KATZ, J., with whom, VERTEFEUILLE, J., joins, dissenting. The principal issue in this appeal is whether the trial court properly concluded that the 1999–2004 collective bargaining agreement (agreement) between the named defendant, the town of Greenwich (town),[1] and the Silver Shield Association, the union representing the town's police officers (union), required the candidate ranked first on the promotional list to be promoted to the position of police captain, a position outside the bargaining unit. The majority concludes that the provision in the agreement that expressly addresses such promotions only prescribes the class of persons eligible for promotions (members of the bargaining unit), not substantive conditions for making such promotions. It further concludes that the past practices clause of the agreement has no bearing on the issue presented because promotions from a position within the bargaining unit to a position outside the bargaining unit is a nonmandatory subject of bargaining. As such, according to the majority, the town was not bound to adhere to long-standing and well understood past practices relating to the procedure for promotions to police captain prior to the removal of that position from the bargaining unit. In my view, the majority fails to give full effect to the provision in the agreement addressing promotions to the position of captain. The terms therein have a meaning that is informed by past practices, under which it is clear that the town contractually was obligated to promote the plaintiff, F. Gary Honulik, to the position of police captain because he was the highest ranked candidate on the promotional list. Moreover, the question of whether promotions from a position *within* the bargaining unit to one *outside* the bargaining unit is a nonmandatory subject of bargaining is irrelevant in light of the fact that the agreement expressly addresses this subject. Accordingly, I would affirm the trial court's judgment.

The trial court and the parties have relied, for varying propositions, on the town's generally applicable rules, policies and procedures for employment decisions, which are set forth in the town's classification and pay plan (pay plan) and personnel policy and procedures manual (policy manual). The parties agree, however, that the effect of the 1999 amendment to the collective bargaining agreement is central to this appeal. Indeed, both the pay plan and policy manual expressly mandate that the terms of a bargaining agreement will supersede contrary terms in those town documents. Greenwich Classification and Pay Plan § 3.2 ("[a]ny inconsistencies between these rules and procedures and collective bargaining agreements shall be read in favor of the collective bargaining agreements"); Greenwich Personnel Policy and Procedures Manual § 100 ("[t]he policy man-

ual is intended to supplement and should be used in conjunction with the [t]own [c]harter, union agreements, [p]olicy [m]anual, [p]ay [p]lan [r]ules, [f]ederal and [s]tate laws and is not intended to supersede or overrule such agreements or statutes"). Therefore, it is clear that the bargaining agreement has primacy and must be the starting point of our analysis.

"It is axiomatic that a collective bargaining agreement is a contract." *D'Agostino* v. *Housing Authority*, 95 Conn. App. 834, 838, 898 A.2d 228, cert. denied, 280 Conn. 905, 907 A.2d 88 (2006); accord *W.R. Grace & Co.* v. *Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983); *Poole* v. *Waterbury*, 266 Conn. 68, 87, 831 A.2d 211 (2003). "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted *in the light of the situation of the parties and the circumstances connected with the transaction*." (Emphasis added; internal quotation marks omitted.) *Allstate Life Ins. Co.* v. *BFA Ltd. Partnership*, 287 Conn. 307, 313, 948 A.2d 318 (2008). "In ascertaining intent, we consider not only the language used in the contract but also *the circumstances surrounding the making of the contract, the motives of the parties and the purposes which they sought to accomplish*." (Emphasis added; internal quotation marks omitted.) *Barnard* v. *Barnard*, 214 Conn. 99, 109–10, 570 A.2d 690 (1990). Thus, a contract's meaning is contextual. Cf. *Levine* v. *Advest, Inc.*, 244 Conn. 732, 753, 714 A.2d 649 (1998) ("[t]he individual clauses of a contract . . . cannot be construed by taking them out of context and giving them an interpretation apart from the contract of which they are a part").

