issue a burning permit even though the Director of Conservation in protecting the State's interest has determined that a fire may properly be set within township limits.

Therefore, it is the opinion of this office that full effect can and must be given to both Section 7 of Act 143, Public Acts of 1923 and Section 4 of Chapter 45, Revised Statutes of 1846. The answers to your specific questions follow.

Answering question 1, a permit issued by the Director of Conservation may not be revoked by a township official acting under a township ordinance.

Answering question 2, a holder of a Department of Conservation permit may be arrested for burning in violation of a township ordinance even though he burns in accordance with the conditions of the Department permit.

Answering question 3, a citizen who has obtained a permit from a township to burn must also obtain a permit from the Director of Conservation since this is required by Section 7 of Act 143, Public Acts of 1923.

Answering question 4, a township may issue a permit to set fire even though the Director of Conservation refuses to issue or revokes a permit due to extreme danger. However, a citizen cannot proceed to burn without a permit from the Director as required by Section 7.

Answering question 5, the Director of Conservation does not have authority to revoke burning permits issued by a township in cases of extreme danger when such revocation is clearly necessary for the safety of life and property. He may refuse to issue a permit and a citizen setting fire without the permit required by Section 7 of Act 143, Public Acts of 1923, would be in violation of State law.

FRANK J. KELLEY,
Attorney General.

670123.2

CIVIL SERVICE: Classified service, eligibility of National Guard Civilian Technicians.

MILITARY AFFAIRS, DEPT. OF: Status of National Guard Civilian Technicians.

Army and Air Civilian Technician employees of the Michigan National Guard are not eligible for admission to the classified state civil service. Their positions being established pursuant to Federal law and subject to Federal control, are not positions in the state service under Article XI, Section 5, Michigan Constitution of 1963.

No. 4460 January 23, 1967.

Mr. Franklin K. DeWald, Director
Department of Civil Service
Lewis Cass Building
Lansing, Michigan 48933

You requested to be advised by opinion of the Attorney General "whether or not the Civilian Technician employees of the Michigan National Guard should be considered as eligible for admission to the classified state civil service under the terms of Article XI, Section 5 of the Constitution."

The civilian technician employees to which you make reference approximate 1,000 in number and are full-time employees within the army and air branches of the Michigan National Guard. In the main, such civilian technicians perform clerical, administrative, supply and maintenance functions. Although employed in work of a civil nature these technicians, with a few minor exceptions, are members of the Michigan National Guard. They are the same civilian technicians covered and described in detail in Opinion No. 3666 issued by me as Attorney General on December 11, 1962 and published in O.A.G. 1961-62, page 605. Since that opinion is readily accessible there is no need to reiterate the statements that appear therein regarding the organizational structure of the Michigan National Guard as it pertains to the work assignments of these civilian technicians but reference is made to Opinion No. 3666 as a source of this information.

Opinion No. 3666, supra, was concerned with the validity of Act 56 P.A. 1961 which amended Section 13(a) of Act 240 P.A. 1943, creating the State Employees' Retirement System, to include employees of the army and air National Guard performing administrative and accounting duties, maintenance, repair and inspection of material, armament, vehicles, aircraft, and equipment; which is to say, to include the civilian technicians as hereinbefore described. By Opinion No. 3666 the validity of Act 56 P.A. 1961 was affirmed and it was concluded that the act constituted full and lawful authority to proceed immediately to cover such civilian technicians under the State Employees' Retirement System to the extent provided in said Act 56 and in accordance with the eligibility requirements of the basic retirement act.

Opinion No. 3666 at the time of its issuance was the last of a series of opinions issued by various Attorneys General dealing with the status and coverage under beneficial statutes of armory custodians and civilian technicians in the Michigan National Guard. A brief resume of those opinions follows for purposes of information.

