

FILED: December 31, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

TAMI SAWYER,
Petitioner,

v.

REAL ESTATE AGENCY,
Respondent.

Real Estate Agency
200812652, 200812681

A149673

Submitted on January 14, 2013.

Mark D. Blackman and Ransom Blackman LLP filed the briefs for petitioner.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Cecil A. Reniche-Smith, Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Hadlock, Judge, and Egan, Judge.

ARMSTRONG, P. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
-

1 ARMSTRONG, P. J.

2 The Real Estate Agency issued a final order revoking petitioner's real estate
3 license based on her involvement in two real estate matters, referred to as the
4 McDonald/Whitney transaction and the Middleton transactions. The agency concluded
5 in its final order that petitioner had violated ORS 696.805(3)(a) in the
6 McDonald/Whitney transaction and had violated ORS 696.805(3)(a), (b), (c), and (d),
7 and OAR 863-015-0145(1) in the Middleton transactions.¹ Petitioner seeks judicial
8 review of the agency's order, raising four assignments of error. First, she contends that
9 the Administrative Law Judge (ALJ) erred in denying her motion to stay the proceedings
10 or, in the alternative, to grant her use immunity, in light of criminal charges then pending
11 against her in federal court. In her second and third assignments of error, she challenges
12 the merits of the agency's conclusions that her conduct violated the specified statutory
13 and rule provisions. In her fourth assignment of error, she contends that the agency erred
14 in imposing revocation of her license as a sanction for her conduct because her license
15 had expired during the pendency of the proceedings. We reject petitioner's second and
16 third assignments of error without discussion. For the reasons explained below, we also
17 reject her first and fourth assignments of error. Accordingly, we affirm.

18 I. BACKGROUND

19 We begin by describing the pertinent facts with respect to each transaction;

¹ The relevant statutes and rule are set out below. ___ Or App at ___ n ___ (slip op at 7, n 3).

1 because petitioner does not dispute the agency's findings of fact, we state the facts
2 consistently with the agency's final order. We then describe the proceedings below.

3 A. *The McDonald/Whitney Transaction*

4 In January 2008, the McDonalds listed their Bend, Oregon, home for sale,
5 with petitioner as the listing agent.² Petitioner showed the home to Whitney, whom
6 petitioner also represented, in May of that year. The McDonalds signed a disclosure form
7 consenting to the dual representation, though they were not aware that petitioner had a
8 personal relationship with Whitney and had known her for several years.

9 On July 31, 2008, Whitney made an offer to purchase the McDonalds'
10 home for \$585,000, with an earnest money deposit of \$1,000 and a closing date of
11 October 25, 2008. In preparing the Residential Real Estate Sale Agreement, petitioner
12 checked a box acknowledging receipt of a check for the earnest money, although
13 petitioner had not actually received a check from Whitney. Along with the agreement,
14 she also presented to the McDonalds a separate document entitled "Promissory Note for
15 Earnest Money," signed by Whitney, in which Whitney promised to pay the \$1,000
16 earnest money ten days after mutual acceptance of the offer.

17 On August 1, 2008, the McDonalds rejected Whitney's offer and submitted
18 a counteroffer for \$610,000, with an earnest money deposit of \$2,500. Whitney accepted
19 and signed the counteroffer on August 5, 2008. Petitioner did not require Whitney to

² At the time, petitioner was licensed by the agency to conduct professional real estate activity.

1 execute a new promissory note or otherwise set a deadline for payment of the increased
2 earnest money. By check dated August 25, 2008, Whitney paid the earnest money
3 amount of \$2,500, and it was deposited into a client trust account. In September,
4 Whitney decided not to proceed with the purchase and sought a refund of her earnest
5 money; the McDonalds did not agree to release the earnest money. After negotiations
6 with petitioner's principal broker, Whitney agreed to surrender the earnest money, and it
7 was paid to the McDonalds on November 6.

8 B. *The Middleton Transactions*

9 On October 16, 2006, Thomas Middleton executed a durable power of
10 attorney (POA), appointing petitioner, his friend of approximately 20 years, as his agent
11 and attorney-in-fact. On the same date, Middleton instructed his attorney, Albertazzi, to
12 hold the POA until Middleton requested that it be provided to petitioner or until
13 Middleton became incapacitated or incompetent.

14 In 2008, petitioner operated three separate business entities--Tami Sawyer
15 PC for her real estate activities; Starboard LLC, a real estate investment company; and
16 Genesis Futures, LLC, a property-management company. Due to the declining real estate
17 market at that time, all three businesses "were experiencing significant financial stress
18 and had difficulty making payments to creditors"; Starboard LLC, for example, owed
19 more than \$2,000,000 to four investors. As of January 1, 2008, Middleton had invested
20 \$250,000 in Starboard LLC.

21 On March 5, 2008, Middleton instructed Albertazzi to deliver the POA to

1 petitioner. On the same date, he established the Thomas S. Middleton Revocable Living
2 Trust (the trust), naming himself as trustee and appointing petitioner successor trustee in
3 the event of Middleton's resignation, death, or incapacity. The trust required the trustee
4 to sell Middleton's personal residence following his death, and the proceeds were to be
5 added to the corpus of the trust. Petitioner's three adult sons were among the
6 beneficiaries of the trust. On July 15, Middleton amended the trust to give the trustee the
7 discretion to rent or sell his residence based on market conditions; he also changed some
8 of the details regarding the distribution of the trust after his death.

