the government to actively engage in labor-management relations, which are basically civil relations. It seems that the role of the government has to be such as to enforce labor inspection for employers who do not comply with basic labor standards, to create jobs, to create an environment for labor-management autonomy, and to create industries. It would be interesting to examine the legal issues on the government's intervention of labor relations through guidelines in the perspective of what is the role of the state.

II. Problems with administrative action by guidelines

Among guidelines that are arbitrarily enacted without delegations by Acts and subordinate statutes, there are also so-called administrative rules, which are merely criteria for the treatment of labor administration affairs inside MOEL. These are not particularly problematic. However, many other guidelines are distributed to the labor and management parties in the name of administrative guidance, affecting the formation of intentions of labor relations parties. In particular, some of the guidelines may be contradictory to the current labor law statutes, or they may be contradictory to the Supreme Court's decisions, which are the final authoritative interpretations of labor relations laws. This can result in various problems.

For example, the "Rules for the Performance of Litigation by the Ministry of Employment and Labor,"

"Rules on the Disposal of Industrial Accident Statistics," and "Regulations on the Research Project of the Ministry of Employment and Labor" are not related to labor relations and seem to be just for the treatments of internal affairs of MOEL. Among the cases in which the effect of the guidelines was actually a problem, the Supreme Court has ruled that the the "Rules on Medical Care and Medical Treatment Benefits," one of the guidelines of MOEL, establishes merely the administrative standard of the internal affair treatments and has no binding force to the Court or ordinary people externally."[6] In addition, the Supreme Court ruled that the "Guidelines for the Protection and Management of Foreign Industrial Technical Trainees," one of the guidelines of MOEL, is also merely a set of administrative procedures within the administrative agency and has no binding force to the Court or ordinary people externally."[7] However, the "Guidelines for the Calculation of Normal Wages," "Guidelines for the Interpretation and Operation of Work Rules," and the "Manual of Affairs for Collective Labor Relations" were enacted without specific legal grounds and distributed to the labor and management in the name of administrative guidance. These have an influence on the formation of intention of labor and management parties, and leads to an impact on labor relations. This is especially true because employers rely on these guidelines to operate their businesses.

In this regard, the Constitutional Court made a decision about the aforementioned "Guidelines for the Protection and Management of Foreign Industrial Technical Trainees" unlike that of the Supreme Court. The Constitutional Court has ruled that "if administrative rules are enacted as a rule of discretionary exercise and repeatedly implemented so as to constitute administrative practice, administrative agencies shall be subject to self-binding in relationship to people to obey the principle of equality or the principle of protection of trust. In this case, the guideline becomes the exercise of public power with external binding force. It may be subject to constitutional appeal because there is possibility of infringement of basic rights."[8] This Guideline stipulated that industrial trainees are not subject to the Labor Standards Act. However, the decision ruled that even though the industrial trainee is practically working under the supervision of employer with receiving a wage, if the labor standards guaranteed by the Labor Standard Act are not applied to him/her, this is an infringement of equality rights. And the decision also ruled that to restrict the right to enjoy equal working conditions of equal value of work as defined in the Labor Standards Act and the United Nations' "International Covenant on Economic, Social and Cultural Rights," it must be only by statutes, and it is illegal because the restriction was prescribed for the first time by the administrative rules without legal grounds.

If an administrative disposition, which is disadvantageous to people, is imposed based on guidelines, the people can contest it through administrative appeal or administrative litigation. Of course, in the case of labor relations, if a disadvantageous administrative disposition is imposed on an employer or a worker by MOEL, the party can dispute it. However, when guidelines are issued for the purpose of administrative guidance, employers apply these guidelines to labor relations, which causes problems because workers or labor unions are affected by them. Since employers are directly regulated in the relationship with MOEL, it is almost impossible for employers to ignore these guidelines and run a business. Thus, if these guidelines do not have legal grounds, or if their contents are different from statutes or precedents, labor relations can be twisted. That is, labor-management autonomy is distorted. In such cases, it is impossible for employers, workers and unions as the victims to file a judicial review of the guidelines. It is because the specific administrative disposition of administrative agencies has not been given to employers, workers or unions. In other words, although administrative guidance through guidelines is often in effect compulsory, it is difficult to make an administrative appeal or administrative litigation because of informal administrative action.[9]

6 Supreme Court 1995. 9. 15. 94*Nu*12326 ruling.

7 Supreme Court 1997. 10. 10. 97*Nu*10352 ruling.

8 Constitutional Court 2007. 8. 30. 2004*Hunma*670 ruling.

9 Donghee Kim, *supra note* 1, at 210-217; Kyunsung Park, *Administrative Law* (9th ed.), Parkyoung Publishing & Company, 366-367 (2012) (S. Kor.).