To put the provisions of the agreement at issue in their proper context, it is useful at the outset to state what is not in dispute. Prior to 1999, the positions of captain, lieutenant and sergeant were in the bargaining unit controlled by the agreement between the town and the union. At that time, the bargaining agreement did not address promotions expressly but did include a provision entitled "Past Practices Clause," which remained in the agreement after 1999. The past practices clause, set forth in article XXVIII of the agreement, provides in relevant part: "All benefits and obligations which are not described in this [a]greement or in either the [town police] manual or [pay] plan and which are now enjoyed by or required of the employees are specifically included in this [a]greement by reference just as though each such benefit or obligation was specifically set forth." Thus, if promotion on the basis of one's rank on the promotional list was a benefit enjoyed by members of the bargaining unit, that past practice would be protected under the agreement, even though the agreement does not expressly address promotional practices.

The trial court concluded that promotional practices within the bargaining unit were a benefit that fell within the past practices clause; the town does not dispute this interpretation of the agreement.[2] Thus, prior to 1999, the past practices provision controlled promotions to the positions of sergeant, lieutenant and captain. The trial court also made the unchallenged factual finding, overwhelmingly supported by the evidence, that "the well established past or prevailing practice within the Greenwich police department of the hiring authority was to fill a vacancy with the top scoring candidate listed in rank order on the promotional list."[3] Indeed, the town's principal witness, Alfred C. Cava, director of human resources for the town, conceded in his testimony before the trial court that, throughout the extended period in which the town engaged in this practice, it had acquiesced to the union's position that promotion within the bargaining unit of the top ranked candidate on the promotional list is a past practice mandated under the agreement.

In 1999, the town and the union agreed to remove the position of police captain from the bargaining unit. This change undoubtedly altered the legal rights of persons who already had attained the position of captain. Once removed from the bargaining unit, the agreement no longer controlled the wages, hours and conditions of employment of captains except to the extent that the parties voluntarily had agreed and provided otherwise. See *Assn. of Civilian Technicians* v. *Federal Labor Relations Authority*, 353 F.3d 46, 50 (D.C. Cir. 2004); *Connecticut Education Assn.* v. *State Board of Labor Relations*, 5 Conn. App. 253, 271, 498 A.2d 102, cert. denied, 197 Conn. 814, 499 A.2d 804 (1985). This appeal turns, however, on whether the agreement, as amended in 1999, altered the rights of those persons whose positions are *still included within the bargaining unit*. Specifically, we must consider whether the trial court properly construed the agreement as "call[ing] for the implementation of the procedure of promoting in rank order from the promotional list" for persons within the bargaining unit, like the plaintiff.

As a result of the parties' agreement to remove the position of captain from the bargaining unit, the parties amended article XXV of the 1999–2004 agreement, entitled "Conditions of Employment," by adding paragraph D, which provides: "Promotion to the classification of [p]olice [c]aptain shall be made from bargaining unit employees who are *candidates certified to the promotional list*."[4] (Emphasis added.) It is this provision that is at the crux of this appeal. The critical question is whether it evidences an intent to continue the past practice of promoting the top ranked candidate on the promotional list or to alter that practice.[5] Specifically, the question arises as to the meaning of the term "promotional list." Neither the parties, the trial court nor

the majority have concluded that the meaning of this term is self-evident. The term is not defined in the agreement, and the agreement does not incorporate by express reference any documents other than the police manual. Two sources, however, clarify the meaning of this term as it affects the resolution of the issue before us: past practice specific to the police department and town documents generally applicable to all town employees.

