

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

BYRON C. FARLEY,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2025-1827

Petition for review of the Merit Systems Protection Board in No. DA-1221-25-0189-W-1.

Decided: January 15, 2026

BYRON C. FARLEY, Weslaco, TX, pro se.

STEPHEN FUNG, Office of the General Counsel, United States Merit Systems Protection Board, Washington, DC, for respondent. Also represented by KATHERINE MICHELLE SMITH.

Appendix A

Before REYNA and CHEN, *Circuit Judges*, and FREEMAN,
District Judge.¹

PER CURIAM.

Pro se appellant Byron C. Farley challenges a final order of the Merit Systems Protection Board dismissing his appeal as untimely and not subject to equitable tolling. We affirm.

BACKGROUND

In 2010, Mr. Farley was removed from his position at United States Customs and Border Patrol for failure to cooperate with an official investigation. On October 21, 2024, Mr. Farley filed a complaint with the Office of Special Counsel (“OSC”), alleging his removal was a prohibited personnel action and retaliation for whistleblowing. SAppx45–75.² On November 20, 2024, OSC issued a letter closing its inquiry into Mr. Farley’s complaint on grounds that each of his claims was deficient. SAppx76–77.

Sixty-six days later, on January 25, 2025, Mr. Farley filed an individual right of action (“IRA”) appeal with the Merit Systems Protection Board (“Board”), again challenging his removal based on whistleblowing. SAppx28–29. Without reaching the merits, the Board issued an order on timeliness, notifying Mr. Farley it “appears that your appeal was filed 1 day late.” SAppx78–81. The order required Mr. Farley to submit “evidence and/or argument” showing the filing was timely or that the circumstances warrant equitable tolling. SAppx80–81.

¹ Honorable Beth Labson Freeman, District Judge, United States District Court for the Northern District of California, sitting by designation.

² “SAppx” refers to the supplemental appendix accompanying Respondent’s Informal Brief, which is docketed at ECF No. 17.

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Mr. Farley submitted a response to the Board's order on timeliness. SAppx86-89. In his response, he acknowledged that he "missed the deadline date," but countered that he "did everything within [his] power to make the deadline." SAppx86. For example, Mr. Farley explained that he had discussed appealing the OSC decision to the Board with his same attorneys who handled the OSC proceedings. SAppx86-87. Mr. Farley claimed that about two weeks before the deadline, he sent his attorneys a "narrative" to be used in the IRA appeal. SAppx86. His attorneys acknowledged receipt and stated that they were "working on [his] response." SAppx87. Mr. Farley contended that three days before the filing deadline one of his attorneys explained that his firm would not "take on" the IRA appeal because it would likely not prevail, but that Mr. Farley could file on his own, and that the deadline was in three days. SAppx87-88. Mr. Farley started working on his appeal and realized he "didn't have the tools or the information" needed to file on time. SAppx88. Mr. Farley alleged that he tried to contact his attorney but was unable to reach him until 2:15pm on the filing due date, at which point his attorney provided "two user guides" for filing an appeal and Board contact information. SAppx88-89. Despite this information, Mr. Farley noted that he "missed the deadline by 3 hours and 23 minutes." SAppx89.

The Board rejected Mr. Farley's arguments and dismissed his IRA appeal. SAppx1-4. First, the Board concluded Mr. Farley's appeal was untimely because he filed one day late. SAppx2 (citing the sixty-five-day deadline set by 5 C.F.R. § 1209.5(a)(1)). Second, the Board declined to equitably toll the filing deadline. SAppx2-4. The Board acknowledged the filing deadline for IRA appeals can be equitably tolled based on 5 C.F.R. § 1209.5(b), but found that Mr. Farley's justification for his late filing—his attorney's alleged inaction and unresponsiveness—did not satisfy the limited circumstances for equitable tolling. SAppx2-3 (citing *Irwin v. Dep't of Veterans Affs.*, 498 U.S.

89, 96 (1990)). As Mr. Farley did not file a petition for review, the Board's decision became final. SAppx4.

Mr. Farley petitions for review of the Board's final order dismissing his appeal. We have jurisdiction under 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9).

