OPINION NO. 73-103

Syllabus:

The Director of Administrative Services has authority to act in behalf of the state of Ohio to modify the existing agreement with the Secretary of Health, Education and Welfare, in order to obtain continued social security coverage for the employees of a regional transit authority.

To: Joseph J. Sommer, Dir., Dept. of State Personnel, Columbus, Ohio
By: William J. Brown, Attorney General, October 17, 1973

I have before me your request for an opinion which reads as follows:

> This request for your opinion arises as a result of the acquisition by three Regional Transit Authorities of three separate transit systems. Each system was privately owned and all were acquired by the Regional Transit Authorities after 1965.
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> Under private ownership all transit employees participated in and contributed to the Federal Insurance Contributions Act (F.I.C.A.). Many of the affected employees contributed substantial sums of money during their many years as employees in employment covered by Title II, 42 U.S.C. Section 401 et seq. After acquisition, the Secretary of Health, Education and Welfare refused their continued participation in the Social Security System because they were then participating in the Public Employees Retirement System (P.E.R.S.). Under present consideration is a proposal which seeks to permit the transit employees continued participation in the Social Security System.
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> On December 20, 1962, the State of Ohio executed an agreement with the Secretary of HEW extending the insurance system established by Title II of the Social Security Act, 42 U.S.C. Section 401 et seq. to the Teachers Insurance and Annuity Association at the University of Cincinnati. That coverage group was designated by the State pursuant to 42 U.S.C. Section 418(c)(1), and coverage was extended pursuant to that agreement.

That agreement provided for future modifications to include additional services not now included in this agreement. On January 2, 1973, that agreement was modified to include services performed by employees of the Lucas County Recreation, Inc. and the Toledo Mudhens, Inc., both non-profit recreational corporations. Coverage was also extended pursuant to this modification.

Since the acquisition by the Regional Transit Authorities, the transit employees have been required to participate in P.E.R.S., R.C. Section 145.03. While this dual participation in retirement is permissible under federal law, it can only be accomplished if authority exists in the Ohio Revised Code for the Director of Administrative Services to execute an agreement with the Secretary of HEW designating those transit employees as a separate coverage group pursuant to 42 U.S.C. Section 418 (c)(1). Proposed Modification No. 2 (attached) is drafted to fulfill that purpose.

In the legislation permitting the creation of transit authorities, the General Assembly, in Sections 306.35(M)(1) and (3) provided that the Regional Transit Authority shall, if it acquires any existing transit system, make arrangements for the protection of the employees affected, including

> ...the preservation of rights and benefits under any existing pension plans covering prior service, and continued participation in social security in addition to participation in the public employees retirement system as required by Chapter 145 of the Revised Code; (emphasis added)

Under R.C. 144.02 the Director of Administrative Services has been directed by the governor to execute all agreements extending Social Security coverage to the employees of cities or county-related corporations as defined by R.C. Section 144.01(P) and (F). While the term Regional Transit Authority is not used or defined in Chapter 144, this absence, by itself, does not appear determinative of the Director's authority to execute an agreement covering these transit employees. Section 306.35(M)(1) is clear, providing for continued coverage in the social security system. If that provision is not construed as incorporating the provisions of Chapter 144, or as authorization in itself to effect its purpose, then that language in R.C. Section 306.35 (M)(1) would be meaningless. The authorization to do something in the absence of any implementing language, must be construed as including the authority and power to effect and implement that purpose. Premising the foregoing is the principle that the General Assembly does not perform vain acts.

Therefore, your opinion on the following questions is requested:

1. May the Director of Administrative Services, acting on behalf of the State of Ohio for the Regional Transit Authorities, execute "Modification No. 2" to the existing agreement, designating the employees of the Toledo, Columbus and Miami Valley Transit Authorities as a separate coverage group for purposes of their continued participation in the Federal Social Security Insurance System?

2. Does the Director of Administrative Services derive the authority to execute this agreement from R.C. Section 306.35(Y)?

