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SEVERANCE PAY AND JEWISH LAW

BETH DIN OF AMERICA

Teacher

v.

Elementary Yeshiva Day School

*[To preserve the confidentiality of the parties,
their names have been deleted in the public version of the opinion.]*

Psak Din

Order and Judgment

July 30, 2002
21 Av, 5762

Rabbi Michael Broyde, Dayan:

This matter is being heard by a single *dayan* in accordance with the rules of the Beth Din of America¹ and with the consent of the parties.² Furthermore, this matter is being resolved without a hearing in front of the Beth Din of America, with the explicit written consent of the parties³ and in accordance with the rules of the Beth Din of America.⁴

This matter involves a dispute between plaintiff and defendant concerning the obligation of defendant yeshiva to provide severance pay to the plaintiff. Since the defendant yeshiva questioned whether it has any obligation ever to pay severance (as its employment contracts are silent regarding the obligation, and secular law does not mandate such payments) the Beth Din of America will use this as an opportunity to address the severance obligation generally.

This was an opinion written on behalf of the Beth Din of America.

I. A REVIEW OF THE OBLIGATION TO PROVIDE FOR SEVERANCE

The opening section of this opinion addresses the question of severance pay for employees of Jewish educational institutions generally. As is widely known, there is a common practice in Jewish educational institutions that when a Judaic studies faculty member or administrator is either terminated from employment or denied a regularly expected renewal, without due cause, severance pay must be provided, and this pay is at the rate of one-twelfth of one's annual salary per year of employment.⁵

This opening section is divided into five short sections. The first explores the halakhic basis for a policy of severance, and explains the origins of this practice. The second explains how Jewish law examines such a custom to determine whether it is a common custom—what is industry practice (*minhag ha-sokherim*), and how and why does it get incorporated into Jewish labor law for yeshivot? The third section compares this custom in Israel and in America. The fourth examines the exact parameters of this severance obligation, and notes its limitations. Finally, the fifth section applies the above to the case at hand.

A. The Jewish Law Basis For the Severance Obligation

The Talmud never recounts an obligation for an employer to pay severance to an employee. However, the Talmud does recount, based on an explicit biblical verse (*Deuteronomy* 15:13-14), that when an indentured Jewish servant finishes his term of service, there is a clear obligation to provide him with a parting gift of thanks for his work. This obligation (*ha'anaka*) is not merely proper but mandatory.⁶ *Sefer Me'irat Enayyim*, (*Sma*, *Hoshen Mishpat* 86:2) posits that even the obligation to provide severance pay to a servant is merely a form of mandatory charity, and cannot be considered a formal debt according to Jewish law. *Siftei Kohen* (*Shakh*, 86:3) essentially agrees with this formulation, although many halakhic authorities do not (see those quoted by *Shakh*, particularly *Mishna le-Melekh* commenting on Rambam, *Avadim* 3:12).

However, Jewish law denied the servant a parting gift when he causes his own departure, such as by running away, or buying his freedom.⁷

All of this, however, provides only the vaguest of precedent to severance pay, as severance pay is to employees and not to servants. The

connection between a parting gift for a servant and severance pay is first explicitly stated in *Sefer ha-Hinukh* (*Mitsva* 450), which states:

The obligation (to provide a parting gift to a servant) was practiced only when the Temple was extant, since these laws depend on the Jubilee year being observed. . . . However, even in the current reality a wise person should understand the implications. Whoever hires an individual who works for him for a long or even short time should pay the worker severance pay out of that which God has provided to the employer when the worker leaves his job.

Indeed, as posited by Maharam of Rothenberg, if Jewish law required payment of severance to a servant, whose voluntary servitude was sinful, certainly it is proper to pay severance to one's workers, whose employment was without sin.⁸

This notation alone, however, would not explain the practice of paying severance *as a right*, or paying 8.33% per year of employment (*hodesh le-shana*), and only to employees of Jewish institutions. Severance as an enforceable obligation can only be explained in Jewish law as a custom that has gained wide acceptance, and thus develops a force of its own. In the words of the Israeli Rabbinical court, "the custom of paying severance has support in the text of the Torah and the halakha and is thus a proper custom."⁹ However, if this had not been the self standing custom, rabbinical courts in the United States would *not* have imposed severance pay as a matter of halakha. The parameters of the obligation to pay are determined by the common commercial custom.