In principle, although these guidelines are not legally binding, they are practically applied to the workplace, and even though there is room for labor and management parties to be suffered from damage by the infringement on their rights, adequate remedies do not exist. In particular, as a result of the labor market reform initiative suggested by the government on the ground of the tripartite agreement on September 15, 2015, in January 2016 MOEL announced the "Fair Personnel Guideline" to propose dismissal requirements for low performers and the "Guidelines for the Interpretation and Operation of Work Rules" to alleviate the difficulty of procedures to amend work rules more disadvantageous to workers on the ground of Socially Accepted Rationality. This has led to a lot of controversy over labor relations intervention through the guidelines. With the announcement of these guidelines of which legal grounds are unclear by MOEL, it is likely that these guidelines will be applied to industrial relations through employers in the name of administrative guidance. Nevertheless, the legitimacy and justification of the guidelines must be reviewed separately.

III. Scopes and limits to be included in the guidelines

1. Overview

MOEL has issued guidelines and has been conducting administrative guidance by distributing them, in relation to the enactment and revision of labor-related statutes, labor-related precedents and important labor-management relations issues. These guidelines are not to be judged uniformly, but they should be assessed in whole or in part differently according to their contents, objects or others. If the contents of the guidelines are intended to clarify the treatments of administrative agencies affairs regardless of working conditions or labor relations, it does not matter. However, if the contents of the guidelines are related to working conditions or labor relations, there may be a problem in the authority of enactment or legal basis from the viewpoint of administrative guidance.

Administrative guidance is detailed in the "Administrative Procedures Act." The Act defines the meaning of administrative guidance as "an administrative action, such as guidance, recommendation, advice by an administrative agency to encourage or discourage a particular person regarding performance of certain acts, within the scope of duties or affairs under its jurisdiction in order to realize specific administrative aims" (The Act, Articles 2, 3). In addition, the Act clearly states the limit of administrative guidance or the principle of administrative guidance by saying "(1) Administrative guidance shall be rendered only to the minimum extent required to attain its purpose and shall not be unjustly exercised against the will of the other party to such administrative guidance. (2) No administrative agency shall treat any other party to administrative guidance disadvantageously on grounds of his/her non-compliance with the administrative guidance" (The Act, Article 48).

Labor relations are also legal relations. Thus, it may be also necessary to provide guidelines sometimes for administrative guidance regarding labor relations. In such cases, if the nature of the administrative guidance is, for example, providing technical advice, knowledge or skills to a concerned person, it is not a problem even if there is no legal basis. However, if the administrative guidance has a regulatory nature that restricts certain acts, or a nature of adjustment of disputes or competitions between stakeholders, then there must be a legal basis. For example, in the former case, the Recommendation for Correction of Article 51 of the "Monopoly Regulation and Fair Trade Act" can be mentioned as an example,[10] and in the latter case, the Industrial Disputes Adjustment Procedures of Sections 2 through 4 of Chapter V of the "Trade Union

10 "Monopoly Regulation and Fair Trade Act" Article 51 (1) If a violation of this Act has occurred, the Fair Trade Commission may determine a scheme for correction and recommend that the enterpriser or enterprisers' organization concerned comply with it.
(2) Any person who has been recommended under paragraph (1), shall notify the Fair Trade Commission within ten days of receipt of the notice of recommendation for correction, as to whether or not he/she accepts the recommendation.
(3) If a person, upon receipt of a recommendation for correction under paragraph (1), accepts the recommendation, it shall be considered that an order to take corrective measures has been issued under this Act.

and Labor Relations Adjustment Act." In such cases, there are always legal grounds.

However, even if these guidelines for administrative guidance do not have direct legal binding force, they may be problematic, because if they serve as actual standards for the interpretation or application of labor-related Acts and subordinate statutes, they affect the legal status of labor and management parties. Particularly, when the guidelines are enacted, it is not workers but employers that rely on them. Therefore, their feelings will differ between the parties in its application. Needless to mention, the haptic effect is different from employers who apply working conditions and workers who receive working conditions.

The formation of working conditions and the dynamics of labor relations should be left basically to Acts, subordinate statutes, precedents and autonomy between labor and management. That is in principle, right. However, the guidelines become such a thing by which the administrative agencies instruct employers regarding working conditions that they will apply to workers without the legal grounds. Therefore, it is necessary to note that the administrative agencies may be implementing things without any authority and duty in Acts and subordinate statutes. In addition, although the guidelines are for administrative guidance and administrative guidance is intended to expect voluntary cooperation of the related parties, it should not be forgotten that even if employers apply the guidelines of MOEL by using the economically superior position, workers almost cannot do anything.