STANDARD OF REVIEW

The Board has "broad discretion to control its own docket and we will not substitute our judgment for that of the [B]oard in this regard." *Olivares v. Merit Sys. Prot. Bd.*, 17 F.3d 386, 388 (Fed. Cir. 1994). We must affirm a decision of the Board unless it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c)(1)-(3).

DISCUSSION

The issue on appeal is whether the Board erred in determining that Mr. Farley failed to allege sufficient facts to equitably toll the filing deadline.

Mr. Farley acknowledges his appeal was untimely. SAppx86 (stating "I agree, I missed the deadline date"). We agree. An IRA appeal "must be filed" no later than sixty-five days after OSC's written notification that it is terminating its investigation of the appellant's allegations. 5 C.F.R. § 1209.5(a)(1). Here, Mr. Farley filed his appeal with the Board sixty-six days after OSC notified him that it was closing its investigation. *Compare* SAppx28, with SAppx76.

Next, we consider whether the Board erred in its determination that equitable tolling does not apply. Equitable tolling permits a deadline extension "where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing." 5 C.F.R. § 1209.5(b). Equitable tolling is limited to circumstances in which "a litigant has pursued his rights diligently but some extraordinary

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circumstance prevents him from bringing a timely action.” *Warne v. Merit Sys. Prot. Bd.*, No. 2025-1258, 2025 WL 3135456, at *1 (Fed. Cir. Nov. 10, 2025) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)). The regulation provides examples when equitable tolling applies, such as “cases involving deception or in which the appellant filed a defective pleading during the statutory period.” 5 C.F.R. § 1209.5(b).

Mr. Farley attributes his late filing to his attorney’s last-minute decision not to take his case, his lack of resources until the filing date, and other issues, like technical glitches and problems with portal access. SAppx86–89; Informal Reply Br. 2–3. Mr. Farley argues that after his attorney declined his case, he worked “diligent[ly] to the point of exhaustion” but was still unable to file on time. Informal Reply Br. 3.

The Board addressed Mr. Farley’s reasons for his late filing. The Board found that alleged attorney misconduct or miscommunication did not trigger equitable tolling because Mr. Farley “bears the responsibility for any failings of his chosen representative.” SAppx3. The Board also determined that Mr. Farley could have investigated how to file himself instead of waiting for his attorney to provide resources and that any delay was “simple negligence,” which the Board noted is not enough to apply equitable tolling. SAppx3–4. We see no error in the Board’s findings. While we are sympathetic to Mr. Farley’s situation, we see no reason to disturb the Board’s decision.

CONCLUSION

We have considered Mr. Farley’s remaining arguments and find them unpersuasive. Accordingly, we affirm the Board’s final decision dismissing Mr. Farley’s IRA appeal.

AFFIRMED

COSTS

No costs.

**United States Court of Appeals
for the Federal Circuit**

BYRON C. FARLEY,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2025-1827

Petition for review of the Merit Systems Protection Board in
No. DA-1221-25-0189-W-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

January 15, 2026

Date



Jarrett B. Perlow
Clerk of Court

Appendix A-1

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

BYRON C. FARLEY,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2025-1827

Petition for review of the Merit Systems Protection Board in No. DA-1221-25-0189-W-1.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, STARK, *Circuit Judges*¹, and FREEMAN, *District Judge*.²

¹ Circuit Judge Newman did not participate.

² Honorable Beth Labson Freeman, District Judge, United States District Court for the Northern District of California, sitting by designation, participated only in the decision on the petition for panel rehearing.

Appendix C

PER CURIAM.

O R D E R

On March 2, 2026, Byron C. Farley filed a combined petition for panel rehearing and rehearing en banc [ECF No. 30]. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en-banc is denied.

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

April 2, 2026
Date

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE**

BYRON C. FARLEY,
Appellant,

DOCKET NUMBER
DA-1221-25-0189-W-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: April 3, 2025

Byron C Farley, Weslaco, Texas, pro se.

Jennifer N. Milam, Esquire, and Corey Pullig, Esquire, Houston, Texas, for
the agency.

