

1 Severance Pay for Yeshiva Day School Employees

Rabbi Michael Broyde

Rabbi Broyde is a law professor at Emory University and a dayan in the Beth Din of America

As a *dayan* in the Beth Din of America, I have observed that one matter that is frequently litigated in *dinai torah* is claims for severance pay under Jewish law for employees of Jewish school. This article sets forth some of the factors that come into consideration during such *dinai torah*. As is widely known, there is a common practice in Jewish education 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.¹

This article is divided into five short sections. The first explores the halachic 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 (in Hebrew, *min ha'etza*), 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 section examines the exact parameters of this severance obligation, and notes its limitations. The fifth applies the above to this case.

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 (Devarim 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 (in Hebrew, *shelich*) is not merely a proper activity, but is a mandatory one.² Sefer Meirat

1 Thus, a full time faculty member earning \$100,000 per year with 23 years' seniority, whose contract is not renewed, and yet cause is not found for dismissal, is entitled to a severance payment of \$191,667.

2 See Rambam, Sefer Hamitzvot, *aseh* 196 and *lav* 233; Chinuch Mitzvah 450, and 484. See generally Kiddshin 16a-17b.

Einayim (Sema CM 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. Shach (86:3) essentially agrees with this formulation, although many halachic authorities do not; see authorities quoted by Shach in Choshen Mishpat 86:3, and particularly Mishnah LeMelech (5) commenting on Rambam, Avadim 3:12.

However, Jewish law denied the servant a parting gift when he caused his own departure, such as by running away, or buying his freedom.³

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 the Sefer HaChinuch, in Mitzvah 450, where he states:

The obligation (to provide a parting gift to a servant) was practiced only when the Beit Hamikdash was extant, since these laws depend on the Yovel (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 a 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 MeRothenberg, if Jewish law required payment of severance to a servant, whose fundamental activity of making himself a bound worker was sinful, certainly it is proper to pay severance to one's employees, whose conduct was without sin.⁴

This notation alone, however, would not explain the practice of paying severance as a right, or paying 8.333% per year of employment (Ⓢ) and only to employees of Jewish

3 It is disputed as to whether a gift need be paid when the master dies, thus freeing the servant; see Yerushalmi, Kiddushin 1:2.

4 Teshuvot Maharam MeRotherberg 4:85 [Prague edition].

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 halacha and is thus a proper custom".⁵ **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 halacha.** 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 Halacha, 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 Jewish law validity, 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 Mishnah pronounces the validity of commercial customs. It states:

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 not to come early or stay late, the employer is not allowed to compel them to do so. . . All such terms are governed by local custom.⁶

The Shulchan Aruch makes it clear that common commercial practices override many Jewish law default rules that would otherwise govern a transaction.⁷ Moreover, these customs are valid even if the majority of the business people establishing

5 Quoting from Nest v. Management Committee, 1 P.D.R 330, 331 (1955).

6 Bava Metzia 83a.

7 Shulchan Aruch, Choshen Mishpat 331:1. See also Jerusalem Talmud, Bava Metzia 27b (statement of Rav Hoshea, "Custom supersedes *halakhah*"); Maharik, 102 and Maharashdam, 108.

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.⁸

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.⁹ However, it is the custom that establishes the obligation, and not the reverse.

10Thus, 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 does not wish to follow the custom.

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 HaShalom HaIvri courts,¹¹ mandates that severance be paid at the rate of one month per year of employment for all employees in almost every field of labor.¹² Therefore, in Israel severance is routinely paid and its parameters are fundamentally guided by the secular severance

8 *Iggrot Moshe*, Choshen Mishpat 1:72. See also Aruch HaShulchan, Choshen Mishpat 73:20.

9 See, e.g., *Iggrot Moshe*, Choshen Mishpat 1:72; Nidiv Lev, 12- 13; Maharyah Ha- Levi 2:111; D'var Avraham 1:1; Beit Yisroel, 172; Piskei Choshen, Dinei Halva'ah, chapter 2, *halakhah* 29, note 82.

10 See Rabbi Ezra Batzri, *Dinnai Mamanut*, Dinai Avodah 1:1 n.1.

11 See Menachem Elon, IV Jewish Law 1592- 1596 (JPS, 1997) 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.

law and its applications.¹³ The custom is to follow the secular law in Israel on this matter.¹⁴

The situation in America is completely different. Secular law in all 50 states¹⁵ has no concept of mandatory severance. In the absence of a contractual provision granting severance, no severance payments need be paid in American law. Since outside of the field of Jewish education, Jews normally and presumptively conduct themselves consistent with the secular

12 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 Rackover, *Jewish Law in the Debates of the Knesset*, pages 1019- 1038 (Library of Jewish Law, 1988).

13 See Rabbi Zvi Yehuda ben- Yaakov "Debatable Abandonment of One's Right to Severance", *Divrai Mishpat* 1:234- 151 (5756) at page 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.