B. What is the Basis for Any Common Commercial Custom Being Incorporated into Halakha, Generally?

Jewish law provides that: (1) any condition that is agreed upon with respect to monetary matters is valid under Jewish law; and (2) customs established among merchants acquire validity in Jewish law, provided that the practices are not otherwise prohibited by Jewish law. These two precepts are arguably interrelated; commercial customs are sometimes said to be binding because business people implicitly agree to abide by them.

The Mishna pronounces the validity of commercial customs. It states (*Bava Metsia* 83a):

What is the rule concerning one who hires workers and orders them to arrive to work early or to stay late? In a location where the custom is

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not to come early or to stay late, the employer is not allowed to compel them to do so. . . . All such terms are governed by local custom.

The *Shulhan Arukh* makes it clear that common commercial practices override many default halakhic rules that would otherwise govern a transaction.¹⁰ Moreover, these customs are valid even if the majority of the business people establishing them are not Jewish. Rabbi Moshe Feinstein explains:

It is clear that these rules which depend on custom . . . need not be customs . . . established by Torah scholars or even by Jews. Even if these customs were established by Gentiles, if the Gentiles are a majority of the inhabitants of the city, Jewish law incorporates the custom. It is as if the parties conditioned their agreement in accordance with the custom of the city.¹¹

In addition, many authorities rule that such customs are valid under Jewish law even if they were established because the particular conduct in question was required by secular law.¹² However, it is the custom that establishes the obligation, and not the reverse.

Thus, once severance pay is established as a normal practice in a field, it has the status of common commercial custom, and is implicitly incorporated into all deals made in that field. Of course, one may explicitly chose not to pay severance, but the burden of proof to show that custom does not apply is on the one who wishes not to follow it.¹³

C. Severance Pay In Israel and In America: A Comparison

The situation in Israel and the Americas with regard to severance pay is dramatically different. General Israeli labor law, based on the custom and practice of Israeli labor courts and the pre-independence *Mishpat ha-Shalom ha-Ivri* courts,¹⁴ mandates that severance be paid at the rate of one month per year of employment for all employees in almost every field of labor.¹⁵ Therefore, in Israel severance is routinely paid and its parameters are fundamentally guided by the secular severance law and its applications.¹⁶ The custom is to follow the secular law in Israel on this matter.¹⁷

The situation in America is completely different. Secular law in all 50 states¹⁸ has no concept of mandatory severance. In the absence of a contractual provision granting severance, no payment need be made. Since outside of the field of Jewish education Jews normally and pre-

sumptively conduct themselves consistent with the secular norms, it is the common custom in our community to neither give nor receive any severance pay except when it is specifically contractually negotiated.

Such is not the common custom in Jewish educational institutions, where the custom of severance pay continues. Jewish institutions (yeshivot, synagogues and other such institutions) continue to accept the tradition of paying severance at the rate of 8.333% per year of service (*bodesh le-shana*) in cases where a Judaic studies employee is dismissed for reasons other than cause.¹⁹ Torah Umesorah's Code of Practice, "The Rights and Responsibilities of the Torah Educator," puts it simply: "Severance pay for a tenured teacher is one month's gross salary, based on the most recent scale, for each year of service in that particular school."²⁰ Similar sentiments are expressed in the published guidelines of nearly every association of Jewish educators, including those not under the auspices of the Orthodox community, such as the "Rights of the Educator" in Rabbinical Assembly guidelines.²¹ Thus, the practice of paying severance is a clearly established custom almost universally present in the Jewish educational system.²²

D. The American Severance Practice: Limitations

This custom, which is implicitly incorporated into every single employment contract for a Judaic studies teacher in the United States, appears to be limited—again by custom and usage—in five manners.