9 On July 20, 2008, Middleton provided Albertazzi with final instructions--
10 signed by petitioner as "[POA] for Thomas S. Middleton"--stating that he had decided to
11 give the spa at his residence to petitioner "because my house is going to be a rental until
12 the real estate market improves. The idea is to eliminate all liability due to injury or
13 accidental drowning from the spa."

14 Middleton died two days later, on July 22, 2008. On that morning,
15 petitioner told Maunder, an employee of Genesis Futures, LLC, that Middleton wanted to
16 know the rental value of his home. Maunder evaluated the home on July 22 or 23 and
17 told petitioner that she could rent it for \$995 per month. The next morning, another of
18 petitioner's employees asked Maunder for the keys to the house because petitioner had
19 decided to sell it rather than rent it. Petitioner listed the house for sale on July 24, with
20 her company, Tami Sawyer PC, as the listing agent.

21 On September 4, an offer was accepted for the purchase of Middleton's

1 home. Neither the Residential Real Estate Sale Agreement nor the real estate listing
2 disclosed that petitioner was acting as a principal in the transaction in her capacity as
3 successor trustee. In response to an e-mail note from one of Middleton's sons in early
4 October asking about the house, petitioner told him that she had received an offer on the
5 house and that the sale was likely to close within the week. She told another of
6 Middleton's sons that she had tried to rent the home but "had not one call" and decided to
7 sell it.

8 Petitioner, her husband, and her businesses had outstanding obligations of
9 more than \$150,000 due in September and October 2008. Petitioner told employees that
10 the debts would be paid following the sale of Middleton's home.

11 On October 8, petitioner hired a company to move the spa from Middleton's
12 home to petitioner's residence. The \$550 cost to move the spa was eventually paid from
13 the proceeds of the sale of Middleton's home; Middleton's estate was never reimbursed
14 for that cost.

15 On October 9, petitioner, in her capacity as trustee of the Middleton trust,
16 signed a statutory warranty deed conveying Middleton's home for \$219,900; after
17 deducting certain costs associated with the sale, including the costs of moving the spa, the
18 escrow officer issued a check for \$202,077.06, payable to petitioner as successor trustee
19 of the trust. Petitioner received a commission of \$4,464.85.

20 On October 10, Starboard LLC received a bank deposit of \$202,077.06;
21 before that deposit, the balance on the Starboard LLC account was \$86.80. Also on that

1 date, \$70,000 was transferred from the Starboard LLC account to an account held by
2 Genesis Future, LLC, and \$20,000 was transferred from the Starboard LLC account to
3 one held by Tami Sawyer PC.

4 A "Successor Trustee's Inventory Report" for the trust, prepared by
5 petitioner on November 26, 2008, stated that, at the time of Middleton's death, the trust
6 had an investment with Starboard LLC valued at \$250,000. The report also stated that
7 the trust had invested an additional \$150,000 in Starboard LLC from the proceeds of the
8 sale of Middleton's home. It also listed \$52,568 as an additional asset of the trust, but did
9 not indicate where those funds were held. The value of the trust bank account was listed
10 as \$4,563.04 on the date of Middleton's death.

11 C. *Agency Proceedings*

12 On December 17, 2009, the agency issued notice to petitioner that it
13 intended to revoke her real estate license based on her conduct in the McDonald/Whitney
14 and Middleton transactions. Petitioner had been licensed by the agency since at least
15 1995, and her then-current license was set to expire on April 30, 2010.

16 In connection with the McDonald/Whitney transaction, the notice alleged
17 that petitioner had failed to account for earnest money in a timely manner, in violation of
18 ORS 696.805(3)(a) and (b), ORS 696.810(3)(a) and (b), and ORS 696.815(2), and had
19 violated ORS 696.805(3)(a) and ORS 696.810(3)(a) when she had marked the box in the
20 agreement indicating that she had received a "check" for the earnest money deposit.

21 Based on petitioner's conduct in the Middleton transactions, the notice

1 alleged that petitioner (1) had violated ORS 696.805(3)(a), (c), and (d) by removing the
2 spa from Middleton's residence for her personal use, contrary to Middleton's instructions
3 that it be removed only while the house was held as a rental; (2) had violated ORS
4 696.805(3)(a), (c), and (d) by selling Middleton's home contrary to instructions that it
5 was to be held as a rental property until market conditions improved; (3) had failed to
6 provide written disclosure "that she was acting as a principal in her capacity as a
7 successor trustee" in violation of OAR 863-015-0145(1); (4) had failed to account for
8 over \$52,000 in proceeds from the sale of the Middleton home in violation of ORS
9 696.805(3)(a) and (b) and ORS 696.815(2); and (5) had used proceeds from the sale of
10 the Middleton home to pay for personal bills and debts of Starboard LLC, Genesis
11 Futures, LLC, and Tami Sawyer PC in violation of ORS 696.805(3)(a), (b), and (c) and
12 ORS 696.815(2).³