Moreover, even if MOEL has the authority to interpret Acts and subordinate statutes in the manner of administrative interpretation, it is thought that it is possible for the Ministry to interpret them, at least, in order to make unclear legal status of the related parties clearer and secure their legal stability when their legal status is unclear from their own perspective. However, when MOEL issues an administrative interpretation irrespective of an administrative disposition to the parties, or when employers ask questions for the purpose of worker management, administrative guidance is provided in the form of administrative interpretation. If the administrative interpretation meets legal grounds, it will not be a problem. However, if MOEL issues an administrative interpretation different from existing precedents, or if MOEL creates a 'positive' interpretation without authority in the absence of any precedent over the relevant statutes and forms a single stream in labor relations, this can make an extensive problem.

2. 'What can be achieved' and 'What should not be achieved' by the guidelines

MOEL can, in principle, express its opinion on the interpretation of statutes in the form of guidelines and the like, as it has the authority capable of interpretation. However, since the authoritative interpretation of administrative agencies is not the final stage of the interpretation, there are limits that can be categorized into 'what can be achieved' and 'what should not be achieved.'

First, it will be possible for administrative agencies to express examples prohibited by Acts in the language of prohibition method. For example, Article 23, Paragraph 1 of the "Labor Standards Act" stipulates in the language of the prohibition method that "an employer shall not, without justifiable cause, dismiss, lay off, suspend, or transfer a worker, reduce his/her wages, or take other punitive measures (hereinafter referred to as "unfair dismissal, etc.") against him/her." Therefore, it would be possible for MOEL to interpret or explain authoritatively about examples to be thought as unjustifiable or matters to be cautious for legal prohibition by using precedents published until now. However, since the "justifiable cause" of this provision belongs ultimately to the interpretation area of the Court, it would not be permitted for MOEL to arbitrarily interpret justifiable causes except for examples of precedents and explain as "if a worker..., he/she can be dismissed." This is because it can violate the Court's ultimate authority to interpret Acts and subordinate statutes.

However, it is thought that the examples permissible by Acts can be expressed in a permissive language. For example, Article 51 of the "Labor Standards Act" stipulates that 'an employer may extend work hours provided that...' by using a permissible language with respect to the flexible work hours system. Therefore, it is considered possible to describe and explain in the guideline that the contents of the

Act are more strictly in the way of flexible work hours system and 'the system can be carried out provided that...' within the limits allowed by the Act. In this case, the guideline serves as a guide for what should be provided in order for the system to be possible under the Act. Thus, it can be considered that there is no additional legal basis for this guideline. In this regard, the "Flexible Work Hours Introduction Manual," one kind of guidelines, can be an example. In this case, however, if there would be any part of the manual that has an effect on the labor relations without legal grounds, then there is a need for a separate judicial review on the legality of the relevant part.

In addition, in case the boundaries of judgment can be clearly divided within one subject area, when the jurisprudential interpretation is established through precedents or theory, it is possible for MOEL to accept it and describe the opposite interpretation in a guideline. For example, the Supreme Court has several times ruled that "if bonuses are paid periodically and regularly at a fixed rate, it has the nature of wages to be paid in return for work, but, if the occurrence of the reasons for payment is uncertain and temporary, the payments cannot be regarded as wages."[11] These judgments show that the boundaries of the distinction can be clearly divided within the realm of wages. On this basis, if MOEL says that 'since the payment terms of management bonuses are settled on an annual basis by collective agreement between labor and management, if the payment or the rate of payment is changed according to the production results of the year, and if it is not paid continuously or regularly regardless of production results, it is not a wage and the company is not obligated to pay it.' This interpretation is deemed to be sufficiently possible as a reverse interpretation in accordance with the established case law.

3. Need of procedural control for enactment of guidelines

In general, the government's legislative activities are subject to the Presidential Decree "Regulations on the Operation of Legal Affairs" and the Ordinance of the Prime Minister "Regulations for the Execution of Regulations on the Operation of Legal Affairs." Besides that, when, regardless of its name, an administrative agency enacts Instructions, Examples, and Notices for the enforcement of Acts and subordinate statutes or treatment of administrative affairs, it should comply with the basic principles and procedures stipulated in the Presidential Directive "Regulations on the Issuance and Management of Instructions and Examples." The Presidential Directive clarifies the basic principle as necessity, legality, appropriateness, harmony, and clarity. The Presidential Directive also asks for the administrative agency to consult with other administrative agencies such as the Ministry of Government Legislation, except for self-examination, when enacting administrative rules such as Instructions and Examples.

However, except for those administrative rules, guidelines are often enacted inside the administrative agencies neither for the enforcement of Acts and subordinate statutes, nor for the criteria for administrative affairs treatments. The problem is that the established guidelines like that often have effects on the rights and duties of people without legal basis.