BEFORE

Patrick J. Mehan
Administrative Judge

INITIAL DECISION

INTRODUCTION

On January 25, 2025, the appellant filed an individual right of action (IRA) appeal alleging the agency subjected him to covered personnel actions in retaliation for his protected whistleblowing activity. Initial Appeal File (IAF), Tab 1. The appeal is DISMISSED as untimely without a basis to equitably toll the filing deadline.

Appendix B

ANAYLYSIS AND FINDINGS

Background

In his appeal, the appellant stated he challenged his removal from the U.S. Customs and Border Patrol on September 15, 2010. IAF, Tab 1 at 2. In addition, it appears the appellant contests a debt related to advance leave granted prior to his removal. *Id.*

The appellant filed a complaint of whistleblower retaliation with the Office of Special Counsel (OSC), and OSC issued a letter closing its inquiry into the appellant's claim on November 20, 2024. *Id.* at 3, 114-15. The appellant filed this Board appeal on January 25, 2025.

Because the appeal appeared untimely, I issued the parties an order on timeliness. IAF, Tab 4. The parties responded. The record on timeliness is closed.¹

The appeal is untimely.

To be considered timely, an IRA appeal must be filed no later than 65 days after the date OSC issues its written notification to the appellant that it is terminating its investigation of the appellant's allegations. 5 C.F.R. § 1209.5(a) (1). The uncontested record shows OSC issued its decision closing its inquiry into the appellant's complaint on November 20, 2024. The appellant filed his Board appeal on January 25, 2025, the 66th day after the issuance of this letter. Consequently, this appeal is 1 day late. *See* IAF, Tab 6 (the appellant concedes that he filed his appeal 1 day after the filing deadline).

The appellant failed to allege facts to equitably toll the filing deadline.

The filing deadline in IRA appeals is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his rights, was unable to make a timely filing.

¹ Because I dismiss this appeal on timeliness grounds, I make no findings on Board jurisdiction.

5 C.F.R. § 1209.5(b). Equitable tolling may be available where “the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Court noted that such tolling has been applied “only sparingly” because it amounts to a “broadening” of the government’s waiver of sovereign immunity. *Id.* at 95-96. In addition, the Board has consistently held that appellants bear the consequences of the mistakes of their chosen representatives. *E.g.*, *Pacilli v Department of Veterans Affairs*, 113 M.S.P.R. 526, ¶ 13 (2010) (citing *Johnson v. Department of the Treasury*, 721 F.2d 361, 365 (Fed. Cir. 1983); *De Luna v. Department of the Navy*, 58 M.S.P.R. 526, 530-31 (1993)).

The appellant asserted that he was unaware that his attorney representative was not preparing his Board appeal after OSC closed its investigation, and that he only learned 3 days before the filing deadline that his attorney declined to file a Board appeal on his behalf. IAF, Tab 6 at 4-6. In addition, the appellant claimed his attorney also failed to provide him guidance on Board procedure until the afternoon of the filing deadline. *Id.* at 6. He further stated that this left him with only 8 hours to complete his appeal. *Id.* at 7.

I find the appellant failed to establish equitable tolling applies. First, he did not allege any misconduct by the agency, and there is no evidence the agency tricked or otherwise induced the appellant into filing an untimely appeal. He did not establish he filed a defective pleading during the statutory period. Rather, the appellant attributes delay to the inaction of his chosen representative. However, as noted above, the appellant bears the responsibility for any failings of his chosen representative. Moreover, the appellant still had 3 days to file his Board appeal upon learning that his representative would not file an appeal on his behalf. I determine that a person exercising normal diligence would have investigated how to file a Board appeal, and would not have chosen to wait for his

apparently unresponsive representative to provide that information. *Irwin*, 498 U.S. at 96 (stating the court has been much less forgiving in receiving late filing where the claimant failed to exercise due diligence in preserving his legal rights) (citations omitted). What the appellant describes is simple negligence, which does not support the application of equitable tolling. *Irwin*, 498 U.S. at 96.

Based on the foregoing, I DISMISS this appeal as untimely filed.

