MARCH 24, 1955.

HON. WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 10.

DEAR PRESIDENT KELLY:

Your letter of January 24, 1955 asks our advice as to the power of the Civil Service Commission to revoke the certification of eligibility for appointment of an employee after appointment has been made. Your letter points out that occasionally it is discovered that false representations have been made with respect to residence, age, veteran status or past criminal record.

We have noted that you have been previously advised by an opinion dated January 18, 1918 that the Civil Service Commission has no power to revoke or direct the revocation of an appointment. That opinion stated,

> "I am unable to find anything in the Civil Service Law authorizing the Commission to revoke the appointment of any officer or employe appointed to or to require the person having the power of appointment to revoke the appointment. The appointment having once been made in accordance with the provisions of the Civil Service Act and by the proper authority, I think it unquestionable that the Civil Service Commission has no further power in the matter."

While unquestionably a certification should not ordinarily be disturbed, we cannot agree that the Commission is completely without power in the matter. The Commission is specifically empowered to enforce the provisions of the Civil Service Law and the rules and regulations promulgated thereunder, R. S. 11:1—7. If it is found that an applicant for a position has violated a provision of the statute by furnishing false information, see R. S. 11:23—1, R. S. 11:23—2, the Commission, in the exercise of its enforcement powers, could revoke the certification upon which the appointment or promotion was based. In keeping with the basic policy of the act to afford employees an opportunity to be heard before action affecting their position is taken, we think a hearing should be held by the Commission with full opportunity being given to the employee to offer evidence in justification or mitigation. See Rule 40, which provides, in part,

> "* * *. On the approval of the president and the commission the name of any person who has been dismissed from some other position in the public service or whose character, qualifications and record are found to be such as not to warrant employment in a public position, may be removed from any employment list upon which it may appear. In all such cases the person whose name is considered for removal will be notified of such contemplated action and given *reasonable opportunity to be heard.*" (emphasis supplied)

No reported decisions have been found in New Jersey relating to this subject. However, in other jurisdictions, particularly in New York, where a civil service system similar to our own prevails, the problem has been treated judicially in several cases. In *Application of Katz,* 260 App. Div. 495, 23 N. Y. S. 2d 150 (Sup. Ct. N. Y. 1940), an applicant for the position of stenographer-typist had mis stated her age. This was not discovered until after she had been working for

more than six months. The Civil Service Commission held a hearing after which it revoked the certification and informed the appointing authority it should terminate the employee's services. On appeal the procedure was approved and it was held not to be necessary to hold a hearing before the appointing authority.

In *Marinick v. Valentine,* 263 App. Div. 564, 33 N. Y. S. 2d 486, (App. Div. N. Y. 1942) it was discovered more than four years after a patrolman had been appointed that he had attempted to perpetrate a fraud by placing identifying marks on his test papers. The Civil Service Commission revoked the certification and directed the appointing authority to terminate his services. The action of the Civil Service Commission was approved by the court saying, 33 N. Y. S. 2d 488,