Regarding the legal status of those engaged in the various job-related policies of the government, whether or not their legal status is a worker should ultimately be determined by the judgment of the Court. Nonetheless, on the spot, it is the reality that they are treated sometimes as workers or sometimes as paid volunteers through guidelines enacted arbitrarily by the related ministry. In some cases, those who were engaging in the policy and providing labor but were treated as volunteers, filed lawsuits for minimum wages by insisting their legal status as workers. However, they lost.[12]

Let us take for example the "Guide to the National Basic Livelihood Security Service" manual published annually by the Ministry of Health and Welfare. The manual is a kind of guidebook prepared

11 Supreme Court 2002.6.11. 2001*Da*16722 ruling.

12 Supreme Court 2015.12.24. 2015*Da*234350 ruling & related lower Court rulings. Even the Courts relied on the guideline of the job-related policy for the judgement of whether those who provided labor in the policy were workers or paid volunteers.

for public officials of the Ministry to refer to the implementation of the Service, covering various contents related to the Service. Since the various contents and procedures contained in the manual are actually related to the entitlement of a beneficiary, most of them are based on Act and subordinate statutes. However, in the manual, when a citizen was applying for Basic Livelihood Security Benefits, even if his/her income was below the standard and met seemingly the requirements, if he/she was presumed to have informal income, in a view of an official in charge, the guideline asked the official to impose Estimated Income to the applicant. When the Estimated Income was imposed on him/her, he/she could not be able to meet the requirements of the benefit. The 'Estimated Income' stipulated in the manual had no basis in Act and subordinate statutes, despite the fact that imposing it was a very important administrative action that influenced and determined whether or not to obtain the benefit. Therefore, in cases of failure to acquire the entitlement due to the disposition of the Estimated Income, the Court decided that the disposition of the Estimated Income was invalid due to the violation of the principle of legal reservation.[13] Since the Court ruling like this has appeared several times, the imposition of 'Estimated Income' has disappeared in the manual. This case is not an informal administrative action, because it is mediated by administrative disposition. However, it shows the side effects of the guideline in that it is an administrative disposition based on the guidelines without the legal basis. A similar situation may well occur in the guidelines in the area of labor.

Therefore, there is a need of procedures for verifying and revising the guidelines in the enactment process or even after enactment, about whether there are no legal problems in enacting the guidelines. In this process, it may be necessary for scholars, lawyers, or even researchers who have particularly critical viewpoints, to participate and reflect on their opinions.

IV. Cases and problems in the intervention of labor relations by guidelines

1. "Fair Personnel Guidelines" case

A lot of controversy arose when the government announced on September 2015 that it would create an ordinary dismissal guideline as part of the deregulation in relation to labor market restructuring. Ordinary dismissal is distinguished from disciplinary dismissal and dismissal for managerial reasons. It is not a concept of Act, but a concept of lectures. It means dismissing workers for failing to fulfill their obligation to provide labor in labor contracts.

In this regard, questions of whether MOEL has the authority to make such guidelines and whether those guidelines are legally effective have been raised. This is because since Article 23 (1) of the Labor Standard Act stipulates that an employer cannot dismiss a worker without justifiable cause, the employer has the burden of proof on justifiable cause and the Court has the authority to determine the existence of justifiable cause. The Supreme Court Ruling says that justifiable cause for a dismissal due to poor work performance or a failure to provide the contractual work means that the worker's performance is objectively too poor to maintain employment relations according to Socially Accepted Understanding. However, such situations shall be judged on a case-by-case basis.[14]

With regard to dismissal, since the criminal penalty clause for violations of the restrictions on dismissal stipulated in Article 23 of the Act was abolished in 2007, a labor inspector is no longer authorized to investigate a dismissal case. Thus, there is no reason for MOEL to be involved in judging the justification of dismissal. If the guideline for ordinary dismissal is only for explaining the Act and judicial precedents, then there is no need for it, and if the guideline is for administrative guidance for easier dismissal outside the Act and judicial precedents, it is illegal. With respect to the Ministry's pushing the enactment of

13 Seoul Administrative Court 2014.2.20. 2013*GuHap*51800 ruling.

14 Supreme Court 2005.11.25. 2005*Du*9217 ruling; Supreme Court 2007.2.9. 2006*Du*18287 ruling; Supreme Court 2009.9.24. 2009*Du*12600 ruling; Supreme Court 2012.9.27. 2012*Du*13955 ruling; Supreme Court 2014.11.13. 2014*Du*10622 ruling.

guidelines for ordinary dismissal, the labor communities have suspected that there is an intention of the government to make it easy to dismiss poor performance workers because an ordinary dismissal for poor performance is not easy under the current restraining provisions of the Act and the attitude of precedents.[15] In the case of a dismissal for managerial reasons, it is necessary to report to the Minister of Employment and Labor in order to dismiss a certain size or more ("Labor Standard Act" Article 24 (4)). Therefore, a guideline may be necessary to establish a standard for dealing with the declaration affair, but there is no such necessity in the case of ordinary dismissal.