1. It only applies to teachers of Judaic studies. Although many schools have extended its scope by contract, this writer is not aware of a single case in which a secular studies teacher was awarded severance pay on the grounds of this custom alone.²³
2. It only applies to employees, and not to people who work as independent contractors, such as after-hours tutors, Shabbaton directors, and other employees of a school who seem to set their own hours.²⁴
3. The obligation to pay severance is limited to situations in which the teacher's contract is not renewed, or the teacher is dismissed, other than for cause. A teacher who resigns waives the right to severance, as does a teacher dismissed for cause. (While what is cause or fault varies based on the institution and its culture, it is clear that cause must be documented as a failing, and may not be a mere pretext for the denial of severance.)²⁵

4. Yeshivot and teachers may contract around this custom if they so wish. A school and its faculty (or any individual faculty member) may explicitly agree that their employment arrangement does not include severance.²⁶ Upon acceptance by the teacher and yeshiva, such a contract would be binding on both.²⁷ Just as severance can be waived completely, schools and communities can change the custom of the amount of severance pay.²⁸ (However, since schools are the writers of their contracts, the burden is upon the school to note the absence of severance or a diminution from 8.333%; schools cannot simply assert that silence about severance in a contract constitutes waiver of the right to receive it by teachers.)

5. There is a dispute as to whether part-time or untenured faculty are entitled to severance pay.²⁹ Since the matter is in dispute, one is hard pressed to note a common commercial custom that would be present in such cases. (See Rema, *Hoshen Mishpat* 331:1.)

Another matter that has yet to be fully addressed is the relationship between pension rights, retirement, and severance. Indeed, a number of unreported *dinei Torah* have addressed this issue; however no firm resolution has yet been accepted. Essentially, yeshivot with pension plans that are primarily funded by contributions from the yeshivot themselves have claimed that severance pay ought to be limited to situations where the teacher expects to seek another job at a different institution, and this payment is thus some form of a relocation subsidy. However, in a school with a funded pension plan, when a teacher is removed from his job in order to retire, a significant claim can be made that the school's payments into the pension plan ought to be deducted from the severance obligation. If the school's contribution exceeded 8.333% of the teacher's salary, no severance needs to be paid. Pension serves in lieu of severance in cases of retirement. (Although this argument has a great deal of merit, it is not the issue confronted in the present dispute.³⁰)

E. Summary of the Custom to Pay Severance in America

1. There is a common commercial custom that Jewish educational institutions pay severance of 8.333% per year of employment to full-time Judaic studies employees who are terminated without cause.
2. This custom may be explicitly contracted against, but in the absence of a specific contractual waiver, common commercial custom

dictates that this provision be deemed present in all agreements governed by the custom.

3. The burden of proof is on the one who does not wish to follow the custom. There is nothing wrong with deviating from this custom, so long as all the parties involved agree to such a change.

II. FINDINGS OF FACT AND APPLICATIONS OF HALAKHA IN THIS CASE

A. Facts³¹

The plaintiff, who had been nearly a full-time employee of the defendant yeshiva for a number of years, was passed over for another promotion in March—and at that time plaintiff’s total compensation was \$40,000. On August 30, just prior to the commencement of plaintiff’s final year of employment, after agreeing a number of months earlier to continue to work at defendant yeshiva for another year, plaintiff resigned the position at defendant yeshiva for the upcoming year. Defendant yeshiva, given the last-minute resignation by plaintiff, sought to persuade plaintiff to return to employment, which they succeeded in doing, in part by offering plaintiff a considerable increase in wages to \$44,800, and in part by moving plaintiff, at the last minute, to a slightly better position so as to allow plaintiff to claim that a promotion was given. However, defendant yeshiva felt that plaintiff’s conduct, in seeking to resign at the last minute, was unethical, and informed plaintiff in February of the following year that plaintiff’s contract would not be renewed and severance would not be paid.