It is well settled that, even in the absence of an express past practice clause, past practices properly may be relied on to illuminate the meaning of a term or provision of a bargaining agreement. See F. Elkouri & E. Elkouri, How Arbitration Works (A. Ruben ed., 6th Ed. 2003) c. 12.1, p. 605 ("[p]roof of custom and past practice may be introduced . . . to indicate the proper interpretation of contract language"); see, e.g., *Black* v. *Surface Transportation Board*, 476 F.3d 409, 414 (6th Cir. 2007); cf. *Anheuser-Busch, Inc.* v. *International Brotherhood of Teamsters, Local No. 744*, 280 F.3d 1133, 1139 (7th Cir.), cert. denied, 537 U.S. 885, 123 S. Ct. 119, 154 L. Ed. 2d 144 (2002). "Indeed, the parties' course of performance may be the best evidence of their intent in using a particular term." *Martinsville Nylon Employees Council Corp.* v. *National Labor Relations Board*, 969 F.2d 1263, 1269 (D.C. Cir. 1992); see also id. (criticizing cramped interpretation of bargaining agreement by labor board and administrative law judge that failed to consider meaning of terms in light of past practice, especially in light of fact that past practice predated agreement). As the trial court properly recognized, although it would be improper to read the agreement to incorporate past practice if such a reading contradicted the express terms of paragraph D of article XXV of the agreement; F. Elkouri & E. Elkouri, supra, c. 12.9, pp. 627–28; neither the majority nor the town has demonstrated that any such conflict arises under the trial court's construction.

It is an undisputed fact, both here and before the trial court, that the long-standing past practice in the police department was to compile and use promotional lists in a specific, consistent manner. Promotional lists were compiled on the basis of a competitive examination, listing candidates in rank order of their score. Candidates were selected from the promotional lists strictly in rank order. Therefore, the term "promotional list" undoubtedly had a particular meaning "in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) *Allstate Life Ins. Co.* v. *BFA Ltd. Partnership*, supra, 287 Conn. 313.

Indeed, because promotional lists for sergeant and lieutenant positions, which are positions within the bargaining unit, undoubtedly continued after 1999 to be compiled and used in accordance with the past practice

of rank order, the use of the term promotional list in paragraph D of article XXV of the agreement should be presumed to embody a similar meaning. In other words, had the parties intended to depart from past practice of rank order promotion, they presumably would have used a different term than "promotional list" or qualified that term with language indicating that rank order would not be the sole basis for appointment. For example, paragraph D could have provided "the appointing authority may select any candidate on the promotional list, regardless of rank," or "the appointing authority may select from the top three ranked candidates on the promotional list." Compare General Statutes § 5-215a ("The candidate list certified by the commissioner [of administrative services] shall contain the final earned rating of each candidate [for the classified state service]. The appointing authority shall fill the vacant position by selecting any candidate on the candidate list.") and General Statutes § 7-414 ("Such persons [on the eligibility list for classified civil service] shall take rank as candidates upon such register or list in the order of their relative excellence as determined by test, without reference to priority of time of test. . . . The board shall submit to the appointing power for each promotion the names of not more than three applicants having the highest rating.").[6]

Turning next to the town's rules and policies, the term "promotional list" is defined in the town's pay plan and policy manual.[7] A "promotional list" is defined therein as "[a] list of qualified employees who have passed a promotional examination for a position in the classified service[8] and *ranked on the list in the order of the score received* . . . ." (Emphasis added.) Greenwich Classification and Pay Plan § 4.1.19; Greenwich Personnel Policy and Procedures Manual § 102. Applying that definition to paragraph D of article XXV of the agreement, nothing therein would alter, or be inconsistent with, the meaning of that term as understood in the light of their past practice. Indeed, it appears to make express the past practice.[9] Prior to the 1999 amendment of the agreement, the position of captain had been filled exclusively by persons within the bargaining unit. Similarly, under that past practice, bargaining unit members eligible for promotion had been certified to a promotional list, meaning they had been ranked high enough, on the basis of a competitive examination, to be deemed eligible for promotion.

In light of the history of the past practices clause of the agreement and the language in paragraph D of article XXV of the agreement that is entirely consistent with past practices, I would conclude that the agreement unambiguously requires the town to continue its past practices for promotions to captain. Quite simply, the agreement controls until a bargaining unit member is promoted to the rank of captain; once appointed to that position outside the bargaining unit, the agreement no

longer controls.