³ As pertinent here, ORS 696.805(3) provides that a seller's agent owes the seller involved in a real estate transaction the affirmative duty to "exercise reasonable care and diligence"; "account in a timely manner for money and property received from or on behalf of the seller"; "be loyal to the seller by not taking action that is adverse or detrimental to the seller's interest in a transaction"; and "disclose in a timely manner to the seller any conflict of interest, existing or contemplated." ORS 696.805(3)(a), (b), (c), (d). Similarly, ORS 696.810(3) provides that a buyer's agent owes the buyer involved in a real estate transaction the affirmative duty to "exercise reasonable care and diligence" and to "account in a timely manner for money and property received from or on behalf of the buyer." ORS 696.810(3)(a), (b).

OAR 863-015-0145(1) provides:

"If a real estate licensee, whether active or inactive, either directly or indirectly offers or negotiates for the sale, exchange, lease option, or purchase of real estate and the licensee is a principal to the transaction, the licensee must disclose to the other party to the offer or transaction that the licensee is a real estate licensee. The licensee must make the disclosure in

1 The notice alleged that petitioner was subject to discipline under various
2 provisions of ORS 696.301⁴ for her conduct in the two matters. Petitioner requested a

any advertising or display signs, and it must appear in writing on at least the first written document of agreement concerning the offer or transaction. The disclosure set forth on the agreement document also must state that the real estate licensee is representing himself or herself as either the buyer or the seller in the transaction."

Finally, ORS 696.815(2) provides:

"A real estate licensee acting pursuant to a disclosed limited agency agreement [under which a licensee may represent both the seller and the buyer in a real estate transaction with full disclosure of the relationship, ORS 696.815(1)] has the following duties and obligations:

"(a) To the seller, the duties under ORS 696.805;

"(b) To the buyer, the duties under ORS 696.810; and

"(c) To both seller and buyer, except with express written permission of the respective person, the duty not to disclose to the other person [certain specified information]."

4 As relevant, ORS 696.301 provides:

"Subject to ORS 696.396 [relating to rules for progressive discipline and investigation of complaints], the Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal of a license to an applicant who has done any of the following:

"* * * * *

"(3) Disregarded or violated any provision of ORS 659A.421, 696.010 to 696.495, 696.600 to 696.785 and 696.800 to 696.870 or any rule of the Real Estate Agency.

"* * * * *

"(5) Acted as an agent and an undisclosed principal in any

1 hearing, the agency referred the hearing request to the Office of Administrative Hearings
2 (OAH), and an ALJ was assigned. Between the time that the notice of revocation was
3 issued and the hearing was held, two events occurred: (1) on October 21, 2010, petitioner
4 was indicted in federal district court for conspiracy to commit wire fraud, wire fraud,
5 bank fraud, false statement to financial institution, and money laundering; and (2)
6 petitioner's real estate license expired.

7 On October 29, 2010, petitioner moved to dismiss the administrative
8 proceeding on the ground that the agency lacked jurisdiction over her because her real
9 estate license had expired on April 30, 2010. She also moved to stay the proceeding or,
10 in the alternative, to grant use immunity to her on the ground that there was a factually
11 related federal criminal case pending against her. With regard to that motion, she stated,
12 in part, that

13 "[a] comparison of the Notice [in the agency proceeding] and the
14 Indictment [in the federal criminal proceeding] demonstrates that the two
15 proceedings arise out of a common set of facts, are factually related, that
16 [petitioner] has a good faith need and basis to assert the privilege against

transaction.

"* * * * *

"(12) Demonstrated incompetence or untrustworthiness in performing any act for which the licensee is required to hold a license.

"* * * * *

"(14) Committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the applicant or licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity."

1 self-incrimination in this proceeding, and that absent an opportunity to
2 participate in this proceeding, would be denied a full and fair hearing as
3 required by ORS 183.415(10) [*sic*] and the Oregon and United States
4 constitutions."

5 At the start of the hearing on November 3, 2010, the ALJ, after extended
6 discussion, denied both motions, concluding that, unlike a circuit court, he had no
7 authority to grant use immunity, and, regarding the motion to stay, that there was "a
8 public interest in moving forward with the case." The ALJ ruled that the case "would go
9 forward * * * with the understanding that [petitioner] has the right to assert her 5th
10 Amendment rights not to testify."

11 The evidentiary portion of the hearing then began. The agency called
12 petitioner, and petitioner invoked her privilege against self-incrimination under the state
13 and federal constitutions in response to the agency's questions. The ALJ heard other
14 evidence, and the parties filed written closing arguments. Subsequently, the ALJ issued a
15 proposed order concluding that petitioner had committed all of the violations alleged by
16 the agency, except it concluded that petitioner "did not fail to account to a seller for
17 earnest money" in the McDonald/Whitney transaction, as had been alleged by the agency.
18 The ALJ also concluded, however, that, although the agency had jurisdiction to discipline
19 petitioner under ORS 696.775, it had no "power to revoke a license [that] does not exist."
20 Nor could it deny the issuance or renewal of a license in the absence of an application for
21 one. Thus, the ALJ concluded, the only discipline available under the circumstances was
22 a formal reprimand, and that is what the ALJ proposed.