> Opinion No. 1117 issued March 21, 1950 by Attorney General Stephen J. Roth and published in O.A.G. 1949-50, page 504, in which it was determined that in performing its responsibility for custodial care, the State furnishes civilian employees such as janitors and watchmen in the state and local armories; such caretakers are hired by local armory boards of control; are paid from the local armory maintenance fund; are state employees; and are excluded from state civil service because the positions are in the military and naval forces of the State.
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> Opinion No. 1508 dated February 11, 1952, issued by Attorney General Frank G. Millard and published in O.A.G. 1951-52, page 432, which dealt with the same civil positions of caretaking as were considered in Opinion No. 1117 and in which it was concluded that such civilian employees in the state and local armories are eligible for membership in the State Employees' Retirement System but were not eligible for social security benefits under the law as in effect at that time.
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> Opinion No. 1739 issued January 7, 1954 by Attorney General Frank G. Millard and published in O.A.G. 1952-54, page 282, in which it was ruled that civilian employees in the air branch of the Michigan

National Guard are state employees but are not eligible either individually or as a group for benefits under the Federal Social Security Act.

Memorandum Opinion No. 777 dated October 16, 1961 and published as a formal opinion No. 3666-A issued by me as Attorney General and published in O.A.G. 1961-62, page 611, which had as its concern full-time actual duty officers (approximately 32 in number) of the Michigan National Guard who were ruled not to be state employees or officers within the provisions of the State Employees' Retirement System, being restricted to the military retirement pension provided by Act 84 P.A. 1909 as amended.

Opinion No. 3593 issued January 10, 1962 by me as Attorney General and published in O.A.G. 1961-62, page 232, in which it was decided that civilian employees of armory boards of control who attained full tenure and permanent status in the classified civil service of the State may qualify for unemployment benefits under the Michigan Employment Security Act.

Unpublished Memorandum Opinion No. M-788 issued by me as Attorney General on March 27, 1962, ruling that members of the Michigan National Guard occupy positions covered by a retirement system within the meaning of the Federal Social Security Act, as amended, and as such may not be included in the state-federal agreement for social security coverage due to the fact that under the Michigan enabling act the governor has no power to hold a referendum or to issue a certificate with respect to the military retirement system.

Opinion No. 3666 dated December 11, 1962 issued by me as Attorney General, published in O.A.G. 1961-62, page 605, and discussed above.

Article XI, Section 5, Michigan Constitution of 1963, deals with the classified state civil service and to the extent here pertinent is as follows:

"The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

" * * *

"The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel

transactions, and regulate all conditions of employment in the classified service.

"No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

"Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. * * *.

" * * *

"No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state."

The basic authority for the National Guard Technician Program appears in Section 709, Title 32, USCA. That law authorizes the Secretary of the Army and the Secretary of the Air Force to establish a Technician Program. The Secretary of the Army and the Secretary of the Air Force have delegated to the Chief, National Guard Bureau, the authority to administer the Technician Program. Such delegation of responsibility appears in Section III, National Guard Regulation (N.G.R. 51) and Air National Guard Regulation (A.N.G.R. 40-01) issued by the Departments of the Army and the Air Force under date of January 2, 1964 and subsequently amended and supplemented.

The Chief, National Guard Bureau, is responsible for the overall administration of the Technician Program. The implementation of this responsibility is contained in N.G.R. 51/A.N.G.R. 40-01 which at Paragraph 1-17 specifies the duties of the Chief, National Guard Bureau. This regulation is applicable to both the Air and the Army National Guard and is the basic guide for all the States including the Commonwealth of Puerto Rico and the District of Columbia. By Paragraph 1-18 of the foregoing regulations the State Adjutant General is made responsible for the implementation and administration of the Technician Program authorized for his State by the Chief, National Guard Bureau. Paragraph 2-1 of the foregoing regulations states that the employment of technicians is the function of the individual State to be carried out under operating procedures established by the State Adjutant General within the limitations prescribed by the Chief, National Guard Bureau.