The majority reaches a contrary conclusion on the basis of two fundamentally flawed propositions relating to paragraph D of article XXV of the agreement and the past practices clause. First, it determines that a noncontextual and selective reading of paragraph D must apply. The majority reads this provision as if there was no history between the parties that would have given particular meaning to the terms they used. It presumes that the parties were writing on a blank slate when drafting that provision, unencumbered by and unaware of the fact that the police department had used "promotional lists" in a specific manner for many years—promoting candidates in the order of their rank on the promotional list, without exception. Although the majority faults the dissent for looking to past practice to illuminate the meaning of paragraph D, it implicitly acknowledges the ambiguity therein by its resort to the definitional section of the pay plan. The majority then determines that this definition renders paragraph D unambiguous, however, by conveniently omitting from its analysis the portion of that definition that is consistent with the past practice—"ranked on the list in order of the score received . . . ." Greenwich Classification and Pay Plan § 4.1.19; Greenwich Personnel Policy and Procedures Manual § 102. The majority thereby implicitly concludes that this phrase has no meaning, or at least no intended effect, contrary to the rule that we do not read contracts to render terms superfluous.[10] See *Connecticut Medical Ins. Co.* v. *Kulikowski*, 286 Conn. 1, 12–13, 942 A.2d 334 (2008); *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008).

It defies logic that the parties would have incorporated a term that had a particular meaning under well established past practice, which previously was an implied term of the agreement under the past practice clause and was defined in the town's policies in a manner consistent with that practice, if their intent was to change past practice. If that had been their intention, it is reasonable to assume that they either would have provided for a different promotional procedure for captains than the one previously adhered to (discretion rather than rank order)[11] or would have expressly disavowed past practice. See, e.g., *Truck Drivers Local No. 164* v. *Allied Waste Systems, Inc.*, 512 F.3d 211, 214 (6th Cir. 2008) (citing clause in bargaining agreement "which [provides] that the terms of the enacted agreement 'shall supersede and render ineffective any past practices, addendum, letters of understanding, oral or written agreement as may now exist or as may have existed' "); *Michigan Family Resources, Inc.* v. *Service Employees International Union Local 517M*, 475 F.3d 746, 749 (6th Cir.) (citing clause in bargaining agreement providing that " '[t]here are no past practices which are binding upon the parties' "), cert. denied, U.S. ,

127 S. Ct. 2996, 168 L. Ed. 2d 704 (2007); *Gannett Rochester Newspapers* v. *National Labor Relations Board*, 988 F.2d 198, 199 (D.C. Cir. 1993) (citing clause of collective bargaining agreement providing that contract "supersedes all prior agreements, commitments, and practices, whether oral or written between the [c]ompany and the [u]nion, or the [c]ompany and any covered employee or employees" [internal quotation marks omitted]). The town's failure to add terms to negate the past practices clause while expressly reaffirming procedures consistent with past practice was, in effect, an agreement to retain the status quo regarding promotions to the rank of captain.[12] To the extent that the town may have harbored a subjective view of the meaning of paragraph D of article XXV of the agreement that was contrary to past practice, I would agree with the trial court that the town was obligated to make that intention clear.[13] See *Garrison* v. *Garrison*, 190 Conn. 173, 175, 460 A.2d 945 (1983) ("[t]he making of a contract does not depend upon the secret intention of a party . . . but upon the intention manifested by his [or her] words or acts, and on these the other party has a right to proceed" [internal quotation marks omitted]).

Second, the majority concludes that a distinction in labor law between mandatory and nonmandatory subjects of bargaining is dispostive, when that distinction has no bearing on the question before this court. The majority cites cases holding that the subject of promotions *within* the bargaining unit are mandatory subjects of bargaining, whereas the subject of promotions from a position within the bargaining unit to one *outside* the bargaining unit is a nonmandatory, or permissive, subject of bargaining. Accordingly, because promotions to police captain would have become a nonmandatory subject of bargaining once that position was removed from the bargaining unit, the majority posits that the town could not be compelled to adhere to its past practices for promotions to police captain. Although I would agree that the weight of authority, albeit quite limited, holds that promotions to a position outside the bargaining unit is a nonmandatory subject of bargaining,[14] this distinction is a red herring under the facts of this case.