23 The agency issued an amended proposed order largely adopting the

1 findings and conclusions of the ALJ, with one notable exception: The agency concluded
2 that, under ORS 696.775 and ORS 696.301, it retained authority to revoke petitioner's
3 license. Accordingly, it rejected the ALJ's recommended sanction and ordered that "the
4 license that formed the basis of the present case is revoked due to [petitioner's] repeated
5 and serious violations of ORS 696.805(3) and OAR 863-015-0145(1)." Petitioner did not
6 file exceptions to the amended proposed order, and it became final.

7 II. ANALYSIS

8 A. *Denial of Motion to Stay Proceedings or Grant Use Immunity*

9 In her first assignment of error, petitioner contends that the ALJ erred in
10 denying her motion to stay the proceedings or, in the alternative, to grant use immunity to
11 her in light of the criminal charges pending against her in federal court for conduct that,
12 she contends, was "factually related" to the allegations in the administrative action.⁵ We
13 consider each in turn.

⁵ We note that the agency has filed a notice of probable mootness, informing us that petitioner has now entered guilty pleas to the federal charges and arguing that petitioner's first assignment of error is, therefore, moot. It reasons that, "[b]ecause there is no longer a pending federal prosecution, a reversal of the ALJ's rulings regarding petitioner's request for a stay or use immunity would have no practical effect on the parties." We fail to see how the assignment of error is moot; if the ALJ erred in failing to stay the administrative proceedings or to grant petitioner use immunity, as petitioner contends, then that error would result in a reversal of the final order revoking petitioner's license and a remand for a new hearing. Thus, our decision in the matter certainly "will have some practical effect on the rights of the parties." *Brunnett v. PSRB*, 315 Or 402, 405, 848 P2d 1194 (1993). If we decide in petitioner's favor, the fact that, *on remand*, petitioner may no longer need a stay or immunity does not obviate the ALJ's error, if any, in denying petitioner's motion to stay the proceedings or grant her immunity in the first place. The issue remains justiciable.

1 1. *Denial of Motion to Stay*

2 In support of her argument that the ALJ erred in denying her motion for a
3 stay, petitioner contends that she

4 "was entitled to a stay under both Article I, section 12, of the Oregon
5 Constitution and the Fifth and Fourteenth Amendments to the United States
6 Constitution. The ALJ's denial of a stay constituted a 'material error in
7 procedure' that undermined the 'fairness of the proceedings' [quoting ORS
8 183.482(7)⁶] that warrants setting aside the [agency's] Final Order."

9 However, she does not explain how those sources of law--*viz.*, ORS 183.482(7); Article I,
10 section 12; and the Fifth and Fourteenth Amendments--operate to support her contention
11 that the ALJ erred by not staying the administrative proceedings. Instead, she cites a
12 string of federal cases indicating that a trial court has discretion--as a matter of federal
13 constitutional law--to stay civil proceedings in light of a pending criminal action
14 concerning the same conduct.⁷ Accordingly, we focus our analysis on that theory and do

⁶ ORS 183.482(7) provides, in part:

 "The court shall remand the order for further agency action if the
 court finds that either the fairness of the proceedings or the correctness of
 the action may have been impaired by a material error in procedure or a
 failure to follow prescribed procedure, including a failure by the presiding
 officer to comply with the requirements of ORS 183.417(8)."

ORS 183.417(8) provides, in turn that "[t]he officer presiding at the hearing shall ensure
that the record developed at the hearing shows a full and fair inquiry into the facts
necessary for consideration of all issues properly before the presiding officer in the case
and the correct application of the law to those facts."

⁷ Petitioner does cite one Oregon case--*Dept. of Human Services v. K. L. R.*, 235 Or
App 1, 230 P3d 49 (2010)--but only for its recognition of the application of the *Fifth
Amendment* privilege; specifically, she argues that "forcing someone to waive privilege
or forgo resistance to a significant non-criminal loss [there, parental rights] runs 'afoul of
[her] Fifth Amendment right to avoid self-incrimination.'" (Quoting *K. L. R.*, 235 Or App

1 not consider petitioner's undeveloped arguments under ORS 183.482(7) or the Oregon
2 Constitution.⁸ See *Redwine v. Starboard, LLC*, 240 Or App 673, 682, 251 P3d 192
3 (2011) (considering privilege against self-incrimination only under Fifth Amendment
4 where parties did not develop a separate analysis under Article I, section 12).