3. If the answer to question No. 2 is negative, is any authority to execute this agreement derived from Chapter 144?

R.C. 306.35 was amended by the General Assembly in 1970, 133 Ohio Laws 304, 316, to read in part as follows:

> Upon the creation of a regional transit authority as provided by section 306.32 of the Revised Code, and upon the qualifying of its board of trustees and the election of a president and a vice-president, said authority shall exercise in its own name all the rights, powers, and duties vested in and conferred upon it by sections 306.30 to 306.53, inclusive, of the Revised Code, and, subject to such restrictions, limitations, and qualifications as are set forth therein, said regional transit authority:
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> * * * * * * * * *
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> (Y) Shall, if it acquires an existing transit system, assume all the employer's obligations under any existing labor contract between the employees and management of the system. The board shall, if it acquires, constructs, controls, or operates any such facilities, negotiate arrangements to protect the interests of employees affected by such acquisition, construction, control, or operation. Such arrangements shall include, but are not limited to:
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> (1) The preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise, the preservation of rights and benefits under any existing pension plans covering prior service, and continued participation in social security in addition to participation in the public employees retirement system as required in Chapter 145. of the Revised Code * * *.

Thus, R.C. 306.35(Y) requires the transit authorities to negotiate arrangements to provide for continuing employee participation in the federal social security program.

R.C. 306.44 reads as follows:

> The board of trustees of a regional transit authority may enter into such contracts or other arrangements with the United States government or any department thereof, with the state government of this or other states, with counties, municipalities, townships, or other governmental agencies created by or under the authority of the laws of the state or other states, with persons, with public corporations and private corporations as may be necessary or convenient for the making of surveys, investigations or reports thereon, and for the exercise of the powers granted by sections 306.30 to 306.47, inclusive, of the Revised Code.

Thus, the transit authority has the power to enter into arrangements with the United States or a state governmental agency to enable its employees to obtain the benefits of the social security program.

42 U.S.C. Section 418(a)(1) reads as follows:

> The Secretary of Health, Education, and Welfare shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.

The state, by the express terms of this provision, is the only governmental body with the authority to enter into the agreement with the Secretary of Health, Education, and Welfare to extend the social security program to the employees of a transit authority. My reading of the statute to this effect has been confirmed by discussions with the federal authorities.

The only authority for the State to enter into an agreement with the Secretary for extension of the social security system is provided by R.C. Chapter 144. R.C. 144.02 reads in part as follows:

> The state agency as defined in Chapter 144. of the Revised Code is hereby authorized on behalf of the state to enter into an agreement with the Secretary of health, education, and welfare consistent with Chapter 144. of the Revised Code, for the purpose of extending the benefits of the federal old age and survivors insurance system to employees of any county-related corporation or city with respect to services specified in such agreement which constitute "employment". Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification, and termination of the agreement, administration, and other appropriate provisions as the state agency and secretary of

> health, education, and welfare agree upon, but, except as may be otherwise required by or under the Social Security Act as to the services to be covered, such agreement shall provide and include the following * * *.

This Section refers only to "any county-related corporation or city." Thus, if a regional transit authority does not fit under the definition of either of these terms, R.C. 144.02 does not expressly apply to it.

R.C. 144.01 reads in part as follows:

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> (B) "City" means any municipal corporation having its own retirement system and includes any municipal university belonging to the municipal corporation.
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> (E) "State agency" means that agency which the governor may designate to carry out the provisions of Chapter 144. of the Revised Code.
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> (I) "County-related corporation" means a non-profit corporation, without capital stock, organized and existing under Chapter 1702. of the Revised Code of Ohio, to carry on county-related recreational functions, on property, the title of which rests in the name of the county, that would normally be carried on by commercial interests for profit, the receipts in excess of actual and necessary expenses of which are transferred to a board of county commissioners and the assets of which, upon dissolution of the corporation, become the property of a board of county commissioners.

A regional transit authority obviously does not qualify under the above definitions of "city" or "county-related corporation." Therefore, R.C. Chapter 144. provides no express authority for a state agency to enter into an agreement with the Secretary of Health, Education and Welfare extending the coverage of the social security program to employees of regional transit authorities.

As my predecessor stated in Opinion No. 2071, Opinions of the Attorney General for 1958, at page 278:

> Few principles of law are better settled than that a public body which is created by statute has only such powers as the statute expressly gives it, together with such powers as are necessarily implied from the powers granted. * * *

See also, State, ex rel. Clarke v. Cook, 103 Ohio St. 465 (1921); Opinion No. 73-090, Opinions of the Attorney General for 1973.