It is well established that parties may agree to include a nonmandatory subject in a bargaining agreement, and, if they do so, a breach of contract action will lie for a violation of such a term. See *Danbury* v. *International Assn. of Firefighters, Local 801*, 221 Conn. 244, 253, 603 A.2d 393 (1992) ("The duty to negotiate is limited to mandatory subjects of bargaining. As to other matters, however, each party is free to bargain or not to bargain. . . . To the extent that such permissive bargaining results in an accord between the parties, their agreement may be incorporated into a binding contract . . . ." [Internal quotation marks omitted.]); *First National Maintenance Corp.* v. *National Labor Rela-*

tions Board, 452 U.S. 666, 675 n.13, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981) (parties are free to negotiate in good faith nonmandatory subject of bargaining but may not insist on it to point of impasse); *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187–88, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971) ("By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining. . . . The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract . . . not in an unfair-labor-practice proceeding." [Citation omitted.]); see also *Lid Electric, Inc.* v. *International Brotherhood of Electrical Workers, Local 134*, 362 F.3d 940, 943 (7th Cir. 2004) ("Labor law permits collective bargaining agreements to reach beyond the certified unit of workers. How employers treat non-unit workers is a permissive subject of bargaining. Neither union nor employer is required to negotiate about permissive subjects [that is what it means to call them 'permissive' rather than 'mandatory'] . . . but they can do so when they find it mutually beneficial." [Citation omitted.]).

Paragraph D of article XXV of the agreement is clear evidence that the town did bargain on the subject of promotions to police captain and agreed to included terms consistent with past practice. Thus, the distinction that the majority and the town draw between mandatory and nonmandatory subjects of bargaining as it bears on whether the town *could* be compelled to bargain on this matter or could unilaterally alter a past practice that was *not* protected expressly in the agreement is irrelevant. Moreover, neither the majority nor the town has pointed to any case law that requires us to eschew basic principles of contract interpretation, under which we determine the parties' intent in light of their situation and the circumstances of the transaction, when a nonmandatory subject of bargaining has been included in an agreement.[15]

In sum, the parties previously had agreed to include a past practices clause in the bargaining agreement. Promotions made strictly on the basis of rank order on the promotional list had been the established past practice. The parties thereafter agreed to remove the position of captain from the bargaining unit, but to add paragraph D to article XXV of the agreement to address the procedure for promotions to captain. That paragraph simply restates the past practice. Indeed, in light of the numerous ways that the agreement could have reflected a clear intention to break from past practice, I question how the majority can fail, at the very least, to conclude that the agreement is ambiguous as to the question before us.[16] Therefore, I would determine that the trial court properly concluded that the town had breached the contract by failing to promote the plaintiff, who was ranked first on the promotional list.

Accordingly, I respectfully dissent.[17]

[1] Although the plaintiff, F. Gary Honulik, also named certain town employees as defendants; see footnote 2 of the majority opinion; all of the defendants assert the same claims with respect to this appeal, and I refer to them collectively as the town for purposes of convenience.

[2] In its brief to this court, the town relies on labor board decisions that have held that promotions *within* the bargaining unit constitute a mandatory subject of bargaining, whereas promotions from a position within the bargaining unit to one *outside* the bargaining unit constitute a nonmandatory subject of bargaining. It then contends that "[t]he [state labor relations board], construing 'benefits' in a past practices clause, has concluded that 'benefits' are mandatory subjects of bargaining. . . . Thus . . . the past practices clause must be read to apply only to 'benefits' that are mandatory subjects of bargaining. Because promotion to a supervisory position outside the bargaining unit is a nonmandatory subject of bargaining, it is not a 'benefit' preserved by the past practices clause." (Citations omitted.) Therefore, the town implicitly concedes that the subject of promotions within the bargaining unit falls within the past practices clause by virtue of its status as a mandatory subject of bargaining. Despite this uncontested point, the majority faults the trial court and this dissent for failing to analyze the contours of the past practices clause and contends that the trial court did not make an explicit finding that rank order promotion was a "benefit" within the meaning of the past practices clause. Unlike the majority, I think this connection is implicit in the trial court's numerous citations to the past practices clause in its analysis and its repeated findings as to the past practice of rank order promotion.