5 Petitioner relies primarily on *Securities & Exchange Com'n v. Dresser*
6 *Indus.*, 628 F2d 1368 (DC Cir), *cert den*, 449 US 993 (1980) (*Dresser*), as support for her
7 argument. In that case, the Court of Appeals for the D. C. Circuit explained that,
8 although "[t]he Constitution * * * does not ordinarily require a stay of civil proceedings
9 pending the outcome of criminal proceedings, * * * a court may decide, in its discretion,
10 to stay civil proceedings * * * 'when the interests of justice'" seem to require it. *Id.* at
11 1375 (quoting *United States v. Kordel*, 397 US 1, 12 n 27, 90 S Ct 763, 25 L Ed 2d 1
12 (1970)); accord *Keating v. Office of Thrift Supervision*, 45 F3d 322, 324 (9th Cir), *cert*
13 *den*, 516 US 827 (1995). The D. C. Circuit further commented:

14 "Other than where there is specific evidence of agency bad faith or
15 malicious governmental tactics, the strongest case for deferring civil
16 proceedings until after completion of criminal proceedings is where a party

at 11; brackets in petitioner's brief.)

⁸ In her *reply* brief, petitioner contends that not granting the stay "undermined the ALJ's ability to fulfill his obligation under ORS 183.417(8) to 'ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues,'" citing *Berwick v. AFSD*, 74 Or App 460, 703 P2d 994, *rev den*, 300 Or 332 (1985), and *Dennis v. Employment Div.*, 302 Or 160, 168, 728 P2d 12 (1986). To the extent petitioner is thus arguing that ORS 183.417(8) provides an independent source for concluding that a stay was *required* as a matter of law in this case, the cases petitioner cites in support of the proposition are unavailing, and, in any event, the argument comes too late. *Clayton v. DAS*, 258 Or App 689, 691 n 2, 313 P3d 296 (2013).

1 under indictment for a serious offense is required to defend a civil or
2 administrative action involving the same matter. The noncriminal
3 proceeding, if not deferred, might undermine the party's Fifth Amendment
4 privilege against self-incrimination, expand rights of criminal discovery
5 beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the
6 basis of the defense to the prosecution in advance of criminal trial, or
7 otherwise prejudice the case. If delay of the noncriminal proceeding would
8 not seriously injure the public interest, a court may be justified in deferring
9 it."

10 *Id.* at 1375-76 (footnotes and citations omitted). Citing two federal district court
11 memorandum opinions, *Nowaczyk v. Matingas*, 146 FRD 169, 174 (ND Ill 1993), and
12 *White v. Mapco Gas Products, Inc.*, 116 FRD 498, 502 (ED Ark 1987) (*Mapco Gas*),
13 petitioner contends that the factors a court is to consider in deciding whether to grant a
14 stay under *Dresser* are

15 "(1) whether the two actions involve the same subject matter; (2) whether
16 the two actions are brought by the government; (3) the posture of the
17 criminal proceeding; (4) the effect on the public interests at stake if a stay
18 were to be issued; (5) the interest of the plaintiffs in proceeding
19 expeditiously with this litigation and the potential prejudice to plaintiffs of
20 a delay; and (6) the burden that any particular aspect of the proceedings
21 may impose on defendants."

22 Beyond that, however, petitioner, in her opening brief, simply contends that
23 she was "awaiting trial in federal court on allegations overlapping with those in the
24 Notice of Intent to Revoke License" and that "[e]ach of the six factors favoring a stay
25 identified in *Nowaczyk* and *Mapco Gas* were present." She provides no explanation as to
26 *how* the allegations "overlap" such that they "involve the same subject matter"; nor does
27 she provide any analysis of the other enumerated factors and how they apply in this case.
28 That is insufficient to compel the conclusion that the ALJ was required to exercise his

1 discretion to stay the administrative proceeding as petitioner asserts.

2 In other words, even assuming that the factors petitioner cites are
3 dispositive in this context,⁹ petitioner has not provided sufficient grounds from which we
4 can conclude that the ALJ abused his discretion in denying a stay. It is not up to this
5 court, for example, to scour the indictment in the federal criminal case to determine
6 whether the two actions, indeed, involve the same subject matter. As the agency points
7 out, "[t]he federal criminal charges were not related to either transaction [for which the
8 agency sought to revoke petitioner's real estate license] but, rather, to petitioner's use of
9 two companies--Starboard LLC and Starboard Indiana LLC--to defraud investors of more
10 than \$4.4 million"; thus, the overlap, if any, "is only that, before his death, Thomas
11 Middleton had invested in petitioner's ventures, and petitioner used funds from the sale of
12 the Middleton residence to pay debts incurred by those companies." That could well be
13 the case; petitioner does not give us any reason to think otherwise. In short, it is not
14 clear, without more, that even the first of the six factors on which petitioner relies weighs
15 in favor of granting a stay in this case.

⁹ The Ninth Circuit has formulated the factors slightly differently than petitioner does: In *Keating*, the court explained that "the decisionmaker should consider 'the extent to which a defendant's fifth amendment rights are implicated,'" 45 F3d at 324 (quoting *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F2d 899, 902 (9th Cir 1989)), as well as "(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation," *id.* at 325. Given our analysis and disposition of the issue, that discrepancy is of no importance.