DECISION

The appeal is DISMISSED.

Patrick J. Mehan

FOR THE BOARD:

Patrick J. Mehan
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on May 8, 2025, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. The date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3), pertaining to an appellant's receipt of an agency decision. If the petitioner is represented, the 30-day time begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the

Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

Your petition must state your objections to the initial decision, including all of your legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov/>).

Criteria for Granting a Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition for review. Situations in which the Board may grant a petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative

judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words. A reply to a response to a petition for review is limited to 15 pages or 3750 words. A party relying on word count to adhere to the length limitation must include certification of the word count with their pleading. Argument formatted such that the length of the pleading cannot be determined may be rejected. Computer generated and typed pleadings must use no less than 12-point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. Length limitations may not be circumvented by including argument in attachments. Failure to comply with length limitations, after sufficient opportunity to comply, may lead to dismissal of the petition for review. A request for leave to file a pleading that exceeds the limitations must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional

circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length.

If you file a petition for review, you should not include documents that were part of the record below, as the entire administrative record will be available to the Board. Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. The date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3), pertaining to an appellant's receipt of an agency decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first.

Any response to a petition for review must be filed within 25 days after the date of service of the petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review. The Board's regulation at 5 C.F.R. § 1201.23 governs the computation of time.

NOTICE TO AGENCY/INTERVENOR

Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel (under 5 U.S.C. 1212(c)) may file a petition for review. Each party is limited to filing a single petition for review, response to a petition for review, and reply to a response to a petition for review. A petition for review filed by an agency should address the agency's compliance with any interim relief requirements and should contain a certification, as set forth at 5 C.F.R. § 1201.116(a).

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.

Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after this decision becomes final** as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days of the date this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Service Byron Farley
Served on email address registered with MSPB

Agency Representative

Electronic Service Jennifer Milam
Served on email address registered with MSPB

Agency Representative

Electronic Service Corey Pullig
Served on email address registered with MSPB

04/03/2025

(Date)

Ann Fluellen

Ann Fluellen

Supervisory Paralegal Specialist

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

BYRON C. FARLEY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Case No. 2025-1827

**PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

Submitted by:

Byron C. Farley

Weslaco, Texas

Pro Se Petitioner

Appendix D

Introduction

Petitioner respectfully requests panel rehearing and rehearing en banc under Federal Circuit Rules 35 and 40. The panel's decision affirming the dismissal of his Individual Right of Action (IRA) appeal rests on (1) a misapprehension of critical, undisputed facts directly relevant to the equitable-tolling analysis, and (2) the omission of a controlling legal development—**ABA Formal Opinion 516 (2022)**—which clarifies the professional obligations governing attorney withdrawal and bears directly on whether such withdrawal can constitute an “extraordinary circumstance” under *Irwin* and *Holland*.

These errors warrant rehearing because they go to the heart of the equitable-tolling standard and conflict with Supreme Court precedent and modern ethical rules.

I. The panel misapprehended material facts demonstrating Petitioner's extraordinary diligence.

The panel affirmed the Board's conclusion that Petitioner “waited” for his attorney and therefore acted with “simple negligence.” This conclusion is contradicted by the record.

The undisputed facts show:

- Petitioner began preparing the MSPB appeal **immediately** on January 22, 2025, the day after counsel withdrew.
- He worked for **15 hours** that day researching MSPB procedures and rewriting his narrative.
- He worked throughout the next day January 23, 2025, **through the night** into the next day.
- He continued working January 24, 2025, **uninterrupted** into January 25.

- He attempted to contact counsel **multiple times each day**, leaving messages on January 22, 23, and twice on January 24.
- He prepared supporting documentation, researched filing requirements, and attempted to learn the e-Appeal system on his own.
- He worked **over 36 consecutive hours** before filing.
- He ultimately filed only **3 hours and 23 minutes CT** after the deadline.

These facts were presented in Petitioner's filings but were not addressed by the panel. They demonstrate diligence "to the point of exhaustion," not negligence.