Paragraph 1-17 of the foregoing regulations provides that the Chief, National Guard Bureau, is responsible for determining the technician requirements for support of the National Guard units and installations; the program for technicians to meet these requirements; administration of the program through issuance of policies, operating instructions, manning documents, manning criteria, regulations, pamphlets, manuals, and letters; and finally to authorize and distribute to the States maximum rates of compensation schedules for technicians.

The Chief, National Guard Bureau, has provided manning criteria for the Army National Guard in N.G.B. Pamphlet 51-1 and by manning documents has specified the positions authorized. The manning documents are issued on a fiscal year basis. Presently, the Air National Guard relies entirely on the current manning document for the technician pattern.

The Chief, National Guard Bureau, provides job descriptions for all technician positions for both the Air and Army National Guard. A.N.G. Pamphlet 40-01 provides the job descriptions for Air National Guard Technician Program. A.N.G. Pamphlet 40-01 contains approximately 265 job descriptions. N.G.B. Pamphlet 51-2 provides the job descriptions for Army National Guard Technician Program. N.G.B. Pamphlet 51-2 contains approximately 290 job descriptions.

Funds for the payroll of technicians are appropriated by Congress and are allotted to the States by the Chief, National Guard Bureau. The State Adjutant General programs the funds allotted to his State to provide maximum utilization of the authorized technician positions.

The Michigan Constitution of 1963 by Article XI, Section 5, quoted in pertinent part above, makes clear the plenary power of the Civil Service Commission within the sphere of its authority. Section 5 begins with the statement—"The classified state civil service *shall consist of all positions in the state service* * * *." As to such positions the Civil Service Commission is required to make classifications according to duties and responsibilities, to fix rates of compensation, to approve or disapprove disbursements for all personal services, to determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions, by rules and regulations to cover all personnel transactions, and to regulate all conditions of employment.

The Federal statute which creates the positions of civilian technicians, the Federal regulations referred to above, the control of the activities of these technicians and the other indicia of employment are completely antithetical to the exercise of any control in those areas by the Michigan Civil Service Commission. Tested against this background of Federal statute and regulatory control it appears readily demonstrable that the positions of civilian technicians are not "positions in the state service" within the meaning and scope of the Michigan constitutional provision.

In the case of *Pattno v. United States* (1962), 311 F. 2d 604, certiorari denied 373 U.S. 911, 10 L. ed 2d 412, the United States Court of Appeals, Tenth Circuit, in a case involving an action under the Federal Tort Claims Act after deciding that the law of the place of the accident controls the doctrine of respondeat superior then went on to say:

> "The fact of employment is in a different category. The States may not decide for the United States who are and who are not Federal employees because the existence of Federal employment is a Federal question to be answered by application of Federal law. In the case at bar both the Federal Constitution and statutes bear on the fact of employment. The supremacy of Federal law requires the determination of Federal employment by Federal law."

The Supreme Court of Washington in the case of *Washington State National Guard v. Washington State Personnel Board* (1963), 61 Wash.

2d 708, 379 P. 2d 1002, had under consideration an action by the Washington State National Guard against the State Personnel Board and its members to review the Board's action in directing the State National Guard to reinstate five Air Defense Technicians discharged by the State Adjutant General. In that case the Court held that the Washington State Personnel Board, under the powers and authority given to it by the Washington State Civil Service Law, had no right of review nor any control over the dismissal of the Air Defense Technicians by reason of their status as civilian employees. The Court said:

> "It seems incongruous to suggest that the state can enact laws which supersede National Guard regulations that control the employment, supervision, and discharge of Air Defense Technicians.
>
> " * * *
>
> "We find no element or circumstance which takes the discharge of Air Defense Technicians from under N.G.R. 51 and brings it within the purview of the Washington State Civil Service Law.
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> " * * *
>
> "So far as the technicians are concerned, the state cannot say when employment will take place, who will be employed, or what the qualifications for employment will be. It cannot say what the salary rate will be, or what the duties and responsibilities will be. There is no 'probationary period of service as provided by the rules and regulations of the board.' (citation omitted) Under these circumstances, we see no reasonable basis for the Washington State Personnel Board to urge that it has any jurisdiction * * *."