However, in the case of the Labor Relations Commission, it may be necessary to internally set the treatment standard because it is responsible for judging the unfair dismissal relief case. Because the Labor Relations Commission's judgment corresponds to the quasi-judicial function, independence and neutrality in the handling of a judging affair are important. Especially, independence from MOEL is more important. Article 4 (1) of the "Labor Relations Commission Act" also provides a clear legal basis for the enactment of the guidelines for the judging affair, stating that "each Labor Relations Commission shall independently perform duties belonging to its authority." Therefore, if MOEL established an ordinary dismissal guideline, it was possible to criticize it as wrongful or illegal, because it might infringe the authority of the Labor Relations Commission to perform duties independently.

Anyway, after much controversy, MOEL issued guidelines on January 2016 under the name of "Fair Personnel Guidelines." It is a 191-page brochure with the subtitle 'Guidebook for Manpower Management Oriented to Job Ability and Performance.' The Guideline consists of 'manpower management centered on job ability and performance' and 'worker dismissal.' The Guideline is characterized by the division of dismissal as disciplinary dismissal, ordinary dismissal and dismissal for managerial reasons, and an explanation in detail about the just causes and dismissal procedures with many precedents published until now. In particular, it is noteworthy that many cases as a type of ordinary dismissal have been categorized and summarized in detail with respect to dismissal based on the lack of work capacity or low performance. The Guideline also points out that in order for dismissal due to lack of work ability or low performance to be justifiable, it is also necessary for employers, from the viewpoint of procedure, to provide education and training opportunities to low performance workers to improve their work capacity, and to set up redeployments to maintain their employment.[16]

Basically, the labor communities have been afraid that this Guideline will affect employers and thus the dismissal will be abused in the name of ordinary dismissal. This is because it is judged from the viewpoint of the corporation whether a worker is a low performer, and it is an employer who sets the criteria of the performance and evaluates it. In addition, since there is no joint decision system in Korea unlike Germany, it is very difficult to regulate the employer's managerial power. To the contrary, there is also a scholar who thinks that the Guideline is positive to some extent. Regarding the Guideline, he suggests as the grounds that the Guideline shows a direction for reasonable and effective manpower management from recruiting to termination of employment, presents clear procedures and judgment criteria for ordinary dismissal unclear until now, and produces important procedural requirements for justifiable dismissal, such as education and training opportunities or redeployments for job ability improvement.[17] From an employer's point of view, he/she may think that if he/she observes the Guideline, it may become more difficult to dismiss workers.

15 The labor communities have been raising questions about the government's attempts to formulate the ordinary dismissal guidelines before the government's announcement for the enactment of the guidelines on September 2015. Kiduk Kim, "Problems on the Guidelines regarding the Requirements for Ordinary Dismissal," *National Assembly Symposium on National Assembly Act amended and Ministry of Employment and Labor's Guidelines*, New Politics Alliance for Democracy Labor Department, 16-17 (2015.6.17) (S. Kor.).

16 Ministry of Employment and Labor, *Fair Personnel Guidelines*, 156-161 (2016.1) (S. Kor.).

17 John Lee, "The Significance and Function of Fair Personnel Guideline," *Quarterly Labor Law* No.255, 36-45 (Winter 2016) (Jap.).

However, there is still a question to whether MOEL needed to formulate a guidebook like this Guideline, with much effort, by categorizing and summarizing many cases on the direction of effective management of manpower, or the requirements and just causes of ordinary dismissal.

Anyway, the Guideline is not criteria for treatments of internal affairs. Thus, the Guideline neither has the nature of administrative rule, nor legal effects, and it cannot be considered in judging the justification of any concrete dismissal cases. Furthermore, the Guideline is neither administrative disposition, nor an object of administrative litigation. Since the Guideline is not an exercise of public authority, it cannot be an object of constitutional litigation. Therefore, although an employer does ordinary dismissal in accordance with the Guideline, the dismissal cannot be justified in itself. Consequently, the Courts make a judgement for the justification of the dismissal according to its own criteria.

2. "Guidelines for the interpretation and operation of work rules" case

When an employer prepares or amends the work rules, he/she has to report such preparation or amendment to the Minister of Employment and Labor ("Labor Standard Act" Article 93). In this case, a labor inspector receiving the reporting has to write on a list of the work rules, and if there are any illegal points or any violations of collective agreements, he/she has to order the employer to correct the work rules as to be legal.[18]

It is doubtful, however, whether it is appropriate for the labor inspector to order a change to the work rules, which is enough even only by being reported. This is because, if the work rules conflict with statutes or collective agreements, it is a matter for the Courts to judge ultimately. By the way, if an employer violates the procedures of enactment and amendment of work rules, he/she shall be punished ("Labor Standard Act" Articles 94, 114). Therefore, since the "Guideline for Interpretation and Operation of Work Rules" (hereinafter referred to as "Work Rules Guideline") can be used as a basis for the labor inspector to examine the employer's violation of procedures or to treat the reporting affairs of work rules, it may have the nature of the statute interpretation rule.