Rehearing is warranted because the panel's decision rests on a factual premise—Petitioner's alleged passivity—that is directly contradicted by the record. When a decision is based on a misapprehension of material facts central to the legal standard, rehearing is appropriate under Rule 40(a)(2).

II. The panel overlooked ABA Formal Opinion 516, which directly addresses attorney withdrawal and the resulting "material adverse effect" on a client.

The panel affirmed the Board's conclusion that attorney withdrawal and miscommunication are attributable to the client. But the panel did not consider **ABA Formal Opinion 516 (2022)**, which clarifies the professional obligations governing attorney withdrawal and identifies the precise type of harm Petitioner suffered as a "**material adverse effect**" that attorneys must avoid.

Opinion 516 states that:

- Attorneys must not withdraw in a manner that causes a **material adverse effect** on the client's ability to pursue their legal objectives.

- Attorneys must provide **adequate notice, reasonable time, and procedural guidance** to avoid foreseeable harm.
- Attorneys must take **affirmative steps** to protect the client when withdrawal occurs near a deadline.

Petitioner's attorney did none of these things: "

- Counsel assured Petitioner on January 8 that he was "working on your response."
- Counsel provided no draft, no analysis, and no procedural guidance.
- Counsel withdrew **three days before the deadline**.
- Counsel did not return calls on January 22 or 23.
- Counsel provided only two user guides at **2:38 PM on the final day**.
- Counsel left Petitioner to navigate an unfamiliar filing system alone.

This conduct is not "ordinary negligence." Under Opinion 516, it constitutes **professionally improper withdrawal** that foreseeably and directly impaired Petitioner's ability to file on time.

The panel's failure to consider this controlling ethical authority warrants rehearing because it bears directly on whether attorney withdrawal can constitute an "extraordinary circumstance" under *Irwin* and *Holland*.

III. The panel's decision conflicts with Supreme Court precedent on equitable tolling.

The Supreme Court has held that equitable tolling applies where:

1. the litigant diligently pursued his rights, and

2. an extraordinary circumstance **prevented** timely filing.

Lozano v. Montoya Alvarez, 572 U.S. 1, 10 (2014).

The panel affirmed the Board's conclusion that attorney withdrawal is attributable to the client. But the Supreme Court has never held that **professionally improper withdrawal at the eve of a deadline**, in violation of ethical duties, must be treated as ordinary negligence.

In *Holland v. Florida*, 560 U.S. 631 (2010), the Court held that attorney misconduct can constitute an extraordinary circumstance when it goes beyond "garden-variety negligence." *Id.* at 651–52. Petitioner's case fits squarely within *Holland*: his attorney's withdrawal was last-minute, misleading, and harmful in a way that prevented timely filing despite extraordinary diligence.

The panel's decision conflicts with *Holland* by treating all attorney withdrawal as client responsibility, regardless of the severity or ethical impropriety of the withdrawal.

Rehearing is warranted to reconcile this conflict.

IV. The question presented is exceptionally important and warrants en banc review.

This case presents an issue of exceptional importance:

Whether attorney withdrawal that violates modern ethical standards can constitute an "extraordinary circumstance" for equitable tolling in MSPB proceedings.

The Board's current rule—that all attorney withdrawal is attributable to the client—predates ABA Formal Opinion 516 and is inconsistent with contemporary professional-responsibility standards. The Federal Circuit has not yet addressed how Opinion 516 interacts with equitable tolling in administrative proceedings.

This case provides a clean vehicle for resolving that question. The facts are undisputed, the record is complete, and the issue is recurring for pro se appellants who rely on counsel during OSC proceedings.

En banc review is warranted to ensure that equitable tolling doctrine remains consistent with modern ethical obligations and Supreme Court precedent.

Relief Requested

Petitioner respectfully requests that the Court:

- grant panel rehearing or rehearing en banc.
- vacate the panel's decision; and
- remand to the Merit Systems Protection Board for proper consideration of equitable tolling under the correct factual and legal standards.