To recapitulate, R.C. 306.35 empowers and requires a board of trustees of a regional transit authority to arrange for its employees' continued participation in social security. R.C. 306.44 authorizes it to enter into "contracts or other arrangements" with the state or the United States for such purpose. However, 42 U.S.C. Section 418 (a)(1) requires the Secretary of Health, Education, and Welfare to enter into such contract with the state, and no state agency has express authority to do so. Can it be, then, that the omission of any mention of regional transit authorities in R.C. Chapter 144. precludes the Department of Administrative Services from entering into the contract in question?

To so conclude, I would have to rely upon the rule of statutory construction expressio unius est exclusio alterius, the mention of one thing implies the exclusion of all others. Thus, the mention of cities and county-related corporations in R.C. Chapter 144. implies that the Legislature did not intend for that statute to include any other entities, such as regional transit authorities.

With respect to the maxim of expressio unius, it is stated in 2A Sutherland on Statutory Construction 132, Section 47.25 (4th ed. 1973), as follows:

> The maxim * * * requires certain caution in its application, and in all cases is applicable only under certain conditions. * * * And so, where the meaning of the statute is plainly expressed in its language and if it does not involve an absurdity, contradiction, injustice, invade public policy, or if the statute is penal in nature or in derogation of the common law, a literal interpretation will prevail. Conversely, where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, is a necessary incidental to a power or right, or is the established custom, usage or practice, the maxim will be disregarded and an expanded meaning given. * * *

The rule of expressio unius, as all rules of statutory construction, is merely an aid to ascertaining the legislative intent. The following language with respect to it appears in both State, ex rel. Curtis v. DeCorps, 134 Ohio St. 295, 299 (1938) and Wachendorf v. Shaver, 149 Ohio St. 231, 241 (1948):

> The maxim is of utility only as an aid in ascertaining legislative intent, but when its employment operates to defeat such intent it will be held to be inapplicable.
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> The rule should not be carried beyond the reason for its existence. It is to be applied only as an aid in arriving at the legislative intention and not to defeat the apparent intent." * * *

The third branch of the syllabus of Wachendorf v. Shaver, supra, reads as follows:

> The rule of expressio unius est exclusio alterius is of no significance and is to be given no consideration in the construction or interpretation of a statute when the application of such rule contravenes legislative intent.

See also, City of Akron v. Dobson, 81 Ohio St. 66, 75 (1909).

In R.C. 306.35, the Legislature has expressed an unmistakeable intent to authorize continued social security coverage for employees of regional transit authorities. To find the necessary contract precluded by the omission of specific authority for a state agency to enter into it would directly contravene the well-settled limitation on the rule of expressio unius, as stated in the aforementioned cases.

The United States Supreme Court has applied this limitation to a federal statute, in Holy Trinity Church v. United States, 143 U.S. 457, 36 L. Ed. 226, 12 S. Ct. 511 (1892). The Court held that a contract for employment of a minister was not covered by a statute prohibiting the importation of an alien subsequent to his entering into a contract to perform labor or service "of any kind" (143 U.S. 458). The statute expressly exempted, inter alia, "professional actors, artists, lecturers, singers and domestic servants", but not ministers. (143 U.S. 458-9). While the Court did not mention the rule of expressio unius, they actually had to contend with it, as it is described in Sutherland, supra, at 123, Section 47.23.

> The maxim operates as a double negative to produce the opposite of its usual exclusionary effect in the case of exceptions, provisos, saving clauses or other negative provisions. The enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded. "Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.

Despite the fact that ministers were not among those expressly excluded, the Court held that the statute did not apply to them, because the purpose of the statute was wholly unrelated to such profession.

Similarly, I conclude that the agreement in question is authorized, despite the lack of express authority for the Department of Administrative Services to enter into it. This conclusion is based upon a reading of R.C. 306.35(T), 306.44, and Chapter 144., which relate to the same subject matter and therefore should be construed in pari materia. Such statutes when construed together in the light of the principles discussed previously, authorize the agreement. See United States v. Barnes, 222 U.S. 513, 56 L. Ed. 291, 32 S. Ct. 117 (1912). To conclude otherwise would frustrate the apparent legislative intent.

In specific answer to your question, it is my opinion and you are so advised, that the Director of Administrative Services has authority to act in behalf of the state of Ohio to modify the existing agreement with the Secretary of Health, Education and Welfare, in order to obtain continued social security coverage for the employees of a regional transit authority.