Although the Work Rules Guideline has the nature of the statute interpretation rule, this is so only to the extent that the labor inspector deals with those affairs. The Work Rules Guideline cannot have an influence on the legal effect of the work rules amended. The Supreme Court also states that even if the employer did not obey the duty to report, the enactment or amendment of work rules would not become invalid.[19] This is because the Courts alone judge whether the modified work rules are valid or not, regardless of the Work Rules Guideline.

An employer charged with violation of the procedures for the enactment and amendment of the work rules may contend Misunderstanding of Law on the ground of the Work Rules Guideline.[20] However, the employer's contention is not easy to be accepted in the Courts.[21] This is because the Work Rules Guideline has no legal binding force, and as the employer, he/she is in a position to fully understand such matters through consultation with legal experts, and if he/she has made serious efforts, he would be able to recognize the illegality.

The most problematic item of the Work Rules Guideline is the part explaining in detail about Socially Accepted Rationality as a basis of the justification for disadvantageous amendment of work rules. The

18 "Labor Inspector Affairs Manual" Articles 74, 75.

19 Supreme Court 2004. 2. 12. 2001*Da*63599 ruling; Supreme Court 2004. 2. 27. 2001*Da*28596 ruling.

20 "Criminal Act" Article 16 (Misunderstanding of Law) When a person commits a crime not knowing that his/her act constitutes a crime under existing Acts and subordinate statutes, he/she shall not be punishable if the misunderstanding is based on reasonable grounds.

21 Supreme Court 2008. 10. 23. 2008*Do*5526 ruling; Supreme Court 2010. 7. 15. 2008*Do*11679; Supreme Court 2009. 12. 24. 2007*Do*1915 ruling; Supreme Court 2006. 3. 24. 2005*Do*3717 ruling. Many Supreme Court Rulings did not accepted Misunderstanding of Law in the cases.

Supreme Court introduced the Socially Accepted Rationality concept for the amended work rules with violation of the legal procedures to become valid. However, the concept has never been stipulated in the Labor Standard Act. Because it is such a concept, the Supreme Court is extremely cautious about the application of Socially Accepted Rationality. Therefore, the detailed explanation about the Socially Accepted Rationality concept in the Work Rules Guideline may be understood as an implication that MOEL is working on matters outside its own authority. The precedents of the Courts just determine whether or not a specific disadvantageous amendment of work rules is against Socially Accepted Rationality without giving detailed explanations as in the Guideline. Such a detailed explanation of the Socially Accepted Rationality concept may cause employers to misunderstand the legitimate procedural requirements of disadvantageous amendment of work rules.

3. Several cases on guidelines regarding collective labor relations

It is appropriate to the original character of administrative guidance to make concrete methods for realizing industrial safety policy or employment policy and to guide labor and management to execute those methods. However, if the government intervenes in the conflicting collective labor relations with wrongful administrative guidance, it may raise conflicts and confusion. Thus, it may also cause the tripartite confrontation between labor, management and government.

For example, we can look at the guideline "Time-off Limit Manual." In the "Trade Union and Labor Relations Adjustment Act," Article 24(4) states that the trade union full-time officer may conduct affairs prescribed by this Act or other laws and affairs of maintaining and managing a trade union for the healthy development of labor-management relations without loss of wages, such as consultation or bargaining with an employer, grievance settlement, or industrial safety activities, within the maximum time-off limit. About the time-off scope, the 2010 Manual explained that industrial actions and dispatch of union members to upper groups were not related to the common interests of labor-management. Thus, they did not belong to the time-off affair. However, the amended 2013 Manual changed dispatch of union members to upper groups to be included in the time-off affair with leaving industrial actions alone. Regarding this, it would be the right interpretation to include industrial actions within the time-off affair in the point that the Act stipulates the time-off affair in a comprehensive manner. Therefore, it seems that MOEL intends to intervene in labor-management relations without authority or legal basis by limiting the scope of the time-off affair with the Manual.