14 See for example, *Divrei Yosef*, no. 21, 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.

15 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);

norms, it is the common custom in our community to neither give nor receive any severance pay except when it is specifically contractually negotiated for.

Such is not the common custom in Jewish education, 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 (i.e., one month's pay for every year worked; in Hebrew: $\text{שְׁלֹשָׁתֵי עָשָׂר \text{ וְשָׁלֹשׁ } \%$) in cases where a Judaic studies employee is dismissed for reasons other than cause.¹⁶ 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.'¹⁷ Similar sentiments are expressed in the published guidelines of nearly every professional educators association in Jewish education, including those not in the Orthodox community, such as the "Rights of the Educator" in Rabbinical Assembly Guidelines.¹⁸ Thus, the practice of paying severance is a

Mexico (the employer must pay a severance premium based on length of service or seniority, equivalent to 12 days salary for each year of service rendered); Netherlands (severance pay determined by courts); France (some employees receive twenty hours pay per year of service as severance; other employees receive ten percent of a month's salary per year of employment as severance).

16 In this regard, the commercial custom in Jewish institutions rejects the view of Rabbi Feinstein (found in Igrot Moshe, Choshen Mishpat 1:76-77) who denies that a school or Yeshiva may ever chose not to rehire a teacher other than for proper cause. In Rabbi Feinstein's view, all employment – even when it appears to be only for a set term of years – 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 Rabbi Feinstein's decision is very unpersuasive, and in fact they are arguing with Rabbi Feinstein on this matter of custom).

17 Torah Umesorah "The Rights and Responsibilities of the Torah Educator" at page 5 (1988).

18 See the 2002 Directory and Resource Guide of the United Synagogue of Conservative Judaism at page 87 which states that "The amount of the severance pay shall be calculated at the rate of one month's compensation for

clearly established custom nearly universally present in the Jewish educational system.¹⁹

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 aware of not a single case where a secular studies teacher was awarded severance pay grounded in this custom alone.²⁰
2. It only applies to employees of a school, and does not apply to people who work as independent contractors, such as after-hour tutors, Shabbaton directors, and other such employees of a school who seem to set their own hours.²¹
3. The obligation to pay severance is limited to situations where 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

each year of service to the institution, not to exceed a period of twelve months at the highest rate of compensation..."

19 Of course, even in cases where no severance needs be paid by custom, the wise words of the Chinuch would seem to counsel for a parting gift to an employee.

20 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.

21 Sema, Choshen 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. Halachic authorities do not generally follow this view.

must be documented as a failing, and may not be a mere pretext for the denial of severance.)²²

4. Yeshivot and teachers may contract around this custom if they so wish. A school and its faculty (or any individual faculty members) may explicitly agree that their employment arrangement does not include severance.²³ Upon acceptance by the teacher and Yeshiva, such a contract would be binding on them both.²⁴ Just as severance can be waived completely, schools and communities can change the custom of the amount of severance payments.²⁵ (However, since

22 One of the regular issues rabbinical courts confront is the issue of a teacher with a 'for cause' failing who a school chooses to retain for a number of years, and then the school seeks to fire that teacher, as a for cause dismissal, based on this failing. This is not necessarily a pretext, but it is a case where the employee has a serious halachic argument that once his failing became apparent and the school accepted him with this failing that 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 dismissal as a teacher. One set of problems that regularly appears is the question of teacher assignments to specific classrooms. When a teacher's assignment is changed, and the teacher resigns because of the new assignment is one that the teacher feels he cannot do effectively, is that a case of implied termination (with severance) or insubordination (without severance). See Piskai Din Yerushalayim, Dinnai Momonut 1:157 for such a case. Matters such as this are resolved at a din torah.

23 See Rabbi Ezra Batzri, Dinai Mamonut, Volume 3, Dinai Avodah, 1:1-4.

24 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", Divrai Mishpat 8:420-422 (5761) which deals with exactly such payments.

25 Consider for example, the standard found in the Code of Practice for Day School Teacher promulgated by the Miami Jewish Federation "Center for the Advancement of Jewish Education," the local Jewish Federation agency addressing educational matters. It states:

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

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%; and 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.²⁶ Since the matter is in dispute, one is hard pressed to note a common commercial custom that would be present in such cases; See Rama, Choshen 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 dinai 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 Yeshiva itself 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 payment. However, in a school with a funded pension plan, when a teacher

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, and yet cause is not found for dismissal, is entitled to a severance payment of \$50,000. Such a provision, which its guidelines indicate are a mandatory provision of every Federation supported day school under its jurisdiction, certainly change the nature of the common commercial custom.

26 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 Kapach 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 present in America.

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 at all. Pension serves in lieu of severance in cases of retirement. Although this writer thinks that such argument has a great deal of merit to it, it is frequently the source of a great deal of controversy in dinai torah, and day school would be well advised to clarify the matter in their contracts or employee handbooks.²⁷

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.

27 Torah Umesorah in its "The Rights and Responsibilities of the Torah Educator" (1988) at page 7 notes that "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 seems apparent to this writer.