[3] The lone exception to this practice was a situation in which a top ranked candidate for a promotion to captain apparently had agreed to be passed over as part of negotiations to resolve pending disciplinary issues.

[4] There was no evidence admitted to explain the textual differences between the 1999 preliminary agreement and article XXV, paragraph D, of the 1999–2004 bargaining agreement, but the bargaining agreement controls the issue in the present case.

[5] Because the parties expressly included promotions to captain as a "condition of employment" in the agreement, there is no need to determine whether, in the absence of any such express manifestation, the past practices clause alone would require the town to promote in the rank order of the promotional list.

[6] Section 7-414 embodies what is commonly known as the "rule of three," a practice adopted by many municipalities. See *Kelly* v. *New Haven*, 275 Conn. 580, 587 and nn.9 and 10, 881 A.2d 978 (2005) (citing New Haven city charter and civil service rules); *Hartford* v. *Board of Mediation & Arbitration*, 211 Conn. 7, 10–11, 557 A.2d 1236 (1989) (citing Hartford city charter and personnel rules and regulations); *State ex rel. Barnard* v. *Ambrogio*, 162 Conn. 491, 495 n.2, 294 A.2d 529 (1972) (citing Haddam town charter).

[7] The term "promotional list" is not actually used in the section of either the policy manual or the pay plan that encompasses the subject of promotions. The definitions, of course, could not, in and of themselves, prescribe substantive rights. Cf. 1A J. Sutherland, Statutory Construction (6th Ed. Singer 2002) § 27.1; *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 70, 689 A.2d 1097 (1997); *Toll Gate Farms, Inc.* v. *Milk Regulation Board*, 148 Conn. 341, 342–43, 170 A.2d 883 (1961).

[8] A classified position is one filled by way of a competitive examination process; Greenwich Classification and Pay Plan § 4.1.8; whereas an unclassified position is excluded from the merit testing policies because of the nature of the authority and responsibilities exercised. Id., § 4.1.14. Although the town recently changed the position of police chief to unclassified, during the period relevant to this appeal, all positions in the police department were classified.

[9] The significance of rank order is underscored in other provisions in the policy manual, suggesting that rank order may in fact be intended to operate as a constraint on filling promotions. The policy manual sets forth a procedure for breaking tie scores, and that procedure relates to the merits of the examination rather than nonmerit based criteria. See Greenwich Personnel Policy and Procedures Manual § 402.1 ("[w]henever identical grades are received, such names shall be arranged in order of relative rating given in the most heavily weighed part of the examination"). It also requires notification to employees of their "final grade *and relative standing* on the employment list . . . immediately after the certification of the employment list to

the appointing authority." (Emphasis added.) Id. We need not, in the present case, however, determine whether the town generally has committed to fill promotions in rank order. The question before us is the intent of the parties to the bargaining agreement at issue, specifically, what meaning they attached to the term "promotional list."

[10] The majority gives substantive effect to the part of paragraph D of article XXV of the agreement that requires candidates to be "certified" to the promotional list and the counterpart in § 4.1.19 of the pay plan and § 102 of the policy manual that requires a qualified employee to have "passed a promotional examination . . . ." The majority fails, however, to ascribe any substantive meaning to, or even acknowledge, the portion of the definition that requires candidates to be "ranked on the list in the order of the score received . . . ." Greenwich Classification and Pay Plan § 4.1.19; Greenwich Personnel Policy and Procedures Manual § 102. Under the majority's view, despite the clear meaning that rank order had with respect to promotional lists in the police department, it would not be a substantive violation of the agreement for the town to compile a promotional list in alphabetical order of those candidates who passed the promotional examination.