In addition, the "Manual of Affairs for Collective Labor Relations" guideline book contains contents that clearly disagree with the Supreme Court precedent. Typical items are as follows. For example, the "Trade Union and Labor Relations Adjustment Act" Article 2 subparagraph 4 stipulates a reason for disqualification of the trade union "where an employer or other persons who always act in the interest of the employer is allowed to join a trade union." Regarding the interpretation about 'persons who always act in the interest of the employer,' the Supreme Court stated that in the case of secretaries, drivers, and security guards, only if the duties and responsibilities of the job conflict with the obligations and responsibilities of the trade union members, they shall be regarded as 'those who always act in the interest of the employer.'[22] Nonetheless, the Manual uniformly, without analyzing and distinguishing between cases, states that they are all those who always act in the interest of the employer.[23]

There is another example. If a trade union and an employer engaged in collective bargaining, but they enter an industrial dispute because of inconsistencies in their claims, the trade union has to file an application for mediation to the Labor Relations Commission, as a preliminary procedure, to enter an industrial action. In other words, no industrial action shall be permitted without completing adjustment

22 Supreme Court 2011.9.8. 2008*Du*13873 ruling.

23 Ministry of Employment and Labor, *Manual of Affairs for Collective Labor Relations*, 25 (2013) (S. Kor.).

procedures of mediation. In the case of labor disputes, if the Labor Relations Commission has conducted administrative guidance on the grounds of lack of collective bargaining, and the labor union has begun an industrial action (e.g., a strike), is the industrial action judged to be illegal for a procedural violation because it has not completed an adjustment procedure? In principle, the Labor Relations Commission has the authority to conduct administrative guidance without adjustment if it considers that the contents of the trade union's application for adjustment cannot be objects for adjustment.[24] Therefore, if the trade union's rushing into an industrial action after the administrative guidance of the Labor Relations Commission is considered to be without completing adjustment procedures, the side effect of restricting the right to industrial action of the trade union may arise.[25] In this regard, the Supreme Court consistently states that although the trade union applied for mediation of an industrial dispute but the Labor Relations Commission provided administrative guidance because of no sufficient negotiation, the trade union's rushing into an industrial action without additional application for mediation is considered to be legal as completing adjustment procedures.[26] Nonetheless, the Manual states that the industrial action without additional application for mediation after the Labor Relations Commission's administrative guidance because of no sufficient negotiation, is considered to be illegal as a violation of the procedural provision, Article 45 (2) of the "Trade Union and Labor Relations Adjustment Act."[27]

In April 2015, MOEL conducted administrative guidance after investigating illegal or unreasonable matters of collective agreements (over 3,000) at workplaces with more than 100 workers. It may be acceptable to conduct administrative guidance of what constitutes an apparent violation of law. Administrative guidance is based on a certain direction, but the problem is that there is no basis for legal or democratic justification to 'guide' changes to collective agreements that are not illegal. It is up to the autonomy between labor and management to decide what to negotiate in collective bargaining. The "Trade Union and Labor Relations Adjustment Act" also stipulates the minimum standard on collective bargaining and collective agreement. This is because of the respect for the autonomy between labor and management. The intervention of the government on objects that labor and management can autonomously set as collective bargaining items undermines the principle of collective agreement autonomy. Rationality as a basis on which the Ministry asks for the amendment of collective agreements, is also not an absolute test, but a relative concept.

Suppose, for example, that a clause requiring trade union consent for a company in order to dismiss a trade union member is inserted in a collective agreement because of arbitrary personnel, abuse of dismissal, and resulting cost loss to the company. Is this clause "irrational" or "ineffective"? How is it possible to verify the validity of such judgments? And, is it appropriate for MOEL to intervene in labor relations through administrative guidance with such a judgment?

The intervention of the government in collective labor relations should be particularly limited. Aforementioned "administrative guidance" means an administrative action, such as guidance, recommendation, advice by an administrative agency to encourage or discourage a particular person regarding performance of certain acts, within the scope of duties or affairs under its jurisdiction in order to realize specific administrative aims. Specific administrative aims cannot be set up unilaterally by the administrative agency. The aims should, of course, be a legitimate purpose. Such an administrative purpose of negating the fundamental principle of labor-management autonomy and reducing the autonomy cannot be justified.

24 "Enforcement Decree of the Trade Union and Labor Relations Adjustment Act" Article 24 (2); "Rules of Labor Relations Commission" Article 153.

25 Chongyul Lim, *Labour Law* (15th ed.), Parkyoung Publishing & Company, 229 (2017) (S. Kor.).

26 Supreme Court 2001. 6. 26. 2000*Do*2871 ruling; Supreme Court 2003. 4. 25. 2003*Do*1378 ruling; Supreme Court 2003. 12. 26. 2001*Do*1863 ruling; Supreme Court 2008.9.11. 2004*Do*746 ruling.