1 It is not until her reply brief that petitioner--for the first time--attempts any
2 explanation as to the application of those factors to the circumstances of this case.
3 Although, even then, she still does not articulate why the two proceedings are factually
4 related in a legally significant way, she contends that, because of "one particular
5 circumstance"--*viz.*, the fact "that Petitioner's [real estate] license had lapsed"--there was
6 no need for the agency to proceed expeditiously, nor would the granting of a stay
7 adversely affect the interests of nonparties or the public. Conversely, she contends,
8 proceeding with the administrative action "imposed an enormous burden on Petitioner--it
9 precluded her from presenting her side of the story--and resulted in an extremely
10 inefficient use of judicial resources." However, even if we were to consider petitioner's
11 argument, raised for the first time in reply, *but see, e.g., Clayton v. DAS*, 258 Or App 689,
12 691 n 2, 313 P3d 296 (2013) ("To the extent that plaintiff's argument was developed for
13 the first time in his reply brief, it is not properly before us on appeal."), it would not
14 change our conclusion.

15 "In the absence of substantial prejudice to the rights of the parties involved,
16 [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our
17 jurisprudence." *Keating*, 45 F3d at 324 (quoting *Dresser*, 628 F2d at 1374; brackets in
18 *Keating*). "In deciding whether to proceed with the hearing, the extent to which the
19 defendant's Fifth Amendment rights are implicated is a significant factor for the ALJ to
20 consider, but it is only one consideration to be weighed against others." *Id.* at 326
21 (citation omitted). Here, the ALJ assessed the circumstances and concluded that a stay

1 would not be in the public interest. The ALJ commented that "the federal courts move at
2 a very glacial pace," and petitioner did not provide any potential timeline for resolution of
3 the criminal proceedings. As the agency points out, it "has an interest in ensuring the
4 timely resolution of charges against licensees, either to protect the public against
5 unscrupulous licensees or to absolve innocent licensees of unfounded accusations."
6 Moreover, there was no evidence that the civil proceedings were being used to
7 circumvent the discovery rules in the criminal proceeding, *see Dresser*, 628 F2d at 1376,
8 "would expose the basis of the defense to the prosecution in advance of the criminal
9 trial," *id.*, or would otherwise prejudice petitioner's case. Finally, petitioner's right to a
10 full and fair disciplinary hearing did not *depend* on her testimony. *See State v. Graf*, 316
11 Or 544, 550-52, 853 P2d 277 (1993) (recognizing that a party may obtain a full and fair
12 hearing in a disciplinary proceeding without testifying). Petitioner's attorney was present
13 at the hearing to make objections, cross-examine the agency's witnesses, and offer
14 evidentiary exhibits on petitioner's behalf. In short, even considering petitioner's late-
15 raised argument, petitioner has not demonstrated "substantial prejudice" to her rights by
16 going forward with the administrative proceeding; accordingly, we cannot say that the
17 ALJ abused his discretion by denying petitioner's motion to stay the proceedings. *See*
18 *Keating*, 45 F3d at 326 ("A defendant has no absolute right not to be forced to choose
19 between testifying in a civil matter and asserting his Fifth Amendment privilege."
20 (Citing *Baxter v. Palmigiano*, 425 US 308, 318, 96 S Ct 1551, 47 L Ed 2d 810 (1976)).

1 2. *Refusal to Grant Petitioner Use Immunity*

2 Petitioner argues, alternatively, that, if we reject her argument regarding the
3 stay, we "should hold that [the ALJ] erred in denying her request for use immunity,"
4 relying entirely on *Dept. of Human Services v. K. L. R.*, 235 Or App 1, 230 P3d 49
5 (2010). We disagree.

6 In *K. L. R.*, a juvenile dependency case, the mother appealed a dispositional
7 order of the juvenile court requiring her and the child's father to complete polygraph
8 examinations in an effort to determine if they had caused their child's unexplained
9 injuries or if they knew the cause. 235 Or App at 3. The mother contended, as she had
10 below, that the polygraph requirement violated her rights against self-incrimination under
11 the Fifth Amendment. *Id.* at 5. Drawing on case law from other jurisdictions, we
12 observed that, "[g]enerally speaking, if a person is granted properly framed use immunity
13 from criminal prosecution, he or she may be compelled to provide evidence in a
14 dependency proceeding." *Id.* at 9 (citations omitted). We held that the court in *K. L. R.*
15 had erred in ordering the polygraph, in part, because it did not also provide the mother
16 with immunity from criminal prosecution as a condition of her completing it. *Id.* at 10.
17 Petitioner asserts that, similarly here, we should hold that the ALJ erred in "proceeding
18 with the hearing without granting Petitioner properly framed use immunity." (Internal
19 quotation marks omitted.)

20 The agency responds, first, that the ALJ had no authority to grant petitioner
21 immunity because that authority derives solely from statute, citing *State v. White*, 96 Or

1 App 713, 716, 773 P2d 824, *rev den*, 308 Or 382 (1989), and, to the extent *K. L. R.* can
2 be read to suggest otherwise, it was wrongly decided. We need not address that issue
3 because we agree with the agency's second argument, which is that petitioner's argument
4 fails for the simple reason that, here, unlike in *K. L. R.*, petitioner was not *compelled* to
5 testify within the meaning of the Fifth Amendment. *See Graf*, 316 Or at 550-52.