> "At the time the examiners of the Civil Service Commission rated petitioner's papers they were not aware of the employment by him of the identifying marks which he admitted were deliberately used. If they had had knowledge of the purpose of these objectionable markings, petitioner's papers would not have been rated, his name would not have been placed on the eligible list and he could not have been certified or appointed. It seems too clear for argument that petitioner may not benefit by reason of the fact that his attempted fraud was not discovered until the lapse of several years. The law is now settled that the Municipal Civil Service Commission has power and is under a duty to rescind a certification obtained by fraud or where there is an attempt to defraud. Matter of Shraeder v. Kern, 287 N. Y. 13, 38 N. E. 2d 110; Matter of Resnick v. Huie, 287 N. Y. 607, 39 N. E. 2d 258. Matter of Katz v. Goldwater, 260 App. Div. 495, 23 N. Y. S. 2d 150, affirmed 285 N. Y. 830, 35 N. E. 2d 500. The power may be exercised upon discovery of the fraud even if the appointment has become permanent. Matter of Smith v. Hodson, 287 N. Y. 609, 39 N. E. 2d 259; People ex rel. Hornstein v. Moskowitz, 51 N. Y. L. J. 1296, affirmed 165 App. Div. 979, 150 N. Y. S. 1104. In the Hornstein case, Lehman, J. (now Chief Judge of the Court of Appeals) said:
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> 'It is urged, however, that the Commission having once certified the relator's name have no power thereafter to reconsider their action. It seems to me that while they have no power to reconsider a certification not due to fraud or mistake, where their action is based upon mistake caused by the applicant's own fraud such fraud and mistake invalidate the original certification and they have power to correct their records to show its invalidity, and have power also to determine the question of fact involved in the claim of fraud and mistake.'
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> In People ex rel. Finnegan v. McBride, 226 N. Y. 252, at page 258, 123 N. E. 374, 376, Pound, J., in stating the applicable law, said: 'The action of the commission, had with due deliberation, upon such a matter as the establishment of an eligible list, should, for obvious reasons, be regarded as a finality, but the commission's authority thereon does not wholly cease. It certifies names therefrom for appointment. Error may be corrected by setting it aside if it was the result of illegality, irregularity in vital matters, or fraud. The commission may not act arbitrarily. Public officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made, however much they may have erred in judgment on the facts, even though injustice is the result. A mere change of mind is insufficient. Further action must, where power is not entirely spent, be for cause, with good reasons and proper motives for the correction of improper action.'

> In the public interest, civil service examinations must be kept free from fraud and dishonesty and it is the obligation of a civil service commission to give no place on an eligible list to any candidate who perpetrates a fraud or attempts to practice any deception in an open competitive examination. Confidence in the fairness and integrity of the merit system would be completely undermined if practices like those indulged in here were overlooked or condoned."

The exercise of such a power is not limited to cases of fraud or misrepresentation. It has been held to extend to instances where mistakes affecting the eligibility of the individual for appointment are made. *Romanchuck v. Murphy,* 200 N. Y. Misc. 987, 103 N. Y. S. 2d 704 (Sup. Ct. N. Y. 1951) was a case involving an error in computation of the final grade of the applicant. The court held that such a circumstance would justify rescission of the certification. See also: *People ex rel. Laist v. Lower,* 251 Ill. 527, 96 N. E. 346 (Sup. Ct. Ill. 1911) where before appointment it was discovered that an applicant for appointment as an architect did not have a license, and *Application of O'Brien,* 255 App. Div. 385, 7 N. Y. S. 2d 596 (App. Div. N. Y. 1938), aff'd. 280 N. Y. 697, 21 N. E. 2d 202 (Ct. App. N. Y. 1939) where certification was rescinded before appointment on the ground that the employee seeking promotion was no longer employed in the division in which the position was located as required by the civil service rule.

We wish to emphasize, however, that matters of judgment involving subjective appraisals of an applicant's qualifications should not be the subject of a revocation of certification proceeding. As indicated in *People ex rel. Finnegan v. McBride* quoted *supra* in the opinion in *Marinick v. Valentine,* "A mere change of mind is insufficient." The stability of the public service requires that such subjective determinations not be rescinded. We recognize, therefore, that the power to revoke a certification after an applicant has been appointed is limited to cases of fraud, misrepresentation or mistake of a nature which affects the legality of the certification.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

b.

MARCH 25, 1955.

HON. CHARLES R. HOWELL,
Commissioner of Banking and Insurance,
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 11.

MY DEAR COMMISSIONER HOWELL:

Your letter of March 4, 1955 requests advice as to whether it is permissible under our law for an insurance company to issue a group life insurance policy in New Jersey to insure the payment of the balance remaining unpaid at the time of death on a periodic payment plan mutual fund investment contract. Another question raised by your letter is whether, if the issuance of such a policy is not permissible