Plaintiff brought this action in the Beth Din of America for severance at the customary rate of *hodesh le-shana*.

B. Halakha

Firstly, although plaintiff did, in the end, work for a final year, both sides agree that plaintiff did in fact resign from the defendant yeshiva prior to that year of working in the school. Plaintiff was rehired after some negotiations over the new terms of employment. Plaintiff thus waived the right to severance pay by resigning. Although plaintiff was rehired, it was through a new contract, dated after school began and

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with a different job description and a new supervisor. Plaintiff resigned from the previous job, and waived any right to severance.

Secondly, the decision by the plaintiff to resign employment at defendant yeshiva on August 30, after accepting an employment contract from defendant yeshiva, was improper, and such conduct could reasonably be grounds for termination for cause. Indeed, particularly since plaintiff was placated by a 12% raise, it is halakhically proper to note that the decision to leave is not governed by the general halakhic right of a worker to leave whenever he wishes.³² Certainly such conduct is not to be rewarded with severance.³³

Additionally, plaintiff was not a full-time employee of defendant yeshiva, did not work directly in Judaic Studies, and did receive a regular contribution to a pension plan. All of these factors also argue against severance.

III. ORDER AND AWARD

Thus, in light of all of these factors:

No severance needs to be paid in this case.

It would be proper, and consistent with the spirit of the *Sefer ha-Hinukh* set out above, for defendant yeshiva to give plaintiff one thousand dollars as a gift to thank plaintiff for many years of service to the school.

So ordered on this twenty-first day of *Av*, 5762, corresponding to July 30, 2002.

Rabbi Michael Broyde
Dayan, Beth Din of America

NOTES

1. The Rules of the Beth Din of America state:

Section 5. Number and Selection of Arbitrators (*Dayanim*).

(b) If the amount in dispute is more than \$10,000 the matter shall be heard by a single arbitrator (*dayan*) unless either party—within 10 working days of submission of the matter to the Beth Din—states, in writing, that he wishes for the matter to be heard by a panel of three arbitrators (*dayanim*).

For a copy of the rules of the Beth Din of America, visit www.bethdin.org.

2. As per the arbitration agreement signed by the parties on February 11, 2002.
3. The arbitration agreement between the parties states:

It has been further agreed by the parties that the right to a formal arbitration hearing has been waived, and that the Beth Din of America shall resolve the matter solely on the basis of the written submission of the parties. Said parties agree that for the purposes of a just and equitable resolution of the matter, the Beth Din of America shall disclose to each party any and all written submissions made by any other party.

4. The rules of the Beth Din of America state:

Section 24. Waiver of Oral Hearings.

(a) The parties may provide, by written agreement and the consent of the Beth Din, for the waiver of oral hearings....

5. Thus, a full-time faculty member earning \$100,000 per year with 23 years' seniority, whose contract is not renewed while cause is not found for dismissal, is entitled to a severance payment of \$191,667.
6. See Rambam, *Sefer ha-Mitsvot, asch* 196 and *lav* 233; *Sefer ha-Hinukh, Mitsva* 450 and 484. See generally *Kiddushin* 16a-17b.
7. There is a debate whether a gift need be paid upon the master's death, which frees the servant; see *Yerushalmi Kiddushin* 1:2.
8. *Teshuvot Maharam mi-Rotenberg* 4:85 [Prague edition].
9. Quoting from *Nest v. Management Committee*, 1 P.D.R 330, 331 (1955).
10. *Shulhan Arukh, Hoshen Mishpat* 331:1. See Rav Hoshca's statement, *Yerushalmi Bava Metsia* 27b, about custom superceding halakha; see also Maharik 102 and Maharashdam 108.
11. *Iggerot Moshe, Hoshen Mishpat* 1:72. See also *Arukh HaShulhan, Hoshen Mishpat* 73:20.
12. See, e.g., *Iggerot Moshe, Hoshen Mishpat* 1:72; *Nediv Lev* 12-13; *Mahariya ha-Levi* 2:111; *Devar Avraham* 1:1; *Bet Yisrael* 172; *Piskei Hosben, Dinei Halva'a* 2:29, note 82.
13. See Rabbi Ezra Batzri, *Dinei Mamonot, Dinei Avoda* 1:1, note 1.