6 In *Graf*, the Supreme Court reversed our conclusion that the defendant--
7 whose acts of misconduct formed the basis for termination of his employment as well as
8 criminal charges--was compelled to testify within the meaning of the Fifth Amendment at
9 his pre-termination hearing, and thus was entitled to use immunity, because his "failure
10 to appear and testify at the pre-termination hearing would have resulted in defendant's
11 being denied his right to a full due process post-termination hearing at which he could
12 refute the charges and offer matters in mitigation." *Id.* at 550 (quoting *State v. Graf*, 114
13 Or App 275, 280, 835 P2d 934, *aff'd on other grounds*, 316 Or 544, 853 P2d 277 (1993)).
14 The Supreme Court concluded that the applicable administrative rule "exerted no
15 compulsion on defendant to testify at the pre-termination hearing." *Graf*, 316 Or at 552.
16 The court reasoned that the pre-termination hearing procedure was noncoercive, in part,
17 because

18 "the employee need not testify personally to preserve any claims or
19 defenses. The employee or the employee's lawyer or representative can
20 attend, offer testimony, and make legal or equitable arguments. Co-
21 workers or supervisors or others who have pertinent information can be
22 called as witnesses. Other evidence can be offered. In many situations a
23 strong case for the employee can be made without having the employee
24 testify personally. * * * Because the employee is not required to testify, and

1 because the rule specifies that silence shall not constitute any admission of
2 the charges, there is no compulsion to testify."

3 *Id.* at 551.

4 Petitioner essentially ignores the Supreme Court's holding in *Graf*, and,
5 without argument to the contrary, we are not persuaded that the circumstances here are
6 meaningfully distinguishable. As noted, petitioner's attorney was able to--and did--make
7 arguments and offer evidence on petitioner's behalf. Moreover, the agency had the
8 burden to prove the allegations against petitioner by a preponderance of the evidence, *see*
9 ORS 183.450(2); *Sobel v. Board of Pharmacy*, 130 Or App 374, 379, 882 P2d 606
10 (1994), *rev den*, 320 Or 588 (1995); as in *Graf*, there is no indication that petitioner's
11 silence would constitute admission of the allegations. In short, although to be sure, *Graf*
12 is not entirely on all-fours--after all, *Graf* involved a *pre*-termination hearing--petitioner
13 has not persuaded us that she was compelled to testify within the meaning of the Fifth
14 Amendment because, without use immunity, she was "denied a meaningful opportunity
15 to defend against the [agency's] allegations."

16 B. *Revocation of Real Estate License*

17 As noted, in her fourth assignment of error,¹⁰ petitioner contends that the
18 agency erred in revoking her real estate license, which had expired between the time that
19 the notice issued and when the revocation hearing occurred. The agency reasoned that,
20 because ORS 696.775 "specifically extends the Agency's jurisdiction to discipline a

¹⁰ We have previously rejected, without discussion, petitioner's second and third assignments of error. ___ Or App at ___ (slip op at 1).

1 licensee whose license has expired[,] * * * the agency has jurisdiction to impose
2 discipline in this case." And, because discipline under ORS 696.301 includes
3 "revocation, suspension, reprimand, or the denial of the issuance or renewal of a license,"
4 the agency concluded that "revocation of the license that existed at the time the Notice
5 was issued is an appropriate sanction and is within the Agency's discretion."

6 On review, petitioner challenges the agency's reasoning, contending that,
7 "while ORS 696.775 authorizes the [agency] to proceed with a disciplinary proceeding
8 [after a license has expired], it does not authorize the revocation of an expired license."¹¹
9 She contends that we should adopt the ALJ's analysis instead and "vacate" the agency's
10 order revoking her license. Referencing *Schurman v. Bureau of Labor*, 36 Or App 841,
11 844, 585 P2d 758 (1978), and ORS 696.301, the ALJ reasoned as follows:

12 "There is no evidence that [petitioner] applied to renew her license
13 or that the license was valid after April 2010. Thus, there is no evidence
14 that she holds a license which can be suspended or revoked. Furthermore,
15 in the absence of an application, the Agency may not deny the issuance or
16 renewal of a license. While the Agency established that [petitioner]

¹¹ Petitioner also suggests that we should vacate the order of revocation based on what she characterizes as the agency lawyer's "judicial admission" that the agency lacks authority under Oregon law to revoke a license that does not exist. Suffice it to say that we agree with the agency that it is at least questionable whether the lawyer actually made such a concession, and, in any event, the principle of judicial admission relates to the establishment of facts, not legal conclusions. See *Great Seneca Financial Corp. v. Lisher*, 223 Or App 496, 500, 196 P3d 86 (2008) ("[A] judicial admission is a formal concession in pleadings or stipulations that withdraws a fact from issue, and is made for the purpose of dispensing with proof of a fact in issue." (Internal quotation marks, citations, and brackets omitted.)); *State v. Porter*, 202 Or App 622, 627, 123 P3d 325 (2005) (describing judicial admission as "a statement by which one party waives the right to require the other party to prove a particular fact"; the party "must knowingly make the statement for the purpose of dispensing with the need for proof" (citations omitted)). Accordingly, we reject that argument without further discussion.

