3.4 SPECIFIC PROCEDURES

3.4.1 Inspections

A good starting point for a review of current law on administrative inspections of premises is *Camara v. Municipal Court*.[1] *Camara* involved a routine housing inspection of an apartment building for possible code violations.[2] The U.S. Supreme Court held that an attempted warrantless search of a residential unit in a building constituted an unlawful search and seizure in violation of the Fourth Amendment.[3] In the absence of consent, officials could not conduct an inspection without first obtaining a warrant by establishing that probable cause existed to conduct the search.[4] The Court, however, broadly defined the probable cause standard for the conduct of routine administrative inspections.[5] In addition, the Court required only that the need for the particular inspection be weighed in terms of reasonable goals of the code being enforced.[6] Thus, if reasonable legislative or administrative standards existed for the conduct of an inspection, the warrant would issue.[7] Warrantless inspections could continue to be held in an emergency or, of course, where permission was granted by the owner of the property.[8]

On the same day as the *Camara* decision, the Supreme Court issued its ruling in *See v. City of Seattle.*[9] The only question in *See* was whether the *Camara* holding applied to commercial structures not used as private residences.[10] The Court found that a warrant was necessary for a nonconsensual inspection of commercial premises or portions of commercial premises that are not open to the public.[11]

The Minnesota Court of Appeals cited the *Camara* decision in upholding an administrative search of rental housing by a city.[12] A city ordinance authorized a search warrant for the inspection of rental housing upon a showing of probable cause for its issuance, made to a court of competent jurisdiction.[13] The court of appeals determined that no statutory authority was necessary for the search warrant in light of the case law

1 387 U.S. 523 (1967).
2 *Id.* at 526.
3 *Id.* at 534.
4 *Id.* at 535.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 539.
9 387 U.S. 541 (1967).
10 *Id.* at 542.
11 *Id.* at 544-45.
12 *In re* Search Warrant of Columbia Heights v. Rozman, 586 N.W.2d 273, 276 (Minn. Ct. App. 1998). In the criminal context, the Minnesota Supreme Court has looked to article 1, section 10, of the Minnesota Constitution in order to provide greater protection for Minnesota citizens' right to be free from unreasonable searches, beyond the protections of the Fourth Amendment. *See, e.g.,* State v. Carter, 697 N.W.2d 199, 212 (Minn. 2005) (self-storage unit exterior); State v. Larsen, 650 N.W.2d 144, 153-54 (Minn. 2002) (ice-fishing house); Ascher v. Comm'r of Public Safety, 519 N.W.2d 183, 187 (Minn. 1994) (drunk driving roadblock). The court has not specifically addressed whether the Minnesota Constitution would also provide greater protection from administrative searches.
13 *Rozman*, 586 at 274-75.

authority and that the warrant did not have to be executed by a peace officer as is usually required by Minn. Stat. § 626.15.[14] The court found that probable cause existed in this particular inspection since it was a re-inspection.[15] The court of appeals invited the legislature to consider enactment of a statute providing general authorization for administrative search warrants.[16]

After *Camara* and *See,* the Supreme Court allowed warrantless administrative inspections in certain circumstances. In *Colonnade Catering Corp. v. United State*s, the Court concluded that Congress could statutorily authorize a warrantless search of a liquor licensee's premises.[17]. However, since the statute did not specifically authorize a forcible entry, the Court suppressed the evidence that was obtained when Internal Revenue Service agents forced their way into a locked storeroom.[18] In *United States v. Biswell,* a warrantless search of a licensed gun dealer was permitted for the purpose of determining whether the dealer was in compliance with the federal Gun Control Act.[19] The federal act authorized the warrantless search in such situations. The Court noted that the businesses involved in these cases were "pervasively regulated"[20] and "long subject to close supervision and inspection."[21] The rationale underlying both of these cases is that of implied consent to the inspection. The Court concluded that anyone entering businesses involving close government supervision must do so fully aware that inspections are likely. Therefore, these businesses are presumed to have consented to such inspections. In considering whether an agency can engage in a warrantless search of business premises, it is necessary to examine the statute or regulatory scheme by which the search is conducted and determine whether the method of regulation makes a warrant unnecessary.[22]

Inspections conducted pursuant to the Occupational Safety and Health Act of 1970 (OSHA) were determined, in *Marshall v. Barlow's, Inc.* to require warrants when the owner of the property refuses to consent to the inspection,[23]. In requiring that administrative agencies obtain warrants for nonconsensual OSHA inspections, the U.S. Supreme Court stated that the warrantless searches permitted by *Colonnade* and *Biswell* were exceptions arising out of "relatively unique circumstances."[24] Again, the Court stressed that probable

14 *Id.* at 276-77.