[11] Indeed, testimony suggested that, at some point, the town had amended paragraph F of article XXV of the agreement to alter past practice with respect to the timing for certain promotional examinations not pertinent to this appeal.

[12] In its brief to this court, the town contends that, applying the maxim "inclusio unius est exclusio alterius," we must read the express inclusion in paragraph D of article XXV of the agreement of *who* is eligible for promotion as excluding *how* promotions shall be made. I disagree that this maxim is applicable. Although that maxim might have some force if this provision set forth a list of similar or related terms that appeared exclusive, that is not the case here. See F. Elkouri & E. Elkouri, supra, c. 9.3.A.xi, pp. 467–68 (explaining limitations on application of this doctrine); id., p. 622 (general clause preserving past practice would not require employer to continue past practice of designating day before Christmas as paid holiday when contract specifically listed paid holidays and did not include day before Christmas); see also *Cahill* v. *Board of Education*, 187 Conn. 94, 107, 444 A.2d 907 (1982) (*Shea*, *J.*, concurring) ("the maxim inclusio unius, exclusio alterius is merely an aid to construction and not a rule of law having universal application").

[13] In its memorandum of decision, the trial court repeatedly emphasized that "the [town] specifically and unequivocally declined to negotiate a specific provision regarding the manner of testing and selecting a person promoted to the rank of [p]olice [c]aptain; and that therefore, the [agreement] calls for the implementation of the procedure of promoting in rank order from the promotional list and not according to the '[r]ule of the [l]ist,' so called." I note that Cava, director of human resources for the town, offered the following testimony on the express representations made by the town during negotiations relating to the change in the status of captains:

"[The Plaintiff's Counsel]: You did discuss with the union during the time the captain's position went out of the bargaining unit, the fact that it was on the table and discussed, that the impact of that would be that the bargaining unit could no longer negotiate for the wages or the benefits, or those type of things for the captains, correct?

"[Cava]: Correct. . . .

"[The Town's Counsel]: You said that you chose not to address the issue of a promotional process with the union, correct?

"[Cava]: Correct.

"[The Town's Counsel]: Did the union indicate to you that it wanted to discuss the promotional process for captains?

"[Cava]: Well, they initially raised a number of those issues. And I chose not to discuss it with them. That was my initial position. They were outside the bargaining unit and I wouldn't have any discussion with them over it. Subsequently, I learned that their real interest was they were concerned that the town may go outside of the department and hire outside people into the position of captain, so we acquiesced and that was never our intent. And we acquiesced to the language that's now in the [agreement] that the promotions would continue to come from within the department.

"[The Town's Counsel]: So you never specifically discussed the promotional process even though the union had indicated that it wished to do that?

"[Cava]: Never discussed it."

[14] There is not, however, universal consensus on this question. See *Local 1383 of the International Assn. of Fire Fighters* v. *Warren*, 411 Mich. 642,