14. See Menachem Elon, IV *Jewish Law*, pp. 1592-1596 for an explanation of these non-rabbinical arbitration courts and their role in establishing the commercial customs of Israel in the early part of the twentieth century.
15. See "Laws of the State of Israel, Severance Pay Law of 1963." For the full text of the law, as well as a summary of the Knesset discussions relating to this law, see Nahum Rakover, *Jewish Law in the Debates of the Knesset*, pp. 1019-1038.
16. See Rabbi Tsevi Yehuda ben Ya'akov "Debatable Abandonment of One's Right to Severance," *Divrei Mishpat* 1:234-151 (5756), pp. 147, who discusses whether one is entitled to severance for bonuses that are not salary, in light of Israeli law. As Israeli law changes, so does this custom, as he notes in this article.
17. See for example, *Divrei Yosef* 21, which states:

One cannot cast doubt upon the validity of this custom on the basis that it became established through a decree of the King that required people to so act. Since people always act this way, even though they do so only because of the King's decree, we still properly say that everyone who does business without specifying otherwise does business according to the custom.
18. Interestingly, Puerto Rico has a law mandating severance pay. The Employee Dismissal Act of Puerto Rico provides for a mandatory severance payment to any employee who is discharged from employment without just cause or for an unjust cause. Severance payments are computed as follows:
 - (i) one month's salary if the employee has been employed from 0 to 5 years;
 - (ii) two months' salary if the employee has been employed from 5 to 15 years;
 - (iii) three months' salary if the employee has been employed for more than 15 years;

... plus an additional progressive indemnity equivalent to one week's pay for each completed year of service. Under this law, a teacher with 23 years seniority earning \$100,000 per year receives severance of \$67,307.

Indeed, many countries outside the United States have the tradition of paying severance. Among them are: Spain (upon termination of the employment contracts, the employer must pay dismissed employees the legal severance of 20 days of salary per year of service with a maximum limit of 12 months pay); Mexico (the employer must pay a severance premium based on length of service or seniority, equivalent to 12 days of salary for each year of service rendered); the Netherlands (severance pay determined by courts); France (some employees receive twenty hours of pay per year of service; other employees receive ten percent of a month's salary per year of employment).
19. In this regard, the commercial custom in Jewish institutions rejects the view of R. Feinstein (found in *Iggerot Moshe, Hoshen Mishpat* 1:76-77) who prohibits a school or yeshiva from not renewing a teacher's job except when there is proper cause. In R. Feinstein's view, all employment is even when it appears to be only for a set term of years but comes with implied

