

## Opinion No. 55-6129

March 14, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. E. B. Swope, Warden, Penitentiary of New Mexico, P. O. Box 1059, Santa Fe, New Mexico

Receipt is acknowledged of your letter, dated February 22, in which you request an opinion on the practicability of marking the letter "P" on all clay products made at the penitentiary.

You make reference to § 42-1-49 of the New Mexico Statutes Annotated, 1953 Compilation. This statute covers prison made goods and how they should be branded, marked or labeled before exposure for sale in New Mexico. The last paragraph, reads as follows:

"And Provided further that in lieu of other marking and where practicable, all brick and clay products, shall be marked with a capital letter P."

You ask whether markings on brick and clay products can be dispensed with since the marking of each individual brick was not a practical procedure for the reason that this would have to be done manually and the expense of obtaining automatic equipment, if such was available, was impractical to the extent that the plant is antiquated.

Therefore, we will have to interpret the above quoted last proviso, and in Volume 33 of Words and Phrases, on page 170, is found the meaning of the word "practicable":

"In general the meaning of 'practicable' depends largely on context, but ordinarily means that which may be practiced or performed; capable of being put into practice, done, or accomplished."

I also find in Volume 2 of Sutherland Statutory Construction at the bottom of § 4704 the following:

"In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention should be taken or presumed according to what is consistent with reason and good discretion."

In the case of Beck et al v. Board of Commissioners of Shawnee County, a Kansas case, reported in 182, P. 397, the Supreme Court on page 402 of the same volume had this to say in construing the word "practicable" in the statute:

"Words of a statute are to be construed according to the context and approved usage of language. Gen. Stat. 1915, Sec. 10973. In this instance the meaning of the word 'practicable' is the ordinary meaning, 'capable of being done or accomplished' (Webster's New International Dictionary, title 'Practicable',) and the statute requires the settlement to be established as near the county seat as is capable of being done."

It is the opinion of this office, in view of the language of the last provision on § 42-1-49, New Mexico Statutes Annotated, 1953 Compilation, and the authorities hereinabove cited, that the Penitentiary Board has discretionary power in deciding whether or not it is practicable to mark each brick with a "P". They should be guided however, not only by the authorities cited above, but also by the available man power, the public's right to know that the bricks are prison made, and other such factors.

Trusting this fully answers your inquiry, I remain

By Hilario Rubio

Assistant Attorney General