653 n.2, 311 N.W.2d 702 (1981) ("[p]romotions are such an important topic of employment relations that even promotions out of a bargaining unit are mandatory subjects [of bargaining]"); *Detroit Police Officers Assn.* v. *Detroit*, 61 Mich. App. 487, 492–94, 233 N.W.2d 49 (1975) (explaining and applying principle subsequently cited by Michigan Supreme Court in *Local 1383 of the International Assn. of Fire Fighters*); see also *Manistee* v. *Manistee Fire Fighters Assn., Local 645, IAFF*, 174 Mich. App. 118, 121–22, 435 N.W.2d 778 (1989) ("What constitutes a mandatory subject is determined on a case-by-case basis. [*Detroit Police Officers Assn.* v. *Detroit*, supra, 490–91]. The test generally applied is whether the matter has a significant impact upon wages, hours, or other conditions of employment, or settles an aspect of the employer-employee relationship." [Internal quotation marks omitted.]). I would not conclude, as it appears the majority has, that promotions from a position within the bargaining unit to one outside the bargaining unit would be a nonmandatory subject of bargaining in every case. Indeed, the majority's deference to two state board decisions reaching such a conclusion on the basis of the rule that we afford deference to "time tested" agency interpretations is puzzling given that: (1) this rule applies to formal interpretations of *statutory* terms; see *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 404, 944 A.2d 925 (2008) ("[w]e traditionally have accorded deference to the time-tested interpretation of an agency charged with enforcing the provisions of a statute, provided that the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable" [internal quotation marks omitted]); and (2) this court expressly has rejected two agency decisions as being sufficiently numerous to satisfy that standard. See *Vincent* v. *New Haven*, 285 Conn. 778, 784 n.8, 941 A.2d 932 (2008); *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 603 n.9, 893 A.2d 431 (2006). To the extent necessary to resolve the issue in the present case, I would assume, without deciding, that such promotions are a nonmandatory subject of bargaining because of the posture of this case, in that the plaintiff concedes in his brief to this court that paragraph D of article XXV of the agreement addresses a nonmandatory subject of bargaining in order to pursue his independent breach of contract action.

[15] Although a past practice may no longer be binding if the underlying conditions on which the practice was based have changed; F. Elkouri & E. Elkouri, supra, c. 12.6, p. 618; that rule would not apply in this case for two reasons: (1) the past practice has been made an express term of the contract; id.; and (2) there is no evidence that the status of the position at issue in the promotion as within or outside of the bargaining unit was a "condition" on which the practice of rank order promotion was instituted and maintained.

[16] To the extent that one still could view the agreement as ambiguous after considering the undisputed past practice, the evidence before the trial court did not reflect that the parties' conduct subsequent to the 1999 amendment manifested a clear intent to alter the existing practice. Significantly, within months after agreeing to remove the position of captain from the bargaining unit, promotions were made to fill two police captain openings. Peter Robbins, the police chief who filled those promotions, testified that he believed that he was required to promote in rank order of the promotional list, as the police department always had done in the past, and that no one had told him anything to the contrary. As a result, Robbins promoted the top two ranked persons on the promotional list. It seems extraordinary that the appropriate town officials never communicated to Robbins, the appointing authority, that there had been a change in the promotional process such that he now had complete discretion to hire anyone on the promotional list. See *Jaasma* v. *Shell Oil Co.*, 412 F.3d 501, 508 (3d Cir. 2005) (subsequent conduct relevant to construe ambiguity in agreement); *Sure-Trip, Inc.* v. *Westinghouse Engineering & Instrumentation Services Division*, 47 F.3d 526, 534 (2d Cir. 1995) (same); *Federal Ins. Co.* v. *Scarsella Bros., Inc.*, 931 F.2d 599, 603 (9th Cir. 1991) (same). Moreover, the announcement for those positions contained nothing that would have indicated to eligible officers that the practice regarding the promotional procedure had changed. The only manifestation to the contrary was in a letter from the town's deputy director of human resources, which apparently was sent to only those two top ranked candidates who thereafter were promoted. That letter provided in relevant part: "Under the [r]ules and [r]egulations of the Greenwich [p]ay [p]lan, a [d]epartment [h]ead may hire any candidate certified as eligible by the [h]uman [r]esources [d]epartment. Your name has been forwarded to the hiring authority for consideration for

appointment to this position." Honulik received a similar, generically phrased letter in 2003. Under such circumstances, if resort to subsequent conduct was necessary because the agreement was ambiguous after consulting past practice and applicable town documents, a finding by the trial court that the ambiguity in the agreement should be read as retaining the status quo would not be clearly erroneous. See *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007) (noting that, if contract is determined to be ambiguous, finding of intent is factual question reversed only if clearly erroneous).

[17] In light of the urgency to resolve this expedited public interest appeal as expeditiously as possible, I do not address the remaining arguments of the parties. See General Statutes § 52-265a (direct appeal on questions involving public interest authorized in case "in which delay may work a substantial injustice").