A case arose in the State of New York based on a proceeding on petition for restoration by petitioners who had been employed in civilian capacities as National Guard technicians at a federal missile base. It was the contention of petitioners that they occupied permanent positions in the state classified civil service and were therefore entitled before discharge to a hearing upon charges, which hearing concededly had not been given them. The Supreme Court, Appellate Division, in the case entitled *Application of Anthony J. Anselmo, et al., Appellants, for an order, etc., directed to Nelson A. Rockefeller, as Governor of the State of New York and Commander-in-Chief, et al., Respondents* (1963), 19 A.D. 2d 761, 241 N.Y.S. 2d 761, (leave to appeal denied, 13 N.Y. 2d 599, 245 N.Y.S. 2d 1026, 194 N.E. 2d 837), concluded that these civilian National Guard technicians who occupied positions created by federal statute and whose compensation was fixed by the Secretary of Army and paid from federal funds and who were subject to National Guard regulations and whose employment and discharge were federally controlled were not state employees but were members of the militia and therefore were excluded from the civil service of the state.[1]

It appears as established by both law and fact that the civilian technician employees in the National Guard do not occupy positions in state service

[1] In subsequent decisions it was adjudicated that these same National Guard technicians were not federal civil service employees and were not in federal employment. *Anselmo v. Ailes* (1964), United States District Court, E. D. New York, 235 F. Supp. 203, affirmed by the United States Court of Appeals, Second Circuit, 344 F. 2d 607.

of the State of Michigan. The positions in which these civilian technicians serve are federally established and federally controlled. It is not for the State of Michigan, acting through its Civil Service Commission to classify these positions. That area of authority has already been preempted by the Secretary of the Army and the Secretary of the Air Force, respectively, acting through the Chief, National Guard Bureau, as their designee. In my opinion the civilian technician employees of the Michigan National Guard, described herein, are not eligible for admission to the classified state civil service under Article XI, Section 5 of the Michigan Constitution of 1963.

The foregoing conclusion is not in conflict with my Opinion No. 3593 issued January 10, 1962 and published in O.A.G. 1961-62, page 232. The civilian employees involved in Opinion No. 3593 were employed by local armory boards of control in positions of janitors and maintenance men, sometimes called custodians. They are not required to be members of the Michigan National Guard, are presently covered by the state civil service and are selected from civil service rosters without regard to physical fitness to perform National Guard duty. Contrasted to these local armory employees, the civilian technicians are required to be members of the National Guard with the exception of female technicians in limited positions and male technicians employed in the office of the United States Property and Fiscal Officer prior to March 2, 1956. (NGR 51/ANGR 40-01, Paragraph 1-4)

FRANK J. KELLEY,
Attorney General.

670214.1

INSURANCE AGENTS: Group credit insurance policyholder.
MOTOR VEHICLE INSTALLMENT SALES: Licensed insurance agents cannot lawfully reimburse group credit insurance policyholders for any portion of expense incurred in administration of policies when the group policyholder is an installment seller licensed under the Motor Vehicle Sales Finance Act.

No. 4572 February 3, 1967.

Mr. Charles D. Slay
Commissioner of Banking
Department of Commerce
Lansing, Michigan

You have asked for my opinion as to whether licensed insurance agents can lawfully reimburse group policyholders for any portion of expenses incurred by such policyholders in administration of policies when the group policyholder is an installment seller licensed under Act 27, P.A. 1950, the Motor Vehicle Sales Finance Act.

Group credit insurance covering a group of borrowers from a single financial institution, or a group of purchasers from a single vendor, is specifically authorized by section 4416 of Act 75, P.A. 1937, as amended (C.L.S. 1961 § 500.4416; M.S.A. 1965 Cum. Supp. § 24.14416), which is the Insurance Code.