- tenure and one can only be removed for cause. Instead, the custom in America follows the view of the Israeli Rabbinical courts (found in 5 P.D.R. 129-162) and permits non-renewal of a contract even without valid cause, but directs that severance be paid. (As noted by Rabbi J. David Bleich in the *Jewish Law Annual* 1:187-190 (1980), the Israeli Rabbinical court's attempt to explain R. Feinstein's decision is very unpersuasive, and in fact they are arguing with R. Feinstein on this matter of custom).
20. Torah Umesorah, "The Rights and Responsibilities of the Torah Educator," p. 5 (1988).
 21. See the 2002 "Directory and Resource Guide of the United Synagogue of Conservative Judaism," p. 87, which states: "The amount of the severance pay shall be calculated at the rate of one month's compensation for each year of service to the institution, not to exceed a period of twelve months at the highest rate of compensation. . . ."
 22. Of course, even in cases where no severance needs be paid by custom, the wise words of the *Hinukh* would seem to counsel for a parting gift to an employee.
 23. Cases where a Judaic studies teacher also teaches a secular subject, so as to role model for students are a different case, and full severance has been granted in those cases.
 24. *Sma*, *Hoshen Mishpat* 333:16. *Mahari Engel* 16 posits a narrower definition, in that he accepts that if one is paid to engage in a specific task one is an independent contractor, even if one's hours are fixed. Halakhic authorities do not generally follow this view.
 25. One of the regular issues rabbinical courts confront is that of a teacher with a "for cause" failing who a school retains for a number of years and then seeks to fire on the basis of the earlier cause. This is not necessarily a pretext, but it is a case where the employee has a serious halakhic argument that, once his failing became apparent and the school accepted it, it can no longer be grounds for a "for cause" dismissal. The basic issue becomes of "acceptance" and thus the implied insertion of the failing as acceptable in this teacher's employment contract.
As a general matter insubordination is grounds for a teacher's dismissal. One set of problems that regularly appears is assignments to specific classrooms. When a teacher's assignment is changed, and the teacher resigns because he feels he cannot do it effectively, is that a case of implied termination (with severance) or insubordination (without severance)? See *Piskei Din Yerushalayim*, *Dinei Mamot* 1:157 for such a case. Matters such as this are resolved at a *din Torah*.
 26. See Rabbi Ezra Batzri, *Dinei Mamot* 3, *Dinei Avoda* 1:1-4.
 27. In the alternative, there are schools that pay an additional amount every month in lieu of severance. Acceptance of such monthly payments constitutes waiver of severance when they are so denominated. For an example of this, see "Severance Pay to a Worker," *Divrei Mishpat* 8, pp. 420-422 (5761), which deals with exactly such payments.
 28. Consider for example, the standard found in the Code of Practice for Day School Teacher promulgated by the Miami Jewish Federation's Center for the Advancement of Jewish Education. It states:

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Dismissal: Severance Pay (HA'ANAKAH):

Involuntary termination of employment for full time teacher (20 or more hours), with the exception of dismissal for "cause," will entitle the employee to severance pay. This severance pay shall begin with the fourth year of employment and computed on the basis of one week for every year employed from the initial year of employment up to the seventh year. Thereafter, two weeks will be added for every year of employment to a total maximum of a half-year's salary. The school is authorized to consider the granting of additional severance pay.

By this provision, a full time-faculty member earning \$100,000 per year with 23 years seniority, whose contract is not renewed, while cause is not found for dismissal, is entitled to a severance payment of \$50,000. Such a provision, presented as mandatory for every day school under its jurisdiction, certainly change the nature of the common commercial custom.

29. The Torah Umesorah Guidelines do not limit severance to full-time employees, even as they limit such payments to tenured teachers; many rabbinical courts do in fact limit severance to full-time employees. The rabbinical courts in Israel have established the custom-now codified in Israeli law-that severance pay is provided for both full-time and part-time employees; see P.D.R 4:126, where Rabbis Yehuda Waldenberg, Ovadia Yosef and Yosef Kapah state that "it has been established in Israel for decades that there is no difference between a full- and part-time worker." However, this custom is simply not firmly established in America.
30. Torah Umesorah's "The Rights and Responsibilities of the Torah Educator" notes: "On the topic of termination of Employment, there was concern that a teacher dismissed at an age where he can collect a pension and receive social security, should not get severance or at least a reduced severance." The logic of this concern is apparent.
31. The facts in this published version have been changed to protect the anonymity of the parties.
32. See *Pit'hei Hoshen, Hilkhos Sekhirut* 11:3 (and note 5), which discusses such a case. See also *Rema, Hoshen Mishpat* 333:3.
33. See, e.g., *Pit'hei Hoshen, Hilkhos Sekhirut* 11:11-12, which states:

A teacher of children is a profession which leaving under contract generates an unexpected loss. . . . When an employees withdraws from work in a matter that generates an expected loss that cannot be compensated for, the owner may fool or promise the worker a raise to persuade him to continue to work, but in the end is not obligated to pay except as promised.