15 *Id.*

16 *Id.* at 276.

17 397 U.S. 72, 75 (1970).

18 *Id.* at 77.

19 406 U.S. 311, 316 (1972); *see also* State v. Wybierala, 305 Minn. 455, 460, 235 N.W.2d 197, 200 (1975) (licensed junk and second hand dealers).

20 *Biswell,* , 406 U.S. at 316.

21 *Colonnade,* 397 U.S. at 74.

22 Donovan v. Dewey, 452 U.S. 594, 603-05 (1981). *See also* New York v. Burger, 482 U.S. 691 (1987) (warrantless search of "closely regulated" automobile junkyard permitted); United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977); Mendez v. Arizona State Bd. of Pharmacy, 129 Ariz. 89, 628 P.2d 972 (1981); State v. Tindell, 272 Ind. 479, 399 N.E.2d 746 (1980); Lanchester v. Pennsylvania Racing Comm'n, 325 A.2d 648 (1974); State Real Estate Comm'n v. Roberts, 271 A.2d 246 (1970) (relied on required record doctrine of Shapiro v. United States, 335 U.S. 1 (1948), in holding that warrantless inspection of escrow records pursuant to statute requiring that such records be kept and open to inspection would not be unconstitutional).

23 436 U.S. 307, 322-24 (1978).

24 *Id.* at 313.

cause for obtaining a warrant in a criminal law sense was not required.[25] The inspection intended to be conducted need only be reasonable, regardless of whether the agency had any evidence of a violation.[26] Later, in *Donovan v. Dewey,* a warrantless inspection conducted under the Federal Mine Safety and Health Act was found not to violate the Fourth Amendment,[27]. The *Donovan* decision expressly limited *Marshall v. Barlow's, Inc.,* to OSHA inspections.[28] The Court found that in determining the constitutionality of a warrantless inspection, an analysis must be conducted of the particular statute.[29] Since *Donovan* involved a relatively new regulatory program, the Court rejected the implication of *Colonnade* that a long tradition of government supervision must be found before a warrantless search is permissible.[30] Instead, the Court held that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."[31] Consequently, courts must attempt to examine the nature and purpose of an administrative program to determine whether a search is reasonable and whether implied consent might be found. Under that analysis, a case worker visiting the home of an individual receiving public assistance has been found not to violate the Fourth Amendment.[32]

3.4.2 Other Investigations

In addition to the inspection of premises, agencies investigate matters in a variety of other ways. These include the use of subpoenas, the submission of reports, the submission to examinations, and the use of fact-finding hearings.

The authority of agencies to require the submission of reports has long been recognized. In *United States v. Morton Salt Co.*, the Supreme Court held that an agency with statutory authority may require a business to submit a report regarding its compliance with the law provided that the demand is "not too indefinite and the information sought is reasonably relevant.",[33] Within this authority, an agency may be able to require more than the production of existing documents;[34] it may also be able to compel a party to develop and compile information.[35] In *Application of Northwestern Bell Telephone Co*., the Minnesota Court of Appeals held that the express authority of the Minnesota Public Utilities Commission (MPUC) to make investigations and determinations regarding the conduct of the businesses it regulates includes an implicit authority to impose record-keeping requirements such as the submission of accounting reports.[36]

In *United States v. Ward,* the Supreme Court examined a Fifth Amendment challenge to the requirement that an individual in charge of an onshore facility report oil discharges

25 *Id.* at 309.
26 *Id.* at 320.
27 *Donovan,* 452 U.S. at 603-05.
28 *Id*. at 601.
29 *Id.*
30 *Id.* at 605-06.
31 *Id*. at 606.
32 Wyman v. James, 400 U.S. 309, 326 (1971).
33 338 U.S. 632, 652 (1950).
34 *Id.* at 650.
35 EEOC v. Citicorp Diners Club, Inc., 985 F.2d 1036, 1038 (10th Cir. 1993).
36 371 N.W.2d 563, 567 (Minn. Ct. App. 1985).