27 Ministry of Employment and Labor, supra note 23, at 255.

V. Conclusions

The so-called labor relations Acts, such as the current "Labor Standards Act" and the "Trade Union and Labor Relations Adjustment Act," do not grant the Minister of Employment and Labor any authority regarding the interpretation or validity judgment of legal requirements, or the procedures in various legal provisions. They are all prescribed by the Acts. The interpretation of the relevant statutes is also part of the authority of the Court, not that of MOEL.

Therefore, regarding the interpretation or validity judgment of the statutes, it does not seem that the affairs to be executed by the Minister of Employment and Labor and its public officials exist. In addition, many of the guidelines enacted by MOEL do not correspond to legislative rules that are typical administrative legislation, and it is difficult to comprehend them in the concept of administrative rules, which are the criteria of administrative affairs treatment within the administrative agencies. It is a logical contradiction to enact guidelines as a rule for the affair treatment, because there are no affairs to execute.

Finally, the guidelines that MOEL intends to enact belong to the category of 'informal administrative action' as 'administrative tools to induce people to act in accordance with the expectation of administrative agencies by influencing the formation of the people's intention without imposing on them certain duties or obligations to do or not to do something.' These can be understood as administrative guidance, if in a favorable light. However, it is necessary to note that the contents of the "Administrative Procedure Act" must be observed in order for them to be legal as administrative guidance. Therefore, these guidelines will not be recognized as legally binding, but the employer's applying them to the labor relations or their *de facto* binding force can become controversial. When it is necessary to clarify the ambiguity of Acts and subordinate statutes, which causes difficulty of labor relations regulation, MOEL can interpret it authoritatively. Nonetheless, the Ministry has to keep the range and limit of the interpretation. Particularly, the guidelines, which are not based on Acts and subordinate statutes, cannot bind the Court and people. If the guidelines without legal binding force actually bind the people, it causes problems that cannot be overlooked from the viewpoint of the rule of law. Not only are there concerns that the guidelines weaken the functions such as the elimination of arbitrariness, legal stability and predictability, which are the ideological foundations of the rule of law. Also, the labor and management parties who have been violated of their rights and interests due to the guidelines do not have appropriate remedies.

It should be noted, therefore, that the guidelines of MOEL may result in an increase of uncertainty as opposed to the original good intentions of resolving uncertainty in labor-related systems and practices. For example, the primary cause of the enormous social costs incurred by the controversy over the past decades on normal wages was the fact that when enacting the "Guidelines for the Calculation of Normal Wages," MOEL had previously interpreted wrongly the relevant provision of the "Enforcement Decree of the Labor Standards Act" and failed to follow the Supreme Court precedents. In this regard, it is not a simple worry that huge social costs can arise due to various guidelines issued by MOEL.

The illegal guidelines of MOEL are adding to the confusion and uncertainty of the workplace. Moreover, guidelines have no legal effect, but they have *de facto* binding force in the workplace. Therefore, they are likely to be used as evasion measures to avoid difficulties in revising Acts. Even in a specific case, a court ruling judged the case by trusting the guidelines.[28] The guidelines violating Acts or the Supreme Court precedents become consequently confirmed as legal by the Supreme Court, resulting in serious confusion in the rule of law. There is also concern that the Court will judge the workplace issues such as the legitimacy of ordinary dismissal, the legitimacy of disadvantageous amendment of work rules, and the legitimacy of the wage peak system by relying on the guidelines.

It is best if MOEL does not set guidelines beyond its own authority. However, it is not realistic that

28 Supreme Court 2013. 12. 18. 2012*Da*89399 all the Justices collegiate panel ruling explains that point very well.

MOEL does not. If so, it is necessary to think about ways to control illegal guidelines. The following methods can be considered for this. First, the Court must actively interpret the standing to sue in the direction of expansion in the appeal litigation among the administrative litigations. Second, the "Administrative Litigation Act" should be revised to constitute the appeal litigation as an objective litigation for the purpose of ensuring the legality of administration. Third, the Constitutional Court should more widely acknowledge the scope of an "exercise of public authority" as a constitutional appeal object, and the immediacy of infringement of fundamental rights as a qualification for appellant. Fourth, the "National Assembly Act" should be revised so that the National Assembly can review and control the guidelines established by the executive branch.[29] In this process, it is also necessary to consider using the basic principles prescribed in the aforementioned Presidential Directive "Regulations on the Issuance and Management of Instructions and Examples" as an examination method for guidelines and the like. This Presidential Directive is related to the administrative rules originally enacted for the enforcement of statutes or internal affairs, but it could be thought as one of the control methods to use these principles as the criteria to review the guidelines belonging to informal administrative action.

After the change from the Park Geun-hye administration to the Moon Jae-in government, it was decided to abandon the two guidelines discussed in this paper: "Fair Personnel Guidelines" and "Guidelines for the Interpretation and Operation of Work Rules".

29 Sunjin Kim, *supra note* 4 at 114.