Date: March 2, 2026

Signature: Byron C. Farley

Byron C. Farley

**THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

BYRON C. FARLEY

Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD

Respondent

Case No. 2025-1827

PETITIONER'S INFORMAL REPLY BRIEF

U.S. Court of Appeal for the Federal Circuit, I respectfully submit my Informal Reply Brief for the Merit Systems Protection Board (MSPB) Informal Brief and Supplemental Appendix submitted on September 29, 2025. The MSPB AJ asked the court to affirm their decision to dismiss my case as untimely filed without any basis to apply equitable tolling.

In summing up the AJ's determination that there was no basis to apply equitable tolling in this case, he states: "*The AJ further found that the delay was due to the to the delays of petitioner's chosen representative, and held that petitioner's actions in the three days he had remaining after he learned his attorney would not file an appeal on his behalf did not demonstrate due diligence. SAppx002-004. Specifically, the AJ held that petitioner's decision to wait to receive further instructions from his former counsel rather than personally investigate how to file an appeal did not represent diligence, and instead constituted simple negligence by petitioner. SAppx002-004.*" See Resp't Brief P. 5

Appendix E

I hired Attorney Aaron Wersing to represent me in this case on March 27, 2024. I actively assisted the assigned Attorney Leah Badri through the entire process. On January 21, 2025, I was notified by Mr. Wersing that he was not going to submit my appeal to the MSPB, however, I could if I wanted to. Since I had previously sent him a draft for a whistleblower narrative, I decided to proceed with the case pro se.

The following day, January 22, 2025, I started researching the appeal process and learned that I needed to edit the narrative I had written and began working on it. I also tried to reach Mr. Wersing's office for information concerning how to submit the appeal online. His office didn't return my call that day and I became engrossed with editing my narrative and learning more about the appeal process. I worked on the appeal 15 hours that day and during the process discovered there was more to it than I realized.

The following day, January 23, 2025, I continued working on the appeal at 7:00 a.m. that morning. During the day I attempted to contact Mr. Wersing's office without success but continued working on preparing the appeal without interruption. I was so concerned about making the deadline that I worked on the appeal throughout the night uninterrupted into the following day, January 24, 2025. I left a message with Mr. Wersing's office at the beginning of the workday and again at lunchtime, all the while working on the appeal and preparing supporting documentation. I finally got through to Mr. Wersing at approximately 2:15 p.m. and he said he would email me the information I would need to submit the appeal. I received his email at 2:38 p.m. and continued preparing the supporting documentation until about 7:00 p.m. at which time I went to the MSPB website to submit the appeal. I established an account with e-Appeal to begin the input process. I had a few documents to scan and when I attempted to do so, discovered a technical glitch between the printer and computer. That took a little time to resolve but I had no problem with it. Afterward

I returned to the e-Appeal account to file the appeal and that was when I began to have problems. By this time, I had been working nonstop on the appeal for over 36 hours. I encountered most of the problems attempting to upload the supporting documents. At the time, I wasn't sure how to submit the case narrative but noticed a statement on the form that other documents could be submitted at a later time. When the AJ later ordered a jurisdiction statement from me, I realized that it was, in most part, my case narrative. Unfortunately, it was after the official workday, and I could not contact the MSPB for assistance to resolve the issues I was having uploading supporting documents. Eventually I succeeded in uploading everything, however, when I checked the time, it was 3:23 a.m. January 25, 2025.

The MSPB AJ incorrectly presumed that I did nothing after learning that my attorney wasn't going to submit my appeal and deemed it simple negligence. I must disagree; I was anything but negligent. I had been diligent to the point of exhaustion.

I decided not to appeal the MSPB decision on timeliness because I didn't want to take a chance for a second dismissal, and the AJ gave me the option to appeal to this court with sufficient time to prepare and file my appeal.

I did not challenge the dismissal in my brief before this court because the MSPB had already ruled on it and my only concern since I started this undertaking on February 10, 2023, has been to have my case reviewed by a fair and unbiased board or court.

On June 23, 2025, this court sent out an ORDER under Petition for review of the Merit Systems Protection Board in No. DA-1221-25-0189-W-1. The court considers the proper respondent in this matter.