1 committed serious violations that would support revocation, it may not
2 revoke a license that does not exist. The only available form of discipline
3 available under the circumstances of this case is a reprimand."

4 (Footnote omitted.)

5 The agency responds that petitioner's reliance on the ALJ's analysis, and
6 "by extension," *Schurman*, is misplaced. Rather, according to the agency, this case is
7 closer to *Grobovsky v. Board of Medical Examiners*, 213 Or App 136, 159 P3d 1245
8 (2007), in which the operative statute authorized the Board of Medical Examiners to
9 suspend the petitioner's medical license, although the petitioner had allowed the license to
10 expire. We conclude that the agency has the better argument.

11 ORS 696.775 provides:

12 "The lapsing, expiration, revocation or suspension of a real estate
13 license, whether by operation of law, order of the Real Estate
14 Commissioner or decision of a court of law, or the inactive status of the
15 license or voluntary surrender of the license by the real estate licensee, does
16 not deprive the commissioner of jurisdiction to:

17 "(1) Proceed with an investigation of the licensee;

18 "(2) *Conduct disciplinary proceedings relating to the licensee;*

19 "(3) *Take action against a licensee*, including assessment of a civil
20 penalty against the licensee for a violation of ORS 696.020(2); or

21 "(4) Revise or render null and void an order suspending or revoking
22 a license."

23 (Emphasis added.)

24 As noted, petitioner acknowledges that ORS 696.775 authorizes the agency
25 to continue disciplinary proceedings against her notwithstanding that her license has
26 expired; however, petitioner disputes that it authorizes the agency to *revoke* her license as

1 a result of that disciplinary proceeding, because her license no longer exists. Essentially,
2 petitioner concludes--as did the ALJ--that revoking an expired license is logically
3 impossible.

4 That position, of course, has some appeal. That is, how is it possible to
5 revoke a person's license when the person no longer holds a license? However, by the
6 same token, the legislature has authorized the agency to "investigat[e]," "[c]onduct
7 disciplinary proceedings relating to," and "[t]ake action against" a "licensee" whose
8 license has lapsed, expired, or been revoked or suspended, ORS 696.775(1), (2), (3)
9 (emphasis added), which, under petitioner's theory, would be equally illogical. That is, if
10 a "licensee's" license has expired, how can there be a "licensee"?¹² And, from the plain
11 text of the statute, there can be no mistaking the legislature's intention to grant the agency
12 jurisdiction to continue disciplinary proceedings against a person notwithstanding the
13 "lapsing, expiration, revocation or suspension of" the person's license; the legislature took
14 pains to delineate all of the means by which that might occur--operation of law, agency
15 order, court decision, inactive status of the licensee, or voluntary surrender of the license.
16 Thus, petitioner's argument is sensible but not dispositive.

¹² Although the parties do not mention it, ORS 696.010(18) defines the term "[r]eal estate licensee," to mean, "*unless the context requires otherwise*," "an individual who holds an active license as a real estate broker, principal real estate broker or real estate property manager." (Emphasis added.) ORS 696.010 also defines the terms "expired," "inactive," "lapsed," and "nonlicensed individual," with the same caveat. "Expired" means, in the context of a real estate licensee, that the license has not been renewed in a timely manner, but may still be renewed," ORS 696.010(6), whereas "[l]apsed" in that context means "that the license has not been renewed in a timely manner and is not eligible for renewal," ORS 696.010(8).

1 Nor does *Schurman* assist petitioner. There, the Bureau of Labor revoked
2 the petitioner's business license, and, as in this case, between the time of the notice of
3 intent to revoke the petitioner's license and the revocation hearing, the petitioner's license
4 had expired by operation of law. 36 Or App at 843-44. We held that the Bureau lacked
5 authority to take such action with respect to a "non-existent license." *Id.* at 844. We
6 stated, flatly, "Where no license exists, the Bureau is without jurisdiction to act." *Id.*
7 However, in *Schurman*, the statute under which the Bureau purported to act, ORS
8 658.115 (1977), did not, like ORS 696.775, grant the administrative body *any* continuing
9 jurisdiction in the circumstance of an expired license.

10 In *Grobovsky*, we made clear that *Schurman* does not control where there is
11 a statute authorizing the agency to impose discipline on a licensee or a former licensee.
12 213 Or App at 147-48. There, the operative statute, ORS 677.175(3), provided that "[t]he
13 surrender, retirement or other forfeiture, expiration or cancellation of a license issued by
14 the board shall not deprive the board of its authority to institute or continue a disciplinary
15 action against the licensee *upon any ground provided by law.*" (Emphasis added.) To be
16 sure, ORS 696.775 is not as explicit as ORS 677.175(3); nonetheless, as we explain
17 below, it leads to a conclusion similar to the one that we reached in *Grobovsky*--that is,
18 that the board was not prohibited from suspending the petitioner's license, even though
19 that license had expired.¹³ 213 Or App at 147-48.

¹³ Petitioner contends that *Grobovsky* is inapposite because the issue there was only whether the board had authority to discipline the petitioner at all, not the nature of the discipline available. We disagree. The order of which the petitioner sought review in