into navigable waters.[37] The Supreme Court upheld the requirement as constitutional on the basis that information in the report could result only in the imposition of a civil penalty, not a criminal penalty. [38] Accordingly, the Fifth Amendment protection against self-incrimination was found not to apply, despite the fact that a failure to file a report could result in a criminal penalty.[39] In *Hudson v. U.S.,* the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment is not a bar to a later criminal prosecution, because the administrative proceedings in the Office of the Comptroller of the Currency resulting in monetary penalties and occupational disbarment were civil, not criminal, reaffirming the rule exemplified in *Ward*.[40]

Along with the authority to require the submission of reports, certain occupational licensing agencies have the authority to require licensees to submit to medical examinations. In *Humenansky*, the Minnesota court of appeals upheld the Board of Medical Practice's authority, under Minn. Stat. § 147.091, subd. 6(a) (1992), to require a licensed physician to submit to a mental and physical examination as part of an investigation into the physician's fitness to practice.[41] The court determined that the proposed examination was an investigatory tool and that no disciplinary action would be forthcoming absent formal adjudicatory proceedings.[42] Therefore, the court found that Humenansky's protected interest in her license was not implicated and full due process requirements do not attach at this procedural stage.[43] In so finding, the court emphasized the government's interest in protecting the public from unsafe or incompetent practitioners.[44]

Agencies also use fact-finding hearings as a means of investigation. Such hearings are not a quasi-judicial function of the agency and, therefore, do not require the agency to apprise the subject of any allegations made or to permit confrontation or cross-examination of witnesses.[45] Only if the investigation results in a decision to adjudicate the rights of participants in the investigation do the constitutional and statutory provisions regarding contested cases apply.[46] An agency may use its subpoena power for an investigative hearing with respect to persons not subject to direct regulation by the agency.[47]

Finally, agencies frequently use methods of investigation comparable to those used by the police. Such investigative techniques range from interviewing witnesses to the use of undercover investigators to discover a violation.[48]

37 448 U.S. 242, 244 (1980).

38 *Id*. at 254-55.

39 *Id.*

40 522 U.S. 93, 95-96 (1997).

41 Humenansky v. Minn. Bd. of Medical Exam'rs, 525 N.W.2d 559, 568 (Minn. Ct. App. 1994).

42 *Id*. at 566.

43 *Id*.

44 *Id*. at 567.

45 Hannah v. Larche, 363 U.S. 420, 446 (1960); *see, e.g.,* MINN. STAT. § 62D.14 (2014) (investigative hearings of health maintenance organizations); § 216B.28-.31 (investigation of public utilities).

46 State *ex rel.* R.R. & Warehouse Comm'n v. Mees, 235 Minn. 42, 50, 49 N.W.2d 386, 391 (1951).

47 *Id.*

48 The use of undercover investigators may raise a question of entrapment. State v. Grilli, 304 Minn. 80, 89, 230 N.W.2d 445, 452 (1975), establishes that Minnesota follows the majority ("subjective") view on the entrapment defense in criminal proceedings, which is concerned primarily with the element of the particular defendant's predisposition to commit the crime. The minority ("objective") view focuses not on the defendant's predisposition to commit a crime, but rather on determining whether the state actions

would induce a normally law-abiding individual to commit a crime. *Id.* Although the issue has not arisen frequently, it appears that an entrapment defense may legitimately be raised in an administrative action where the agency has used an undercover operation. *See* Patty v. Board of Medical Exam'rs, 9 Cal. 3d 356, 362, 508 P.2d 1121, 1125 (1973). *But compare* Schaffer v. State Bd. of Veterinary Med., 143 Ga. App. 68, 77, 237 S.E.2d 510, 513 (1977) (stating that an entrapment defense is available in disciplinary action against a veterinarian), *with In re* Kennedy, 266 Ga 249, 466 S.E.2d 1 (1996) (concluding that the elements of an entrapment defense render it incompatible with the nature of an attorney disciplinary proceeding). Minnesota courts have not definitively addressed the availability of the entrapment defense in administrative proceedings. In *In re* Disciplinary Actions against Pedley, No. CX-92-1453, 1993 WL 79588, at *1 (Minn. Ct. App. Mar. 23, 1993), relators challenged the county's use of underage decoys to purchase alcoholic beverages, resulting in fines and suspensions of retail liquor licenses. The court stated "it is not clear whether the entrapment defense is available in administrative proceedings." *Pedley, 1993 WL 79588,* at *2. However, the court did not reach the entrapment issue because relators had not established inducement. *Id.*