Pursuant to 5 U.S.C. § 7703(a)(2), the Merit Systems Protection Board is designated as the respondent when the decision on review concerns the procedure or jurisdiction

of the Board. The deciding agency is designated as the respondent when the Board reaches the merits of the underlying case. Because the Board dismissed the appeal as untimely and did not reach the underlying merits, the Board appears to be the proper respondent in this petition for review.

Upon consideration thereof,

It Is Ordered That:

Absent objection within seven days of the date of entry of this order, the court will reform the caption to designate the Board as respondent. Case: 25-1827 Doc. 7

The Board did not respond to the above-mentioned order, resulting in the caption reform to designate the MSPB as the respondent. I do not understand why the Board chose not to use the opportunity this court provided above to establish the underlying elements of this case and make a ruling. It appears that the Board has its own reason for divesting itself from this case.

Considering the circumstances mentioned above, I humbly petition this court to review the underlying elements of this case and make a ruling.

Respectfully submitted,

Byron C. Farley

Byron C. Farley

DATE: October 20, 2025

Byron C Farley v. Department of Homeland Security

Docket # DA-1221-25-0189-W-1

Response to 02 06 2025 Response to 01 30 2025 Order On

Summary Page

Case Title : Byron C Farley v. Department of Homeland Security

Docket Number : DA-1221-25-0189-W-1

Pleading Title : Response to 02 06 2025 Response to 01 30 2025 Order On

Filer's Name : Byron Farley

Filer's Pleading Role : Appellant

Details about the supporting documentation

#	Title / Description	Mode of Delivery
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Appendix F

Byron C Farley v. Department of Homeland Security

Docket # DA-1221-25-0189-W-1

Response to 02 06 2025 Response to 01 30 2025 Order On Timeliness

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Byron C Farley v. Department of Homeland Security

Docket # DA-1221-25-0189-W-1

Response to 02 06 2025 Response to 01 30 2025 Order On
Online Interview

1. What is the title of the MSPB notice or order to which you are responding?

Response to 01 30 2025 Order On Timeliness

2. What is the date of that notice or order?

01/30/2025

3. Does your pleading assert facts that you know from your personal knowledge?

Yes

4. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

Timeliness Order Reply

Honorable Judge Patrick Mehan:

In your Order on Timeliness you observed, *"It appears that the filing period in this case began on November 20, 2024, and that your appeal was filed by e-filing on January 25, 2025. It therefore appears that your appeal was filed 1 day late."* I agree, I missed the deadline date, however, I did everything within my power to make the deadline and believe that the circumstances in my case meet the test for equitable tolling.

I started this appeal with FEDLAW Attorney Aaron Wersing, on March 27, 2024. Throughout the OSC appeal, I provided my assigned Attorney Leah Badri with complete narratives and all necessary supporting documentation in a timely manner. On November 21, 2024, after learning the OSC was closing my case, I sent an email to Attorney Badri asking about the next step in this process. She replied to me the same day as follows:

To me · Thu, Nov 21, 2024 at 4:59 PM

Message Body

Good evening Mr. Farley,

I have reviewed the OSC response dismissing your claim; I will consult with Mr. Wersing regarding potential next steps and circle back with you.

Have a nice evening!

Best,

Leah Badri-Moradi

On December 6, 2024, Aaron Wersing called me, and we discussed our thoughts on the appeal, and how to proceed forward with the MSPB. During our discussion I told him that I would write a narrative to the MSPB concerning our discussion for his use as needed. He said he would do some legal research. By January 6, 2025, I had not received anything from FedLaw going forward with the case, so I sent the narrative I had written for the MSPB to Mr. Wersing for review. Two days later, 1-8-2025, I left a voice message for Mr. Wersing to confirm receipt of my 1-6-2025 email and attachment. That same day I received an email from FedLaw's Administrative Assistant Mariela Newbill, it read as follows:

Response from Atty Wersing

Mariela Newbill

To me · Wed, Jan 8 at 6:58 PM

Message Body

Hi Byron,

We received your voicemail message. Attorney Wersing wanted me to notify you that he is working on your response and wanted me to let you know that he will be getting that over to you soon.

Thank you.

—
Mariela Newbill

Administrative Assistant

2656 South Loop W, Suite 210

Houston, TX 77054

832-810-9509 (Phone)

832-827-8523 (Fax)

On January 21, 2025, Aaron Wersing didn't have anything prepared to start the appeal process with the MSPB, instead he sent me a response via email informing me that it is not in the best interest of the company to continue the case, however, I can still file the appeal on my own. His email read as follows:

Aaron D. Wersing

To me · Tue, Jan 21 at 4:32 PM

Message Body

Hi Byron,

I've been looking into the issue after our December 6 phone call. The issue specifically was regarding the merits of an appeal to the MSPB after OSC issued its decision not to pursue the whistleblower retaliation claim themselves. After researching the issue further, I don't feel it would be a strong enough case before the MSPB for our firm to take on. The central issue we discussed is the retaliatory nature that caused the overpayment from advanced leave debt.

While it may be true that the advanced leave was given to you in bad faith with your removal already pending, the specific issue here is whether the collection itself is an act of retaliation, and because 5 DCR 209 requires the government to collect the debt from unearned leave, including by deducting it from money owed to you by the government, I believe that a further appeal to the MSPB would not likely prevail.

My goal is to give you my honest assessment of the next stage of the case to help you make an informed decision on a course of action, but even with my assessment above, I want to clarify that you can still file an appeal on your own if you wish. From November 20, 2024, the 65-day deadline would fall this Friday, January 24.

Thank you,

Aaron

Aaron D. Wersing, Esq.

2656 South Loop W, Suite 210

Houston, TX 77054

832-232-0838 (Phone)

832-827-8523 (Fax)

I started to work on the appeal the following day. By the end of the day I realized that I didn't have the tools or the information I needed to file the appeal with the little remaining time left. The next day, January 23, 2025, I called Aaron Wersing and left a voice message advising him that I intended to file the appeal with the MSPB and requested information on the filing procedure. I also reminded him that I had very little time to work with. He did not return my call that day.

The following day January 24, 2025, was the last day my appeal could be filed. I still had not received any instruction on how to proceed with filing and was able to reach Mr. Wersing at approximately 2:15 PM for guidance going forward. During our conversation he apologized for not returning my call and sent me the email below.

MSPB information

Aaron D. Wersing

To me · Fri, Jan 24 at 2:38 PM

Message Body

Byron,

Attached are two user guides for the new e-Appeal format, and [here is the link](#) to contact their offices by phone or fax. Please note that filing pleadings by email is not allowed and will be rejected.

Thank you,

Aaron D. Wersing, Esq.

2656 South Loop W, Suite 210

Houston, TX 77054

832-232-0838 (Phone)

832-827-8523 (Fax)

I had to call Mr. Wersing the day my Appeal was due to be filed to get instructions on how to submit it. After skimming through the two attachments that I received, *Account Registration Guide* and *e-Appeal General User Guide*; I had less than 8 hours to establish an account for a system and interface that I was not familiar with, and input an unknown amount of data before midnight, without any further assistance. Three days prior, I was depending on Mr. Wersing's Office to submit the appeal. I didn't expect nor was I prepared for this.

This would be difficult to accomplish under the best of circumstances. It becomes impossible for some of us while working through issues like portal access, interpreting submission instructions and navigating an unfamiliar format, to name a few. If nothing else I'm persistent and worked uninterrupted until I completed filing the appeal. After I finished, I checked the clock and discovered that I missed the deadline by 3 hours and 23 minutes, but not for the lack of trying. I had no clue that I would be responsible for filing my appeal three days before the due date.

It doesn't bother me that I had to file the appeal myself. I feel cheated, because I only had 3 days out of 65 days and had to do it from scratch.

Thank you for your consideration,

Byron Farley

Certificate of Service

e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

Name & Address	Documents	Method of Service
MSPB: Dallas Regional Office	Response to 01 30 2025 Order On Timeliness	e-Appeal
Milam, Jennifer	Response to 01 30 2025 Order On Timeliness	e-Appeal
Pullig, Corey	Response to 01 30 2025 Order On Timeliness	e-Appeal